February Term 1831.

Friday 11th February.

No. 1363 & No. 1988.
Berthelet v. Dewitt, Cur. &c. & Stebens - Opt. Quesnel & al Opts.

In this case a writ of Venditioni exponas had issued at the instance of Mr Quesnel one of the Opposants, in order to sell a certain house and lot of ground seized in the hands of the Defendant as Curator to the vacant estate of the late Sabez D. Dewitt - Some irregularity had accrued in suing out this writ, and the Defendant applied by petition to the Judges in vacation for a writ of Supersedeas to stop the effect of the said writ of Venditioni exponas, as by law no opposition could be received after the same had issued - The writ of Supersedeas was in consequence granted, and the Counsel for Mr Quesnel now moved that the said writ of Supersedeas be quashed as having issued improvidently upon the following grounds -

1st That the Court, nor the Judges in vacation, have not the power to issue or grant such a writ - That the power and jurisdiction of this Court are limited and ascertained by the Judicature act of 1793, by which no such right or authority is vested in this Court, nor any of the Judges thereof - That a writ of Supersedeas is a thing unknown in the laws of this Country or in the practice of the Courts -

2d -

2d That the reasons alledged for granting this writ are not sufficient to stop the effect of the writ of Venditioni exponas - The only appearance of reason alledged was that the writ had been granted in Vacation without the concurrence of the Defendant - but this was no sufficient ground, as the Opposant Quesnel was entitled to sue out this writ as a matter of right.

3d That the necessary formalities have not been observed in suing out the writ of Supersedeas, as according to the course and practice in England it was necessary that security should have been given by the person obtaining it, to answer all costs and damages which might have accrued to the adverse party - Com. Dig. Tit. Supersedeas. p. 706.

Mr Pelletier for the plff - The constitution of our Courts is different from what they were in France and the course of proceeding is necessarily different in many instances - Here as in England all writs and processes are in the name of the King and what in France the Court or the Judge commanded the Huissier to execute, is here done by the Kings writ addressed to the Sheriff who is the only executive Officer this Court knows - and as the Sheriff could not receive an Opposition after a writ of Venditioni exponas had issued, it became necessary to obtain a writ in the name of the King to suspend the effect of the writ of Venditioni expon- and this is no more than a Surcis to that writ obtained by another mode than by Opposition which could not have been received - That a Supersedeas is not entirely unknown to our laws, as we find mention made of it in the Ordinance of 1787. -

That

That there was no reason for the party suing out the writ of Supersedeas in this Case, as the writ is made returnable into the same Court from whence it issued.

By the Court— We cannot have a doubt of the power of this Court to check and controul the proceedings had before it, as much as the Courts of Westminster Hall in England have over their proceedings, and therefore where a writ has issued irregularly, there must exist an authority to stop its execution— The only question to be determined here is whether the mode adopted on the present occasion is correct or not— As under our present System all writs and processes must be in the Kings name, we see no reason, that in granting a Sursis to the writ of Venditioni exponas, why the English form of a Supersedeas should not be adopted, when the law of Canada furnishes no particular form, and that there is nothing in the form here used which militates against, or is at variance with any known principle of our law, or which infringes it in any manner— In this Case a writ of Venditioni exponas issued and by the Provl. Stat. 41. Geo. 3. no opposition afin d'annuller could be received, the party therefore prima facie under the terms of the Statute was without relief, unless this mode could be adopted, and we cannot give such a rigid interpretation to the law as to suppose that the intention of the Legislature was to exclude all right to complain of the irregularity of suing out a writ of venditioni exponas, or that this law could apply to any thing that may have subsequently occurred, or that it could have the effect to render valid a writ of Venditioni exponas however irregularly sued out, or

that

that it intended to take from the Court the power of stopping the progress and execution of a writ so improperly obtained; and we see no reason why in the exercise of this right the form of an English writ should not be adopted provided it amount to no more than the Surceance, so well known in the law of Canada – Rip^n v^s Surceance – Mr Quenet's motion was therefore rejected. –

Monday –

Monday 14th February 1831.—

No. 1229.

