February Term, 1830.

Mr Justice Foucher having died during the last vacation, on 26th Dec. last, Jean Roch Rolland Esq was promoted from the Bar here to fill his situation.

Saturday 13th February

Willm Porteous vs Joseph Eno & Deschamps.

This was an action in the nature of an action populaire, against the Defendant for having stopped up a public road. —

The declaration stated, that there was a certain common and antient public and legal front road and highway leading through the Seigniory of St Sulpice and divers other parts and places in the district of Montreal, along the eastern bank of the River Lassomption to the front road on or near the bank of the River St Lawrence in the Seigniory of Repentigny, and from thence to a road leading down the bank of the said River to the edge of the water at a place near the junction of the said River Lassomption with the river Ottawa, and also with the River St Lawrence, for all the Kings Subjects &c — which road the Defendt obstructed &c — Concludes to payment of £1000 — damages, and that Defendant be adjudged to remove the obstructions &c — with Costs. —
Pleq — Not Guilty — Replication — joins issue —

A great number of Witnesses was examined by both Plff and Defendant, the amount of whose testimony stands thus —

On

On the part of the Plaintiff evidence was adduced to the following facts

1st. That there runs a road from the highway leading to Quebec, or the cote publique, in front of the Defendant's house, along the bank of the River Lassomption, being a navigable river, to a certain extent on that river beyond the village of Lassomption.—

2d. That this road has been used, as proved by the personal knowledge of several of the witnesses, between fifty and Sixty years last past, as a public road, in and by which all persons passed and repassed at all times and seasons, freely, and without let or hindrance of any kind.—

3d. That there were gates, or barriers on the said road which were considered to be used as a means to prevent cattle from doing damage to the grain on the adjoining land, but which did not prevent individuals from passing — and that about seven or eight years ago when fences were erected to proted the grain, these barriers were removed and the road left open.—

4th. That this road is useful and convenient, and as such has been used by all the Inhabitants on the South side of the River Lassomption, and by all persons going and coming in that direction.—

5th. That this road had been shut up, and all communication thereon and thereby impeded and stopped up, by a fence erected across it by the Defendant, who has opened a new road for the use of the public in the rear of his buildings.

6th. That connected with this road, there is a certain Cote or communication from the River at a landing place called the Remoux, which was safe and convenient for passengers crossing the River by the plaintiff's ferry, which cote has been blocked up by the Defendant, and all Communication with the said road by passengers landing from the said ferry interrupted —

On

On the part of the Defendant, evidence was adduced of the following facts.—

1st. That the road in question was considered to be a route or private road, which subsisted on the Defendants land and for his utility during all the time before mentioned.

2d. That there were gates or barriers erected by the Defendt and his predecessors on different parts of the said road since it been first known or used.—

3d. That many persons, who considered this road as private property, asked permission of the Defendant to pass by and through the same, which was granted on condition of their closing the gates or barriers.—

4th. That this road, as stated by some of the witnesses, has been changed at times — parts of it have been — cultivated and potatoes planted in it — although this did not prevent people from passing as usual —

5th. That the Defendant and his predecessors were the only persons who mended this road and kept it in repair — they never received any assistance from the public in this respect.—

6th. That it was not a front road, as established by law, nor was there any proces Verbal establishing it as a public road — nor was the public ever required to do any labor upon it, beyond the line between Lareau and Soliboi's, being the extremity of the Defendants land fronting the River Lassomption —

7th. That this road had become dangerous and — impassible, from its being exposed in certain places to be washed away by the high water of the River, and particularly at the corner of the Defendants garden, where it had been narrowed to about nine feet — and that in consequence of the opinion of the Grand Voyer a new road had been opened by the Defendant on his land, which afforded all necessary communication, and was safer than the old road —

8th.

8ᵈ. That the cote or communication from the river to the said road at the landing-place, called, the remoux, was made two years ago by the Plaintiff with the permission of the Defendant as being on his land, but conditionally, being for the sole convenience of the plaintiff and such passengers coming by his ferry who landed there —
9. That Defendant shut up the said road as being proprietor of the soil and having a right to do so. —

By the Court — This action is founded on the principle that the plaintiff has been deprived of a public and common right, that of passing and repassing in a public and common highway upon and across the land of the Defendant, whereby he the pltff has been injured — In principle the action is maintainable. —
It is alledged, that the road in question is a legal front road, — which is a description of road known by the law, and which every man is bound to allow and to maintain on his land, the shutting up of which, must necessarily create injury and inconvenience — but the fact does not stand so before us in evidence — the front road on the Defendants land appears to been in a different direction, being the high road leading from the river towards Quebec — and by law no man is bound to — maintain two front roads on his land, unless it extend beyond thirty acres, and we have nothing in evidence to shew that the road that was shut up was another and different front road extending beyond these thirty acres — It is said however that this is a road on a navigable river recognized by law, and therefore the public are entitled to it — but the road seems not at all connected with the — navigation of the River in the view in which the law requires such road to exist, that is pour le tirage des batteaux — this was required by the Ordᵉ des Eaux & Forets 1669. tit. 28. art. 7 — but were this Ordᵉ even considered to be in force in this Country yet it will not apply here, as it contemplates merely the

road

road to be left for dragging bateaux sur les greves et bords des rivieres, to the extent of 24 feet — but this road is not on the beach, nor does it appear to be within 24 feet of the water, as far as we can discover by the evidence —

This road appears to have existed on the Defendants land for upwards of fifty years and to have served as a means of communication between the main or front road leading to Quebec and the more distant habitations on the River Lassomption, and as such it has been considered as useful and Convenient — but this is the only principle upon which its existence depends, for we see no authority or legal obligation under which it was established or kept up — use and convenience seem to be the only title the public can pretend — this however can create no right upon the property of any one, for if it could, it might be urged in favor of any illegal pretention, and would be the source of many encroachments and burthens upon the property of individuals — we cannot recognize such a principle — For although this road appears to have existed on the property of the Defendant and his predecessors for so many years, yet as there appears no legal title for its creation or maintainance, neither the plaintiff nor the public can enforce a right to it as a burthen and charge on the Defendants land, however long it may have existed — Nul servitude sans titre — so says the 186e art. of the Custom, and accordingly some title must appear, either that which the law creates, or which the party himself has granted — mere occupancy is not sufficient to establish a servitude of any kind — And here we must guard against the opinions of those writers on the law in the different Provinces in France governed by the Droit Ecrit, where it is held, that a Servitude may be acquired without title, by a prescriptive use and possession of 30 years, whereas by

by the Customary law of France no prescription in this case can avail —

But the possession of the public in this road was not even of a nature to create a prescriptive title of servitude on the land of the Defendant, could such title have been thereby acquired, as the right here claimed, as far as we can discover appears to have originated from an act of favor or civility and was continued under such circumstances that no prescriptive title could be founded thereon — it was that kind of acte de commodité or familiarité referred to by Salaun. p. 229 — and Dunod. p. 90, who describe it thus — "pour distinguer si un acte est de pure familiarité, il suffit "d'une cause apparente ou une conjecture probable pour "juger que c'est un droit ou une grace" — according to which rule let us look at the facts before us — The earliest intimation we have of the existence of this road shews, that there existed at the same time upon it a mark of private authority and right over it in the Defend^t and his predecessors, that is, the gates, or barriers which were kept up by them on the different parts of it — we call this a strong mark of private right, for it has not been usual, nor could it be tolerated, that an individual for any private purpose, whether for restraining his cattle or otherwise, should erect a barriere on a public highway because this is assuming a right and control over it which is inconsistent with the public right — and while the public allowed such a barriere to exist, they were acknowledging the right of the Defendant to be better than theirs, and they held it merely as a Chemin de souffrance — A case strongly similar to this is to be found in Denizart v° Chemin §. 5. N°3. p. 527. and more fully reported in the Gazette des Tribuneaux. tom. 14. p. 292. to which Denizart refers — Merlin. Rep^e v° Chemin de Souffrance, says. — "Le droit du proprietaire du Sol

"de

"de supprimer ces sortes de chemin, et le principe qu'ils
"doivent toujours etre presumés tels, lorsqu'ils sont entre
"des grilles ou des barrieres, ont été confirmés en 1782 par
"un arret très precis" + alluding to the above case in the
Gazette des Tribunaux — and in England such a
barrier would be taken as upholding the right of the
proprietor against the public — 5 Taunt. 135. Woodyer vs
Hadden — 11 East. 375. note (a) —

That although some of the Witnesses have said
that they considered this as a public road, and that
many persons did and might pass by and through
the same at all times — yet in the opinion of an equal
if not of a greater number, it was considered to be a
private road, and belonging to the Defendant, and
that some of them were on this account induced to ask
permission of the Defendant and of his father, to pass
that way, which was granted to them, on their shutting
the barrier — Whatever opinion the public or individuals
might entertain in regard of this ~~road~~ being a public
or a private road, may be of little moment, yet it
proves, that the Defendant and his predecessors always
kept up their claim and pretention to the road as their
own private property, by thus granting leave to those
who asked it, to pass that way, and upon certain
conditions —

Another mark of the private right of the Defend^t
in this road, is the occasional cultivation of the soil
over which it passed — although this did not
prevent people from passing, yet it was telling the
public, that he as proprietor had a right to use this
soil as he pleased — it was holding a possession contrary
to that of the public, and inconsistent with all idea of
prescription —

It

It is also in proof, that the public never did any thing in the way of repairing or keeping up this road and although the Inspectors and Sous-voyers of the day caused the road on the River Lassomption to be repaired up to the line of the Defendants land, yet the Defendant and his predecessors neither obtained nor demanded any assistance from these public officers because the road being considered by them as private property the Defendant and his predecessors were left to manage and maintain it as they pleased —

All these facts and circumstances shew that the road was originally and continued to be a chemin de souffrance, and as such that the Defendant had a right to shut it up at pleasure, —

Action dismissed with Costs —

Jul.n Fraser
v
Maitland & Co
and
E. Forbes. oppt

On the opposition and claim of Euphemia Forbes widow of the late George Garden, Esq a fin de conserver, for her marriage portion.

The opposition stated, that on the 28th. day of October 1815, at Housdale in Scotland, certain articles of agreement in contemplation of marriage were made and executed by and between the said George Garden and the opposant, in the presence of witnessis, according to the laws and usages then in force in Scotland, by which it was amongst other things contracted and agreed, and William Forbes the father

father of the said Euphemia, party to the said Agreement, did thereby bind and oblige himself to pay to the said Geo. Garden the principal sum of two thousand pounds Sterling in name of tocher, that is of dot, or marriage portion, with the said Euphemia, in full satisfaction to the said Euphemia and her said husband, of her patrimony, and of all that they, or either of them might ask or claim of him the said William Forbes or his representatives through his death or the death of Mrs Elizabeth Arbuthnot, or Forbes, his spouse in virtue of any deed of settlement executed by him or her in any other manner or way whatsoever, all such claims and demands being thereby renounced and discharged by the said Euphemia Forbes and her said husband the said George Garden — And further she the said Euphemia Forbes did in and by the said articles of agreement dispone convey and make over to the said George Garden her promised husband, all heritable and moveable estate, subjects and effects of every kind which she should acquire right or succeed to during the subsistence of her marriage with the said George Garden, with power to him to take possession of and use and dispose thereof as his property at pleasure: For which causes, and on the other part the said George Garden did in and by the said articles of agreement, bind and oblige himself and his heirs &c to make payment to the said Euphemia Forbes in case she should survive him, yearly and each year during her lifetime after his decease of a free life rent and annuity of four hundred pounds Sterling at the two terms in the year of Whitsunday and Martinmas by equal portions, and did also bind and oblige himself to make payment to the said Euphemia Forbes of the principal sum of two thousand pounds Sterling, at the first term of Whitsunday or Martinmas that should happen six months after his decease — And which provisions and others in the said articles of Agreement mentioned the said Euphemia Forbes did accept of in

full

full satisfaction of all terce of lands, half or third of moveables, and every other claim and provision whatever which she could by law ask or demand by and through the decease of the said late George Garden, in case she should survive him, and in full of all that her heirs executors or nearest of kin, could ask or demand on any account whatever by and through her decease, in case she should not survive the said George Garden —

That afterwards on the twenty eighth day of October 1815 at Housedale aforesaid, the said George Garden and Euphemia Forbes were married, and that afterwards and before the term of Martinmas then next ensuing, the said William Forbes did well and truly pay and cause to be paid to the said George Garden the said sum of two thousand pounds, and that afterwards on the 15th day of October 1828, the said George Garden died at Montreal aforesaid. — That since the death of the said George Garden, his heirs and legal representatives have not paid to her the said Euphemia Forbes the said sum of two thousand pounds Sterling as her said tocher or marriage portion, which it was stipulated should be paid to her as aforesaid in case she should survive the said George Garden, by reason whereof all and every the lands and tenements whereof the said George Garden was possessed as proprietor before and at the time of his decease, and particularly the lot of land sold by the Sheriff as belonging to the said George Garden by virtue of the writ of execution sued out in this Cause, became and were — specially charged and hypothecated for the payment to the said Euphemia Forbes of the said sum of Two thousand pounds Sterling, with the interest from the said 15th day of October 1828 until paid and Costs —

The

The said Opposition and claim concluding accordingly for the payment of the said principal sum of Money &c.

To this Opposition the plaintiff by her plea pleaded that all the matters and allegations therein contained were unfounded in fact and insufficient in law to maintain the Opposant's claim — On which plea the Opposant joined issue by her Replication —

The parties having been fully heard on the merits on an admission made and filed in the Cause, the Court now gave the following Judgment —

There are several questions which come under the consideration of the Court in this case from the particular circumstances of it — The late George Garden, who is stated to have been domiciliated in Montreal in Canada in October 1815, contracts marriage with the Opposant in Scotland, and according to the usages and Customs of that Country, a marriage Contract is made and signed by the parties in the usual form, that is, in the presence of witnesses, and in which Contract are contained the stipulations on which the Opposant founds her present claim — As the stipulations in this Contract must necessarily affect the property of the late Mr Garden in Canada, if it is to be considered as valid and binding the first question that arises as to its validity as a marriage Contract according to the laws of Canada — according to which the Opposant seeks to enforce it —

It must be admitted, that if this Contract be clothed with the necessary forms required for its validity in the place where it was made, it must carry that validity along with it wherever it comes in question — It is a doctrine too well known and established, that the lex loci

of

of the Contract must regulate its form — and it is a general principle of international law, and essential for promoting their intercourse with each other, that what is legally contracted in one Country shall be binding in another — And therefore the marriage Contract in question being admitted to have been made and executed according to the usual forms in Scotland, must be admitted here as legal and binding on the parties —

The next question is as to the effect of this Contract whether it will create a mortgage on the property of the husband in the same manner as it would have done had it been executed before a public notary in this Province Here a distinction is to be taken between Contracts executed in other Countries and those executed here, as regards mortgage — The Hypotheque with us is a creature of Civil authority, effected by the intervention of a public officer, by whose ministry all acts executed before him give this kind of security to the contracting parties — but a contract executed before witnesses, or sous seing privé, — without the intervention of the public officer, although legal and binding, yet creates no mortgage — Whatever may be the law of Scotland in this respect is unnecessary to enquire, as the Civil authority of one State cannot be exercised in another, nor can all the Consequences accruing from an act executed in one Country be admitted and received in another Country where the law does not recognize them, any more than an Officer known and recognized in one Jurisdiction can act in another where he is not known or recognized — A Contract legally made in one Country, will be binding in every Country, but in regard to its effect and consequences, these can be allowed no further than as recognized by the laws of that Country where a remedy is sought for — A Judgment of

the

the Superior Courts in England cannot carry execution nor create mortgage on the real Estate in Canada because we do not recognise the jurisdiction of those Courts here, nor the authority of the laws of that Country in this — Arrets may be cited, by which Contracts and obligations passed in a foreign Country have been admitted to carry a mortgage in France, but they are few in number and their authority has been long exploded by latter decisions founded on juster principles. We must therefore hold in regard of this marriage Contract, that although it is legal and binding as regards the parties to it, yet as to its effect & consequences as operating a mortgage on the property of the husband in Canada, we cannot admit them —

The next point to be considered is, whether under this Contract of marriage, there was a Community of property established between the parties as recognized by the law of Canada — The husband at the time of his marriage was domiciliated in Canada, and according to the general principle, the law of the domicile of the husband ought to regulate this question when not otherwise provided for by the Contract — In this case the language of the Contract and the place where it was executed must be considered as they tend to shew what was the intention of the parties. In this Contract, nothing is said about Community of property, nor any reference had to the law of the domicile of the husband, on the Contrary it would appear, that all the stipulations in this Contract have a reference to the law of the Country where it was made, and when there is said to exist a Communio bonorum, between husband and wife although not to the extent allowed by the laws of this Country,

but —

but to which communio bonorum, this clause in the Contract was no doubt intended, and does contain an express renounciation on the part of the Opposant, for it is there stated, "that in consequence of the provision therein and thereby made by the intended husband to his wife, she accepted thereof in full satisfaction of all tierce of lands, half or third of moveables and every other claim or provision whatever, which she could by law ask or demand by and through the decease of the said George Garden, in case she should survive him, or which her heirs in case of her death could ask or demand on any account whatever by and through her decease" — these words evidently imply a renounciation to all Community of property and to all right and claim upon the estate of the husband beyond the provision so made for her — had this Contract even been made in Canada — but looking to the place where it was made, it is evident that the parties never intended nor contemplated such a Community of property. — A case somewhat similar to this we find in the Journal d'Audience, under date 28 March 1640, and also referred to by Renusson in his Traité de Communauté Ch. 4. N° 44 — It is the case of the widow of one Laurent Vannelly, who was claiming a right of Community under the following circumstances — Laurent Vannelly was an Italian, born at Lucca, but had come to Paris where he had settled and carried on business for many years — In 1594 he took a journey to his native Country and while there, married one Laure Berty, who was also a native of Lucca — after his marriage he returned to Paris with his wife, where they lived together until 1638 when Vannelly died, leaving considerable property — his widow claimed a right of Community under the Custom of Paris, which was contested to her by the heir of the deceased, on this among other grounds that her marriage Contract had been made, and her marriage solemnized in a foreign State where the Community of property was unknown, and that although before, at the time, and after his marriage the said Vannelly had been

Domiciliated

domiciliated at Paris, yet that no Community of property existed between the parties — The contest having been brought before the Chatelet, the claim of the widow was allowed but on an appeal to the Superior Tribunal the Judgment was reversed — The reasons and grounds of the Arret are best known from the opinion held by M^r L'avocat General Bignon, whose sentiments were adopted on that occasion — "Il est vrai, he says, que s'il n'y avoit point du tout de "Contrat, et que Vannelly se fut simplement marié à Lucques, "et dans l'an amené sa femme à Paris, lieu de son domicile, "la raison de droit, et l'opinion commune des docteurs, — "desireroient que l'on reglat les Conventions de ce mariage, "en ce cas la Communauté auroit été tacitement introduite par "la force de la Coutume, mais puis qu'il y a ici un Contrat "exprés et par ecrit, qui contient les pactions dotales et — "matrimoniales selon l'usage du droit ecrit et les Statuts de "Lucques, ou il n'est pas parlé du tout de Communauté, il n'y "a point de raison de dire, qu'il faille suppléer à un Contrat "de cette qualité, et l'interpreter par la Coutume de Paris, à "laquelle il ne fut jamais pensé par les Contractans — de maniere "que le Contrat est une exclusion assez expresse de la Communauté "et un empechement assez puissant pour faire que la Coutume "de Paris, ni le tems qui a suivi ne l'ayent pu introduire" — This case in its principal features, resembles that before us, with this distinction however that the latter seems the stronger of the two, from the express words of the Contract, which imply an exclusion of all right of Community between the parties. — We therefore consider that in this Case there was no Community between the parties, which was necessary to be ascertained, for had a Community existed, the claim of the Opposant here must have failed, from the want of a renounciation on her part to that Community. —

We next come to the consideration of the objection raised to the claim of the Opposant for the dot or marriage portion, it being contended, that in this marriage Contract there is no stipulation of reprise, without which, under the Custom of

Paris

Paris, the wife can claim nothing of this description, as all that she brings to the husband in the shape of marriage portion becomes the property of the husband, which cannot be reclaimed or recovered back, without express stipulation inasmuch as the reprise is different from indemnity for debts contracted by the wife jointly with her husband, or remboursement for any of her property alienated during marriage, which are claims allowed by law without express stipulation — Were this a material point in the case, we would say, that there is a reprise stipulated in this Contract, although not in the terms we generally find it as a stipulation on the part of the wife to take back what has been so brought to the husband or alienated by him, but the stipulation here is on the part of the husband to pay back what he has received, which is the same thing, for whether this stipulation be on the one side or the other, it is immaterial, the effect is the same — But it may be asked, of what value can this stipulation be, if by the marriage Contract no — mortgage, as in such case her claim could amount to no more than a mere creance chirographaire ? — This brings us to consider the opposant's claim in another point of view, and on the principle of that privilege which is given to the Dot, by the general usage of all Countries, and recognized by the Customary Law of France under which the present Opposition is founded —

We must however first get rid of the objection, that in this case there exists no dot which the Opposant can claim, as it appears by her own shewing, that for the considerations stated in her marriage Contract, she among other things, transferred and conveyed to her husband the whole of her — right and interest in this dot, to be used and disposed of by him as his own property — If this transfer is to be considered as a total abandonment of all claim to the Dot, the present Opposition must fail, if on the contrary this transfer was giving no greater right to the husband than the law gave him, the claim will still be open, if by law it can be — maintained — Now it may be said in favor of the Opposant here

here, that the transfer made by her of the dot to the husband were words of mere form, as it gave him no greater right than the law would have given him, for according to the Custom of Paris, whatever the wife brings in marriage of a movable nature, merges in the general mass of the Community, where Community exists, and falls under the Control and administration of the husband, more especially when it is a sum of money which can retain no separate and distinct existence — But by allowing the fair and just interpretation of this marriage Contract, we are of opinion, that the intention of the parties was, that this dot should be paid back to the opposant in case of Survivorship, and that the two thousand pounds stipulated to be repaid, were the two thousand pounds he was to receive as the marriage portion of his wife, and which was to constitute a part of her maintenance, the law construes a Contract of this kind favorably, and where there is doubt will interpret it in favor of the claim — N. Denis. Vo Dot. §. 5. No. 3 — says — "Les regles de droit employées pour
" l'interpretation des Conventions, s'appliquent à la constitution
" de dot, avec cette difference, que les Conventions ordinaires,
" s'interpretent dans le doute en faveur du debiteur, et
" qu'ici, quand l'intention des parties n'est pas clairement
" expliquée sur un point que la loi n'a pas prevu, on se
" decide toujours en faveur de celle à qui la dot a été constituée.

Admitting therefore that according to the Contract between the parties the claim of the opposant has not been barred by any express stipulation, it only remains to determine whether there exists under the laws of this Country that privilege in favor of the Dot which will support the present claim, —

This depends entirely upon the authorities of law and decisions of the Courts, which place this

question

question beyond all doubt, and which allow the privilege with or without a marriage Contract where the amount of the dot is certain — To these authorities we must refer, in adjudging to the opposant her claim. —

2. Raviot sur Perrier. p. 384. Nos. 15 & 16. —
Arrets de Lepretre. 4e Cent. ch. 80. No. 18.
N. Denizt. Vo. Hypotheque §. 3. sec. 1. p. 749. +
Id —— Vo. Dot. —— §. 20. No. 5. +
Repse Vo. Hypotheque p. 642. & seq. +
Arrets de Lacombe —— p. 123. & seq —
LaPeyrere Vo. Hypotheque. p. 47. +
Arrêtés de Lamoignon. Tit. 21. No. 25.
N. Denizt. Vo. Hypotheque §. 3. sec. 4. No. 15. p. 760
Tronçon on 165e Cout. —
Basnage des Hyps. Tres ch. 12. p. 133. & seq. —
Lemaitre on 164e art. Cout. & 165e art. —
Repse Vo. Dot. p. 253. +
Gazette des Tribunaux. 4e Vol. p. 278. 280 —

By these authorities it will appear that even by the Customary Law of France, a privilege is granted to the wife for her Dot, upon the property of the husband from the day of her marriage in a foreign Country, and not by virtue of any stipulation in the marriage Contract, which being executed in a foreign Country can create no mortgage in favor of the wife, either for the Dot or for any other advantages stipulated by her in that Contract. —

N.° 1448.

Benoit
v.°
Dezery. —

This was an action founded on an award

Plea — That the award informal and unjust — that the arbitrators had conducted themselves with partiality — had exceeded their authority, and awarded what they had no power to determine — and further that their proceedings had been carried on without any notice given to the Defendant —

The parties were admitted to proof, which the Court did not consider sufficient to affect in any manner the conduct of the arbitrators or the regularity of their proceedings In the award it was stated, that the parties had been notified by them of the time and place of their proceedings — that the Defendant did not attend, but sent his witnesses who were sworn and examined as well as those of the Plaintiff —

The Plaintiff conceiving it necessary to make proof of the notice given to the Defendant, produced and examined the Arbitrators, who stated that after they had agreed upon the time and place of meeting, the arbitrator chosen by the Defendant gave the notice personally to him — Objection having been taken to the competency of the arbitrators as witnesses to support their own proceedings the regularity of which had been contested the Court were disposed to think that the Arbitrators might be examined touching this point, as well as any other point touching the award made by them in which doubt or difficulty occurred, but they thought it unnecessary that such evidence should be adduced, as the Statement in the award that notice had been given to the parties must be considered as prima facie evidence of that fact unless controverted by some other evidence, — that even an acknowledgment made by the parties in presence of the arbitrators and embodied in the award was binding upon them, which was even more material than the fact of having given notice to the

parties

4. J. Rep. 146. —
Rep.ve v.° Arbitrage
p. 546. 2.d Col. —
1 Pigeau 27. —

Royer. v.° Arbitrage 89
Rep.ve v.° Arbitrage
p. 547. bottom of last Col.

parties, and as nothing appeared to controvert the fact so stated in the award the Court held it to be sufficient, and gave Judgment for the Pltff.

O'Sullivan & al
vs
Solomons.

This was an action on a promissory note drawn by Defendant in favor of John Spragg for one hundred pounds, bearing date on 16th Augt 1825 and payable on 1st Febry 1826 – The note was indorsed by Spragg to the Plaintiffs on the 15. March 1826 for a valuable consideration –

To this action the following pleas were pleaded

1st The general issue
2d That the note in question was indorsed to Pltffs after it had become payable – and that Defendt never received any consideration for it. –
3d Same point –
4th That the note was obtained by fraud and surprise and without consideration. –
5th That the note was made and given on the false declaration of John Spragg that the Defendt was indebted to him in £100 – on their mutual dealings and transactions, – whereas Defendt was not indebted to him in any sum of money whatever.
6th That John Spragg and his partner Will: Hutchinson, on 7 Febry 1826 were indebted to the said Defendt in a sum of £279. 19. 6 for divers goods &c before that time sold & delivered by the Defendt to Spragg & Hutchinson – and for money advanced &c – which Defendt is entitled to compensate and set off agt Pltffs demand. –
7th That after the making of the said note, and before the same was indorsed to the pltffs the Defendt had fully paid and satisfied the same. –

Replication, joined issue on all these pleas. –

The evidence on the part of the Defendant went to prove

prove, that subsequent to the making of the said note, he had consigned sundry quantities of furs to the House of Sprags & Hutchinson for Sale, and that they had rendered an acct Sales to him at prices below that at which the furs were sold, & to an amount beyond that of the said note — and this amount the Defendant contended he had a right to set off against the demand of the Pltffs on the principle that he would have been entitled to do so had John Sprags the payee of the note brought the action —

But the Court were of opinion that the matters here pleaded by the Defendant regarded the partnership of Spragg and Hutchinson of which the individual Creditors of John Sprags were not bound to take notice — and as the matters so pleaded, were not properly a payment or discharge of the note, nor appeared to be in anywise connected with it, that the said matter tended only to establish an uncertain and unliquidated damage against the said partnership of Sprags and Hutchinson could not be admitted as a Compensation against the said note, the more especially as the Partnership of Sprags & Hutchinson were not before the Court, who were more immediately interested in these matters and better able to answer thereto than third persons, and as no fraud appeared in the transaction nor any sufficient cause shewn why the Defendt may not have his recourse agt Sprags & Hutchinson — the Court gave Judgment for the Pltffs. —

Friday 19th. February 1830

No. 2076.