Roi & al
vs
Roi.—

This was an action brought by David Roi and Alexis Roi, against the Defendant to obtain the rescision of certain acts executed by them and an account and partage of the property belonging to the succession of their mother, Elizabeth Breau.—

The declaration states, that the late Laurent Roi and Elizabeth Breau were married at the parish of St Philippe on the 11th Augt 1777, of which marriage the Plaintiffs were issue as well as the said Defendant.

That the said Elizabeth Breau died on the 29th Decr 1825, leaving the said Plaintiffs and Defendant and five other children as her heirs. That the said Laurent Roi remained three years in the possession of all the property of the Community for three years after the death of his said wife without rendering any account thereof to the said plaintiffs.— That on the 7. Febvr 1829, the Plaintiffs demanded of the said Laurent Roi, to make such Inventory and account, when he agreed to give up to his children one half of all the property he possessed but without making any Inventory to which he shewed great reluctance — That on the 19. Febvr. 1829 the said Laurent Roi in consequence called the plaintiffs and his other Children together, when he offered to make over to them a sum of twenty four thousand livres, and two certain farms or lots of land, for all their rights in the Succession of their said mother, over and beyond what they had already received, which the said plaintiffs and the other children out of respect for their father agreed to accept, and in consequence an act was then passed before Archambault this Colleague Notaries, bearing date on the said 19th Febvr. 1829, whereby in

consideration

consideration of the aforesaid sum of money and two lots of land the said Plaintiffs and the other Children of the said Laurent Roi, made a Cession and transport to him of all the rights and claims they had or might have in the succession of their said mother, by reason of the said Community — And by another act of the 19th March 1829, the said Laurent made over to his said Children divers Sums of money due to him by Obligation in order to make up to them the aforesaid sum of twenty four thousand livres. — That on the 21st day of April 1829, the said Laurent Roi died, and by his last will and testament bearing date the 9th day of April 1829, he named and appointed the said Defendt his universal legatee, having bequeathed to him all his property and Estate — That the said plaintiffs have been greatly injured by being thus deprived of their expectations in the succession of the said Laurent Roi their father, and as no legal Inventory was made of the aforesaid Community whereby to ascertain their just rights in the succession of their said mother, they have been greatly injured by the aforesaid cession et transport so made by them to their said father, as appears by the statement they produce, and they are therefore entitled to have and demand from the said Defendant a just and faithful account of all the property of the succession of their said Mother from him, as being now in possession of all the Estate and effects left by their said father —

Concluding, that the aforesaid acts of Cession and transport may be rescinded and set aside — And that the Defendant be condemned to make a true and faithful Inventory of all the property of the Community that subsisted between the said late

Laurent

Laurent Roi and Elizabeth Breau, and to render a just account thereof in order that an equitable partition may be made of the same, allowing to each of the said Plaintiffs one eighth part thereof, and that the Defend be adjudged to pay and deliver the same to the said Plaintiffs with the fruits issues and profits thereof, besides damages.—

Plea— That the present action cannot be maintained inasmuch as the aforesaid acts of the 19th Febr. & 19 March 1829 were made and executed with the approbation of the plaintiffs who were of full age and consenting thereto and done with a view to prevent a law suit and much litigation between the parties, and for a just consideration of all the rights of the plaintiffs in the estate and Succession of the said Elizabeth Breau their mother— and further that the said acts had been fully carried into effect and executed by the said Plaintiffs by their accepting their proportion of the aforesaid sum of twenty four thousand livres and also by taking and retaining possession of the aforesaid lots of land— Therefore praying that the action be dismissed

Replication is general and joins issue on Plea—

The evidence adduced by the plaintiffs at the Enquête, was to give an estimate of the value of the property— of the late Laurent Roi at the time of his wife's death and on the part of the Defendant to shew that the aforesaid acts of Cession and transport had been carried into effect by the parties.—

The parties being now heard on the merits, the Court proceeded to give Judgment thereon—

By the Court— The main question to be here— determined is whether the transaction that took place

between

between the parties is null, and for the reasons alledged may be set aside by the present action? — There is nothing more clear than that this transaction must have been considered a nullity, had the late Laurent Roi been the Tutor of his children, because a tutor is always accountable, notwithstanding every transaction so long as he has not rendered an account as Tutor, and a rescision of every such transaction may be had at any time within the ten years without invoking the lesion. —

The authorities cited from Bornier, Ferriere, the parfait notaire, Bouchel, Argou, Dic.ᵉ des arrets, Henrys & others, apply only to transactions between Tutors and their pupils after they have come of age — One authority from Bouchel. v.ᵒ Restitution. p. 294 by which it would appear that restitution was granted to a daughter against an act of Transfer of her rights of succession to her father, is so vague that nothing certain can be drawn from it, nor does it appear whether the father was the tutor or not, although it must be presumed he was — see arret of 4 June 1579. —

As to the paternal respect which is alledged as a cause of restitution — see Potb. obl. N.ᵒ 27. he says, that this reverential dread, does not vitiate the Contract, unless there be also violence, it might then be a ground — The authority from the Dic. des arrets, letter E. p. 97. is in the case of a renounc.ᵉ of rights, as also the arrets in the 1.ᵉ Vol. Jour.ˡ des Audiences pp. 76 & 173, where there was a question touching the abandonment by the children of the advantages which their father had stipulated in their favor by their marriage Contract, and this without sufficient Cause or consideration for such abandonment — there, the interests of a family were concerned, which had been secured on marriage, and accordingly we see that in the course of the proceeding, an Intervention was made and conclusions taken by those of the family who were interested

interested — But this is not the case of a renounciation, but of a Sale or Cession for a valuable Consideration — we must therefore have recourse to the grounds of restitution which the law gives to persons when of age — (voy. l'arret du 10 Mai 1633 hereafter mentioned, also an arret of the 7th Dec. 1666. Jour. du Palais 1 Vol. p. 8. —) these are — L'Erreur, le dol, la lesion &c. — which of these have the plaintiffs invoked? — It is a principle that in Cases of partition restitution may be had in case of lesion from a third to a fourth part — Is this the case here? — It is said by LeBrun. Succ. liv. 4 ch. 1. Nº 56 & 60, that a partition made in the form of a Transaction, may be set aside from cause of lesion, as whatever may inserted therein it is still a partition, and there is an Arret of the 27 Feb. 1577 which he cites — He also lays it down, that a Sale of the right of succession made to a Coheir, is subject to restitution against the general rule of a Sale to a Stranger, — it is no doubt an exception to the rule. Pothi. Vente. Nº 341. —

It is necessary however to observe that the nullity of the act here is not demanded on the score of lesion, and as might have been done, but the Court can supply the defect — voy. 1 Rogeau 399. — Admitting even that the lesion was one of grounds alledged, will it follow, that a transaction among Coheirs, can be set aside like a simple partage? — In the case cited by Lebrun, a real partage was in question, but with the usual clause of transaction, or in the form of a transaction, but this clause gives no greater validity to the act — If instead of a real partition one of the partitioners transfer all his rights to another under the form of a transaction — would this be a case in which to alledge lesion de trois au quart? Is it not rather a Sale of the rights of succession. — Mr Pothier a Nº 37. Tr. des Obl. lays it down as a principle, that in all

Contracts

contracts where the price of the thing is very uncertain and when it is difficult or impossible to ascertain its real value and to judge whether there be a lesion d'outre moitié, the restitution is rarely admitted, and he cites the case of the sale of rights of Succession — This doctrine is generally received except in the case of sale among Coheirs, which is considered as a partition. —