Prince —
vs
Willm. Scott, and
Cath: Ferguson
his wife.

On the Plaintiff's motion for a Contrainte par Corps against Catherine Ferguson the wife of the Defendant Scott, for the satisfaction of the Judgt rendered agt. him for damages for an Assault and battery on the pltff.

By the Court

In this action, which was for a most violent and aggravated assault and battery committed by the Defendt and others on the plaintiff, judgment was obtained in this Court on the June 1823 for fifty pounds damages & Costs — This Judgment was originally rendered against the husband as well as against the wife, but upon an appeal instituted by him, he was discharged, so that the Judgment now remains in force and executory against the wife alone — The Plaintiff not having obtained satisfaction, resorted in vain to all the usual modes of Constraint, and is now compelled to ask for the Contrainte par Corps apres les quatre mois against the Defendant Catherine Ferguson — This is the second application of the same kind, the first having been unsuccessful in consequence of a failure in the delay required in such Cases — the present however seems to be in all respects regular and in strict Conformity with the Ordce of 1667 — it might however have been a question, whether the present was one of the Cases coming under the operation of that Ordce, and whether the Contrainte might not in the first instance have been obtained without the formalities therein required, but this question not having been submitted to us, we are not called upon to give any opinion thereon; the proceeding however in this respect, so far from being objectionable, we must say, was equally judicious and humane, as affording every opportunity to the Defendant to satisfy the Judgment, had she been so disposed and more particularly as the Original Judgment did not award

award the Contrainte, and it was necessary that such a condemnation should be obtained and pronounced before the Contrainte could be exercised — The objection therefore urged by the Defendants Counsel, that to entitle the plaintiff to the Contrainte, this should have been awarded by the original Judgment, is not well founded, as it is that Condemnation which is now sought for by a Judgment d'iterato, and the only question that could arise is, whether this is one of the Cases in which by law the Contrainte is allowed. —

As to the exemption from the Contrainte par Corps — contended for by the Defendant on account of her sex, it is true that in most Cases the law has in that respect exercised a degree of tenderness towards females, where it was consistent and proper to do so, and such was the motive of the 8th. art. of the 34th. tit. of the above Ordre of 1667, when it declares — "ne "pourront les femmes et filles s'obliger ni être contraintes par "Corps si elles ne sont marchandes publiques, ou pour cause "de Stellionat procedant de leur fait" — the exemption therefore even by this article is declared not to extend to all Cases, and the exceptions therein made prove, that as well from principles of policy in favouring Commerce, as from unworthiness, it has been found necessary and indeed just, to deprive even women of their liberty in particular cases. It is evident therefore, that the Ordre of 1667 in abrogating that part of the Ordinance de Moulins, which allowed without exception the Contrainte to all Judgment Creditors in Civil Cases, apres les quatre mois, had only in view cases of a civil nature, and that the exemption of women from arrest in those Cases, where the Ordre of 1667 had subjected males, was confined to such as arose either from the express or implied Contracts of the parties, and in the N. Denizart in observing upon the same article, it is said, "Les deux causes exprimées par l'ordonnance, sont les seuls "pour lesquelles les femmes et les filles puissent etre "contraintes par Corps en matiere Civile" — but immediately after

after he adds — "mais elles sont contraignables par
" corps en matière Criminelle pour dommages et interets,
" ce qui a été jugé par un arret du 5 Juin 1671" — as reported
in the first Vol. of the Journal du Palais — "Elles peuvent
" aussi être contraintes par Corps en vertu de Jugement
" d'iterato pour simples depens en cette matiere" — It
is then added — "elles peuvent l'être à plus forte raison
" pour les delits qui leur sont personnels" — Several
authors are equally express upon the point, among others,
Bornier, Lacombe, and Ferriere, and the latter makes
use of the words, — dommages et interets pour éxcés
par elle commis, d'autant, says Bornier, qu'ils —
tiennent lieu de reparation et satisfaction — The
authority however the most clear and positive is to
be found in the Repertoire, under the title, Reparation
Civile. p. 193 —

To counteract these authorities, which appear to be
founded on positive decision of the French Courts, no
one arret has been produced, which establishes a —
different principle, and the authors that have been
cited, do not negative the right to the arrest in such
cases, but merely say, that except in the two cases
mentioned in the article, women are in Civil cases,
exempted therefrom, which amounts to no more
than this, that women were exempt from that arrest
which was permitted by the Ordre of 1667 against
males, unless in the two Cases specially mentioned
And Serpillon who also speaks in the same general
terms, afterwards in pages 664. 5. 6. & 7, clearly confines
these exemptions to matters (to use his own words)
purement Civiles — This author clearly establishes
the distinctions which we have explained, as will be
found on reference to the pages of his work now
cited

cited, it is therefore only necessary to give a few short extracts therefrom — "Les depens en matieres Criminelles derivent d'un delit, ou quasi-delit, ils ne sont par — consequent pas dans le Cas de l'article 1er de ce titre, qui n'a abroge les Contraintes par corps, que pour dettes — purement Civiles — And further on, he says — Il n'est donc pas juste qu'une femme convaincue d'un delit, en soit, pour ainsi dire, quitte en payant des dommages et interets mediocres exigibles par Corps, et qu'elle puisse se promettre l'impunité pour le paiement des depens que son delit a occasionné — by which it would appear that it had never been a question, whether the contrainte could be awarded for damages resulting from a delit, but whether the same extended to Costs. —

It is obvious that in deciding upon this question it is not necessary to consider, that this Court has in the Civil terms, no Criminal jurisdiction, but it is the nature and cause of the Condemnation that alone must be looked to — this Court on the Criminal side can award no Civil reparation to an injured party occasioned by a delit, it is on the Civil side alone, it can be demanded, and the Contrainte follows as a legal consequence to enforce the Judgment and afford the means of redress, which if now refused would amount to this, that women, particularly those under coverture, may commit every species of violence with impunity — Justice therefore and the welfare and peace of Society require, that the injured party should receive a Compensation equal to the injury sustained, and the aggressor be thereby punished — The present Case under all its — circumstances, is one of a most aggravated Assault and battery, nor do we conceive that under a view of the

the whole case, this Court can exercise any favorable discretion towards the Defendant, which in other Cases of Contrainte apres les quatre mois, it is authorized to exercise, but must without hesitation award the Contrainte which will probably draw forth that satisfaction to the Plaintiff which he has not yet been able to obtain by any other means allowed by law —

The Contrainte therefore is awarded to be executed after fifteen days due notice, that is, 17 days, including the day of service, and that on which the delay will expire. —

See also. Rodier on Ordre 1667. p. 529. & 536 —
Brodeau & Loret. Letter D. Somm. 31. N° 3 —
——— Letter F. Somm. 11. N° 10. —
Fromental. Decisions. V° Prisonniers. p. 583 —
Repertoire de Merlin. V° Reparation Civile §4. p. 563. —
1 Journal du Palais. p. 123. anni of 5 June 1671 —

In Appeal. July 1831.

The Report of the Judgt rendered in appeal in the above case as stated in the Quebec Mercury of 27. Octr. 1831 — deserves to be noticed.

The Ch. J. in giving Judgt refers to the Ordre of Moulins of 1667, said the Contrainte par Corps for a principal demand was totally abolished, but that damages interest and costs, were so recoverable after four months, as a punishment for bringing futile actions — Bornier, Savelon, (Serpillon, no doubt) Gogné (unknown) all unitedly say so. — If this be a punishment it is a Criminal prosecution, and if so, what have we to do with it? — If it be not Criminal, where is the demand, and how comes it before the Court? — It was undoubtedly Criminal but if not, it was undoubted that Women en Communauté de biens, could not be proceeded against Contrainte de Corps, nor even in case of Stellionat — Rodier 678 & Serpillon. 666. — Mrs Scott had been committed without any competent authority & must be discharged. — The Judgt was therefore set aside with costs. —

No 2327.

Conroy & al
vs
Smith.

Action of debt on deed of lease and transfer

The declaration stated, that on the 12th December 1826, by a certain deed of lease made before Lalanne Public Notary and witnesses, one John Mills granted a lease of certain premises mentioned and described in the said declaration for a term of three years, for and in consideration of an annual rent of forty pounds, to the Defendant Timothy Smith, the said rent to be paid quarterly to Samuel Hamilton Mills, his heirs or legal representatives — That afterwards on the 19th day of September 1827, the said Samuel Hamilton Mills appeared before the said Notary, and accepted of the delegation made to him by the said John Mills his father — That afterwards on the said 19th day of September 1827, the said Samuel Hamilton Mills transferred to Guy Mills of St Armand the sum of eighteen pounds fifteen shillings to be by him taken and received out of two quarters rent of the aforesaid premises to become due and be paid by the said Defendant on the 23d day of September and 25th day of December of the year 1827, the said Samuel Hamilton Mills subrogating the said Guy Mills in all his rights and privileges to enable him to recover and receive from the said Defendt the aforesaid sum of £18.15 — That afterwards ~~on the~~ and before the payment of the said two quarters rent by the said Defendant, the said transfer so made by the said Samuel Hamilton Mills to the said Guy Mills was duly notified to the said Defendt by reason whereof the said Guy Mills became entitled to demand and receive of and from the said Defendt the said sum of £18.10 out of the aforesaid two quarters rent then due —

That

That on the thirtieth day of April 1828 the said Guy Mills died, leaving the plaintiffs as his heirs and legal representatives, who now prosecute the present action to recover from the said Defendant the said sum of £18. 15. with interest & costs —

To this action the Defendant pleaded a general demurrer or defenses au fond en droit — on which issue was joined by the plaintiff, and the parties having been heard thereon, the Court maintained the demurrer and dismissed the action, on the the principle that Samuel Hamilton Mills was no party to the lease made by John Mills to the Defendant, and that the stipulation made in the said lease that he the said Defendant should pay the rent to the said Samuel Hamilton Mills visted no right in him to prosecute the recovery of that rent — That the act of acceptation made before the said Notary by the said Samuel Hamilton Mills without the knowledge or participation of the parties to the lease, was not binding on any of them and created no delegation in favor of the said Samuel Hamilton Mills, and therefore the transfer made by him to the said Guy Mills could be no avail —

—

No 2096.

Roi & al. —
vs
Roi. —

This was an action en reddition de Compte. —

The declaration stated, that on the 11th Augt 1777 Laurent Roi was married to Elizabeth Breau at the parish of St Philippe in this district, by virtue whereof

whereof a Community of property was created and existed between them — That during the said Community they acquired and became possessed of much real and personal property — That on the 29th day of December 1825 the said Elizabeth Breau died, leaving as her heirs the said plaintiffs and Defendant and several other children of her marriage with the said Laurent Roi, and leaving also all the property of the said Community in the possession of the said Laurent Roi. — That on the 21st day of April 1829 the said Laurent Roi died leaving his said children as his heirs — That the Plaintiffs, David Roi and Alexis Roi, two of the said Children, as heirs of the said late Elizabeth Breau were entitled to their part and portion in the half of the said Community that existed between her and the said late Laurent Roi — That the Defendant, Pierre Roi, at the time of the decease of the said Laurent Roi, took possession of all the property left by him, and of all the property of the said Community without having paid or rendered an account to the said Pltffs of their share and portion thereof as two of the heirs of the said late Elizabeth Breau their mother, or of the Estate and Succession of the said Laurent Roi their father The action concluding for an account of the property & Estate left by the said Elizabeth Breau and Laurent Roi, and for a sum of £2500 — damages with interest & Costs.

The Defendant pleaded as a peremptory exception to this action, that on the 19th day of February 1829, a certain deed of transaction was made and entered into by and between him and the said plaintiffs and Defdt

and

and his other children, heirs of the said late Elizabeth Breau whereby it was agreed that no Inventory should be made of the property of the Community that had subsisted between him and the said Elizabeth Breau, and after viewing and examining the property of the Sd Community the said plaintiffs and Defendant and other heirs of the said Elizabeth Breau agreed to accept and receive from the said Laurent Roi, certain real and personal property which he the said Laurent Roi in and by the said transaction transferred conveyed and made over to them in lieu and in full satisfaction of all the rights claims and pretentions of the said plaintiffs and Defendt and his other Children in the aforesaid Community and in consideration whereof the said Plffs and Defendt & other heirs aforesaid declared themselves content and satisfied and did release acquit and discharge the said Laurent and all others of and from all claim or demand as heirs as aforesaid, transferring to the said Laurent Roi all and every their right interests and pretentions in and to the property of the said to be by him held, used and disposed of as his own proper Estate; by reason whereof the action and demand aforesaid of the said Plffs in regard of their rights and claims as heirs of the said Eliz: Breau in the property of the said Community, is wholly extinct and satisfied — That afterwards to wit on the 10th day of April 1820, the said Laurent, having thus become the proprietor of all the remaining property of the said Community, made his last Will and testament and thereby devised and bequeathed all his property and

Estate

Estate both real and personal of every description to the said Defendant as his universal devisee and legatee burthened with the payment of a sum of ten pounds to each of the said plaintiffs and his Children, as and for their legitime in his the said testators Succession — That the said Defendant in and by virtue of the said last will and testament now holds and possesses all the said property and Estate so devised and bequeathed to him by the said late Laurent Roi and is not bound or liable to render to the said Pltffs any account thereof — And concluding that the action be dismissed —

To this exception the Plaintiffs answered, that notwithstanding any of the matters therein contained they were entitled to maintain their action against the Defendant because the said late Laurent Roi had rendered no account to the Plaintiffs of their mothers property and succession he having always remained in the possession of the whole of the property of the said Community and held and enjoyed the same and all the revenues thereof — That the deed of Transport set up by the said Defendant in and by the said plea of exception is wholly null and void and of none effect in law — 1st Because Alexis Roi, one of the Plaintiffs was no party to the said deed — 2d Because Antoine Bissonet and Laurent Roi, two of the other Coheirs refused to sign the said deed — 3d Because the said deed was not made and executed in the Office of or before Archambault Public Notary — who refused to shew the pltffs the minute thereof — That the said deed of Transaction mentioned in the said plea of exception is unjust and deprives the Plaintiffs of their share & proportion in the Estate and succession of their said Mother, they having

been

been induced to accede thereto, in the expectation and on the promise of the said Laurent Roi, that they would be indemnified for any loss or injury in regard thereof when his own Succession came to be divided among them, but in this they have been deceived through the influence and ascendancy of the said Defendt over the mind of the said Laurent Roi, by which he was induced to make a will in favor of the said Defendant — That the said deed of transaction as well as the other acts referred to by the said Defendant in and by his said plea of exception is null and void and of none effect in law and cannot prevent or destroy the right of action of the said plaintiffs — That at the time of making the said last will and testament the said Laurent Roi was of weak mind and incapable to make the same or in any manner to dispose of his property as the Pltffs are ready to verify —

The Defendant by his reply to the above answer joined issue thereon as to all the matters of law and fact therein contained —

The parties were now heard en droit upon the sufficiency of the Defendants exception — when the Court maintained the said exception in regard of the demand of the said plaintiffs for an account of the Estate and Succession of the late Elizabeth Breau, their mother, inasmuch the deed of transaction set up by the Defendant and admitted by the Pltff was not null and void in law, although — voidable, and until an action had been brought to shew its nullity and obtain the rescision thereof, it must be held and considered as binding on the parties, this part of the said action was therefore dismissed — and in regard of the last will and Testament of the late Laurent Roi, a day was given to the parties to adduce their evidence. —

Hubert & Carley ~~appeal~~. 20 June 1822.
Reps^ve V^o Rescision. p. 329.
Id. v^o Transaction pp. 236. 244. 5. 6
1. Masli. p. 289 — 2 Vol. 45. 6.
Lacomb. v^o Restit^n en Entier No 4. —

No 793.

Leveque, Tutor &c.
v.
Alair. —

Action on obligation, by which it was stipulated that the money due by the Defendant should be paid by him, à l'age de majorité des dits mineurs ou pourvus par mariage, it being alledged, that the said children were then of age —

Plea - That the Defendant according to the terms of the obligation could not be held to pay the amount thereof, nor any part or portion thereof until all the children were of age, and that there was one of them still a minor —

Replication - admits, that one of the three children was a minor, and thereupon restricts the demand to two thirds of the sum demanded by the declaration. that is, for the parts and portions of the two children who are of age. —

The Court interpreted the obligation to be payable in the manner restricted by the Replication. inasmuches the minors when they came of age were severally entitled to demand what was due to them, and that this appeared to have been the intention of the parties, from the answers of the Defendant to the faits & articles proposed to him by the Plaintiff. —

No 1408.

Lacroix
&
Aubain. —

Action for Lods & Ventes. —

The declaration stated, that by a deed of donation made and executed on 18 Sept: 1828, Amable Desjardins and his wife transferred and conveyed to the Defendant two certain lots of land and premises mentioned and described in the said declaration, subject to certain charges, reservations, obligations and burthens, viz^t. — à la charge par ledit defendeur de jouir, user et disposer des sus dits terreins en pleine propriété, et a commencer la jouissance du tout sous huit ans de la date du dit acte de donation — et à la charge par ledit Defendeur des reparations et entretiens des batimens & clotures en bon état, et de repondre à tous les travaux publics pour les dits terreins à cet epoque de huit années, tems auquel ledit Defendeur entrera en possession des dits terreins — et à la charge de laisser jouir les dits Amable Desjardins et son epouse, leur vie durante de la chambre du coté du Sud-ouest dans la maison erigée sur la premiere terre designée le droit de communiquer dans le restant de ladite maison, de passer par la meme porte du Defendeur pour aller dehors; le droit de faire leur ordinaire à la cheminée de la Cuisine, — d'avoir place dans le grenier et dans la Cave de ladite maison le droit de se servir des fours et d'avoir un chemin pour aller à la riviere — le droit de loger deux vaches dans les batimens, ainsi que d'y loger leur fourrage, et le droit de se servir de la laiterie — et du moment des huit années expirées à la charge par lui Defendeur de livrer la moitié des jardinages de toute espece qu'il recoltera sur le premier terrein donné, ainsi que la moitié du produit de tous les arbres fruitiers, et enfin de payer à chacun des enfans des Donateurs la somme de cinq livres de vingt sols au décés des donateurs — Encore à la charge par le Defendeur de payer et livrer partie en argent et partie en effets, — une somme de deux mille livres ancien Cours qu'il auroit payé ou promis de payer aux dits donateurs, ou pour eux à d'autres

personnes

personnes, laquelle somme n'auroit pas été portée ou mentionnée au dit acte de donation par les dits donateurs ou ledit defendeur dans la vûë de frauder le demandeur de ses droits de lods et ventes sur cette somme —

Que toutes les reserves, charges, servitudes, et obligations crées en faveur des dits donateurs, seroient evaluées et estimées, suivant l'état ci-annexé, à une somme de 6680ᵗ — anciens cours, dont les lods et Ventes se monteroient à la somme de 556ᵗ-15ˢ — meme Cours, egale à £23. 2 — cours actuel, et en outre 7ˢ. 6ᵈ que le demandeur auroit payée pour copie du dᵗ acte de donation — Concludes for the payt of the sum of £23. 9. 6 with interest & Costs —

Etat referred to in the declaration —

La jouissance du 1ᵉʳ terrein pendant 8 ans par les Donateurs, à 300ᵗ.	2400„—„—
La Jouissance du 2ᵈ terrain pour 8 ans à 50ᵗ.	400„—„—
L'entretien des batiments & clotures sur les terrains à 18ᵗ —	180„—„—
L'obligation de repondre à tous travaux publics	60„—„—
Jouissance de la Chambre dans la maison — faire l'ordinair à la Cheminée du Defendr — place au grenier — et se servir du four, pendant 10 ans à 30ᵗ.	300„—„—
Le logement de deux vaches et leur fourages	100„—„—
Droit à la laiterie	30„—„—
La moitié du produit du jardinage et des arbres fruitiers, pendant 10 ans à 120ᵗ.	1300„—„—
Argent pour legitime	10„—„—
Argent payée & non portée au Contrat.	2000„—„—
	6680„—„—
£23. 2. —	½ — 556„15ˢ

To this action the Defendant pleaded 1ˢᵗ Denied all the facts stated in the declaration — 2ᵈ That the donation as stated was merely remuneratory and imposed no burthen or charge in favor of the said Desjardins & wife the donors, and therefor no Lods & Ventes were due thereon to the plff — That if any thing were due

to

the plaintiff in this respect, it could be only on the sum of five livres which the Defendant was bound to pay to Amable Desjardins and Joseph Desjardins, the Children of the said donors, which has been tendered to, and refused by the said Pltff.

The Replication joins issue —

The Court were of opinion that the Plaintiff was not entitled to lods et Ventes upon any of the reservations made by the Donors in the deed of Donation, as this was imposing no burthen upon the Defendant, nor creating any benefit in favor of the Donors beyond what they enjoyed before that deed was made, in this respect the rights of the donors remained as they were before the making of that act — That according to the terms in the donation there were only three objects upon which the Pltff could claim his lods & Ventes — viz^t —

1	Entretien & reparations des batiments & clotures sur les terrains donnés à 18".	180.—
2	L'obligation de repondre pour tous travaux publics	60 —
3	Argent pour legitime aux enfans des Donateurs	10
		250

The lods & Ventes upon which sum was 17/4 for which the Court gave Judg^t with Costs as in the Inferior Court

April Term 1830.—

Saturday 10th April.—

No 902.—
Dunn.—
vs
Campbell
Campbell
&ppt

Judgment was obtained by the plaintiff in this Case on a promissory note of the Defendr for £30.— in which note it is necessary to remark no interest was stipulated to be paid, and not having been protested when due, the defendant was condemned to pay the amount of the note with interest only from the day of the demande judiciaire and Costs.— On this Judgment Execution issued, and as several payments had been previously made on account, a Statement was annexed to the execution of the balance remaining to be levied, in which Statement the principal interest and costs were added together, the payments deducted from the aggregate sum, and interest charged on each balance from the period of each payment.— Under this execution the Defendants moveables had been seized, the sale of which he has opposed on two grounds—
1st Because the payments made by the Defendant have been deducted from the general total of debt, interest and Costs, and interest claimed upon the balance of these three combined, whereas the payments ought to have been first deducted from the principal or original debt.— and also because a further sum

of—

of five pounds paid on account, is not credited or mentioned in the said Statement and for which a receipt is produced and proved —

On the first of these grounds — the principle of law with regard to the application or imputation of partial payments is therefore involved by the Defendt and although in this Case it may not make any material difference, yet in point of principle, and as fixing a rule for future Cases, it is right that the subject should be investigated and a decision had thereon, particularly as the principle of the Roman law, has by usage been imperceptibly gaining ground among us in this respect, in lieu of that of the Customary law of France, which must have the preference as regulating the jurisprudence of the Country — It is an admitted principle, that when the debtor making a payment declares it to be made in discharge of any particular debt, such application must have its effect, or if he make no such declaration, the to whom the money is due for different Causes may make the application or imputation by the acquittance or receipt which he gives, and this power is more particularly given to him, when partial payments are made on account, for not being bound to receive part payment of any one debt, he may refuse to do so unless what he receives be applied in deduction or payment of the interest or the principal as he shall see fit — it was on this account that the Court on a former occasion expressed a desire that the receipts given by the

Pltff

Plaintiff should be all produced in order to discover if any such imputation had been made by either of the parties at the period of each paymt. but as this could not be complied with, and the parties having declared that no such express ~~stipulation~~ imputation had been made, but that the monies had been paid and received generally on account of the Judgment, we must resort for our guidance to the rules of law which regulate such imputation, where the debtor and creditor have omitted to make it at the period of each payment.

As to the application of payments to the interest before the principal sum, it will be found that there is some variance between the Roman Law, and that of those Provinces in France which were governed by the Customary Law, and this is no where more concisely or distinctly laid down than in the small work called "Instructions surles Conventions" p. 331.- and Pothi. ob. N 528. & 570.- Now it is evident that the cases here alluded to, must be in contradistinction to Conventional interest, and this may be inferred not only the above authorities, but also to those to be found in other authors - see 2 Argou p. 398. 399.- It is therefore sufficiently clear from these authorities that when the authors speak of debts that carry interest, de droit, they mean that interest which was due ex natura rei et beneficio legis - It was on this principle the Judgment of this Court, cited as argument by the Defendants Counsel, of Parker vs Richardson, was founded, and as that principle was not perhaps at the time so sufficiently and clearly explained as to prevent a misapprehension in regard

to

to its application to that particular case which was not commercial in any respect, but that of an ordinary obligation given for money lent and for which interest was stipulated generally, that is, not payable yearly so as to entitle the Creditor to exact payment thereof distinct from the principal, and before the latter became due or could be demanded — What has therefore been just noticed, may be considered more as explanatory of the Judgment alluded to, than as absolutely necessary for the decision of the present Contest — and on this point direct and positive authorities are to be found in regard of such Judiciary interest, clearly establishing that it has not the preference to the Capital in the legal application of partial payments — And to the authorities cited by the Defendants Counsel from Pothier Obl. Nos 570. 571 — Repse vo Imputation. p. 91 — we will now add that of 2 Argou. 399 — "Au Parlement de "Paris quand les interets sont dus ex officio judicis, "l'imputation se fait d'abord sur le principal" — There is also an acte de Notoriété to the same effect of the 9th Augt. 1718, and an arret of the 8th July 1649 — reported in the Journal des Audiences 1 Vol. Book. 5, ch. 44 — It is therefore evident that Judiciary interest forms so far as it were a distinct debt, that the partial payments, where no application has been made by the parties as before stated, must be first applied in discharge of the principal as being the most onerous debt, which is also one of the fundamental rules to regulate the imputation of payments — There is an authority however in Pigeau, which without a previous knowledge of the law upon the subject, is calculated to mislead,

but

but which upon an attentive perusal will be found not in the least to contradict or shake the authorities before noticed — see 1 Vol. p. 608. — This authority is very imperfect and evidently incorrect, for it speaks of interest — generally and without distinction, and is therefore incautiously expressed, but we take the intention of the author to have been, not to enter fully into the subject, but rather to give a caution to Bailiffs charged with an execution, and to — Creditors receiving part payment, that they should make the imputation upon receipt of such payment, they having the power to do so, as no Creditor, whether by Judgment or otherwise, is bound to receive × such without making the — imputation, the law always favorable to the discharge of the debtor, will apply such payment to the discharge of the debt the most onerous — the power is therefore in the Creditor's own hands, but he must exercise it at the moment, it must not be the result of after thought — In this case therefore no application having been made at the period of each payment, the contrary ever appearing by a receipt produced for the first payment, which is expressed to be on account generally, without specification of debt interest or Costs, it may fairly be presumed that no other imputation was made on the subsequent payments — Having thus disposed of this Case as far as regards interest, the next question is whether the Costs are entitled to any preference, and it is somewhat extraordinary, that the authors who have so distinctly treated the one, should have been so silent or so indistinct in regard to the other, for — notwithstanding every diligent research, we have not been able to discover any other authority, than the imperfect one already noticed in Pigeau, and two others to be noticed hereafter, nor can we find that Costs are privileged in any respect as regards or as between the Judgment Creditor and the debtor, though it will be found in the case of an insolvent Estate, that the prosecuting Creditor

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is entitled to the Costs of seizure and sale out of the general mass before distribution of the assets of such Estate among the Creditors, and upon the principle that these Costs having operated beneficially for the whole body of Creditors, they are entitled to be paid by preference, but we know also that in practice the prosecuting Creditor has been refused the Costs of the action upon which such seizure has been obtained — The seizing Officer is also entitled to retain his legal Costs and disbursements out of the proceeds of a seizure — but this and the preceding are particular Cases for which the law has expressly provided and cannot operate in the present Case, which is distinct, and in no respect analogous — if in this Case the costs carried interest as well as the principal, it would be unnecessary to enter into any discussion on the subject, as it would then be quite immaterial to which the payment might be imputed, but it never has been pretended in any Case that such interest was due, and the execution only requires that interest should be levied on the principal sums, and not on the Costs — there can be no doubt but that interest may be obtained even upon Costs in certain Cases, but this could only be after an interpellation judiciaire, and a Judgment awarding such interest, but here none such could be claimed for the payments were all made before execution issued, or the usual preliminary of the Commandement, or demand of payment before Seizure — unless therefore the pretentions of the Pltff could be maintained on the score of privilege, it can have no other foundation — but where is this privilidge to be found? — Some authority should be produced to authorise the Court to grant it, otherwise it must remain subject to the general principle which declares that the imputation must be made beneficially for the debtor and applied in discharge of that which is most burthensome to him —

Upon referring again to Pigeau we find — first — that he does not enter into the detail of the subject of imputations, but refers to Pothier — 2ly That he divides the debt due on a

Judgment

Judgment into three distinct parts, debt, interest, and costs, to which the rules of imputation may be applied — 3dly That he ranks the interest before the Costs, evidently thereby marking that he ascribes no privilege to the latter more than to the former, and if interest is to be excluded from a preference, so à fortiori, will the Costs — 4ly That in regard both to interest and Costs it is clearly admitted, that if the imputation be not made at the time of payment, it will be applied in discharge of the principal as carrying interest and therefore the most onerous part of the Judgment — This authority therefore without a more extensive knowledge of the doctrine of imputation on partial payments, might lead to error, and Pigeau therefore refers to Pothier for the detail, and this from experience we may say will often be the case, where the idea of one author is taken up without consulting others, and obtaining a more general view of the law upon each particular subject — giving Pigeau credit therefore for more knowledge than he has disclosed, and extensive knowledge may be most justly ascribed to him, yet as he discloses, and which does not militate with the rules laid down by the author to whom he refers, is certainly entitled to its due weight, and taking it as given, it clearly establishes a different principle from that contended for by the pffs Counsel, and gives no legal privilege or preference to the Costs of an action, but merely recognizes the power of the Creditor to make the application at the time of the payment, and if not then done, the imputation which the law makes will attach — Besides the reason alledged for the preference given to the principal, is that the judiciary interest, is "la peine du retard du paiement" and so indeed are the Costs — Denizt says, "l'obligation de payer les depens est la peine la plus "naturelle des plaideurs temeraires" — both therefore

Denizt Vo Depens. p. 231. No 2.

appear

appear to stand upon the same footing in this respect as distinct portions of a Judgment, but the principal sum as it regards both is the most onerous debt — Now although no direct and positive authority can be found, yet there are two other authorities from which the same inference may be drawn as from that of Pigeau, the one is that part of the Instruction sur les Conventions where the author treats of — quittances p. 332, and the other in Bourjon 2 Vol. p. 446. — It must be obvious from these two authorities that Costs and interest would not have been mentioned as separate and distinct from the principal to which alone the preference is here given, if the imputation in regard to the interest and Costs did not stand on the same footing as regards preference —

The conclusion from all this must necessarily be that the payments made by the Defendant must in this Case be deducted from the principal sum, and the plaintiff will be authorised under the present Judgment to levy the balance with interest thereon from the date of the last payment, together with interest calculated on the principal sum and on the subsequent balances thereof up to and from the period of each payment and the Costs. —

With regard to the payment of five pounds said to have been made, and for which the Defd alledges no credit has been given, there is some reason to presume, that the receipt produced for a similar sum and for which credit has been given of a date two days latter than the alledged payment is one and the same sum, more particularly as

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the defendant has not produced any receipt for the said sum which has been so credited to satisfy the Court that in truth two sums of five pounds had been paid by the Defendant.—

The only remaining question is the Costs — The Defendant, opposant in this Cause, has claimed main levée of the seizure, and to this he might have been entitled, if he had at the same time tendered the sum which he admits to be due, but not having made such tender, the Conclusions he has taken cannot be awarded to him as the seizure must stand good for the balance due, and a Verd: exponas must issue; but as the result of the Contest upon the Opposition has been a partial success to the Defendant, we consider that upon that Contest, each party should pay his own Costs.—

Friday 16th April 1830.—

No. 844

Courtemanche
vs.
Cartier.—
and
Cheval — opp.ts

Upon a seizure of the Defendants moveables by execution, on the first of December last at the suit of the plaintiff, an opposition thereto, and to the sale of the effects seized has been made by the opposant Cheval upon two grounds.—

1st Because the effects were already under seizure in virtue of a writ of execution of the 10th March 1829, at the suit of one Hubert against the Defendant—

2d Because to such first seizure the opposant was appointed gardien, and as such, answerable to Hubert the seizing creditor for the production of these effects, never having been legally discharged as such gardien.—

The oath of the Defendant, and not that of the Opposant is annexed to this Opposition — Moyens have been filed by which it appears that the present seizure, embraces more than the articles first seized.— To this Opposition and moyens, exceptions have been taken by the Plaintiff—

1st Because such pretended seizure of the 17th March 1829, has not been followed up, but has remained without effect, all proceedings thereon having been stopped by the consent of the Creditor Hubert, without any opposition having been made to such seizure—

2d That between of the day of the return of the said execution issued at the suit of Hubert, and the day of issuing of the present execution at the suit of the plaintiff in this Cause, more than two months had elapsed, whereby the opposant became by Operation of law discharged from his guardianship.—

3d

3dly That the opposition was made by fraud and collusion between the debtor and gardien, to obtain unjust and vexatious delay. —

Upon the first ground — the not following up the seizure, it is natural to suppose that the law would require some diligence on the part of the seizing creditor and prevent any forbearance exercised by him from operating injuriously to other creditors, and therefore independantly of what may be inferred from the 172. art. of the Custom, it is obvious from the general tenor of all the authorities upon the subject, that to entitle the creditor to the full benefit of any seizure of moveables by execution, he must without delay proceed in due course to the sale thereof — Pothier, in observing upon the delay of eight days fixed by the Ordce within which the Sale of the effects seized is prohibited, says, — "lorsque ce delai est expiré, et qu'il "n'y a aucunes Oppositions qui arrêtent la vente, ou que "s'il y en a eu, elles ont été terminées, le Saisissant, non "seulement peut, mais il doit même proceder à la Vente, "surtout, s'il y a des gardiens" — Now it is obvious, that in this Case the first seizure by Hubert has lost its effect and no longer be opposed to any subsequent seizing Creditor — it would appear that it was made on the 23d March 1829, when the opposant was appointed Gardien the effects remaining in the possession of the Defendant — the procès verbal of the seizure, seems to have terminated the proceedings, for on the 22d May, the Sheriff makes this return upon the execution — that having seized the Defendants effects, they had remained unsold by desire of the plaintiff, and since this return, no proceeding of any kind was adopted or taken by the seizing Creditor Hubert — this therefore was virtually an abandonment of the right he had acquired, at least so far as regards the other Creditors of the Deffo and the maxim of "Saisie sur Saisie ne vaut," will not apply:

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indeed if the law were otherwise, the other Creditors of the Deft would be prevented not only from seizing, but also from making any opposition, as they could have no knowledge of the Seizure unless the sale of the effects had been publicly notified in the way the law points out, and this with a view to the benefit of those very Creditors, and for the Security of the rights of third persons — the second seizure therefore now in question and which was made on the first of December 1829, nine months after the first, and seven after the return of the execution into Court, was rightly and legally made, as will appear by the authorities to be noticed under the second ground of exception to the moyens d'opposition —

The second ground is, that more than two months had elapsed between the return of the first writ, and the issuing of the second, the opposant and Gardien, became by operation of law discharged from his guardianship — Now if this principle be correct, and we think it is, with certain modifications, the opposant here as gardien has no interest in making the present Opposition, wherein he concludes for the nullity of the second seizure; the most that he could look for would be a legal discharge from the responsibility he had contracted, and which he had a right to claim; but it certainly appears very suspicious, when it is to be presumed, ^ his Gardien had notified the original Seizing Creditor of the second seizure, that the latter should not appear to support his rights and interest — is it not natural to presume, that he has abandoned any right he had acquired as — premier Saisissant — nay more, that he has been paid and satisfied by the Defendant, and has no longer any claim against, and this may be the more easily presumed from the Circumstance, that although the present opposition was made in the name of the gardien, it appears to have been prosecuted by the Defendant who alone appeared to make the oath required in support of the Opposition — The legal and natural interpretation given by Ferriere to the 172e. art. of

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the Custom, would under all the circumstances of this Case, fully satisfy its application thereto, even if that interpretation were not to be found in the other Authors, as was urged in Argument by the Appt., for it appears too reasonable and just not to be adopted when nothing can be produced to shew that his opinion is any where contradicted, nor can we suppose, that an opinion so decidedly expressed, could have escaped observation or criticism, had it been disapproved of or considered erroneous. The article is in these words — "Les executans sont tenus " de faire vendre les biens dedans deux mois apres les oppositions " jugées ou cessées" — Upon this Ferriere observes — " cet article " decide la question, savoir, combien dure l'execution, et " dans quel tems l'executant est tenu de faire vendre les " meubles executés, savoir, dans deux mois du Jour de " l'execution, en cas qu'il n'y ait point d'opposition formée " par le debiteur saisi, ou par un tiers, ou s'il ne survient " point quelque legitime empechement &c — apres lequel " tems la Saisie demeure sans effet, et les gardiens sont " dechargés de plein droit — Ainsi apres les deux mois " à compter comme dit est, faute par l'executant de faire vendre " les meubles, l'execution demeure deserte et sans effet, de sorte " qu'un autre Créancier qui les auroit fait saisir & executer " seroit reputé premier Saisissant, et par ce moyen preferé au " premier" — Here then is a distinct and unequivocal declaration of the effect to be given to this article, as applying in regard to the limitation of time, equally to Cases where no oppositions have been made as to Cases where oppositions have been made and subsequently disposed of, for it would be absurd to suppose, that where there was no opposition, a greater delay was intended to be granted, for if so the Creditor would in many Cases be more restricted, where oppositions were made, than he would be if

if there were none, contrary to the obvious intention of this article of the Custom —

The 19th Title of the Ordre of 1667 art. 20. contains a similar provision, but is fuller - (see 1 Sousse. p. 299. & nob 4. p. 300.) and in Q. Denrt. in observing upon the same article of the Ordre he says — "et par la même raison ils "doivent aussi être dechargés de plein droit deux mois apres "la saisie s'il n'y a pas eu d'opposition. Vid. titre Gardien "N. 12.2

Here the opinion of Ferriere so far from being combated by Sousse and Denizart, is confirmed and his opinion justified and supported, as it is also in the Repertoire — under the title, Gardien, where in remarking upon the article of the Ordinre of 1667, already noticed, it is said, "Ils doivent par la même être dechargés de plein droit "deux mois apres la saisie, lorsqu'il n'y a pas eu d'opposn "et si la saisie subsiste sans que les oppositions soient levées "ou jugées, les gardiens ne sont dechargés de plein droit "qu'au bout d'un an &c — The same will be found in Bourjon. 2 vol. p. 553. tit. 8. sec. 3. art. 23. "Les gardiens sont "apres deux mois dechargés s'il n'y a eu opposans, et d'apres "1 an, s'il y a eu opposans, leur charge ne pouvoit pas etre "perpetuee, et il a fallu leur fixer une fin" — Nor can the gardian be answerable for effects which are taken out of his hands, in due course of law, and by the same authority under which he was appointed. —

Now if this be the antient law of the County, with how much more reason does it apply where the seizures are made under our present system by the same officer, the Sheriff, by whose ministry in this second instance the effects have been seized, which has in effect discharged the gardien from any future responsibility in regard thereof, for it cannot be assimilated to the general cases

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in France, where seizures were made by different Officers, and not as here, under the Kings writ addressed to the Sheriff — in every point of view, we consider the Opposant, sans interets, to claim as he has done, the nullity of the second seizure, as he is only answerable that the effects shall be forth coming, and that none are lost through his negligence or default — The original seizing Creditor had alone the right to complain, if he had not forfeited that right, and in this case there is a greater reason for supporting the second seizure in preference to the first because it embraces not only the articles originally seized but many more, and it is probable, that even if the first seizing Creditor had appeared, we should even under circumstances more favorable than now appear, have ordered the Sale under the second seizure, as being more extensive and as calculated to prevent the expense of two Sales, which would otherwise necessarily follow and be incurred, and the first execution converted into an Opposition afin de conserver in lieu of the last, and such appears to have been the practice according to Pothier proc: Civ: pp. 187. 8. 9, where two seizures are made by ordinary Creditors not priviledged — It is true that this Court has held, where there were opposants afin de conserver, that any one of them in case the seizing Creditor neglects or refuses to proceed, may be subrogated in the right of the seizing Creditor, to prosecute the sale, and it has been sometimes so ordered by the Court — but this is not the Case of Opposants where the seizing Creditor had given no opportunity to such to come in, the seizure and the sale not having been announced or notified, and therefore his seizure must be presumed to have been unknown to the other Creditors. —

No 1462.

Wm Cook.
vs
M. Knapps.
and
M. Knapps. ops.

In this case the plaintiff had obtained Judgment against the Defendant, as usufructuary and fiduciary legatee and devisee of the late Sarah Bruner his wife, on an obligation made and executed by her in favor of the Plaintiff — The Plaintiff having caused a certain lot of ground with a dwelling house and other buildings thereon erected and in the possession of the Defendant to be seized and taken in execution under the said Judgment, the same was advertised for sale in the usual course at the Sheriffs office, on the 29th day of March 1830, the Defendant came forward and in the course of the enchères offered a bid for the premises in question, which bid the Sheriff refused to accept, and the premises were afterwards adjudged to Messrs Samuel Gale and Charles Simon Simon Delorme — The Defendant having made an opposition to any title being made and given by the Sheriff to the said adjudicataires of the premises so adjudged to them, alledging that the sale was null and void in law and great injury done to the Defendant as the said Sheriff had refused to receive his bid for the said premises at the time and before the sale and adjudication thereof, and praying that the sale and adjudication so made as aforesaid should be set aside, and a new Sale had — The Sheriff having returned the writ of execution into Court with the said opposition annexed, it was moved on the part of the Plaintiff that the said Opposition should be rejected and set aside as frivolous insufficient and vexatious on the following grounds —

Because the said Defendant was not entitled

to

to be a bidder at the said sale —

Because persons against whom Judgments are rendered and executions issued and proceeded upon to actual sale, vente forcée, are not to be considered as solvent to pay the amount of their biddings, and consequently cannot have a right to bid and thereby to prolong and embarass the proceedings without end

Because, were the Defendants bidding to be received as of right, it would be in the power of every debtor to render nugatory all Judgments and executions against him, and to deprive his Creditors for ever of the sums awarded to them and directed to be levied in their favor under His Majesty's Writs, by always becoming himself the highest bidder, adjudicataire, of his own property.

Because it is always in the power of the Defendant debtor, (if he has the means of payment it would be fraudulent and illusory to bid) to prevent the Sheriff's sale, by satisfying the execution even until the last moment of such Sale, and he can have no right, when he hath omitted to do this, to render unavailing the Sale and adjudication in favor of any of His Majesty's Subjects called together for the object of a decret in obedience to His Majesty's Writ. —

Because the Defendant debtor against whom Judgment and execution have gone forth, is as to such Judgment and execution in contempt of Court if he possesses the means of payment, and cannot in relation to his property seized, be entitled to acquire in his own name any new rights under

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the process of the Court until he hath purged himself of such previous contempt.—

Because such Defendant debtor by endeavouring to render himself the adjudicataire, if he doth not possess the means of payment, becomes guilty of a Contempt aggravated by an attempted fraud against the Creditors for the satisfaction of whose claims Judgment and execution have gone.—

Because proceedings upon executions would become wholly vain and illusory, and Sheriff's Sales would be unattended and deserted, if it could be in the power of the Defendant at his pleasure to render doubtful, or prevent the sale and adjudication of his pretended over-biddings and to involve the adjudicataire in legal contests respecting the same — and because such pretended over-biddings were and are wholly null, void and illegal, unaccompanied by any tenders or security for the payment of the same — And because the said Defendant hath not made even in and by his said Opposition and protest, which it is now hereby moved to reject and set aside, and doth not make any offer or tender to pay the aforesaid price and purchase money for which the said house and premises have been adjudged, or any other whatever — and because of various other Causes and objections to the sufficiency and validity of the said Opposition —

And it is hereby also moved that the said Opposition of the said Defendant being quashed and

and set aside, the said Sheriff may be ordered to make out, perfect and deliver to the said Samuel Gale and Charles Simon Delorme, the necessary and proper legal deed and title to the said house and premises, as being the last and highest bidder and the actual purchasers and adjudicataires thereof.—

On the hearing on this motion, Mr Gale for the Plff cited. Hericourt. p. 179— Rep^re v^o adjudicataire and v^o Encheres, to shew that a defendant a debtor had no right to bid — That the present Defendant, as usufructuary devisee and fiduciary legatee under the will of his wife could not bid so as to become the proprietor of the Estate, as had he ever become the purchaser, it must have been for the Children of his wife for whom he was the Trustee.— That it must be in the power of the Sheriff to determine who has and who has not a right to bid, or whose bid he will accept — at all events the recourse of the opposant here can be only against the Sheriff if he is injured, as there is no blame to be attached to the adjudicataires to whom the public faith has been pledged.—

Mr Walker for the Opposant.— The Defendant here is not the personal debtor of the plaintiff, and therefore had a right to bid and to become adjudicataire of the property in question — That a Defend^t may be adjudicataire — Rep^re v^o Enchere. p. 697- 1 Pegeau 747.-766-777- Hericourt 114 — all the authorities cited by the plaintiff apply to the bail judiciaire, and not to the sale of the Estate its elf— Id. 179. 180— That the

question

question cannot be decided in this summary way by motion whether the Defendant had right to become purchaser or not — If the Sheriff had the right yet he did not exact any security from the Defendant on his bid, and the Defendant was always ready and willing to have given ample and sufficient security in this respect, and is still ready to give it — But the Sheriff was no right to refuse the bid of any man at a public and open Sale, where every man was entitled to bid, and the Sheriff could not know the Defendant here from any other man, and if the Defendant had not complied with the terms of the adjudication, it was for the Court to determine what course ought to be adopted —

Gale in reply — The return of the Sheriff to the writ of Execution shews a regular and perfect sale and adjudication of the property in question, and if the present opposition can be admitted or received it will shake the public confidence in Sales made by the Sheriff, who is a public officer and who is bound by his acts, and if adjudicataries can be entangled in proceedings of this kind, they will abstain from the purchase of property from the apprehension of being involved in trouble & expense in regard of the Sheriffs proceedings —

The Court thought that the only question they had to determine upon the present motion was, whether the Defendant could be considered as liable for the debt for which execution had issued against

him

him, as in that case the Sheriff was warranted
nay bound, not receive his bid, because as the partie
Saisie and liable to the payment of the debt, he could
not be the adjudicataire — And the Court were of
opinion that so long as the Defendant held his wife's
property under her will he was liable for the debts she
had contracted, and personally bound for the debt
in question which he had been adjudged to pay —
and thereupon they granted the plaintiffs motion —

1. Arrets Bardet. 318.
1 Hericourt — 182
Rep^e v^o adjudicataire
p. 167. —
& al' —

Monday 19th April 1830.—

Dupuis.— v Richardson

Action Trespass &c— for seizing a certain quantity of timber the property of the plaintiff.—

The declaration contained three Counts—

1st For maliciously and wrongfully sueing out a writ of attachment on 6th April 1824, and afterwards on the 29th of the same month, causing a quantity of 568 pieces of white pine timber, the property of the plaintiff to be attached and seized, and which thereby became wholly lost to the Pltff— which said writ of attachment was never afterwards returned into Court, but all further proceedings thereon were abandoned and given up— to damage of Pltff £500.—

2d For seizing and taking possession, by violence and force of arms, on 29th April 1824, of other 124 pieces of square pine timber of the value of £500— and carrying away and converting same to Defendt's use— to Pltff's damage other £500.

3d Trover and Conversion for other 124 pieces of square pine timber of the value of £500— on 1st June 1824 &c to damage of Pltff other £500.—

General conclusion for damages £500 &c Costs—

Plea— general issue— Verdict for Pltff £220.— damages

On motion of Defendant for a new trial and in arrest of Judgment.—

On the 2d February 1830 the Defendant obtained a rule on the plaintiff to shew cause, why the verdict rendered in this cause should not be set aside, and a verdict entered for the Defendant— Or that the Verdict be set aside,

and

and the plaintiff declared Non suit — Or that the Judgement in this Cause be arrested — Or that a new trial be granted and the plaintiff charged with the Costs of the present action — On the following grounds —

1st Because the said Verdict is against law and contrary to Justice, and ought to have been rendered for the Defendant —

2d Because no evidence of malice was submitted to the Jury, without which no Verdict could, or should have been rendered in favor of the plaintiff —

3d Because it is alledged and Staled that the plff made an affidavit, upon which the writ of attachment was issued of which affidavit no evidence was offered at the trial —

4th Because no sufficient evidence was offered to justify the Verdict —

5th Because the Jury ought to have rendered a Verdict for the Defendant and not for the plaintiff —

6th Because the verdict was contrary to law and the opinion of the Court —

7th Because the Jury rendered a verdict contrary to the opinion of the Court, on mere allegation —

8th Because the said Verdict is subversive of the laws of the land —

9th Because it is a general Verdict —

10th Because the plaintiff hath improperly & illegally blended an action on the Case, with an action in trespass and a Count in trover —

11th Because the issues being three in number, and different in their nature, and the Verdict general, — Judgement ought to be arrested, by reason of the uncertainty on which issue to apply the said Verdict —

12th Because there is a misjoinder of Causes of action, the declaration containing three distinct grounds or Causes of action, viz: Case, trespass and Trover, on neither

of

of which it is expressed that the Jury rendered their verdict. —
13th — Because the said Verdict was and is contrary to law and evidence —
14th — Because the said Verdict was contrary to the charge of the Court —
15th — Because the damages found by the Jury are excessive. —

The evidence adduced on the trial was confined to this that on the 6th April 1824, the Plaintiff caused a process of attachment, or Saisie revendication to be sued ought against certain quantities of square pine timber in the possession of the ~~Defendant, the~~ plaintiff in this Cause, and by virtue whereof the Defendt caused 568 pieces of said timber to be seized on the 29th day of the same month — There was no affidavit produced or proved to shew the grounds upon which this process was obtained — This process was returnable in June Term 1824, but was never returned owing to some defect in the declaration and the Defendant in consequence directed the Sheriff to take off the attachment which was done and the timber was delivered up to the Plaintiff on the 25 May last, when 124 pieces of the timber were missing, having been carried away by the water — There was evidence to shew that this attachment had been injurious to the plaintiff as a dealer in lumber, and had created — considerable loss to him from his being under the necessity to discharge and pay off the men he had in his employ to carry the said timber to market — There was also evidence as to the value of the timber lost —

The Court after hearing the parties, were of opinion, that proof of malice in the Defendant, or of the affidavit upon which the process was obtained, was not necessary to have been made to maintain the action, as the question did not depend so much upon the malicious suing out

of

of the process of attachment, which we may presume was rightfully and legally done, but upon the abuse of the process when sued out, in attaching the plff's property and afterwards abandoning that proceeding whereby the injury complained of arose — Whether the process was rightfully or wrongfully sued out may be immaterial, but the abuse of it afterwards having been injurious was actionable — The generality of cases for malicious arrest and prosecution turns upon the right of suing out the process, where proof of malice is necessary to be made, to shew the undue means whereby legal process had been obtained, and as being without reasonable or probable cause — the effect here was the same, although the Cause was different — It therefore became unnecessary for the plaintiff to prove by what means the process was obtained, or to prove the making of any affidavit as the ground work of it, all that was necessary was to prove that the Defendt caused the process to be sued out and the attachment to be made of the Plffs property which attachment was afterwards abandoned in consequence whereof the plaintiff sustained the injury complained of — As to the Verdict being general, it is no doubt a question which merits consideration and upon which different opinions may be formed — Since the establishment of this Court trials by Jury have not been frequent, and but few questions have been raised or determined touching the practice thereon — but when we look at the numerous decisions on the various questions that have been raised on trials by Jury in that Country from which we derive this institution, we feel satisfied that in many cases the practice there must form precedent

for

for us in this Country, while we cannot help observing, that in somethings, that practice would not only be inconsistent but injurious to the Subject here, from the different system of laws we follow — In regard of different Counts in a declaration, although in principle and in practice, it is desirable that as many objects of demand may be united in the same declaration, ~~as the~~ as a Plaintiff have to make against his adversary, that expense & delay may be thereby prevented, yet there must be that kind of consistency between them, that the whole can be embraced in one Judgment and one execution — this principle is common to the English and to the French law — but where several Counts are contained in the same declaration in order to obtain a recovery of one and the same right, or a demand of the same thing by so many different Counts or actions, here the system of the two Countries varies, as that fiction which obtains in practice in the English Courts, is not followed in this Country, where the rule is more simple, for in this Country when different kinds of action are given for the recovery of the same right, a selection must be made of one, and that selection excludes all the others, and the reason given is, to prevent embarassement and the raising of too many questions in conducting the proceedings to Judgment — The declaration in the Case before us contains three Counts — or three separate and distinct demands, or Causes of action — One, for an injury done to the plaintiffs property under colour of legal process — One, for a trespass by voie de fait, and carrying away the Plaintiffs property — and One, for having become possessed of the Plaintiffs property by finding, and knowingly withholding it from him and converting it to Defendts use — Now according to our course of practice, if these actions were inconsistent and incompatible the Defendant ought to have raised his objection thereto, by the preliminary pleading of an exception peremptoire à la forme,

1 Pigeau. 37.

not

not having done so, it may now be a question how far he can avail himself of any supposed irregularity — Viewing the Case under the English Course of proceeding these Counts in the same declaration are incompatible, the rule there being, that in actions of Assumpsit, Covenant, Case and Trespass, no two of them can be joined, neither can Trover and Trespass be joined in the same declaration — A Defendant however may waive his right of demurrer to the declaration and avail himself of the irregularity in arrest of Judgment, as the rule there is that what would be good in demurrer, is sufficient to arrest the Judgment, as being apparent on the record — Here then arises the question, as to the course to be pursued in our Courts in the conduct of a Cause after verdict — Shall the parties be entitled to same benefit of objection as they would in England or shall they be foreclosed from taking the advantage of an irregularity, which according to our course of proceeding they are presumed to have waived by not having pleaded it? — According to our System, the verdict of a Jury may be compared to a Rapport d' Experts or prud'hommes, which settles merely questions of fact, and before a reference could have been made to such persons by the Court, the right to maintain the action as brought must have been admitted or adjudged, and that right cannot again come under discussion after such a Rapport has been made — But we are disposed to think, that as the mode of trial by Jury as in England, has been adopted here in ejectment cases all things incident, all things incident to this mode of trial should also be adopted here as far as practicable, as otherwise Courts of Justice might greatly cramp or infringe this right — Whatever rights therefore which the parties may have to exceptions to evidence or to the opinion of the Court or Judge trying the Cause, to a new trial, or to arrest the Judgment, arising out of the proceedings — by the intervention of a Jury, should be regulated by the course of practice in England, and therefore if according to

this

this practice the verdict could not be supported for any cause apparent on the proceedings or record, advantage may be taken of it by the parties here in arrest of Judgment, as it could be in England — Proceeding therefore on this principle we see in the Case before us three separate Counts or grounds of action in the declaration which are incompatible, and upon which a general verdict has been given, and according to a received principle, when there is a general verdict, and one or more of the Counts in the declaration are bad, it — vitiates the verdict, and the Judgment is arrested — This principle however has undergone considerable modification and it has been allowed to the parties to have the verdict amended from the Judges notes and to have it entered on the good Count in the declaration, when the evidence addduced was applicable to that Count and sufficient to maintain the action — In the Case of Grant v. Astle 2. Doug. 730. L. Mansfield observes — "I have exceedingly " lamented, that ever so inconvenient and ill-founded a " rule should have been established, as that where there are " several Counts, entire damages and one Count is bad, " and the others not, this shall be fatal, upon the fictitious " reasoning that the Jury has assessed damages on all, " although they in truth never thought of the different " Counts, but the verdict was so taken from the inadvertence " of Counsel in the hurry of Nisi prius — And what makes " this rule appear more absurd, is, that it does not hold in " the Case of Criminal prosecutions — for when there is a — " general verdict of guilty on an indictment consisting of " several Counts, if any one of them is good, that is held to be " sufficient — but in Civil cases, the rule is now settled, and " we have gone as far as we can by allowing verdict in such " Cases to be amended by the Judges notes" — And again in the Case of Eddowes v. Hopkins. 1 Doug. 377. Buller. J. said

said — "there was this distinction, that if there was
" evidence at the trial only upon such of the Counts as were
" good and consistent, a general verdict might be altered
" from the notes of the Judge, and entered only on those
" Counts" — This principle has been further extended in
latter Cases to say, that where there was evidence given
which would support any good Count in the
declaration, however applicable it might be to the
the bad or inconsistent Counts, still the verdict might
be amended and entered upon such good Count, and
this even a writ of Error granted and proceedings
had thereon — see 1 Bos: & Pull. 329. Williams. v
Breedon — 3 T. Rep. 750. Doe. v Perkins — and 3. Bing.
Richardson. v. Mellish. 337. — And it is held as a
principle of Justice that the Court will apply the
damages to the issue on the right Count — ut res
magis valeat quam pereat" — 1 Anst. 261. Webb v
Allen — In this Case therefore according to these
principles we see no reason why the Verdict of the
Jury in this Case may be not be amended and
entered on the first Count in the declaration to which
the evidence is applicable and which is sufficient
to maintain the action —

See 11. Moore's Rep. 104 S.C.