There is an arret of the Parliament of Paris of the 10th May 1633, where there was a cession made by — children being of age, to their father, of their share of the Community, as heirs of their mother, — the father had not made an Inventory — but the allegations there made, were those of fraud, dol personnel, the concealing of titles and other documents, & of monies &c also the lesion — to all these allegations the answer was that in all such sales, the lesion cannot be alledged — The Plaintiffs were dismissed from their action, and the Court without regard had to the letters of Rescision ordered that the sale and transaction should be executed. — This case is the more applicable here, as it ascertains, that although there was no Inventory still the transaction was declared valid. — There is to be found in the Journal du Palais 1r Vol. p. 8, an arret of the 7th Dec 1666, where the question is agitated, and where it seems to be admitted, that a sale of the rights of Succession there is no room to alledge lesion on account of uncertainty as to the value of the thing sold; but it was pretended that an Executor who purchased the rights of the heirs without having made an Inventory, thereby was — guilty of a fraud — this case is also applicable here, as one there sees it admitted, that the contract thus made with a rendant Compte is not nulle de plein droit for want of an Inventory, non visis tabulis, but that the pretentions of the plaintiffs were founded on fraud — and reference is there made to the 9th Law §. 2. of the

2 Bardet. p. 117.

title

title in the Digest - De Transactionibus, where it is said
" Qui per fallaciam coheredis ignoran^s. quo in vero erant
" instrumentum transactionis, sine Aquiliana stipulatione, —
" interposuit non tam pactus sit quam decipiatur " su 1 Vol.
Pand: Poth. p. 90. 2^d Col. where it is said, on a note - "quod si
" fuisset interposita de dolo ageretur" — but as these stipulations
are not required, it follows that fraud must be the only
cause of Restitution. — There is also in the Rep^se v^o Transaction
p. 245. 1^e Col. a case where a lezion enorme was alledged,
(which in certain cases is equivalent to fraud) to set aside a
transaction on a partition of Community between a widow
and the heirs of her husband, the Court ordered the widow
to declare within eight days, whether she would undertake
to prove that she had been led ~~[illegible]~~ by fraud to sign
the act in question, upon this finding that her allegation
of lesion would undoubtedly be rejected, she appealed
from this Judgment, but it was confirmed - upon a
second appeal she succeeded - but in the last ressort, the
Parliament of Flanders by its arret of 24e March 1775,
confirmed the first Judgment - It was contended, that in
Flanders the Ordonance of Ch^s IX. not being enregistered,
the principle ought to be otherwise - That Ord^ce dated in
April 1560. states - " Confirmons et autorisons toutes -
" transactions qui sans dol et force sont passées entre Nos
" Sujets majeurs d'ans pour les choses qui sont en leur Commerce
" et dispositions: Voulons et nous plait que contre icelle nul ne
" soit reçu sous pretexte de lesion quelconque, mais que les
" Juges à l'entrée du Jugement s'il n'y a autre chose alliguée
" contre icelles transactions, deboutent les impetrans des lettres
" de l'effet et enterinement d'icelles et les declarent non recevables."
V. Jour. Aud^ce 5 Vol. p. 205. Transaction ne peut etre attaquée par
lesion, meme sur partage. -

From all this it would appear that Lesion is not a
sufficient ground to invalidate this transaction, nor is it
sufficiently alledged. — Action dismissed. —

Delorimier
&
Laine
&
Lane Appt

№ 1339.

Monjeon & al
vs
Monjeon. —

In this case the plaintiffs had made an inscription en faux against the last Will & testament of the Defendants late wife which had been produced and filed by him with his plea to the action — Moyens de faux had been filed and an issue joined thereon, and the parties heard — Mr Bruneau for the plaintiffs now moved to be allowed to amend the moyens de faux upon payt of Costs, and stated, that amendments were — generally permitted as favorable to justice, and frequently were of right, and at all times within the power of the Court to grant, and more especially in this Case where the amendment to be made did not vary in any respect the allegations contained in the moyens de faux, but stated them in a clearer point of view — cites. Serpillon Code de Faux. pp. 217. 218. & 220. — also the Case in K.B. at Quebec, of the King vs The Receiver General and Caldwell Oppt — where the Court allowed the Opposant to amend after enquête closed, as otherwise he would have lost his right, which would be the Case here if the amendment be not allowed. —