In regard of the damages assessed by the Jury
they are no doubt more than the Court would have
granted, and may be considered in some respects
immoderate — for the whole damages sustained
is the loss of 124 pieces of square pine timber, and the
delay and injury occasioned by the seizure and detention
of the whole quantity seized from the 29th of April to the
26th May following — There is certainly great latitude

given

given to the Jury in forming their opinions and verdict in cases of damages, and the circumstances of this case permitted much of that latitude, and therefore the Court finds it difficult to interfere, unless we could see that the calculation of damages adopted by the Jury, was founded upon some wrong principle, which does not appear — The discretion of the Court in controuling the verdict of a Jury, must always be exercised upon some legal or sufficient grounds that can be maintained as a principle of decision, but here we would be at a loss, where to lay hold of this principle or how to apply it the mere difference of opinion of the Court as to the quantum of damages in a Case like this, is not alone sufficient —

On these principles we therefore think that the rule obtained by the Defendant should be discharged

—

No. 1326.
Cuthbert
Arbour —

On action en declaration d'hypotheque

This action was founded on a right of mortgage upon a certain lot of land in the possession of the Defendant, founded on certain acts and contracts made by one Jean B^te Arbour here on 6^th May 1811, and 30^th July of the same year.

To this action the Defendant pleaded several exceptions and among the others, that since he had become the proprietor of the lot of land in question, he had paid and reimbursed to different Creditors, hypothecary claims

which

which they had upon the said lot of land, which were anterior in point of time and right to the present claim of the plaintiff, (and specifying the nature and extent of the said claims) that the Defendant cannot be held or bound to quit and abandon the said lots of land until the said plaintiff shall have paid and reimbursed to him the amount of the said mortgage debts prior to that of the plaintiff —

The Plaintiff by his reply joined issue on this exception, contesting the Defendants right to the reimbursement demanded

Cherrier for the Defendant in support of this exception contended that the payment made by him of the mortgage in question ought to be assimilated to improvements made by the possessor on the lot of land, which could not be taken from him by a Mortgage Creditor, but on reimbursement of the improvements so made — cits Grand Coutume de Ferrure 2. Vol. p. 36. No 11 — That the plaintiff ought not to be allowed to sell the Defendants land, but on condition of paying the older Mortgage, as these will more than cover the value of the land, and it will be occasioning unnecessary expence to no purpose in such case to effect a sale of the said lots of land —

The Court however were of opinion that the Defendants exception could not be maintained that the right given to a possessor de bonne foi, to retain the land upon which he had made improvements until those improvements were reimbursed, was upon the equitable principle — Nemo debet locupletari alterius jactura

to

to prevent which, this Court, following the opinion of some writers on the subject, has held that the best security to be given to the possessor was the reimbursement of his improvements before being dispossessed of the land — This was however a case of a singular exception against the right of Mortgage of a third person, allowed in the case of improvements made on the land, but which could not be extended to the case before us of the reimbursement of money due by mortgage on the land, which had been voluntarily paid by the Defendant, because the law did not appear to support the claim of the Defendant for monies paid by him to discharge a mortgage on the land, as it would for improvements made on the land — improvements on lands are to be encouraged as they are benefical not only to the individual but to the public, and may be one reason why they are more favored in law than the — payment and discharge of a mortgage on the lands which can be only for the benefit of the individual — That the claim for improvements is allowed on the principle that it is a privileged claim, and possess before all other mortgages, whatever their date or priority may be as to time — That improvements on the land necessarily attach to and become part of it, and the possessor is entitled to hold the thing upon which his privilege attaches until it be satisfied, as it is by possession alone that such — privilege can be maintained — whereas mortgages are not particularly attached to any one lot or piece of ground or real Estate, but are bind to all the real Estate of the debtor and with any special privilege or benefit on any unless by the agreement, obligation or mortgage it be

otherwise

+ in so strong and beneficial manner

otherwise covenanted and agreed by the parties — A claim for a mortgage reimbursed therefor not standing on the same favorable ground as for improvements made on the land, we cannot allow to it the same benefit, as the law has not provided for it in the way claimed by the Defendant whose right must attach upon the land in such way as to give him a claim on the proceeds of it, but cannot prevent the land being sold —

Tuesday 20th April 1830.

No 1874.
Campbell
v
Solomons

This action was brought by the plaintiff as indorsee of a promissory note made by the defendant in favor of one John Spragg, dated 10th August 1825, for £61. 5. 4, payable on the 1st March 1827. — and the declaration contains also the usual money Counts — The plea to this action was. — 1st — non assumpsit — 2d a Special plea — That the note was indorsed after the same became due, that is, after the 7th March 1827, and that no consideration was given by Spragg the payee to the said defendant — 3d Protesting that the said note was indorsed after it became due and not on the 10th August 1825 — that the parties were Merchants and traders — and that no legal or valuable consideration was ever given or paid to the Defendant by Spragg or any other person at any time for the said promissory note. — 4th Repeating the protestation as above, says, that the said note was obtained by fraud and surprise, and without consideration had and received therefor — 5th That on the 10th August 1825 a certain discourse was had between Spragg and the defendant concerning divers dealings and transactions in business between them and William Hutchinson the Copartner of Spragg, then remaining unsettled, when the said Spragg falsely and to deceive and defraud the said defendant, did pretend and assert, that the defendant

stood

stood indebted to him and his Copartner in a sum of one hundred pounds and upwards on such dealings in which the defendant confiding, he gave the promy note in question, at the request of Spragg and for his accommodation, whereas in truth the Defendant was not then or since indebted to them jointly or individually in any sum of money whatever—

5th That before the note was indorsed, that is, on the 7th March 1826, Spragg and his Partner were, and still are, indebted to him in a much larger sum of money viz. the sum of £229.17.6 for goods sold, money lent, paid, laid out, and expended &c which sum so due and owing, exceeds the amount of the promissory note now sued for, and the defendant became and is entitled to compensate and sett-off the said sum so due by them jointly and severally with and against the sum now sued for and all damages &c incident thereto.—

6th That after the making of the said note, and before the transfer thereof, to wit, on the tenth day of January 1826, he the said defendant fully paid to the said Spragg the amount of the said note—

7th That the said John Spragg at the time of the making of the said note, was and continued to be indebted to him the Defendant in a much larger sum of money, than that expressed in the said note, to wit in the sum of £229.17.6 for goods sold &c to Spragg & Hutchinson, which sum of money so due and owing by them jointly and severally exceeds the amount of the note now sued for and all damages &c, and the defendant thereby became and was and is entitled to compensate and sett-off the said

sum

sum of money so jointly and severally due by the said Spragg and Hutchinson with and against the amount of the said Note, as far as the same may extend — and which he doth accordingly compensate and set-off. —

The replication is general and joins issue on the plea —

Upon these several issues the parties have proceeded to evidence, and it does appear that a fraud had been practised by the late firm of Spragg & Hutchinson, & previous to the notes in question having been made, by false accounts of sales furnished by them for goods entrusted to them by the Defendant to be sold on his account and to a much larger amount than the note now sued for, and if it be possible and in the power of the Court to afford relief to the Defendant under such circumstances it will be our duty to extend it to him — We must however in this as in all other Cases, be governed by the evidence before us, and not by the allegations of the parties — Now the facts to be collected from the evidence, are, that John Spragg and William Hutchinson, were on the 10th. Augt 1825, and long before, Copartners in trade, as auctioneers and Brokers, under the firm of Spragg & Hutchinson which firm continued up to the 15th. of the same month of August, when it became bankrupt and insolvent — a few days however previous to such bankruptcy, that is, on the 10th August, the note now in question was made and given by the Defendant to John Spragg, and is of the following tenor —

Montreal Augt. 10th. 1825.

£61. 3. 4 —

On the first day of March 1827 I promise to pay to Mr John Spragg or order Sixty one pounds 3/4 Hfx. for value received — signed. H. Solomon. —

Now

Now under what circumstances this note was obtained, and whether any and what consideration was given for it, does not appear, the note is in the usual form, expressed to be for value received, and nothing appearing to rebut or destroy this, we must presume such value was received — Subsequently to the bankruptcy of Spragg and Hutchinson, but at what particular period has not been disclosed, an assignment was made of the Estate debts, and effects of the firm of Spragg & Hutchinson to certain Trustees for the benefit of the Creditors of that firm by John Spragg one of the firm, who soon after, that is in the fall of the year 1825, left this Province, and afterwards in 1826 William Hutchinson also left it — The Note now appears indorsed as follows — "Pay James Campbell or order, John Spragg" — no date is affixed to it, and the period of such indorsement not exactly ascertained — it however most clearly appears, that this Note, as composing part of the debts due to Spragg & Hutchinson came into the possession of the assignees of that firm, with a blank indorsement, and it is but fair to presume, that under such endorsement by the payee Spragg, the firm of Spragg and Hutchinson became the holders and proprietors of the note, and that it came into the possession of the Trustees under the assignment made for the benefit of their creditors, for it was not until after the Trustees had given to the Plff as a Creditor of Spragg and Hutchinson, his choice of one out of a number of notes in their possession in payment of his claim for wages, as having been a clerk in the employ of Spragg and Hutchinson, and that the Plff had selected the one in question, that the indorsement could have been filled up by a special transfer to the Plaintiff — How far

for the Trustees were authorised to make such a — transfer to one particular creditor we cannot discover as it must have been in their hands for the general benefit of the creditors of Spragg & Hutchinson, and the transfer may perhaps have been made with the consent and approbation of such creditors — One fact is however clear, that the note was not transferred to the plaintiff by John Spragg, but that it had been previously assigned over to the Trustees from whom the plaintiff received it — the — bankruptcy of the firm of Spragg & Hutchinson had then existed for several months, and this to the knowledge of the Plaintiff — the transfer therefore of the note to the Pltff was not made in the ordinary course of negotiation, but under circumstances that ought not to place the Plaintiff in a better or more favorable situation than the original payee of the note or the Trustees themselves would have been, and with regard to them there cannot be a doubt but that any just or legal set-off the Defendant might have to the note in their hands would and ought to be — admitted — the plaintiff cannot be considered in the same favorable light as holder of the note for a valuable consideration in the due and ordinary course of negotiation, but as having acquired the note under advantageous circumstances for himself, and highly injurious to the Defendr who from the insolvency of the firm of Spragg & Hutchinson, would be thereby compelled to pay the amount of the note, and left to take a pro rata dividend thereon, and to seek his recourse for the injury done him and practised by Spragg and Hutchinson in the false and — rendered by them of the sales of his property — Refusing

thereon

therefore to give the plaintiff Judgment places the parties in the situation they stood prior to the transfer as Creditors of the bankrupts, from whose insolvency the plaintiff must equally be a sufferer with all the other Creditors of the firm — And should the Plff be found to be entitled to any privilidge or preference on the score of wages, he can only expect to be paid out of the disposable assets of that firm in the hands of the Assignees or Trustees, and which might be justly found to be the property of the bankrupts — The favor and protection granted by law to the bona fide holders of notes for a valuable consideration cannot be extended beyond the intention of the law in granting this peculiar privilidge to such holders in favor of Commerce in the transfer of negotiable notes and bills contrary to the general law in regard to the transfer and assignment of debts — it is an exception to the general rule which places the assignee in the situation of the assignor in regard to all transactions which may have occurred prior to the making and notification of such transfer, and if the circumstances of this case are such as not to bring the Plaintiff within the benefit of such exception, we must resort to the general laws of Transfer to govern the decision of this particular Case, and there is a greater reason for our doing so in this particular Case from the Plaintiff having been a Clerk in the employ of the Bankrupts, must have had a knowledge of their transactions, if he was not aware of the deception and fraud practised upon the Defendt it would be giving so decided an advantage to persons in

such

such a situation, as to give scope to the greatest injustice and fraud, against the operation and possibility of which the law has so strongly and carefully provided — indeed it would be a violation of all law, to place the plaintiff in the same — favorable situation, and to grant to him the same advantages, as to one who in the usual course of Commercial dealings, and in the confidence and good faith so necessary to be extended and observed therein, has honestly paid a valuable consideration for a note or bill under a transfer by indorsement and under circumstances not calculated to raise any suspicion — It cannot but be considered as a favorable and just principle of our Law that in the case of bankruptcy, the debts and effects of the bankrupt become the property of the Creditors — generally, there can be no preference, nor undue advantage among them, and here both plaintiff and defendant were Creditors of the Bankrupts, nor can the bankrupt holders of a note, or their trustees endorse it in favor of one Creditor in — particular, to the injury of any of the parties to the bill, or Creditors of the bankrupt and thereby prevent their making any legal set-off to such note as regards such bankrupt endorser or holder — besides the fact of such bankruptcy known to the

Cuff

Plaintiff, was sufficient to put him on his guard and lead him to enquiry, who from his situation as clerk of the bankrupts, must have known a variety of transactions and accounts had taken place and subsisted between the holders Sprags & Hutchinson, and the Defendant maker of the note, and which note, out of the usual course had been made in August one thousand eight hundred and twenty five, and was not payable before the first of March one thousand eight hundred and twenty seven — this together with the circumstance of the bankruptcy, and the plaintiff having in reality only acquired the bill at the moment of its becoming due or very soon after, and about seven months after the bankruptcy — the knowledge which the Plaintiff possessed of the situation of the holders of the note, Sprags and Hutchinson, and of the persons to whom they were indebted — the fraud which had been practised by the bankrupts in regard to the Defendant, and the circumstances under which the Note came into the possession of the Plaintiff — these all combined we consider — sufficient to authorise us to say that the Plaintiff took the note at his peril, and subject to any just set-off that the Defendant might have — against such note as to the indorsers & holders

Sprags

Spragg and Hutchinson, and in this view of the Case it is quite immaterial whether the note was indorsed to the plaintiff before or after it became due — There is a marked differnce between this Case, and that of O'Sullivan and Grant against the present Defendant — the plaintiffs in that case stood in the light of bona fide Creditors of the Defendant as holders of a note under an — indorsement from John Spragg, and there was nothing to connect that note with the transactions of Spragg and Hutchinson, to enable the Court to grant that relief to the Defendant which upon fuller evidence in this case we are now enabled to do — And as it has been clearly proved, that the firm of Spragg & Hutchinson at the time of the bankruptcy was indebted to the Defendant in a sum of money exceeding the amount of the note now sued for, and had by false accounts of the proceeds of the Sales made by them for and on account of the Defendant, whom they had thereby most shamefully deceived, we do not hesitate to declare the debt now sued for — compensated and discharged by the sum due

by

by the bankrupts to the Defendant, leaving the plaintiff to his recourse against the assignees for the recovery of what he may be justly entitled to receive in common with the other Creditors, out of the general Mass and funds of the Bankrupts Estate —

20 April
(371)

Millar & Co
v.
Fraser. —

Action by the plaintiffs as indorsees agt. the Defendant as maker of a promissory Note. —

The declaration stated that on 5th January 1824 the Defendant and one James Whiteford made their joint and several promissory note for value received to the late Jacob Oldham, Esquire, for £416.13.4 payable to him or his order, which note the said late Jacob Oldham on the same day indorsed to James G. Bethune, who on the 16th Novr. 1827 indorsed the same to the Plaintiffs —

Plea. —

1st Non assumpsit —

2d That Jacob Oldham died in June 1824 without having ever indorsed the said note to the said James G. Bethune — nor did the said James G. Bethune give any consideration for the said note — That the indorsement on the said note was a blank indorsement in the name of the said Jacob Oldham, and made by him merely as an authority to the person whom he might entrust with the said note, to receive the amount of it, but that the Plffs or some other person or persons in collusion with the Partners in trade of the said Jacob Oldham and with whom he had confided the said note to receive the amount thereof, have since the death of the said Jacob Oldham, in order to deprive the Defendt. of the means of a good defence he now has agt the heirs of the said late Jacob Oldham in regard of the said note — That Defendt. is a Physician, and not a merchant or trader, and therefore the said note could not be negotiated or transferred to the said plaintiffs by a blank indorsement, the indorsment on the said note having been filled up since the death of the said Jacob Oldham, to wit, since October 1827. —

That

That the said Plaintiffs never gave any value to the said James G. Bethune for the said note —

That at the time of the death of the said Jacob Oldham, he was indebted to the said Defendant in a larger sum of money than the amount of the said note, and which he had a right to sett off against the same —

The Replication joins issue on the law & facts —

The facts of the Case were that the promissory note in question was left by Mr Oldham on his going to Dubee about the time it was made, in the hands of Messrs Henry M'Kenzie and Norman Bethune, to recover the amount thereof, to negotiate the same or raise money on it as they should see fit, and when so left with them, the name of J. Oldham was indorsed upon it, but the indorsment was not filled up — The note remained in this State in the hands of these persons up to the month of September 1827 — Jacob Oldham died at Dubee in June 1824 — and by his will appointed Messrs M'Kenzie & Bethune his Exrs — in that Capacity they alledge to have made considerable advances to Mr Oldhams family — and to the full amount of the note, which Mr Bethune negotiated with James G. Bethune for a valuable consideration, and delivered up the note to him with the indorsment not filled up, as it had been left with M'Kenzie & Bethune by Mr Oldham — James G. Bethune forwarded this note to the Plaintiffs to be recovered by them, and

plaed

placed to his credit with them, as he was then indebted to them in a larger amount for goods he had purchased of them — when the plaintiffs first received the note, it had only the blank indorsement of I. Oldham upon it, upon which they returned it to James G. Bethune that a regular indorsement should be made thereon, when the note came back to the Plaintiffs with the indorsements with which it now appears in the Cause. — The Defendant is a medical man, and gave the note in question jointly with James Whilford to the late Mr Oldham upon some dealings and transactions between them. —

It was strongly argued on the part of the Defendant, that the property of the note remained in the representatives of the late Mr Oldham, as no other persons had the power to negotiate it after his death — That Messrs McKenzie & Bethune could be considered only as the agents of Mr Oldham, and their authority as such ceased with his death, and they could exercise no authority over the note after that period — That the Defendant not being a merchant or trader, the indorsement in blank did not transfer any property in the note, and no person could legally complete a title thereto by filling up the indorsement. —

The Court considered that the only question before it was whether the indorsement could be filled up on the note, as there did not appear any circumstances of fraud or collusion to affect the right of the Plaintiffs, the whole burning

upon

upon their title as holders - And the Court held that the endorsement in question could be filled up at any time by a bona fide holder, and that the Executors of Mr Oldham, or any person who gave value for the Note had this right, and therefore gave Judgment for the Plffs -

see N. Denz. Vo Endossement S. 2
Rep. Ed. Vo p. 704. 706 -
1 Pardessus No 110. & ps. 108. 109. - Dem

No 336.
Smith & al' vs Wm A. Merry

The declaration stated, that the Defendt carrying on trade under the firm of W. A. Merry & Co -, made his promissory note in favor of the plaintiffs and subscribed the same with the name of the said firm Wm A. Merry & Co - the amount of which note is now sought to be recovered from Merry alone. -

The Defendant by exception has denied the fact alledged in the declaration, that he - carried on business alone under the name of Merry & Co - but avers, that at the time of making the said note, he carried on trade with Marie Flavie - Raymond, marchande publique, the wife of John M'Callum, and separated from him as to property. - The other plea - was non assumpsit

The answer to the first plea is spread, alledging that the promises and undertakings stated in the

declaration

declaration were not made by the Defendant jointly with the said Marie Flavie Raymond but by the Defend.t as declared, and that the plaintiff never had any knowledge of such Copartnership, and moreover that the allegations in the exception are insufficient. —

Now as to the sufficiency of this plea, it is not averred that the promises were made jointly by the Defendant and Marie Flavie Raymond, but that they carried on trade under that firm, nor is it said that she ought to have been jointly sued with the Defendant and made a party to this action —

The parties however have gone to proof, and it would appear, that when the Defendant purchased from the plaintiff the goods for the value of which the Note was given, there was no mention made by him, that he had any partner in the transaction or that the signature which he used, was that of an existing firm, composed of the Defendant and Marie Flavie Raymond, as alledged in the exception.

On the part of the Defendant, the existence of the partnership has been attempted to be proved, and although two witnesses have deposed to their belief from having heard that the firm of W. A. Merry & Co was composed of two persons, yet they cannot say that the same was publicly known or was ever notified by the parties, or that the Defendant who alone appeared and transacted the business, ever informed them, or those with whom he contracted that such was the Case, nor could the witnesses say from their own knowledge that ~~the Defendant~~ Marie Flavie Raymond was a partner of the Defend.t under the name and firm of W. A. Merry & Co — It appears on the other hand, that when the note

in

in question was protested for non-payment, the clerk of the plaintiff called upon the Defendant and demanded payment of the note, when the answer given by the latter was — I will pay it — Now as there is nothing to prevent any person carrying on trade from adding to their Signatures the words &Co—, and that such is not unusual, yet something more positive than has been proved on the part of the Defendant was necessary, to entitle him to the benefit of his exception, and therefore it would seem almost useless, to make any further observations on this case, the facts necessary for the support of such a defence not having been established in evidence, we would however observe, that in regard to the law applicable to such a case, there is a difference between our law and that of England — In England, in regard to a partnership debt or Contract, all the partners who were such at the time of the Contract must join in the action, and if it turn out in evidence that there are other partners, the Defendant may avail himself of the omission and non-suit the Plaintiffs — for as to them it is a joint Contract, and they cannot be ignorant of what partners their own firm is composed — such also we conceive to be the law of Canada in regard to actions brought by a partnership — but in regard to actions brought against partners there is a difference in the two laws, although under both systems partners are held jointly and severally bound for the partnership debts — in England however all the partners must be sued together, although the omission of any one of them can only be taken

advantage

advantage of by plea in abatement — by our law however it is different, for as persons bound solidairement may be sued severally, each being individually liable for the whole debt, so in regard to partners in trade, they may be separately sued as being not only jointly but severally bound for the partnership debts — Had therefore the Defend succeeded in proving the alledged Copartnership the only question that could have arisen in the present Case, would have been, whether the varriance between the allegations in the declaration and the facts proved, was such as to entitle the Defendant to a dismissal of the Plaintiffs action, — inasmuch as he has not set out a partnership, but an individual Contract or promise — it certainly must be very immaterial to the Defendant, — whether all his partners are joined or not in the action, for no injury arises to him, he being liable for the whole demand and entitled to credit therefor in the partnership accounts — the Contract assuredly should be truly stated in every declaration and if there has been a joint and several Contract it should have been set out accordingly — but was this quoad the Plaintiff a joint and several Contract of two Defendants, we should say not the adding the words & Co to the Defendants name did not necessarily imply that he had a partner, and as the Defendant alone contracted with the Plaintiffs, they were ignorant that the Defend had a dormant partner, they could only know the person with whom they dealt, as no other

sons

was announced or made known by the Defendant when he contracted with the plaintiffs, and he alone could know who were his partners, if he had any, and he was therefore bound to disclose and make known who they were — had however a knowledge of the alledged partnership been brought home to the Plaintiffs, either by a direct communication, a public notification or otherwise, the case would have been widely different, but as it is, it would be quite unreasonable to suppose they had contracted with persons of whose existence they had no knowledge, — particularly when up to the last moment the language of the defendant was calculated to convey the idea that he alone had contracted — "I will pay it" — and when it turns out that the supposed partner is a lady, who although stated to be a marchande publique, and separated as to property from her husband, is still sous puissance de mari — It would therefore be unjust to permit the Defendant now to burn the plaintiffs round, and avail himself of his own laches and silence to defeat a claim the justice of which is too apparent to admit of doubt and for which under any circumstances, the Defendant would be individually bound and liable to pay and satisfy —

Judg.t was therefore entered for the Plaintiffs

No. 1879.

Molson — vs Marcoux, & Jones. —

Action on an Award of Arbitrators —

The principal objections to this award, which were raised by the Defendant, and which — appeared to merit consideration, were — 1st That the award had not been made and rendered within the

time

time limited by the Compromis, that is, on or before the 23d February 1828 — and 2d Because the award, or Sentence of the arbitrators was never pronounced nor notified to the parties. — The fact appeared to be, that on the — 23d February 1828, the arbitrators went before a Notary public and gave in their award to him of which an act was immediately drawn and signed by him and the arbitrators, but no notification or pronunciation of the award to the parties appeared to have been made or given to either of them — The Court however held the deposit of the award at the Office of a public Notary within the time limited for making the award, as sufficient, — although without notice or pronunciation thereof to the parties — That pronunciation of the award had been held necessary, in order to ascertain the date and time that such award was made, but where this was certain, as in the present case, pronunciation of the award could at most be only matter of form, but no respects material or — essential, when the day and time of the award was certain —

See Repse vo Arbitrage - p. 528.
Dic. Dront. vo Sentence arbitrale
——— vo Depot de Sentence arbitrale
La Peyrere vo Arbitrage p. 61 —
Rogue —— vo Arbitres No 56. & 95
Rodier on Tit. 26. art. 7. of Ordre of 1667 —
Jousse on Arbitrages No. 62. & 64 —

And according to the English authorities it would seem that if the Condition of the submission be, that the award shall be ready for delivery by such a day, it is sufficient, if it be in readiness, although not actually delivered — 4. East. Reps. 584 — So where it is conditioned that the award be made on such a day ready to be delivered to the parties, —

proof

proof that it was made is sufficient, as a readiness for delivery will be presumed — Show. 98 — 6 Mod. 82. Raym. 114 — 989. —

June Term 1830

Friday 18th June.—

Hubert
vs
Cartier —
& Cheval Opp.

This was an opposition filed by the Oppost as gardien of the effects seized under a former execution, and praying main levée of the effects seized, and the seizure declared null & void —

The Plaintiff moved for a Summary hearing on the said Opposition, and that the same should be instanter dismissed, the same being without foundation, and made contrary to the course and practice of the Court —

Mr Mondelet for the plaintiff stated, that the opposition in this case was made by the gardien of the effects seized upon a former execution, that in this case, the gardien has no interest, nor can he maintain any opposition in his own name, — That the gardien will be exonerated from all responsibility by the Judgt of the Court ordering the effects seized at the suit of the plaintiff to be sold — refers to the principles laid down in N. Denoz vs Gardien. S. C. No 5 & 6. p. 239. That the seizure under which the Opposant had been appointed Gardien, was made on the 1st Dec. 1829 since which time nothing had been done, so that

the

the Seizure was to be considered as abandoned and the gardien discharged —

M. Rodier for the Opposant — The gardien here is answerable for the effects committed to his charge under the former execution, and this responsibility gave him a qualified property in the goods seized, and enables him to make the present Opposition — cites. 1 Pigeau. 618 — and two cases determined in this Court — Guerin & Papineau, and Lavergne Oppos.t and Harbor & Papineau & Lavergne Opp.t 18 Oct. 1823 —

By the Court — The Cases cited by the Opposant do not apply, as in these cases there were Oppositions subsisting to the seizure on which the Opposant had been appointed Gardien, which the seizing Creditor had not discussed, and therefore the Gardien was not discharged, and had an interest in making the oppos.n — but in this Case there appears no opposition, nor any Cause that could prolong the effect of the seizure beyond the two months after it was made and according to the Opinion held by this Court in the Case of Countemanche v. Cartier & Cheval Oppos.t — last Term, the gardien was virtually discharged and the effect of the seizure lost — The Court therefore granted the plaintiffs motion. —

No 1954 -
Rolland
v
Turgeon & ux
&
Lacroix Opp.t

This was an action to obtain the licitation of certain real Estate belonging to the heirs of the late Mr Lepailleur, and in which a Judgment had been rendered upon the adjudication of the property to the Plaintiff, directing payment of the price to be made among the different heirs, one of whom was Charles Lenor Lepailleur, now absent from the Province, but represented by George Lepailleur, his Curator — The day after the rendering the said Judgt Mr Lacroix filed a claim en sous-ordre of that of the said Charles Lenor Lepailleur, for a certain sum of money due by him to the Oppos.t — The Curator submitted this claim to the decision of the Court —

Mr Beaubien for the Opposant, after stating the nature of the opposition and claim of Mr Lacroix — said, that the only question here was whether the Opposition was made in time, so that the Court could take cognizance of it, as no plea or objections had been raised thereto by any of the parties — That he considered the Opposition to be in time, as the proceeding in this case by Licitation might be assimilated to a decret, where an Opposition may be filed — That the claim here was for a simple créance, and not for any right of hypotheque, in which other parties might have an interest, and such claim — ought to be favorably received — cites. Repse vo Collocation, p. 102. That the present Opposition might be compared to a — Saisie-arret of the money adjudged to Chas. Lenor Lepailleur and as no injury or injustice could accrue, the Oppos.ts claim ought to be allowed — 4. Gr. Comr p. 127. —

Mr

M. Mondelet for the plaintiff, says, that he can have no objection to pay the monies adjudged to Charles Leonor Lespaillem to whomsoever the Court shall direct, he is only interested to obtain a legal and sufficient discharge for the monies he shall so pay — That on this account he submitted to the Court, whether it had any authority over the Cause after a final Judgment had been given, and whether the Opposition made by the Opposr was not too late — That the proceedings here by Hypothec was different from that by Arrest, and the authorities cited did not apply —

The Court held that the Opposition came in too late, as they could take no cognizance of it nor adjudge upon it — That it might be compared to the filing of an opposition on monies levied and returned by the Sheriff, after a Judgment of Distribution thereof made by the Court — Neither in that case nor in this Court could the Court revive the proceedings in a Cause in which they were to be considered as *functi officio*, in consequence of a final Judgment rendered on the right and claims of the parties —

The Court therefore rejected the Opposition —

—

This Judgt. was rendered on the 18th June —

18(385)

Friday 18th June 1830.—

No 2204.

Macnider
v
Perrault.—
and
Divers—Opp.ts

The Sheriff having made his return to the writ of fi. fa. sued out by the plaintiff in this Cause, by which it appeared that he had seized the goods and Chattels of the Defendant and had advertised them for Sale in the usual manner, but that before the day of Sale the Defendant had paid the amount of the debt, interest & Costs which he has now ready to be paid as the Court shall direct.—

Several oppositions had been filed à fin de conserver, alledging the insolvency of the Defendant, and claiming a proportion of the monies levied.—

Mr Walker for the plaintiff moved that the monies levied should be paid over to him in preference to all other Creditors — Contends that the monies received by the Sheriff in this Case became the property of the Plaintiff the instant they were paid, because the Sheriff in this respect was the Agent of the plaintiff and represented him for all beneficial purposes, and by receiving the monies paid by the Defendant, he received them in — extinguishment of the Plaintiffs debt, the money was by the Consent of debtor & Creditor appropriated for that purpose, and the Circumstance of the money being returned into Court, does not alter the nature of the Plaintiffs claim nor divest him of the right he had acquired to have this money paid to him as his own property — because the Plaintiff had done diligence to recover his debt, and the Defendant having obtained the release of his effects

and

and a discharge from the debt, the plaintiff would be in a worse situation than he would have been, had the defendants effects been sold, & the monies here levied should not be paid to him — This may be compared to the payt of monies by a defendant whose body has been arrested in order to obtain his release — the Creditor gets his money in that case, — other Creditors have no claim on money so paid, but may take the same recourse against their debtor who has been released — So here the other Creditors of the Defendant can have no title to the monies paid in extinguishment of the Plaintiffs debt, but may have the same remedy that the Plaintiff took agt the Defendt property, which has been released, and is now liable to the claims of his other Creditors — In England and in Scotland the diligent Creditor is always preferred, and the 178e article of the Custom of Paris, says, that the most diligent Creditor is to be preferred, save in the Case of deconfiture, — now deconfiture supposes, that the whole of a debtors effects have been sold, and that there is not enough to pay the Creditors — there all preference ceases, because preference among those having equal claims would be — injustice, because the insolvency is apparent, but while a debtor can save his effects from being sold by payment of the debt, this negatives all idea of insolvency at that moment at least, and if insolvency has afterwards accrued this ought not to affect the plaintiffs right on the diligence done by him, all parties ought to stand in the situation they were in when the Defendt paid the money into the hands of the Sheriff, without being affected by any subsequent occurrence that may have happened by the delay of bringing the money into

Court

Court. There is no deconfiture in this case, so far from the goods of the Defendant having been sold it does not even appear that they have been seized or are now seized at the suit of any Creditor — That the other Creditors should have done the same diligence for the recovery of their respective debts as the Plaintiff, at all events they ought to have made their claims in time to prevent the Defendants effects from being released by the Sheriff, as those effects are now gone, and may never be recovered — cites 2 Vol. Grand Comre de Ferrure p. 1364. 5. No. 4 — 1366. No 6 — 1372. No 8 — art. 180 - p. 1375 No 1 — p. 1377. No 4 & 5 — Boucher Instre Com. 1964 — Repre vo Contribution p. 657 — Id — vo Deconfiture — which shews there must be an actual sale of property before there can be deconfiture — Repre vo Huissier p. 587. —

Driscoll for Opposants — In the Case of Fisher vs Hawley in 1826, it was held by the Court, that where insolvency was alledged there could be no presume among Creditors, whatever diligence may have been used by them. That in this Case the Opposants were not apprized of the time when the plaintiff sued out his execution or they would then have taken the steps they now do — but it is sufficient if they make their opposition when the Sheriff makes his return, which he is bound to do that all the creditors may be apprized of his proceedings and do diligence thereon, and they are always in time to do so while they come within the rule of practice —

Mr Scott for Opposts — The allegation of insolvency of the debtor is sufficient to entitle the Creditors to an equal division of the monies levied, or at least to

prevent

prevent all preference among Creditors until the question of insolvency was settled, so held by the Court in the Case of Hart & McKenzie & Opposts en 1828. —

The Court held — that according to the 178e art. of the Custom, the most diligent Creditor must be preferred, but the following article has established an exception to this general rule, by declaring that in case of deconfiture, "chacun créancier vient à contribution au "sol la livre, et n'y a point de preference ou prerogative "pour quelque Cause que ce soit, encore qu'aucun des "Créanciers eut fait premier saisir" — but as this question of deconfiture cannot always be immediately determined and may be alledged without Cause, the 180e art. has provided, that in case any difficulty or difference of opinion should arise among the Creditors on the subject of deconfiture, the most diligent of the Creditors may take the money levied on giving security to bring it back when required, — These articles of the Custom seem to embrace the whole difficulty before us, and to determine very clearly, that when deconfiture is alledged even in the face of diligence, that shall prevent all preference until the question of deconfiture be settled — and as the Plff here does not tender any security to bring the money levied in case the deconfiture be hereafter established we must reject the motion. —

No 1453.

Smith. & al
vs
Brown. —

Action in nature of an action en revendication.

The declaration states, that on 25 Oct. 1816, the Defendant was the Tutor of the plaintiffs, who are children of the marriage between the late James Smith and Susannah McClements. — That the late Rosina McClements the grandmother of the Pltffs by her last Will and testament dated 28 Novr 1810 gave and bequeathed to the said Rosina Ann Smith one of the Plaintiffs, the sum of one thousand pounds to be paid to her when she came of age, and in the mean time to be placed out at interest for her use, and did further direct, that the proceeds of her Stock in trade should be divided equally among her Grand Children, which amounted to £486,, 15. Cy for each of them. — That on the 25th day of August 1816, — Susannah McClements the mother of the said Plaintiffs made her last Will and testament and thereby bequeathed to the said Rosina Anne Smith the further sum of £2300 which was placed at the disposal of the Executors of her said last Will, to wit, the Defendant, one Etienne Roi and Robert McKenzie, but of whom the Defendant was the only person who acted and took upon himself the execution of the said Will, the interest of which said sum of £2300 was to be paid to the said Rosina Anne Smith during her lifetime; and to each of them the said William Smith and James Smith the said Susannah McClement did give and bequeath the sum of £1900 Cy which she directed should be placed out at interest and to be paid to them with the principal when the said William Smith and James Smith came of age — and all the rest and residue of her property, the said

Susannah

Susannah McClement directed, should be equally divided between the said plaintiffs share and share alike — That after the death of the said Susannah McClements, there came into the hands of the Defendant as Tutor of the said plaintiffs the following monies, viz^t. the sum of £1626.15 bequeathed to the said Rosina Anne Smith by the said Rosina McClements her Grand mother, including therein a sum of £140. — of interest — and of the monies belonging to the said Rosina Anne Smith bequeathed to her as aforesaid by her said mother Susannah McClement, the further sum of £2152.11.5 making the entire sum £3779.6.5 — And of the monies belonging to the said William Smith bequeathed to him by the said Rosina McClement his grand mother, the sum of £486.15 and £3188 bequeathed to him by his mother Susan McClements, making the entire sum of £3673.10.6 including the interest thereon: and of the monies belonging to the said James ~~Wm~~ Smith bequeathed to him by the said Rosina McClements the sum of £486.15 and £3473.4.5, bequeathed to him by his mother the said Susannah McClement making the sum of £3959.19.5, besides the interest accrued thereon — The said several sums of money so belonging to the said plaintiffs, which came to the hands of the said Defendant, amounting to a Capital sum of £11,412.16.4! —

That the defendant was bound as Tutor of the said plaintiffs to employ the said monies for their benefit, and not to do any act, or employ the same for his own benefit, whereby they might be injured; Yet the said defendant while such tutor, and after a sum of £7500 of their said monies had come to the hands of the Defendant, he the said defend^t did purchase from one James Fraser in his the Defendants own name, a certain house and lot of ground situate in

Notre

Notre dame Street in Montreal, by act or deed of Sale of the 16th March 1818, for and in consideration of a sum of £1500.— and paid the same out of the monies belonging to the said plaintiffs, and fraudulently obtained a title to the the said house and lot in his own name — and did further fraudulently expend and lay out of the monies of the said Plaintiffs in making other buildings and erections on the said lot of ground to the extent of £1750.— That the said plaintiffs are entitled to claim the said house lot and buildings as their property, as having been purchased by their tutor with their monies — and concluding that the Defendant be held and bound to quit and abandon the said lot of ground and premises to the said Plffs and to restore to them the fruits, issues and profits thereof with £5000.— for their damages in this behalf & Costs —

Plea —

1. Defenses au fond en droit —
2. Denegation of the facts —
3. That the Defendant purchased the said lot of land with his own money, and for his own use and benefit, the greater part of the monies which he had at that time received for the said plaintiffs having been laid out and expended in and about the interests and concerns of the said plffs. — That the Defendt had at that time a sum of £5068.18.8 belonging to the late Margaret McClements his wife, which now belong to David Brown, the Child of his marriage with the said Margaret McClements — And Defendt further had a sum of £1000.— which he had received from James Smith and Robert McKenzie, Executors of the last will and testament of the late Rosina McClements, as appears by his obligation, of the 4th October 1814 — That

the

the said defendant had placed a sum of £1000 — belonging to the plaintiffs in the hands of Etienne Pre Roi at interest, as appears by his obligation of the 23d. March 1818 — That the said Defendant has paid to William Smith one of the plaintiffs a sum of £2200.4.— as well before as since he became of age — including interest thereon up to 1st April 1828 — To Rosina Anne Smith, and on her account, a sum of £3200.7.1 with interest as above, and to James Smith a sum of £2085.8.7, including interest as above. — That the defendant has paid certain debts due by the succession of the late Susannah McClements, of whom the plaintiffs are the heirs, to the amount of £1766.11.6, including interest as above, and forming in all the sum of £9252.7.6, leaving a small balance due to the said Plaintiffs — That the Defend has laid out in and about the purchase and buildings in question a sum of £4700, which far exceeds the balance due by the Defendant to the Plaintiffs. — That the Defendant did in good faith purchase the said lot of ground in his own name as well for his own benefit as for that of his creditors, and that the said Pltffs are not and never did become the Proprietors of the said premises, upon which they can claim only their right of mortgage in common with the other Creditors of the Defendant. Replication joins issue on all the facts & law stated in the plea. —

The evidence in support of the action was chiefly documentary, consisting of the different acts referred to in the declaration, and two letters written by the Defendt ex. No 15. & No 16. — There were besides the depositions of some witnesses produced on both sides. — From the evidence adduced the plaintiffs

contended

contended there was enough before the Court to establish their demand

Mr Driscoll for Defendt The evidence adduced is not sufficient to maintain the action — The letters written by Defendt do not admit the purchase of the property for the minors — they are vague and uncertain, and no specific buildings is referred to. There are only two witnesses who speak to the purchase of the property on behalf of the Minors — I. I. Reeves whose testimony is objected to as being inadmissible the deposition being informal, the age of the Witness not being stated, which is a nullity — — That the testimony of Handyside ought to be received he being interested, he has a claim against one of the Pltffs and interested that they should succeed in their suit — That the testimony of Mr Fraser a witness for the Defendants, who was the person who sold the property in question to him, states, that at the time he owed £200 to the Defendt for goods which he Fraser had sold at Auction for him, and this sum was taken as a part payment by Fraser — And further that one of the Plaintiffs has sued out an execution against the lot of ground in question, as being the property of the Defendant — That if the Court were to adjudge the premises in question to belong to the Plaintiffs, it would operate great injustice to other Creditors of the Defendant who are not before the Court, and particularly the minor child of the Defendt who has claims on his fathers Estate of a nature prior in point of Mortgage to those of the Pltffs —

Mr

Rpts Vs Enquete. p. 741. 1st Col. — Feb. 22. art. 14 & 20. Ord. 1667. —

Mr Buchanan of counsel for the plaintiffs in reply stated, that in cases of this kind where the interests of minors were implicated, it was the duty of the Court to watch over them — It was a fraud in the Defendant to apply any part of the monies of the minors in the purchase of property in his own name and all the monies of this purchase made by the Defr which we can see belonged to him is a small sum of £100, but as to the rest of the purchase money as well as the improvements made on the property, the fair & necessary presumption is, that all this was paid for with the monies of the plaintiffs — That the act of Sales produced by Mr Fraser ought not to be received in evidence of payment or added of Sale — nor ought to deposition of Reveste be rejected from a mere clerical omission which may be corrected by the order of the Court — but without this deposition there is sufficient evidence in the Cause — even by the Books of account produced by the defendant himself it will appear that he had become possessed of the monies of the Plffs. to the extent of six thousand pounds — That when one of the plaintiffs sued out the execution in question as the Defendt. they were unacquainted with the fraud which he had committed, but which Espon was withdrawn as soon as the fraud was discovered —

That the Ordr of Charles 9th on Theveneau on Ords p. 371 — will shew the duty of Tutors when they get the monies of minors into their hands —

That even when the Tutor takes obligations for monies he may lay out for the minor, still the minor has the option to sue the Tutor for the money or accept the obligations he has taken on laying it out — Dig. lib. 15. tit 1. law 52. § —

Coquille

Coquille 2 vol. p. 283. Cout: Nivernois, will shew what is the kind of proof which is necessary to establish that the monies of the Minors have been applied by the Tutor in the purchase of property — and particularly in the case of insolvency as here — Lapeyrere v° Deniers No 3. —

By the Court — This is an action stricti juris and ought to be clearly made out to entitle the Pltffs to recover, it is founded upon that strong protection which the Civil law extended in favor of minors, and against Tutors and Curators, so as to prevent injustice. The case before us does not in every respect come within the contemplation of the law, as there are circumstances in it which tend to shew, that the lot of land in question was not purchased with the monies of the plaintiffs, at least not wholly so — It is true that on the 16 March 1818 when the Defr made the purchase in question from James Fraser he had in his hands a considerable sum of money belonging to the Plaintiffs, sufficient perhaps to have satisfied the amount of that purchase — but we also find that at this time the defendant is stated to have been carrying on a good trade, and was able to command more money than the amount of this purchase — and in fact that a part of the purchase money consisted of a debt which Fraser owed to the Defendt for goods sold at Auction for him — That the evidence of Fraser ought to be admitted in this Case, as it contains a charge of fraud against the Defendant, and as Fraser would have been a good witness to prove, so also must his evidence be admitted to rebut it —

It is a presumption in law, that every purchase of property made by a Tutor is made for the use and behoof of his minors, merely because he has monies of theirs in his

his hands, we ought also to hold in strictness, that where the contrary appears either in the whole or in part not to have been a purchase with the Minors property this principle and rule of law ought not to be admitted, as it might be converted into a system of fraud and injustice against third persons, if a Tutor should be disposed to act in collusion with his Minors — All that Minors are legally entitled to is the balance or amount due to them, and for this they have their mortgage on the property of the Tutor should the Tutor however make a purchase of an Estate worth five thousand pounds while he owes his minors a sum of three thousand, would it be right or just, on the supposition that the Tutor cannot pay these three thousand pounds, that the Estate he so purchased shall belong to the Minors, merely because he had this sum of money of theirs in his hands? — Such doctrine would be monstrous — and fraught with injustice, and no man would be safe to trust a tutor or deal with him, as all he possesses may belong to his Minors, however extensive or valuable his property may be — This cannot be admitted — It is in evidence here that part of the purchase in question was made with the Defendt money — that he had other means of commanding money besides that which belongs to the Plaintiffs, that considerable improvements have been made upon the property — since, and upon which the Pltffs are entitled to their mortgage we think that the Pltffs ought not to recover this property from the Defendt as it was not entirely purchased with their money, and it might be productive of injury to others — Action dismissed — Leaving to Pltffs their right of mortgage on the property

(18th June 397)

Fraser. vs Stevenson et al and Smith. Intervs

On an Inscription en Faux. —

The objection taken to the instrument produced in this Case, was, that it was not authentic, the same not having been signed by the party in the presence of the Notary, nor read over to him. —

To prove the moyens de faux, Mr Kimber, who had been a Clerk in the Office of the Notary at the time of the executing the instrument in question, was produced on the part of the pltffs in faux — Mr Brown, one of the parties to the instrument in question, was also produced as a witness on the part of the said Plaintiffs. —

Mr Bourré for Defendants objected to these witnesses as incompetent — that as to the Clerk of the Notary, he could no more be heard than the Notary himself, as the secrets of his master were intrusted to him, and he cannot be permitted to reveal them — cits. Poth. Obl. 829. N° — 1 Rgleau p. 276. 277 — Langlois. p. 467. 468. 9. Lacombe v° Temoins N°. 7. sec. 2. — That the witness Brown could not be examined, on a point which tended to destroy the act — which he has made, as none of the parties to the act could be admitted to do so — cits. Lacombe. v° Temoins. —

Mr Smith for the pltffs en faux, contended, that the question here could not be considered as a secret confided by the Master to his Clerk, and if it were, still in cases of this kind, the law says, that all persons, without distinction, having any knowledge of the fact may be compelled to give evidence respecting it, and where the temoins instrumentaires may be examined — cits Instruc: sur les Conv: p 55 — where D. Denizt v° Notaire. p. 274 is referred to — That Brown the party to the instrument cannot be considered as having any interest in this question, as he is not called to distroy his own act, but the act of a third person cits Instr: sur les Conv. p. 54. —

Merlin's Questions de Droit: vo Temoin. §: 3. — when the deasons are collected —

The Court held that they could not distinguish between the Notary and his Clerk as to the secrets of his office, which neither was bound to disclose, and particularly the Notary as he was incapacitating himself by proving any fact which destroyed the authenticity of the act — That as to the testimony of Brown it might if some doubt, but they thought the safer course was to reject it, as it was dangerous to admit a party to weaken the security he had given to his Creditors by being admitted a Witness to destroy the act he had made

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Hamilton q.t. vs Ayers. —

This was an action instituted to recover a penalty from the Defendant for having imported and brought into this Province from foreign parts certain articles of merchandize without having paid the duties thereon as required by the Statute —

To this action a demurrer had been filed, and on hearing the parties thereon, the Court was of opinion to maintain it, the only question now before the Court, was whether the Information for the recovery of a penalty could be amended —

Mr Sol. Genl for Plff — There is no difference between a Civil and a penal action with regard to amendment as this equally admitted in both — 2 Bunb. Reps. 1098. 3. M: & Sel. 450. — and where there has been no unnecessary delay the Courts will permit the amendment. 4 T. Reps. 458. — 5. Bur. 2833 — Id. p. 49. — 334 — Man: Prac. 221 & 222 — 6 T. Reps. 543. Cross. v Kay — 7 T. Reps. 55. Maddock. q.t. v. Sir B. Hammet & al — 8 T. Reps. 30 — 2 Chitty's Reps. 25 — 4 T. Reps. 457.

Walker for the Defendant — the amendment here goes to the substance of the Information, and the application

to

to amend goes to the discretion, and not to the power of the Court – That amendments are allowed for the furtherance of Justice, but where no substantial right exists they ought to be allowed – That the present action carries no favorable sight with it, but is on the contrary oppressive even from the plaintiffs own shewing – The Defendt appears to have purchased a few articles for domestic use, on the american side of the line, at a short distance from the Defendt. residence, the whole not exceeding the value of £10 or £11 – and because he did not call at the Custom House to pay duties thereon, he is now prosecuted to pay £100 – Had this been a case of marked fraud on the public revenue, or carried with it any circumstances tending to an abuse in this respect, the authority of the Court might be called for, but there was nothing favorable in the cause to entitle the Plaintiff to amend –

That the Cases referred to were generally to amendments in matters of form and not of substance – 2. T. Rep. 707. 6 T. Rep. 171 – 543 – 7 T. Rep. 55 – all cases of amendment in form But amendments have been refused – 8. T. Rep. 30 – when delay was cause – 4 East. 438. 435 – 6 Taunt. 19 – 1 Marsh. 419 6 Taunt. 764 –

Sol. Genl – in reply – The authorities in favor of Amendment and decided, and nothing has been shewn to the contrary – upon particularly to that from Bunbury – That amendments have been allowed after the parties have gone to trial – The cases cited are Cases of Usury – but the present Case is more favorable as the public revenue is concerned 2. Chitty 23. –

The Court seeing that the right to amend was discretionary in Cases of this, and depended upon

upon the Circumstances of the Case, and considering that the fraud committed upon the revenue in this Cause, even if true, was of small moment, and that the articles imported appeared to be for domestic use, refused to allow the amendment demanded, and dismissed the Complaint and information with Costs.

No. 492.

The King
vs.
L. Galez et al

On Certiorari to the Quarter Sessions.—

On conviction of
confirmed in the Court of Quarter Sessions, for having interred a dead body within the town of Montreal, that is in the Vaults of new Roman Catholic Church in this town, contrary to the regulations of Police.—

Mr. Mondelet for the Complainant, urged, that the Conviction ought to be quashed, as the regulations of Police could not apply in this Case — the object of these regulations was to remove burying grounds out of the City, but this cannot apply to the interment of individuals in the Church — the authority of the magistrates, and of the Regulations of Police will not, and were never meant, to apply here — This is a private right, belonging to the Church, to be used as it shall see fit, and cannot be affected or destroyed by any regulation of Police — That the burial of the dead is not properly an object of Police, and could not come within the jurisdiction of

Mr

the magistrates — They cannot be considered as holding a greater authority in this respect than a Corporation, and as such they had not the power to prevent the interment of dead bodies in a Church Bac. Ab. Tit. Bye-laws. Letter (G)

That the rule of Police in this respect, although confirmed by the Court of Kings Bench, may be impeached and its validity tried on a plea to the Complaint — 2. Kyd on Corp. p. 109. — 3 Bur. 1323. —

That this regulation may subsist as to burying grounds so generally understood, without applying to Churches — as Statutes ought not by interpretation to operate against general laws — Viner's Ab. Title Statute, Letter (E) N° 512. 513. 518. 519. —

That the Regulation of Police is made in violation of the Constitutional rights of individuals and of the duties and functions they are called to exercise in the different spheres they hold, and therefore contrary to 14 Geo. 3. ch. 83 — whereby seems to the Kings Subjects are their Civil rights in this Province — And the Provincial Parliament constituted under 31 Geo. 3 — could not have enacted any thing derogatory to such Civil rights without the Consent of His Majesty —

That the priest, the person convicted here does only what belongs to his office as such. his duty is merely spiritual, and the body is interred in the place where the Church wardens point out, they alone can be responsible — Jousse. Govt. Spirit. des provisions. p. 75. 77. —

That prior to making the first regulations of Police in 1800, it was a usage and Custom recognized to bury dead bodies within the Churches, — this usage therefore could not be abolished or taken away without doing violence to the Civil right of individuals, which was an infringement of the above Stat. 14 Geo. 3 ch 83.

That this was a question of public law and to be regulated by the law England, by which ancient usages and Customs are respected — refers to Coke on Littleton — 3 Bac. Abr. title Customs, letter A — 1 Bl. Com. 475. —

Concludes — that conviction be quashed with Costs —

The Sol. Genl for the Prosr. The Regulation of Police has had full effect and has been complied with by all persuasions and descriptions of Citizens ever since it was made in 1800 — if there was any usage to the Contrary, it was abrogated by this Regulation for its effect is general, and no usage an excepted nor permitted to the contrary — But we know nothing of any usage here, it is not pleaded, nor proved, nor known in law, and the Court can take no notice of it — The Legislature who in 1817 renewed the authority to the Magistrates for making regulations of Police must have seen the regulations then in existence in this respect and by renewing the authority under which they were made is confirming the regulations so made —

That the only regulations which are excepted are those which are contrary to any known law of the Province, now there is no law in existence and never was, authorizing the interment of dead bodies in the Churches —

That the interment of dead bodies within the Town

of —

of Montreal, was found to be a nuisance, and all nuisances may be represses by Regulations of Police —

The regulation of Police was not intended to affect the rights of ecclesiastical persons discharging the duties of their respective offices, nor would it affect the clergyman who officiated as such at the interment of the dead body in question — but he chose to admit that he had interred that body, with a view merely of trying the — question of right. —

That the Prohibition to bury in Churches was known and enforced in Paris — C. Denizt. v° Cimitiere. N° 15 — and Ferret traité de l'abus. p. 379. + See also different regulations made for the City of Paris in regard of the interment of the dead Repr. v° Cimitiere. p. 488. —

The Court confirmed the Conviction — it was said — The only question the Court has here to consider is, whether the matter of interment of the dead within the Town of Montreal was a matter of police — if it was, then the regulation in question must have effect, and the Court held, that this was matter of police regulation, and so held in France, and as such affected all the Kings Subjects equally without distinction of Creed, Sect or situation, —

Repr. v° Cimitiere. 488.

No. 309.

Martin. q. t.
vs
Castonguè —
and
Germain, widow of Castonguè, mise in cause —

This was a rule obtained by Mr Ross as counsel for the Plaintiff, against the widow of the Defendt, to shew Cause why execution should not be granted to the Pltff, against the widow and legal representative of the Defendant, for the amount of the taxed costs adjudged to the Pltff by the Judgment of

Mr Bourré appeared for the widow of the Defendant and stated, that since the rendering the above Judgment the Pltff had died, and that no proceedings could be legal or binding in the name of a dead man — That Mr Ross had no right or authority to sue out the present rule in the name of a person who did not exist, and who must be represented in a legal manner before the Court can grant it — The present rule ought therefore to have been in the name of the heirs of the Pltff —

Mr Ross, admitted that the Pltff was dead, but said he was entitled after Judgment to use the name of the Pltff in all the process and proceedings to be had until the Judgment was fully executed — on the principle, that "le mort execute le vif" — vide - Denizt Vo — Mort — refers to Instit: of Loisel — 2 Gs. Comr Ferrier on 168e. art. p. 1152 — No. 22. —

The Court were of opinion, that as it was admitted that the Plaintiff was dead, they could not direct any of its process or proceedings to be had in his name, as all such proceedings can be had only in regard of persons especially before the Court — That the principle of le mort execute le vif, can be considered as applying only to ministerial — proceedings under the Judgment of the Court, but in no case can the proceedings be revived or renewed in Court in the name of a dead person — Rule discharged —

Gibb Clk
Pro

Gibb & al
vs
Dorwin

Action by the Plaintiffs as indorsees of a promissory note drawn by Messrs Ware & Gibb of Montreal, made in favor of the Defendt for £100 - bearing date the 14th Oct. 1825, and by the Defendant indorsed to the Plaintiffs

Plea -

1 Non-assumpsit

2d That the Plaintiffs in and by a certain deed of assignment dated 14 February 1826, made by Ware and Gibb the drawers of the said note, did compound and agree to take ten shillings in the pound as and for the amount of the said promissory note, and for the payment of that sum did grant term and delay to the said Ware and Gibb for the period of three years from the date of the said assignment, and did agree to suspend all proceedings against the said Ware and Gibb during all the above period in regard of the said promissory note, - by means whereof the Defendant has become exonerated and discharged from the payment of the said promissory note to the said plaintiffs

3d A composition made by and between Ware & Gibb and their Creditors the plaintiffs and others, by which it was agreed that the said Creditors in consideration of ten shillings in the pound to be paid to them by the said Ware & Gibb, released and discharged to the said Ware & Gibb all claim & demand against them for the respective debts due to them, and the said Plaintiffs being then the holders of the said Promissory Note, having accepted the said Composition in full payment and satisfaction thereof, are not entitled to maintain their present action against the Defendt

Replication - joins issue on the law and facts pleaded by the Defendant - and further adds, a new promise & undertaking by the Defendt since & after the making of the said deeds of assignment to pay to Plffs the demand aforesaid

It

It appeared in evidence that on the 14th February 1826 the drawers of the Note, Ware & Gibb made an assignment of their property to Trustees for the benefit of their Creditors — that those Creditors had agreed to accept ten shillings in the pound from the insolvents and to allow them three years for the payment of this amount — That at the time of this Assignment there appears by some conversation which then took place and a statement given in by the plaintiffs that they reserved their right of recovery against the indorsers of the Note now in question, — That both Plaintiffs and Defendant in this Cause, as Creditors of Ware and Gibb, were parties to the above deed of assignment — That the Defendant at a subsequent period called a meeting of his Creditors, and in the Statement of the debts due by him which he then exhibited to his Creditors, was the Note of hand he had indorsed to the plaintiffs in this Cause — Upon this evidence the Court was of opinion that the pltffs were entitled to their Judgment against the Defendant, on the principle that any Arrangement entered into between the Pltffs and Ware and Gibb was done with the Consent and approbation of the Defendant, as being a party to the deed of Assignment, and was binding upon the Defendant

2 Bos. & Pull. 61 — 3 Bos. & Pull. 363 —
5 T. Rep. 576. Ellis D. & C. 313. 314 — 299 —

see also the authorities cited on the argument by the parties

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Desjardins v Thomas. } In this Case the Defendant had been arrested on Ca. ad resp? and now moved that the process should be quashed and set aside as illegal 1st Because the said writ of Capias ad respondendum was granted

granted and issued contrary to law — and 2dly Because the said writ was granted without any sufficient affidavit as by law required —

The affidavit upon which the process issued was in the following words — "Joseph Perazeau, —
" commis-marchand, de la paroisse de Vaudreuil dans
" le district de Montreal, etant dument assermenté depose
" et dit, que Henry Thomas, gentilhomme de la dte paroisse
" est personnellement endetté envers Franc. Xavier Desjardins
" marchand de ladite paroisse de Vaudreuil en une somme de —

It was objected that this was not the affidavit required by law, as it did not appear to have been made by the plaintiff, or his book-keeper, or clerk or legal attorney without which no Cap: ad resp: can be granted —

But the Court was of opinion (diss: Mr Justice Rolland) that as the affidavit contained all the essentials requisite namely, the existence of the Debt and the intended departure of the Defendant from the Province, this was sufficient, that although the provincial Ordce of 1785 had pointed out the persons who were to ascertain the existence of the debt, yet this did not necessarily exclude the truth of that fact by any other means, and assumably if the Plaintiff was admitted to make oath of the debt, with equal justice and reason might any indifferent person not interested be admitted to do so —

Defendt's motion dismissed —

see 1. Bos: & Pull. 1. —
4. Taunt: 231. —

Saturday 19th June 1830.

Choquet. vs Donegani.

Action on Notarial obligation made and executed on 7th March 1826. for the sum of £756. Cy which sum the Defendt bound & obliged themselves to pay in the month of July next after the date of the said obligation, with interest thereon from that date till paid.

In this case payments had been made at different times of small sums of money by the Defendants to the Pltff and her late husband, and the only question now before the Court was to determine in what manner these payments were to be imputed; that is, whether the interest should be satisfied in the first instance, and the balance of each payment, if any, be afterwards applied in deduction of the Capital, or whether such payments were to go in deduction of the Capital alone —

Mr Lafontaine for the plaintiff contended that the interest should be first satisfied, as arising from the stipulation of the parties — cited Poth. Obl. Nº 770. Domat. liv. 4 tit. 1. art. 5 & 6. — O. Denizt Vº imputation. — Repse eo: verb: Dic. Droit. eo: Vº —

Mr Driscoll for the Defendants, it has been settled by the Court, in the Case of Dunn. Vs. Campbell, and Campbell Oppost, that where interest does not arise or become due ex naturâ rei, all payments made must go in extinguishment of the Capital, and all the authorities cited seem to refer to this distinction —

The

The Court in alluding to the principles laid down in the Case cited by the Defendant, held that the payments made unless where expressed to have been on act of the interest, must be applied in discharge of the principal, as the most onerous part of the debt. That the interest appeared to be entitled to no preference in this respect, except when growing out of the principal, ex natura rei, and this seemed to be the only exception — The Court therefore directed the payts made by Defendt to be applied according to this principle —

No 1407.

Logan — Forbes. a and Forbes Oppt

This was an action on a deed of Sale made by the plaintiff to the Defendant of a certain lot of land or farm as stated in the declaration, and the demand was for a sum of £179. 5. 6. being the last payment or balance due on a sum of £800 the price at which the said farm had been sold to the Defendant — The Process ad respt was served personally on the Defendant, but he did not appear and in consequence the Plaintiff obtained Judgment agt him for the above balance on the 19th day of June 1829, with costs of Suit — In consequence of this Judgment the Plff sued out execution against the lands and tenements of the Defendant, and took in execution the farm in question in the possession of the said Defendant —

To this seizure the Defendant made his opposition afin d'annuller stating, that the lot of land sold him by the Plaintiff, instead of containing forty acres in depth as stated in the deed of sale made to him by the plaintiff

the

same contained only thirty two acres and one third in depth, whereby there was a deficit of twenty three acres of the quantity sold to him, which in proportion to the rest of the land was of the value of £153. 6. 9, which with the interest thereon since the date of the sale of the said farm, greatly exceeds the amount of the Plaintiffs demand

That the plaintiff being bound by law to indemnify the said Defendr to the extent of the injury he has sustained, which amounting to the full extent of the Judgment obtained by the plaintiff in this action, the demand of the said plaintiff became and was and now is fully paid satisfied and compensated by law, and therefore the aforesaid Judgment and Execution thereon was wholly unjust illegal and vexatious and ought to be set aside — That the seizure made by the said Plaintiff of the aforesaid lot of land or farm is also illegal and ought to be set aside, inasmuch as a just and true description hath not been given of the said lot of land in the seizure made thereof, and whereby injurious consequences may accrue to the said Defendr Therefore praying that the said seizure may be set aside with Costs, and the demand of the said plaintiff declared to be paid satisfied and compensated with the claim aforesaid of the said Opposant. —

To this Opposition the plaintiff pleaded by exception peremptoire en droit, that the Defendant could not have or maintain his Opposition aforesaid after Judgt rendered against him as before mentioned, as the matters stated in the said Opposition in so far as regards the deficiency of land in question, was matter of defence to the plaintiffs action, but cannot now by law be received as grounds of an Opposition afin d'annuller. —

Or

On this plea issue was joined by the Plaintiff oppos.
and the parties were heard en droit thereon when the
Opposant contended, that the deficiency in the shares
sold might be set up at any time against the seller
as it destroyed his right to exact the consideration of
the sale, and that such deficiency operated a compensation
or payment of the Plaintiffs demand, and as such could
be brought forward after execution as much as any other
payment or discharge of the debt — That in this instance
the Plff was entitled to no demand whatever of the said
Opposant, as the deficiency was of greater value than the
sum demanded. —

Scott for the plaintiff, contended that the opposition
made by the Defendant could not be admitted, as it
was setting up a matter of defence to the action, which
could not now be enquired into as Judgment had been
given, and the Defendant had waived all benefit to this
defence by allowing Judgment to be entered against him
by default. — cites. Poth. Proc. Civ. p. 141. 1 Couchot. 273. 1°
Opposition — 1 Jousse on Ord^ce 1667. tit. 11. art. 17. p. 258. 9 — and
Tit. 35. art. 2. p. 370. 374. Rep^re v^o default. p. 315. —

The Court were of opinion (diss. Mr Justice Pyke)
that the opposition could not be maintained — that it was
inconsistent with the course of our proceedings, to admit that
to be set up by opposition which could have been pleaded
by plea to the action — it would be encouraging litigation
and bad faith, and a Plaintiff could never be certain when
he could depend upon obtaining the execution of a Judgment
legally rendered — That the pretention now set up could

and

not be set off even as a compensation of the plaintiffs demand because it was in the nature of a Damage sustained, and even if true required a previous discussion of facts to settle and ascertain the extent of the injury complained of, but this must be the subject of an action, and can not come in by opposition to a demand liquidated by a Judgment of Court — It would become a dangerous practice to admit such an Opposition without better grounds to support it —

Opposition dismissed with Costs

—

No. 215.

Turgeon
v.
Soucie —

This was an action en declaration d'hypotheque founded on a Judgment rendered in the Inferior Court on the 18th Sept. 1816 in favor of the plaintiff against one Louis Soucie, pere, for £8.. 12. 6 with interest from 17th Oct. 1810, and costs taxed at ten shillings and five pence. — That on the 14 Augt. 1817 execution was sued out on the said Judgment, upon which a return of nulla bona was made, and whereby expences were incurred to the amount of ten shillings and nine pence. — That the interest accrued on the said sum of £8. 12. 6 since the 17th day of October 1810 to 17 Oct. 1829, amounts to the sum of £9.. 18. 0½ — the said principal sum of money, interest and costs, making together £19.. 11.. 8½ — That on the 18th day of September 1816, the said Louis Soucie, pere, was proprietor of a certain lot of land (described in the declaration) which hath since come into the hands and possession of the Defendt who now holds the same as the proprietor thereof, and upon which the plaintiff hath acquired a right of mortgage by virtue of his aforesaid Judgment — with the usual conclusions as in action en declaration d'hypotheque. —

To this action a defenses au fond en droit was filed, by which the Defendant contended that the Plaintiff could not maintain the present action in this Court, nor could the Plaintiff obtain any Judgment in this Court upon a Judgt rendered in the Inferior, whereby the landed property of any person could be sold — cites case of Goguet v Bromley. June 1825. — where action was brought on a Judgt rendered in the Inferior Court, which by means of the Costs accrued thereon amounted to the sum of twelve or fifteen pounds, and the object of the action was to obtain a Judgment here whereby to sell the Defendt landed property — but the Court dismissed the action —

Lafontaine

Lafontaine for the Plaintiff contended that the present case was different from that cited — that here the Plaintiff had acquired a mortgage on the lands of his debtor by means of a Judgment in the Inferior Court — this right could be enforced only against the realty. and where the sum demanded was within the competence of this Court it could not refuse its Judgment in favor of the Pltff

To get authorities cited by Dft Pltff

№ 1814.

Marcoux
vs.
Jones —
and
& Contra

This was an action for goods sold and delivered by the Plaintiff to the Defendant — To this action the Defendant pleaded, non-assumpsit, and compensation for other articles sold and delivered by him the Defendant to the Plff — The Defendt also instituted an Incidental demand against the Plaintiff — The parties being at issue on fact went to their Enquete, but no evidence was adduced by either party, and the Cause was now heard en droit upon the merits. —

Driscoll for the plaintiff, stated that the Plaintiff required no other evidence than what was on the record to establish his demand, that the defendant had pleaded compensation which was an admission of the Plff's demand, but as the defendant had made no proof of this Compensation the Plff was entitled to his Judgment —

Walker for the Defendant — The plaintiff ought to have established his demand by evidence, the plea of Compensation pleaded by the Defendant does not admit it — The Defendant has pleaded first the general issue — and 2ly the plea of Compensation — the former plea called on the plff to establish his demand, the latter plea is in nowise inconsistent with the former — as he pleaded it does not admit the Plaintiffs demand, but merely says, that the Plff owed the defendt more than the sum demanded — That every plea of exception is pleaded conditionally — the matter of exception may be a ground of action, and may be pleaded also in compensation Poth. Obl. № 830. 1. 2. — And the avowal or confession of a party cannot be divided — C. Denovt Vo Confession № 2. 3 — That the peremptory exceptions are to be proved only after the plff has established his demand. Poth. Pand. 18 Vol. p. 139

44½

44th book 1st. 1. — and p. 141. — also 8th Vol. 22 Lw. 1st. 3. p. 269-273
C. Denot. vs Compensation. No 23. — Id. vs Exception. No 11. 12. 13. —

Driscoll in reply — The plea of Compensation is a plea of payment, and when set up, necessarily admits the demand, and must be proved — Pb. on Ev. p. 165. of admission on the record amounts to sufficient proof — is a plea of Justification. Bull. N. P. 298 note (b) — When compensation is set up, it must be against some existing demand, without this it would be nugatory — That the authorities relied as to confession regard only the answers of a party upon Interrogatories —

Walker — The plea of Compensation is like the note of set off in England, which does not admit the plaintiffs demand — but this is not to be considered as a Commercial transaction and the Law of the land must govern the mode of proceeding —

Driscoll — The Case must be decided according to the rules of English Law as far as regards evidence, the transaction being commercial —

The Court were of opinion that the plea of Compensation, as a plea of exception, did not admit the Plaintiffs demand and that the Plaintiff was bound to have made proof of his demand before he could call on the Defendant to maintain his plea of Compensation — The Court therefore dismissed the Plaffs action and the Defendants Incidental demand, as neither of the parties had adduced any evidence in support of their demand — Mr Justice Pyke, dissented from this Judgt —

see

see Poth. Obl. No 830. 831. 832 — the avowal of a party cannot be divided —

O. Deniz. vo Compensation No 23 —

——— vo Confession — No 2. 3 —

Repn. vo Compensation. p. 270. 271. —

18 Poth. Pand. 44 liv. tit. 1. pp. 139. 141 —

8 do ——— 22 lib. tit. 3. pp. 269. 273 —

O. Denize vo Exception. No. 11. 12. 13

2 Desp. Tit. 6. p 532. No 5 —

As to sett-off see —

1 Tidd. Prac. 672. sett-off may be pleaded or given in evidence under the general issue —

Id. 667 — Pltff is to prove his demand at trial —

5 Taunt. 228 — Pltff cannot use notice of sett-off as admission of his demand —

Perkins
v
Leslie et al

Hays
v
Girard et al

October Term 1830.

Monday 11th October.—

Boissonneau
vs
Camyré.—
&
Sougas & al
Garnts

The declaration in this case stated, that on the 28th Sept 1823, the Plaintiff was appointed Captain of the second division of Militia of Beauharnois, and that he was now the oldest Captain of Militia in the parish of St Constant in which the Company is he now commands — That as such oldest Captain of Militia of the parish of St Constant, he is by virtue of the laws of the Country and the immemorial usage observed in the said parish, entitled to occupy and possess in the parish church of the said parish, freely and by special privilege attached to his rank of Oldest Captain of Militia, the first pew in the nave of the said church on the side of the altar, opposite the pew of the Church-Wardens, which said pew hath always been left for the use of the oldest Captain of Militia, who has enjoyed the same.—

That the said Defendant well knowing the premises hath nevertheless taken possession of the said pew, and refuses to deliver up the same to the said plaintiff although thereunto required, to the damage of the Plaintiff one hundred pounds—

Charles

Charles Dougas and the other marguilliers of the said parish, having become the Garants of the Defendant, took up the defence of the action in his room and stead, and by their plea alleged as follows — They admitted that the pew in question had by their consent been sold and adjudged to the Defendant, but denied all the other matters alledged in the plff's declaration, and for peremptory exception to the Plaintiff's action stated, that the Plaintiff could not maintain his said action in his alledged capacity of Captain of Militia, because by the laws in force in this Province, no person can have or hold any pew in the said Church, without the consent of the Church wardens, and that there never existed any law or usage in this Province granting to any Officer of Militia the privilege to have & obtain a pew in any Church without the consent as aforesaid —

That although it is true that on the 28th Sept. 1823, the said plaintiff was named and appointed Captain of Militia by His Excellency the Earl of Dalhousie, then Governor of the Province, under and virtue of the Militia act then in force in this Province, that is to say, the provincial Stat. of 43. Geo. 3. ch. 1. continued by several subsequent acts, yet the said Garants say, that all the said acts regulating the Militia have expired and ceased to have force of law in the Province since the first of May 1827, since which time, there hath never existed, nor does there now exist, any law in this

Province

Province touching the Militia, and that all the Commissions given to the Officers of militia under the said laws, and also the aforesaid Commission of the said plaintiff, have become null and of now effect —

That the said plaintiff cannot have and maintain his said action, because at the time of the institution thereof he was not and never had been Captain of militia in virtue of his aforesaid Commission of the 28 Sept. 1823, or by virtue of any other Commission prior to the 1st May 1827 —

That even if the said plaintiff were the oldest Captain of Militia, he is not entitled to hold & possess the pew in question, without paying the same rent which the said Defendant now pays to the Church for the same —

Concluding with a general demurrer, and a denegation of the facts & allegations in the declaration —

The Replication and answer are general and conclude the issue —

The parties were now heard on the matters of law stated on the pleadings — Mr Pelletier for the marguilliers, garants — contended, that there existed no law in this Province to maintain this action, and we must therefore have recourse to general principles as regulating the rights of the Church and the claims of individuals therein — according to the Common law of this Country, the Patron and Haut Justicier, are the only persons entitled to claim a pew in the Church — That there are in the Church what are called the honores majores, and the honores minores — the latter are improperly so called, being matters of mere bien decance, — The honors so

recognized

recognized form a kind of servitude founded either in law, usage, or express stipulation between the parties; but in regard of the lesser honors they cannot be enforced by any legal proceeding, nor maintained by any length of possession — Jousse. Gouv^t. des Par. p. 55. 2 That there exists neither law nor usage in this Province by which the plaintiff can claim a right to a pew in the Church as the oldest Captain of Militia without paying for it — it is that kind of priviledge which must be founded in some law, for a priviledge that trenches upon the rights of others cannot be upheld by mere usage — all priviledges are strictly and closely interpreted — now altho' the Ord^ce or reglement fait au Sujet des honneurs dans les Eglises, made by the King at Paris on the 27^th day of April 1716, directs that certain distinction is to be shewn to the Capitaine de la Cote in regard of the pain beni, yet this must be limited to the particular case and cannot be extended to another, it can in nowise apply to the granting a pew to the Capitaine de Cote, for they are different objects, nor can any usage of the use of a pew by the Capitaine de Cote create a right in him to claim such pew — This right in the Cap^tn de cote appears to have been an object of contest between the Marguilliers and him for many years, and at last we find an Ordonnance of M^r DelaRouvilliere of the 17 January 1737 on the subject of a complaint made that this right was refused, and by that Ordon^ce it was directed — "que le banc le plus honorable "qui sera placé dans lad^te eglise immediatement apres "celui

" celui du Seigneur haut Justicier sera accordé au
" Capitaine de la Côté pour en jouir lui et ses Successeurs
" en payant seulement chaque année à la Fabrique, la
" plus forte rente qui sera reglée pour les autres bancs ".—
There is no other law more applicable to the case than this, and it is decidedly against the pretentions of the plaintiff — But it is questionable whether this or any other law can be considered as now applicable, from the different state of things which prevail in this Country — For if any mark of distinction were formerly granted to the Capitaine de la Côte as the principal Militia officer in the parish. this will now scarcely to apply, as we have now — Majors and Colonels of Militia in many parishes who in all points of honor and distinction would be entitled to rank before the Captain — it may be therefore questioned whether these distinctions granted to the Capitaine de la Côte can now by law be enforced

Mr Lewis Roy for the Plaintiff, the oldest Captain of Militia in the parish of St Constant has always enjoyed a few of distinction in the Church without paying for it — and this is known to be a general usage in the Country — The Regulement of the 27th April 1716 has granted to the Cap: de la côte certain honors of pain beni, and that he may enjoy this distinction in a proper place and manner it has been adjudged that he should hold a particular pew in the Church — refers to a Judgt rendered in the Superior Court of the 31 May 1824, by which a claim of the Marguilliers for the rent of the pew occupied by the Capitaine de la Côte, was dismissed.

and

and the right of the Captain to hold the hay without paying rent was recognized — Before the Conquest, the Captain had a few allotted to him in the different churches, and this usage has been since continued — And the Bishop of the Diocese has given the same direction to the different Fabriques within his jurisdiction — There is also another case now undecided before the Justices Pyke touching a similar claim by the Capt. of Militia of the parish of St Benoit —

The Court were of opinion, that although in many respects the appointments under the Militia Laws at the present day might be considered as interfering with the particular privileges of the Captains de la Côte, yet the Court was disposed in every case where there appeared no inconsistency, nor contrary provisions, to enforce the antient laws and usages of the Country — That in the particular case before the Court, although they considered that the Captain was entitled to the Banc he claimed yet this could not be granted to him on the principle on which he claimed it, that is without paying for it, as this question seemed to have met a decision and to have dictated an Ordonnance to regulate it in future, not merely in the particular place for which it was made, but serving as a principle of decision applicable to all places — That the Court could not extend the distinction granted to the Captains de la Cote to have the Banc levé, to that of obtaining a pew in

Respʳˢ ʸʳ Privilege — in which he was to receive it, — this would be extending a "privilege d'un cas à un autre" — which is contrary to law, nor could they adopt the decision in the Inferior Court as regulating the question when they see so positive laws to the Contrary. —

Action dismissed

—

No. 175.
Archambault v. Jeannot, dit Lachapelle —

On action to obtain, "Decouvert". —

This cause came by Evocation from the Inferior Term, and the declaration de novo, states —

That the pltff is proprietor and possessor of a certain lot of ground, situated in the parish of Long Point, as described in the declaration, bounded on one side by the land of the Defendant — That as well the plaintiff as his predecessors have cultivated and cleared a great part of the said lot of land — That the Plaintiff by virtue of the laws in force in this Province, and according to the usages and Customs thereof, followed and observed from time immemorial, is well founded to demand and obtain from the said Defendant the necessary decouvert, or clearance of his land, according to the said usages and Customs, to enable the said plaintiff to cultivate his said land and in order that the trees and wood growing in & upon the land of the said Defendant may not shade and Cause damage to the grain sown annually by the plaintiff on his said land near the line of separation between

between it and the land of the said Defendant —
That although the Defendant has often been requested by the said plaintiff to give him the usual and customary decouvert for the cultivation of his land as aforesaid, yet the Defendant hath always hitherto refused and still refuses to give to the plaintiff as his neighbour the necessary decouvert according to usage and custom, to the damage of the Plff five pounds Currency — Concluding that Defendr be condemned to pay £5 — &c. reserving to Plff his recourse for further damage —

Plea — denying Plffs right of action — says there is no law or usage in force in this Province which entitles Plff to obtain the decouvert by him demanded — and if there exists any law or usage touching decouvert in this Province, the same will not apply to the present case. —

That the lot of land possessed by the Plff, and that possessed by the Defendant, being each one acre and an half in front, were originally possessed as one entire lot of land, and was considered as such — and afterwards one half of it was sold to the Plff and the other half to the Defendr as now severally possessed by them — That by reason of the division of the said lot of land, no servitude of decouvert such as demanded by the Plaintiff is due to him by the Defendr, nor can the one demand decouvert from the other any more than the heirs of the original grantee could have demanded it from each other, it being a right which an entire land or original grant of land owes to another, but which does not follow every subdivision of such grant —

That according to the usages and Customs of the Country, sanctioned by Judicial decisions, Co-heirs or

Co-proprietors

Coproprietors of a lot of land which has been subdivided among them, as in the present case, have no right to demand from each other, any other servitude or labor than what may be necessary for the Culture of the whole land as originally granted, and this usage holds also in regard of decouvert which would prove highly injurious to cultivation if extended to every subdivision of a land after it had been so granted —

That the neighbours of the entire lot of land as now held and possessed by the Plaintiff and Defendt having given the necessary decouvert for the culture and improvement of the land, the Defendant cannot be held or bound to comply with the unjust pretentions of the Plaintiff, inasmuchas the Defendants land hath been wholly cleared of wood except about two acres and an half upon which there have been reserved some maple trees of great value to the Defendant, as wood is now scarce, and which therefore the Defendt was interested to preserve —

Lastly denying all the facts and allegations contained in the Plaintiffs declaration. —

The Replication is general and completes the issue —

On the 20 June 1828 — The Court after hearing the parties en droit, gave the following Interlocutory —

La Cour après avoir entendu les parties en droit, et en avoir délibéré, ordonne avant faire droit, que par Experts dont les parties conviendront, si non, nommés d'office, il sera procédé de visiter les terres des parties, — afin de constater l'étendu des terres que chacune d'elles possedes, et si les dites terres ne formoient ci devant qu'une seule et même terre — Si celle possedée par le

Demandt —

Demandeur n'est plus avancée en culture que celle du Defendeur, de maniere à exiger du decouvert du Defend^r et quel decouvert lui sera necessaire — Rapport le 1er Octr

For the execution of this Interlocutory Bonaventure Prevoulet was named as Expert on the part of the Plff and P^r Weilbrenner Surveyor for Defend^r —

On the 1st October 1828, these experts made their report to the Court, but differed in opinion, the Expert of the Plaintiff declaring that a certain decouvert was necessary and describing what he thought this ought to be — The Expert for the Defend^r was of opinion that no decouvert whatever ought to be granted to the Plaintiff —

The Court afterwards appointed Jos: Perrault Esquire, expert, ex officio to visit the lands of the parties and to report to the Court conformably to the Interlocutory of the 20 June 1828 — On the first of June 1830 M^r Perrault made his report, by which he considers that the defendant should cut down some trees and lop off the branches from some others, and by so doing a sufficient decouvert would be granted to the Plff The Court after hearing the parties confirmed this report of M^r Perrault's and gave Judgment accordingly

In adopting this opinion the Court had however to observe, that the declaration of the plaintiff was by no means clearly drawn, as from its tenor and content, it would imply that the demand of the plaintiff was founded on the ancient usage of the Country in regard of Decouvert, but that it did not set out, what that usage was, its nature, extent, and in what respect applicable to the situation of the plaintiff's land, and

the

the Court therefore might have been justified, upon the first hearing en droit, instead of ordering the visit and report of experts, to have dismissed the action — but applying the principle, so frequently — requisite to support an informal demand, that if the grounds of the demand be set out in the declaration, it is all that the law in strictness requires, and being of opinion that there was in this case a sufficient — gravamen or ground of complaint apparent on the declaration, namely the injury arising to the Plff from the shade of the trees and wood on the Defendants land and that the remedy prayed for was a sufficient and necessary decouvert, there was ground in this respect to maintain the action on the general principle of granting relief for an injury complained of, but not on the particular usage of the Country, that is, of granting a specific remedy applicable to the particular case of the plaintiff — The very imperfection of the declaration in this case may therefore be said to have saved it — for in adopting the report and opinion of Mr Perrault, in regard of the nature and extent of the decouvert to be granted to the Plff as a remedy for the injury complained of, the Court saw that according to the principle on which the action was maintainable, this remedy could be granted — but it would have been otherwise, had the action been clearly founded upon the antient usage and Custom of the Country, used and practised between the proprietors of adjoining lots of land, that is, to cause the wood on the line of division on each side to be cleared away to the extent of "un quart d'arpent dont moitié fait

"au

"au rateau, et l'autre moitié en abbatis"; because the Court was of opinion that this usage and Custom would hold and apply only between the entire lots of land as originally granted, but not in the subdivision of these lots, because it would be extending a burthen and Servitude on the land beyond its just limits and original intent — And as the two lots of land possessed by the plaintiff and Defendant, formed originaley but one lot, the general usage and Custom of the Country in regard of accessories would not apply to a lot of land so divided — The Court however thought, that as it was evident an injury had arisen to the plaintiff from the shade of some of the trees and wood on the Defendants land that the Defendant ought to have tendered that kind of relief which was suited to the nature and extent of the injury, and which in justice he owed to the plaintiff, and as between neighbours ought to have been granted without recourse to proceedings at law, they therefore condemned the Defendant to pay Costs as in a Cause under £20 — the Costs of the Experts to be divided between the parties. —

№ 1986 & № 1363.
Ermatinger
vs.
Dewitt, Cur
Stebbens — Oppt
and
Berthelet
vs.
Dewitt, Cur
Stebens — Oppt

On opposition of Elizabeth Stebbens for her Douaire Coutumier.—

In this Cause a lot of ground and houses thereon erected had been seized and taken in execution as the property of the late Jabez. D. Dewitt, the present opposition was made by Elizabeth Stebbins, the widow of the said late Jabez. D. Dewitt, by which it was stated — That for several years before the 7th day of September 1811, the said late Jabez. D. Dewitt, had been and then was resident commorant and domiciliated in the City of Montreal, where he carried on trade as a Hatter & trader — That in Sept. 1811, the said Jabez. D. Dewitt went to West Springfield in the State of Massachussets one of the United States of America, where he married the Opposant, and with her returned immediately to his usual domicile at Montreal where they lived together until the death of the said late Jabez. D. Dewitt, which happened at Montreal aforesaid on the 17th March 1827, when Jacob Dewitt, the Defendant in the Cause was appointed Curator to his Vacant Estate and succession —

That at the time of the marriage of the said Opposant with the said late Jabez. D. Dewitt, he was possessed of a certain lot of ground and buildings thereon erected as stated in the said Opposition, and which have been seized and taken in execution by the Sheriff in virtue of a writ of execution sued out in this Cause, and upon which lot of ground and buildings she the said Opposant is entitled to have and obtain the Customary dower according to the laws of this Province, that is the enjoyment during her lifetime of one half thereof, and of all the issues & profits thereof since the death of the said Jabez D. Dewitt her husband —

Thurfen

Therefore concluding that her said claim for dower be maintained — that the said lot of ground and premises hereto be visited & examined by Experts to determine whether the same can be so divided that one half thereof may be assigned to the said Opposant to be by her held and enjoyed during her lifetime, and in case the said premises cannot be so divided, that the said lot of ground and premises be sold and adjudged to the highest bidder, and her right and claim be reserved upon the proceeds, and that one half of the purchase money remain in the hands of the purchaser paying to her yearly and every year during her lifetime the lawful interest thereon, and that her costs on her present claim be adjudged to her. —

Plea: That the Opposition and claim of Oppt is not founded — because the said lot of ground and premises never were subject to the Customary dower claimed by the said Opposant, inasmuches the said late Jabez D. Dewitt and the said Opposant were both Aliens, and their marriage having been contracted in a foreign Country, such marriage could create no right of dower upon any real hereditaments within this Province then in the possession of the said late Jabez D. Dewitt, nor can the Opposant as an alien claim any such dower thereon — Because at the time of the marriage of the said Opposant with the said Jabez D. Dewitt, the whole of the price of the said lot of ground was due and owing by him to Louis Chaboillez and wife from whom the said Jabez D. Dewitt had purchased the same, which said price was not paid until after and during the said marriage

by

by reason whereof the said Opposant is entitled to no dower thereon —

Because since the said Marriage the said Jabez D. Dewitt, hath greatly improved the said lot of ground by building thereon a large dwelling house and other buildings and expended monies thereon to the amount of two thousand pounds, which said monies the said Opposant is bound to pay and reimburse to the heirs and Creditors of the said late Jabez D. Dewitt before she can claim any dower thereon, the interest on which said sum of money far exceeds any right of dower the said Opposant could have thereon — Concluding that in case dower shall be adjudged to the said Opposant, she shall be entitled thereto only on paying and reimbursing to the Creditors of the said Jabez. D. Dewitt the said sum of two thousand pounds and all other sums of money employed by the said late Jabez. D. Dewitt in and about the improving the said lot of ground and premises —

Replication is general and joins issue on the matters of law and fact —

By ~~the~~ admissions made and filed, it appears that the late Jabez. D. Dewitt had resided in Montreal and there carried on business for eight years previous to his marriage — that he was married to the opposant at the time and place mentioned in the Opposition, and without any marriage contract — that at the time of his marriage and up to the time of his death which happened in March 1827, he had his domicile and carried on trade at Montreal — That he purchased the lot of land in question from the late M. Chaboillez*, but did not pay

for

* before his marriage with the oppost.

for it till afterwards, and the house erected thereon was made and built subsequent to the mariage —

The parties were now heard on the merits of the opposition —

Mr Badgley for the Opposant argued, that the douaire Coutumier, is to be considered as a Statut réel and attaching upon the real Estate — Auzanet. Comte p. 158. — Donation. 212 — N. Denizt Vo Aubain. 580 Id. Vo Etranger. p. 89. — Repse Vo Statut p. 402. 403. — That the domicile matrimonial is the domicile of the husband. N. Denizt Vo Domicile Matrimonial. sec 2. No 2 & No 5. p. 687. & 688. — Id. Vo Douaire p. 183. — Repse eo. Vo p. 279 — La Lannes pp. 61. 62. 70 & 72 — 1 Bacquet. p. 126 No 50. 1 Froland 505. 506 — 529 — 536 — & 540 — 3 Gr. Comte p. 679. 661 — Boulenois p. 235. 236 — That the dower is to be regulated according to the law of the domicile of the husband?

That the parties had they been aliens might have legally contracted mariage and solemnized it according to the usages of the place when it took effect — this being a contract du Droit des Gens is every where favoured Repse Vo Aubaine p. 722 — 2 Bacquet. p. 32. No 4 — and p. 53. No 1 — p. 88. No 3 — p. 105. No 5 — 1 Basnage p. 233. 236. 2 Desp. 141 — & 255. 256 — 1 Bac. ch. 21 No 74 — Auzanet 158 — 212. Des Donations — N. Denizt Vo Aubain. p. 580. sec. 2. — and Vo Etranger p. 89 — 2 D. Denizt Vo Etranger p. 338 — If therefore a mariage could legally be contracted by the parties even as aliens, all the consequences to arise from such a contract when valid must be — allowed as consequences necessarily resulting therefrom —

That although the parties here were married in the United States, yet the dower of the wife even as a foreigner must be regulated according to the

law

law of the domicile of the husband — 1 Basnage 492–493 — 1 Bac. ch. 21. N. 74 — p. 210 — 1 Duplessis p. 353. Auz. p. 158 — N. Denis. v° Dot — p. 103 — Id. v° Domicile — Matrimonial p. 685 — Rep. v° Femme. p. 325 — ~~Auz. 158~~ — Rep. v° Domicile 109 — Le Brun Com. p. 17. N. 12 — p. 26 N° 81 — Boucher d'Argis. p. 139. 140. 141 — 1 Journ. d'Aud. 245. 6 — 2 Dupl. 141 — 212 art. Cout. d'Orleans — 2 Desp. 255 — N. Denis. v° Aubaine. 580 — Id. v° Douaire p. 208. — Id. v° Etranger. p. 89 — Rep. v° Etranger 116 — Id. v° Douaire 277 — here the Rep. contradicts the opinion of Renusson who says, that a foreigner cannot contract for her Dower — Lebrun Com. p. 26 also controverts the opinion of Renusson in this respect — Poth. Revenus 580 — 3 Gr. Com. 689. 690. Nº 6 — D. Denis. v° Etranger — Poth. Douaire. p. 67 —

Mr Cherrier for Mr Duesnel — contended, that Dower is not due to the Aubaine — and it is a question yet to be determined if the aubain can hold any real property in this Province, or whether she can acquire a right to dower in the same manner as persons born in the Country — Had there been a Contract executed between the parties by which dower was stipulated the effect might be different — as a Contract when legally made must be binding on the parties whatever they are — but here the whole is left to the operation of law, which cannot take notice of the rights of foreigners — many authors are decidedly of this opinion — Renusson. Douaire — ch. 5. N. 10. 11. where he says, that without express stipulation the Etranger cannot have Dower — while he admits that the Etranger may contract and stipulate a dower, and make all other Contracts which are considered de droit

droit des gens — Semaire. Douaire. ch. 1er follows the opinion of Renusson — the authors who differ from them — are N. Denis. & Pothier — who go on the supposition that the Etranger understood the contract under the authority of the laws of the Country where he was — N. Denis. Vo Douaire — §. 10. No 4. refers to a Contract in France — Poth. Douaire — art 3. No 8. admits, that the claim for Customary Dower is matter of difficulty — Repre. Vo Douaire. p. 277. — persons claiming dower, refer to the law of the place where the Contract was made — There is also an express authority to shew that where the marriage is made between Strangers out of the Country where the law allows of dower, Stipulation is necessary to obtain it — Boing. Douaire. tit. 13. No 4. p. 719 — But the authorities cited by the Opposant do not apply to the particular case before the Court, they refer to general principles merely — That the right accruing to the woman from the domicile of the husband does not apply to the Etranger — and the writers on the question of matrimonial domicile do not enter upon the question of the right of the Etranger, they speak only as to the effect of marriage made under different Customs and when there is a domicile in a different Custom from that where the Contract is formed, but the rights of an alien seem not to have been contemplated in these cases — Repre. Vo Douaire, speaks of the right of the wife to Dower in a Custom different from that in which she was married, it being considered as a general obligation in France that there could be no marriage without Dower — 1 Froland. p. 524 — The domicile — matrimonial is the place where the husband settles

immediately

immediately after the marriage, but this will not apply to Strangers who come to settle here. N Denoz. vr Domicile Matrim.t 81. — and two English persons marrying in England with a view to go afterwards and settle in France, could not by their settling there afterwards create a Communauté de biens between them. Ivland 387 and Communauté is more favorable than Dower, as being of a more personal nature. —

But this is a question of public law, and must be determined by the public law of the Empire — the rights and capacities of the Stranger as to property and Estate must be regulated by the public law of the Land, in which the opposant here can claim no dower as being an alien — In the question of Succession the Court has already had occasion to refer to the Laws of England as regulating the Capacity of the person claiming the property of a deceased person in this Country — and indeed the general laws of the Empire ought to determine the rights of Strangers coming into this Country —

That the Customary dower is created by the mere operation of law, and creats an estate in the realty, whereas contrary to general principles as regards an alien for he can acquire no right or title to the realty Com. Dig. tit Dower Letter E. N.o 2. nor can an alien claim dower. —

That dower cannot here take effect upon the property in question, inasmuchas the late Mr Dewitt had not paid for the property at the time of his marriage, it could not properly be called his property until he had paid for it. 3 Gr. Conv. 721.

That —

That in case dower should be allowed to the Opposant, she ought to be held to reimburse — whatever has been laid out to construct the dwelling house and to make the other improvements on the lot in question, — Lemaitre, Douaire, 296 — he refers to a contrary opinion of Duplessis — see also Lebrun du Douaire p. 383. liv. 2. ch. 5. sec. 1. dist. 2 art. 29. & seq. Pothier Douaire № 185 & № 33. —

By the Court — In this case many authorities have been cited which will not bear on the question as it really stands before the Court — This is not the case of two aliens or strangers who had — married in a foreign Country, and afterwards come here to settle, and claiming the provisions of the law of the Country in regard to Dower; On the contrary it appears in this case, that the late Jabez. D. Dewitt, at the time of his marriage was a Subject of the Crown and domiciliated in Montreal — had he even come from a foreign Country, a fact which does not appear, yet he had lived long enough under the Kings dominion in this Colony to have become naturalized, and to be entitled to all the rights and benefits of a natural born Subject — Such then being his character and situation, he married the Opposant in one of the United States of America, but without any marriage Contract and here the law determines in the clearest manner, that the law of the domicile of the husband must regulate the rights of the parties on such marriage, by a fiction of law, that the marriage is presumed to have taken place

where

where the domicile of the husband was at the time, and the woman is entitled to claim the benefit of the law of that domicile for all the rights accruing to her by such a marriage, one of which was the Customary Dower, which must be adjudged to her in this case — But as it appears, that at the time of the marriage between the Opposant and the late Mr Dewitt, the late of ground in question had been purchased but had not been paid for by him until after his marriage, and that subsequent to this period he had also laid out a considerable sum of money in building a house on the said lot and making other improvements thereon, whereby the value of the said lot had been greatly enhanced beyond what it was at the time of the said marriage, and it having become a question whether the dower was to be allowed upon the principle of the value of the land as it stood at the time of the marriage, or as it stood, when the dower became open and demandable, that is, at the time of the death of the said Mr. Dewitt — Now although the Law writers differ in opinion on this subject, yet the better part agree in saying, that the right of dower must be estimated according to its value at the time of the marriage, which is a just principle, as the Contrary would lead to fraud and injustice, and would put it in the power of the husband to augment or diminish the dower during the marriage, as best suited his purpose — Allowing therefore to the Opposant her right of enjoyment during her life time of one half of the aforesaid lot of ground and premises with the improvements thereon, she must necessarily reimburse to the heirs or creditors of her late husband

husband, one half of the improvements made on the said lot of ground subsequent to the marriage and as the amount of these improvements must be ascertained, Experts must be named for this purpose, as well as to ascertain whether the said lot and improvements can be divided in such way that one half thereof can be assigned to the said opposant as her right of Dower therein —

Tuesday 19th October 1830.—

No 1220.—

Montarville et al
vs
Bedard.—
&
Mignault
Gar.

Action by the Plaintiffs as Seignors of the Seignory of Dumenic in the parish of St. Denis, for Lods et Ventes.—

The Plaintiffs by their declaration, stated, That by act of the 15th Augt 1822, the Defendant and one Benjamin Goulet, exchanged certain lots of land as in the declaration ~~is~~ described, on condition that the Defendant should pay a certain rente ~~o~~pension in discharge of the said Goulet, and which he was bound to pay to one Marie Genevieve Labrodeur estimated by the parties at 7 l 5s, and that he the said Defendant should pay to the said Goulet for a soulte et retour, a sum of 3400l That in consequence of the said deed of exchange the Defendt entered upon the possession of the said lot of ground now occupies and possesses the same — That on the said deed of exchange so made, there became due to the Plffs a sum of 34 l 2s 18d as p Statement filed

That by act of 27 Dec. 1822 executed before Boudrays public notary, Pierre Bourjeau and wife sold to the Defendant, two certain lots of land or emplacements for the sum of 600l, and upon which sale there became due to the plaintiffs a sum of 50l for Lods & Ventes.—

That by act of 31st January 1823, executed before Mignault, public notary, Joseph Belanger and wife sold another lot of land to the said defendant for and in consideration of the sum of 6700l, upon which sale there became

became due to the plaintiffs for Lods & Ventes a sum of 55^{tt}. 6^{s}. 8^{d} —

That by act of the 26th April 1823, executed before Gauthier, public Notary, one Jean B^{te} Mignault sold and conveyed to Michel Seguin and his wife a lot of land in the Village of S^{t} Denis, for and in consideration of the sum of 12000^{tt} — of which said lot the said Seguin and wife obtained the possession and held and enjoyed the same as the proprietors thereof — On which said Sale there became due to the plaintiffs for lods et Ventes a sum of 1000^{tt} —

That by act of the 17th January 1824, executed before Gauthier, public Notary, Marie Henriette Barsalou, then widow of the said Michel Seguin as well in her own name and right as Commune en biens with her deceased husband, as in her name and capacity as Tutrix, made a retrocession of the said lot of land to the said Jean B^{te} Mignault who in consequence took back the said lot of land, and held and enjoyed the same until the 27th March 1824 — That upon the said retrocession there became due to the plaintiffs a further sum of 1000^{tt} —

That by act of 27th March 1824, executed before Boundages, public Notary, the said Jean B^{te} Mignault and wife sold the said last-mentioned lot of land to the said Defendant for a sum of 6000^{tt}, upon which sale there became due to the said Plaintiffs a sum of 500^{tt} for Lods & Ventes —

That of the different sums of money due for Lods & Ventes before mentioned and for Cens & rentes the Defendant owes personally to the Plaintiffs, the

sum

sum of 1806^{tt} 0. 11- of which there still remains a balance due of 606. 0. 11, and as holding and possessing the said lot of land so sold by Jean B^{te} Mignault, and retroceded to him by the said Marie Henriette Barsalone the said Defendant owes hypothecarily to the said Pltff a sum of 2000^{tt}—

Jean B^{te} Mignault and wife having been put-en suit as the Garants formels of the Defendant; they took upon them his fait & cause, and pleaded — That the plaintiffs could not maintain their action against the Defendant for the afores and sum of 2000^{tt} demanded by them as hypothecarily due by the said Defendant 1st Because by law nothing is due for Lods et Ventes upon the said Act of the 26 April 1823, nor upon the said Act of 17 January 1824, inasmuchas the said Act of the 26th April 1823 is not a sale, nor equivalent to a sale of the premises therein mentioned, it being a mere promise to sell—

2^{dly} That the said Act of the 26th April 1823 amounting only to a promise to sell could create no Lods & Ventes more especially as the said Michel Seguin never had tradition made to him of the said lot of ground, and never paid any part of the stipulated price for the same.

3^{dly} That the said Act of the 17 Jan^{y} 1824 cannot be considered as the retrocession of property that had been conveyed and transferred by a deed of sale, but was made and intended as a rescision of the Contract and agreement between the parties.—

4^{thly} That should the Act of 26th April 1823 be considered as a sale of the property therein mentioned, it was at most but a Conditional sale and subject to be rescinded by the failure of the Condition.—

The answer and Replication are general & close the issue—

The

Fonmain No. 615.

The Court considered the act of the 26th. April 1823 as an effectual Sale and conveyance of the lot of land therein mentioned, that although it purported to be a promesse de Vente, yet it contained all the requisites of a perfect contract of Sale, and must be considered as having been carried into effect between the parties, as a tradition and delivery of possession of the said lot of land had been made by the said Jn Bte Mignault to the said Michel Seguin in conformity to the stipulations contained in the said act, which covered the contract perfect and complete in all its parts, and upon which Sale and Conveyance thereto Lods & Ventes were due to the Pltffs — That in regard of the act of the 17 Jany 1824, titled a Renunciation by Marie Henriette Barsalou to the said Jn Bte Mignault, it could be considered only as a rescision of the Contract and Convention between the parties, and ~~could~~ not as a new deed or Conveyance of the property, and further that it appeared that nothing had been paid on account of the price stipulated in the Contract of Sale, and all things ought to be considered as entire, and the Court was always disposed to interpret these kinds of acts favorably by which parties were consenting to the release of obligations they had contracted The Court therefore rejected the demand of the Plaintiffs for Lods & Ventes upon this act of rescision — see Fonmain 2 Vol. N. 622. —

No. 1088.

Bostwick
v.
Moorhouse

Action on a Note or acknowledgment made by ~~one~~ Reuben Th. Moorhouse to Hiram Moorhouse, and by him transferred to the Pltff.

This note is in the following words —

Boone Nov. 11. 1826 —

For value received I promise to pay Hiram Moorhouse or order One hundred dollars by the first day of January 1828, in Neat Stock or grain, with use after due —

Reuben Th. Moorhouse —

On the 20th Sept. 1827, a deed of transfer and assignment of the above note by Hiram Moorhouse to the Pltff was made and executed in consideration of the payment of a sum of fifteen dollars and 67 Cents — but it was to be restored if in 30 days from the date of said agreement the above sum was paid back to the assignee — This transfer was made at Champlain in the State of New York and answers to the laws of that state for the transfer of a chose in action.

On the 25. Sept. 1827 — Wm. Moore a witness says he served a notice from the Plaintiff to the Defendt of the above transfer, when the Defendt acknowledged the note to be due, and promised to pay it. —

The action is in the usual form of an action of indebitatus assumpsit on a promissory Note, with the usual Money Counts. —

Plea

Plea — Non-assumpsit — and 2d. payment of 75 dollars on account before the transfer made — With this plea the Defendant filed a Receipt from Hiram Morehouse for 75 dollars paid on account of this note, dated Broome 31 Jany. 1827 — but from the evidence adduced, it appeared that this receipt had been given after the date of the transfer of the note to the Plaintiff. —

It was contended in argument for the Defendant that the plaintiff could not maintain this action — under the transfer and assignment made in the State of New York according to the laws usages and customs of that State of which here could take no notice, for although it would that according to the laws of the said State the said assignment would have had the effect of transferring the property of the note to the Pltff, still however the action ought to have been brought in the name of the Original payee, as being a chose in action — That if the action is to be considered as governed by the laws of this Country, there ought to have been not only a transport of the debt, but also a signification of that transport to the debtor, and here there was only a simple notice served of something having been done, but not of the act done —

The Court considered the note in question as not negotiable, it being for the payment of a debt in something different from money, and to transfer the interest of the payee to the Plaintiff, a transport and signification under the laws of the Country was necessary — That here although there appeared to have been a transport made by Hiram Morehouse to the pltff on the 20th Sept. 1827 yet there was no legal signification of that transport to the Defendant until the time of bringing the present

action

action which is to be considered as a sufficient signification, and in which case the payment made by the Defendant on account of the note would be special and go in deduction of the demand — That the note having been made within this Province the Court could not take into consideration the mode of transfer adopted by the parties under the laws of the State of New York — The Court therefore gave Judgt in favor of the Plaintiff for £6.5. the balance of the note w. Costs as in the Inferior Court. —

No. 1943.

Finlay, Cur'
v.
Robitaille. —

On action of Debt —

The declaration in this Case stated the action to be brought by William Finlay of Quebec Merchant, as Curator to the vacant Succession of the late John Muir deceased, formerly of Quebec aforesaid but late of Glasgow in that part of the United Kingdom called Scotland, merchant, assignee of all and every the estate debts and effects of the late James Todd, deceased in his life time of Quebec aforesaid, Merchant, Plaintiff against Marie Anne Robitaille of the parish of Varennes widow of the late Pierre Brunean deceased, in his lifetime of Quebec aforesaid, merchant, as well in her own name as Commune en biens with the said late Pierre Brunean and usufruitiere of all the real and personal estate of the Communauté which subsisted between him and the said Defendant — It further stated —

That

That on the 6th day of February 1807, in and by a certain act or deed executed and passed before Tels & another, public notaries, the said late Pre Bruneau did acknowledge himself to be indebted jointly and severally with the said Marie Anne Robitaille, his wife, to James Todd, then present & accepting, under and by virtue of a certain act or obligation executed by the said late Pre Bruneau and Marie Anne Robitaille his wife, to and in favor of the said James Todd, and passed before Dumas, and another, public notaries, on the 9th November 1793, in the principal or capital sum of £830.17.4 Cy — and in the further sum of £607.17.8 for interest accrued thereon, making together the sum of £1438.15. Cy — And whereas in and by the aforesaid act or deed first aforesaid, the said late Pre Bruneau did — acknowledge and confess to be also indebted to the said late James Todd, in the further principal or capital sum of £3727.13.8 Cy and also in the further sum of £1184.13.11 for interest thereon, making together £4912.7.7. That the said Pre Bruneau after making provision for the payment to the said James Todd of a sum of £2230 on account of the aforesaid several sums of money principal and interest making together the sum of £6357.2.7 - there remained a balance of £2127.2.7 still due which Mr Bruneau bound himself, his heirs and assigns to pay to the said James Todd, his heirs and assigns in manner following, to wit - £200 — on 1 Septr. 1807
200 — on 15 May 1808
200 — on 1 Novr do
200 — on 15 May 1809
200 — on 1 Novr do
200 — on 15 May 1810
200 — on 1 Novr do
200 — on 15 May 1811
200 — on 1 Novr do
200 — on 15 May 1812, and the

sum

sum of £400 in two years from and after the decease of one Charles Pinguet of Quebec aforesaid Esquire, and as to the remaining balance amounting to the sum of £1821. 2. 7, the said James Tod, did in and by the said Act or deed fully acquit and discharge the said late Pierre Bruneau from the payment thereof and of every part thereof, upon the express Condition, that he the Sr Bruneau should punctually and regularly pay to the said James Tod, each and every of the aforesaid instalments on the several days they should respectively become due.— And whereas in and by the said Act or deed, the said late Pre Bruneau did further promise and agree to confess Judgment in favor of the said James Todd for the whole amount of the sums of money then due and owing by the said Pre Bruneau and Marie Anne Robitaille his wife, viz: for the aforesaid sum of £6351. 2. 7, and that in default of the payment of all or any of the aforesaid instalments within fifteen days after the respective debts stipulated as aforesaid, the said James Tod might sue out execution under the Judgment to be rendered as aforesaid, for the whole amount or balance then remaining due, including the aforesaid sum of £1821. 2. 7, from the payment of which the said late James Todd, acquitted and discharged the said Pre Bruneau only upon condition of the punctual and regular payment of the instalments aforesaid.—

And

And whereas afterwards on the 20th day of February 1807, in a certain action then pending in the Court of Kings Bench in & for the District of Quebec, wherein the said James Tod was plaintiff, and the said Pierre Bruneau and Marie Anne Robitaille his wife were defendants, they the said Defendants were by the consideration and Judgment of the said Court adjudged and condemned to pay & satisfy to the said James Tod, the sum of £1438.15.- and the said Pre Bruneau alone was adjudged and condemned to pay to the said James Tod the further sum of £4912.7.7, under and in conformity to the clauses, charges, and conditions stipulated in the transaction aforesaid passed between the said parties on the 6th day of February 1807 - which said Judgment still remains in that Court in full force and effect, un nowise satisfied recovered or annulled -

And whereas afterwards to wit on the eleventh day of December in the year 1807, in and by a certain act or deed of Assignment, executed and passed before Planté and Lelièvre public notaries the said late James Tod did for the considerations therein mentioned, assign and convey to said John Mure in trust and to the use and benefit of the said John Mure and others the Creditors of the said James Tod, all and singular the

goods

goods, wares and merchandize, and all debts due to him, and all securities for the same, particularly set forth in the schedule annexed to the said Act, among was included the debt so due and owing by the said Pierre Bruneau and by the said Marie Anne Robitaille to the said James Tod, by means whereof they the said Pierre Bruneau and Marie Anne Robitaille became bound to pay to the said John Mure the aforesaid several sums of money upon the same clauses terms and conditions as stipulated in the aforesaid Judgt in favor of the said James Tod, and in the aforesaid Acte or deed of the 6th February 1807—

And whereas afterwards and before the institution of the present action, the said Pierre Bruneau departed this life — And whereas afterwards to wit in the month of January in the year 1823, the said late John Mure departed this life, and on the 4th day of July 1823, the said William Finlay the plaintiff was appointed Curator to the Vacant Estate and Succession of the said John Mure — By means of all which said several premises, the said Marie Anne Robitaille as well in her own name as Commune en biens with the said Pierre Bruneau, as usufructuary of all and every the real and personal Estate of the said late Pre Bruneau, became liable to pay to the said Plaintiff in his capacity aforesaid, the aforesaid sum of four hundred pounds, which the said late Pre Bruneau was by the aforesaid Act of the 6th Febry 1807 and the aforesaid Judgment bound to pay and

satisfy

satisfy within two years from and after the decease of the said Charles Pinguet, to wit, within two years from and after the 27th day of May 1821, when the said Charles Pinguet departed this life, as the said Plaintiff doth allege, and in default of the payment thereof within 15 days after the expiration of the said two years, she the said Marie Anne Robitaille further became liable to pay and satisfy to the said plaintiff, the said sum of £1821.. 2. 7 6d — Yet the said Defendant although often required hath not yet paid to the said plaintiff the said Sum of £500.. + nor the said sum of £1821.. 2. 7. or any part thereof + Concluding to the payment by the Defendant of the sum of £2221.. 2. 7 6d with interest & Costs —

Plea —

1st a General demurrer to the action —

2d — Peremptory Exception — That from and after the death of the said Charles Pinguet, neither the heirs of the said late Pre Bruneau, then deceased, nor the said Defendant, were at any time required a put en demeure to pay the said Sum of £500 — which the said late Pre Bruneau was bound to pay to the said James Tod within the delay of two years from and after the death of the said Charles Pinguet. — That no demand, notification or necessary diligence, other than by the present action, having been given on the part and behalf of those who represented the said late James Tod claiming the payment of a sum of money the term of payment of which depended on an uncertain event, and upon a demand to be made, the Defendant, nor any other of the representatives of the said Pierre Bruneau are not liable to be condemned in the sum demanded.

That

That so far from making a demand on the Defendant for the payment of the said sum of four hundred pounds, the Pltff and other representatives of the Estate and Succession of the said James Todd have allowed the property of the said late Pre Bruneau to be sold and disposed by the Sheriff without having proferred or made any claim thereon for the said sum of money, and have allowed a distribution of the monies arising from the real Estate of the said Pre Bruneau, to be made unto and among Creditors whose claims were posterior in point of mortgage to those of the representatives of the said Estate and Succession —

And the said defendant further alledges, that at the period at which the said sum of four hundred pounds became payable by the death of the said Charles Pinguet, the said John Mure had before that time died in Scotland without any heir or legal representative in this Country, and that the Curator whom it became necessary to appoint to the vacant Succession of the said John Mure, in July 1823, took no step whatever, nor made any demand on the said Defendant for the part of the sum of £400 — in such way as to deprive her of the advantages accruing to her under the aforesaid deed of Transaction and Judgment

That the demand of the Plaintiff cannot extend beyond the sum of four hundred pounds as being the just balance agreed upon and due by the

the said Pierre Bruneau to the said James Ford.

That the Defendant, who never meant to contest the legality of the claim for four hundred pounds, was always ready and willing to pay it and is still ready to do so, with the interest from the day of the demand by the present action —

Prays acte of the offers she makes, and that she be discharged from the other part of the demand

The answer is general and concludes the issue.

Besides the different notarial instruments stated in the declaration and which were given in evidence it appeared that on June 1814 the late John Mure gave a receipt to Pierre Bruneau for all the payments of the different instalments of two hundred pounds stipulated in and by the aforesaid deed of Transaction of the 6th February 1807, and that there then remained due only the aforesaid sum of £400 — to be paid in two years after the death of Perrault

That in the year 1817. the said John Mure left the Province, and did not return having died in Scotland

That on the 13th April 1820, the said Pierre Bruneau died —

That on the 27th May 1821, the said Charles Perrault died, of which circumstance the Defendant acquired a knowledge on the same day —

That on the 4th July 1823, William Fenlay

the

the present plaintiff was appointed Curator to the Estate of the late John Mure.—

By the Court

The question raised here by the pleadings, is whether the plaintiff was bound to do any and what diligence to put the Defendant en demeure, before bringing the action, so as to entitle him to recover the balance of £1821. 2. 7, which had been conditionally released to the late M.r Bouman by M.r Tod, according to the stipulations contained in the deed of Transaction of the 6.th Febr.y 1807. or whether the non-payment of the sum of £400.— at the end of the two years after the death of M.r Pinguet, was alone sufficient to entitle the Plaintiff to recover?— If the Court were to adopt the strict principle of the Civil law in this case, the bare lapse of two years after Pinguets death, would, on the non-payment of the £400 would have the effect of resciding the stipulation of release given to M.r Bouman, and the Defendant would be held in default, and bound to pay the sum demanded — but the law of France has moderated this principle, and requires in all cases where an advantage is sought for by one of the Contracting parties over the other under any stipulation contained in the Contract, that the party seeking such advantage, shall be held to do all necessary diligence to entitle him thereto — This equitable principle runs through the whole French law, and we see it most strongly marked in cases of penal obligation of damages and interest and such like, where a failure on one side, gives a right to claim an advantage

on

on the other — The nature of the Contract between the parties here, was evidently for the benefit of M^r Bonnieau, as M^r Tod thereby agreed to release a certain portion of his claim against his debtor, on condition of obtaining a ready and punctual payment of the balance — and as a kind of Stimulus to make these punctual payments it was stipulated that in case of default in this respect, the whole should become due and payable — Now according to the principles of the French Law, to entitle the Creditor to take this advantage of his debtor, he must give him a sufficient notice — he must make a demand upon him — and put him en demeure to pay — so that the debtor may not only be able to ascertain the nature of the demand, but may have time and an opportunity given to him to settle it, and to avoid any loss or damage that might accrue on his default to do so — The stipulation in the Contract here cannot be called a penalty, it is more properly a Clause resolutoire — which is described to be — "Celle par laquelle on convient "qu'un acte demeure nul et resolu, si dans le cas "ou l'une des parties n'aura pas rempli ses — "obligations" — Yet it is laid down that such a clause will produce no effect without the party failing has been put en demeure — "Il faut que "celui contre qui ont veut employer une telle clause "soit mis juridiquement en demeure de remplir ses "engagements &c" And in this Case, it would have been consistent with these principles that the

Rep^re v^o "Clause "Resolutoire"

the Plaintiff should have concluded by his declaration to the resolution of the clause in the Contract in favor of the Defendant, and on default of payment of the £400 — in a short delay, that he should be condemned to satisfy the whole debt — This objection however could not have destroyed the action as to the sum of money really due when it was brought, and more particularly when we consider the Defendants admission and offer to pay the same —

su Poth. Obl. Nº 349 & 672
2 Sofve. ch. 6. —

But there are circumstances in this Case which shew the reasonableness, if not the necessity of some demand being made, or some notice given to the Defendant before bringing the present action — The Defendant although bound by the Judgment of the 20th Febr. 1807, yet this — extended only to a part of the debt in question, namely the sum of £1438. 15, and she therefore had an interest to see the amount of the monies paid by her husband, and to what account they had been placed — Besides it would appear that Mr Mure left the Province in 1817, and did not return — That Mr Perrault died in May 1821 — and at the expiration of the two years after his death, that is in May 1823, when the last instalment of £400 — was to become due — there was no person resident

resident or known in the Province as the representative of Mr Munn or of Mr Todd's Estate so that the Defendant could not have known where or to whom to make the payment of the above instalment — When the Plaintiff was appointed Curator to Mr Munn's estate, it became his duty to make himself known to the Defendant as such and to have exhibited to her the nature and extent of the demand he had against her, for the Estate he represented had been dormant for many years and could not take advantage of its own laches —

№ 1810.

Pothier. ux.
vs
Pierce, widow &
others heirs &c.

This was an action for the arrears of a certain rente constituée, and of Cens et rentes on a certain emplacement or lot of ground conceded by the Plaintiff, as Seignior and Proprietor of the Fief Lagauchetiere, to the late Thomas Peck, and was brought against the Defendants as the Widow and heirs of the said Thomas Peck — The action was founded on act found in the Notariat of the L. Chaboillez, Notary Public, drawn up in the form and language of an authentic act before two Notaries, — the act however was signed only by the parties Toussaint Pothier and Thomas Peck, but not by any Notary, and a certain renvois in the margin was not signed nor certified by any person —

To this action the Defendants pleaded —

1st — a general denegation of all the facts stated in the declt —

2d — That the acte or deed set out in the declaration, is not the act or deed of the said late Thomas Peck —

3d — That the said acte or deed was not at any time carried into execution by the parties according to the tenor and effect thereof, no tradition of the said lot of ground, or livery of seizin or possession thereof having been made to the said late Thomas Peck, or to the Defendants —

4th — That the said acte or deed contained stipulations contrary to law and was null and void —

5th — That it was understood and agreed by and between the parties to the said acte or deed, that the same should never be enforced or carried into effect by either of the parties, but should remain without effect —

The Replication joined issue on all the above matters contained in the plea, and the parties were admitted to adduce their evidence thereon —

The

The evidence on the part of the Plaintiff shewed that he was the Seignior in possession of the Fief Lagauchetiere at the time and date of the acte or deed in question – The Original act was produced and the signatures of the parties thereto proved – it was also proved that the late Thomas Peck had paid three pounds on account of the arrears of rent on the said lot of ground On the part of the Defendants no evidence was adduced At the hearing of the Cause – Mr Walker for the Defendts contended that the evidence adduced was not sufficient to maintain the action – That it was alledged that the said Thomas Peck was dead, and that the Defendts were his widow and heirs, but of which facts no evidence whatever had been adduced – that these facts constituted a material feature in the Cause and were necessary to have been proved –

cits – Despeisses. Tit. 10. Sec. 1. des preuves. p. 543. –
Rip[re] v[o] Preuve. p. 562. –
Domat Tit. 6. Sec. 1. N[o]. 6. Des preuves
Poth: Pand: 8[e] Vol. p. 267. Tit. 3. des Preuves
Lacombe – V[o] Preuve. Sec. 3. p. 288. –
Dic: Droit Commun. V[o] Negative –
5. Burn. Rep. – Rice v Shute –

That there was an appearance of falsification on the face of the Act, as there was a large addition on the margin, to which there was no signature – That it also appeared that one half of the leaf on which the last page of writing is contained, has been torn away on which it is evident that something had been written and there is reason to believe that the acte or deed had been originally perfected, and that by some subsequent act the parties had agreed to annul it – particularly

when

when we consider that this act bears date in the year 1811, and that no possession of the lot of ground in question was ever obtained or taken by the late Thomas Peck —

For the Plaintiff it was contended that the evidence adduced was sufficient — That the Defendants had not denied the qualités in which they were sued, but had pleaded to the merits of the action — That the Contract between the parties being proved, livery of Seisin or possession was unnecessary, the late Thomas Peck might have taken possession at any time when he pleased, and it is to be presumed that he did so —

The Court was of opinion that there was sufficient evidence before it to maintain the action, and that the Defendants by pleading to the merits admitted the capacity in which they were sued — That no livery of Seizin or tradition of the property was requisite to give effect to the Contract between the parties, beyond what was expressed on the face of that Contract, under which the late Thomas Peck or the Defendt as his representatives could at all times enter upon the possession of the premises sold, and if any obstruction occured, it would have been the duty of the Plaintiff to remove it —

Judge pro Pluff

1 Pigeau 80. 163.

Serres. Instit. du Dr. Fr. p. 131 —
Instit. Just. liv. 2. Tit. 1. §. 44 —
Pothi. Vente. N. 314. 321.
Id. Prop. N. 202. 204

No 2444

Macdonell qui
v
Coward &c

Action against the Defendant for £18.5.7 being the amount of certain goods and merchandises sold by the plaintiffs to one Henry Philips, on the guarantee and promise of the Defendant to pay the same if Philips did not — Plea — Non assumpsit — The plaintiffs examined the Defendant upon fait & articles, and now moved, that in consequence of the answers of the Defendant, there was a sufficient commencement de preuve par ecrit, they might be permitted to adduce verbal testimony of the guarantee and undertaking of the Defendant —

It was objected by the Defendant, that as this was a transaction of a mercantile nature, the evidence to be adduced must be regulated according to the law of England — That there being no promise or undertaking of the Defend — en writing in this Case, the only evidence the Pltffs could have recourse to was the oath of the Defendant — having obtained this they can go no further — for tho' Defendants answers are not sufficient, yet they are conclusive, as according to the rule in England there can be no supplementary proof allowed to complete the Contract in a case of this kind — The answers of the Defendant cannot be controverted, because those answers constitute the Contract between the parties, and the Plaintiffs having relied thereon must be bound. That there is no such course known in England as a commencement de preuve par ecrit, to let in verbal

evidence

evidence of the Contract, and it may be questionable whether even the admission of the Defendt on calle will cure the defect —

The Court rejected the motion. —

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No. 567.

Levac, Exer &c
&
Sagala, Novelty
& al' —

This was an action brought by the Testamentary Executor of the late Martin Levac de Bapomme against the widow and Children of the Testator, to obtain the possession of all property left by the deceased, in order to make an Inventory thereof. — To this action the widow pleaded separately, denying the right of the Pltff to obtain the possession of the effects left by the deceased or to make the Inventory thereof — That she the Defendt as widow and Commune en biens with the deceased, and being in the actual possession of all the property left by the said deceased, is ~~debitrix and~~ interested therein, and alone entitled to make the Inventory thereof — That she had begun the said Inventory but had been prevented from finishing the same by the improper Conduct of the Plaintiff who refuses to communicate the papers touching the said estate of which he has wrongfully obtained the possession — The other Defendants Children of the Testator and brothers and Sisters of the Pltff have pleaded generally to the action denying the Plaintiffs right to — maintain the same —

The Plaintiff in support of his action cited, the 97 art. of the Custom — Repse de Inventaire.

Costs.

Poth. Test. Ch. 5. p. 361 & seq.
2 Turgole. p. 157.-

The Defendr on their part cited 3 Vol. Gr. Comr p. 267.-452.-457.- Nos 1. 9. & 11.-
Repr vo Renonciation. p. 134.-
Poth: Comte- No 541. & 560.-
1 Brod. & Loue. p. 245. No 5.-
1 Bacquet- Justice p. 107. No 23.-
N. Denist vo Comte p. 717. No 2

The Court maintained the right of the widow to make the Inventory of the Community between her and her late husband, and dismissed the Plffs action saving such recourse as by law he may be entitled to -

No 1770.
McGill
&
Gray. } Action on a promissory note made by the Defendant to the plaintiff for £13. 7. 6, dated 10th April 1830.-

Plea- That plff ought not to have or maintain his action, save and except as to the sum of £8. 7. 6 which he tenders, with the Costs as in an action in the Inferior Court, because he saith, that before and at the time of making of the said Note or acknowledgment in writing, the said Plaintiff did agree with and promise the said Defendant, that he the said Plff would repair and put in a saleable condition, two

pairs

pairs of Card tables, which he the said Pluff had undertaken to make and finish in a sufficient manner for a reward, but which the said Pluff had not then finished and completed; And the said Defendr avers that the said acknowledgment in writing was given on the express condition that the said tables, would be by him the said Pluff put in complete and saleable order immediately, but which the said Pluff hath since and still refuses to do, by means whereof the said Defendant is injured and damnifies to extent of five pounds, Current money of the Province, and which sum he is entitled to sett-off and doth sett-off against the demand of the said Plaintiff.

The Replication joins issue on the fact alledged and denies Defendr right in law to set up the sd defence or plea.

At the hearing of the Cause, Mr Bleakley objected to admissibility of the evidence offered by the Defendt in support of his plea at the enquête, as it went to destroy the written instrument which the Defendant had given, and no verbal testimony could be admitted to this effect - cites. Poth. Obl. Nr 792. & Nr 809 - if this is to be considered as a Commercial Case the principle is the same. 1 Phil: Ev. ch. 10. Sec 2. ps. 536. 7. - 1 Starkie Reps. 361 - 3 Barn: & Ald. Reps. 233 - The Defendant has also set up a demand in the nature of a sett-off against the Pluff's action, which is inadmissible inasmuch as it is for an unliquidated and an uncertain demand for damages, and cannot be pleaded in Compensation

&c

of the plaintiffs action for a certain and liquidated demand - cites 105. art. Cout. Chitty on Bills 71.-

The Court was of opinion with the Plff. and gave Judgment in his favor for the amount of the note. -

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No. 942.

Aubry. - - }
v. }
Chabotte & al }

Action against the Defendants on a Contract stated to have been verbally made with the Defendants, whereby they became bound jointly & severally to pay to the Plff. a certain sum of money for erecting and building a certain Presbytere in the parish of the Presentation The Defendants by their plea denied the facts alleged in the declaration - The evidence on the part of the Plff was limited to the work done by him and the quantum meruit thereon, but without proof of any Contract - upon this evidence the Plaintiff demanded Judgment - But the Court held that the erecting of a public building could not in law be presumed for the private benefit or interest of the Defendts so as to establish a quantum meruit thereon against them and the Defendants being sued in their private capacity could not be made liable without a special Contract - Action dismissed -

No 581.

Gates & Co
vs
Henry & al

This was an action of Special assumpsit brought by the plaintiffs, merchants in Montreal against the Defendants, proprietors of the Steam Boat, Edmund Henry, plying between Laprairie and Montreal, to recover the value of 23 barrels of potashes delivered to them to be conveyed to Montreal on the behalf of the plaintiffs, but which through the negligence of the Defendants had been lost to the Plaintiffs -

The facts proved on the part of the Plaintiffs, were that one Jason C. Pierce, was at the time the resident agent of this Steamboat at S. Johns, for the purpose of procuring and forwarding to it at Laprairie goods and merchandize to be conveyed from thence to Montreal. That one D. Hazen the owner of 23 barrels of ashes which had arrived at S. Johns by one of the Lake Steam boats, called on Pierce on the 12th May 1828, and left the ashes with him - that some doubts existing in the mind of Pierce, whether under the late regulations, it would not be more advantageous for the dealers in this article to have it bonded rather than pay the duties, he gave Mr D. Hazen a letter addressed to the Plaintiffs that he might consult with them on the subject - Hazen came to Montreal and delivered this letter to the Plaintiffs, and it would appear that they had agreed to sell these ashes on account of Hazen - they in consequence on the 15th. May wrote to the Pierce, stating - "Yours of the 12th has been received, and we have advanced Mr Hazen 300 dollars on the Strength of his 23 barrels of Potashes as per Your letter - It seems to be understood that ashes may be bonded and pay no duty, and

our

our impression is, that they may, when bonded, go to England without being considered as foreign ashes, and without any duty, but some others differ with us, and as there is yet no warehouse appointed here, and the ashes if bonded, must go to Quebec, we therefore do not think it best to bond them — do ask Mr. M^c Crae what his views are — This letter was delivered by Hazen on his return to S^t Johns to Peirce. — Peirce acting in consequence of this letter, and in pursuance of the directions it contained wrote to the Cliffs on the 30^th May as follows. —

"M^r Hazen is now here — "I have paid the duty on
"his ashes, and shall dispatch them to Jones's —
"Inspection office this day, my charges on which
"amounting to £20 " 0 " 4 is also to your debit" —

It appears that the 23 barrels of potashes reached the Defendants at Laprairie, accompanied by way bills of the following tenor —

"S^t Johns 30 May 1828 — S^r 13^t Ed. Henry — You
"will receive per ——— barrels potashes, the property
"of D. Hazen, which forward to Jones's office, for
"H. Gates & C^o — Montreal, without delay and receipt
"in good order" — Jasen. C. Peirce —

It appeard that Hazen embarked on board the Steamboat Edmund Henry with the ashes in question, and that upon arrival at Montreal, the Defendants suffered this person to take possession of the 23 barrels of potashes — these Hazen took to Jones's Inspection office, where he had them inspected in his own name and for his own use and afterwards

disposed

disposed of them — and that no delivery of the ashes was made by the Defendants at Jones's Office on the behalf or for the use of the Plaintiffs, nor any intimation given at that place, that the ashes were for the Plffs or had been consigned to them as stated in the way bills —

The Defendants relied for their defence upon the testimony of persons in their employment, as proving that it had been the Custom of the Steam boat Company, before the present difficulty occurred to deliver the goods to the proprietor accompanying them, upon his paying freight, although by the way bills they had been made deliverable at a — certain place for particular Consignees —

The Court held that the plaintiffs had established a just cause of action against the Defts and were entitled to recover to the extent of their interest in the ashes, which the Defendants had failed to deliver according to the terms of their — Contract as evinced in the way bills which had been forwarded to them by Price, as these were to be considered as the bills of lading and pointed out the Consignees — That the position assumed by the Defendants Counsel, that there was no privity of Contract made out between the Plaintiffs and Defends was without foundation, as by the evidence adduced it appeared, that during the transaction from the outset, Price had been the Agent of the Plffs, and there was no incompatibility of his being the agent of both

parties

parties for the different objects in which their interests were concerned — That the possession of the ashes by Pierce, his making the necessary advances on them under the directions of the Plaintiffs, and conjointly with the knowledge of Thayer, who had already received 300 dollars from the Pltffs on account thereof, was establishing in the pltffs an interest in these ashes and a right to hold them by the hands of their agent — That the possession of Pierce here was the possession of the Plaintiffs, and was sufficient to vest in the Pltffs a special property in the goods to the extent at least of the advances made by them — Distinguishes this Case from that of Sargent v. Morris — 3 Barn: & Ald. Reps. 277 — the Court observed that the reason why the Court of Westminster Hall, held in that case denied a right of action to the Consignees, was the absence of all proof that those persons had acquired any lien on the goods, by making advances on them, which was different from the Case here, where it appears that considerable advances had been made by the Plaintiffs and by their Agent on out of these ashes — That for the wise purpose of protecting the interests of Commerce against invasion by fraud or collusion of Carriers, the law has imposed on that class of men a strict observance of their contracts and obligations, and that under no circumstances could they be allowed to change the destination of property committed to their charge without the Consent of the parties interested, — That the Defendants here ought either to have notified the Pltffs of the

Landing

landing of the polaks at Montreal, & to have left the same intimation at Jones's Inspection Office, which they received with the Polaskes, when delivered to them at Laprairie — but the Defendts had failed in this respect and were answerable to the Crops to the extent of the monies which had been advanced on the Polaskes, and the interest thereon and for which the Court gave Judgment for Crops

20 Oct 1830

Harkness
Cunningham
& Coursen

J. Sykes's notes —

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