Grant for the Defendant — This application is unprecedented and cannot be granted — It is the same as if an action had been brought to rescind the will, and that after proof made the plaintiffs should demand to make a new declaration — refers to Serpillon as cited. p. 220 — And that in a case of this kind no new moyens de faux can be received except during the instruction, and this in Criminal

Cases

cases only. Id. p. 230.—

The Court held, that although amendments were often favorably considered, when demanded with a view to meet the Justice of the Case, yet they ought not to be extended so far as to work hardship or injustice — That the Inscription en faux, was an extraordinary proceeding, in which not only the interest but the character of the parties and of the public Officer who had received the Instrument, was implicated, that although not a criminal proceeding it carried with it some of the consequences of such a proceeding, and as the plaintiffs had had an opportunity of examining the Minute of the Will in question, they were bound to make all their objections they then had to its sufficiency either in point of form or substance — That it might be dangerous after the enquête closed, and the parties heard, to admit new moyens de faux which were within the knowledge of the party, when his other moyens were filed, it would be raising a new prosecution against the Defendant, which ought not to be allowed The Court therefore rejected the motion of the Pltffs

Geo: Scott & al
q. t. — on libel
of
Forfeited Goods
&
Marcus Hull
& al' — claimts.

In this Case certain goods and effects which had been imported into this Province from the United States of America, had been seized by the libellants, Custom house officers at St Johns, as not having been entered there as required by law — viz —

forty

forty four dead hogs, two kegs of lard, forty dead geese, one hundred and eleven cheeses, four casks of butter, and three kegs of dried apples.

These articles were claimed by the owners as their property and as having been legally imported and entered at the Custom House at St Johns, and under no circumstances liable to seizure and forfeiture.—

The facts were that when the Sleds in which these articles were loaded arrived at St Johns, they stopped near and in view of the Custom House, where the proprietor of the hogs made his verbal declaration to the Collector of the weight of the hogs, and paid the duty accordingly; whereupon obtained the permit of the Collector to proceed to market with the said articles. Before the articles were removed it having been suggested by some person that the true weight of the hogs had not been given in to the Collector, the libellants who are Custom house Officers, seized the said Sleds and their loading, carried the hogs to the Scales, where they were weighed and where it was found that the true weight of the hogs was some three or four hundred weight more than had been verbally declared by the owner, upon which an additional duty would have been due at the rate of £2.10— for every £100— in value— in consequence the libellants retained the said articles and now prosecuted their condemnation as forfeited—

The Court were of opinion that the said articles had been improperly seized, and adjudged them to be restored to the claimants with Costs. — That the Provl Stat: 53. Geo. 3. Ch. 11. and 55 Geo. 3. ch. 2. regulated this matter, by which the Custom House officer was

bound

bound in the first instance to demand and obtain from the importer his written declaration of the quantity and weight of the goods imported, but in this the officer failed by contenting himself with the verbal declaration of the importer, and wherever a man is to be deprived of his property forms are essential; but allowing that the verbal declaration was sufficient, error as to weight was no cause of condemnation, because the article imported was on the spot, and could be viewed and weighed, and the Custom House Officers are bound to provide the necessary weights and scales for this purpose, and this is a more rational and equitable mode of proceeding, and the only one the law has provided in cases where doubt arises as to weight, it says nothing about seizure or forfeiture — And in regard of value the above Statutes provide that the duty is to be paid upon the estimation made on the oath of the importer, and in case the Custom house Officer should be of opinion that the goods so imported are undervalued, he may retain them for the use of His Majesty on paying such estimated value to the importer — but still there was no forfeiture. In the case before us the Officers would have been justified to have retained the imported articles until the full amount of the duty had been paid, but they cannot be justified in instituting this prosecution —

R. Gillespie vol
v.
John Spragg
& Wm. Hutchinson
&
Peter McGillvral
Garnishees
and
Jas. Hutchinson
Interv.

In this case the plaintiffs, merchants in Montreal, Creditors of the Defendants insolvent debtors, sued out a writ of attachment as well the goods monies and effects of the Defendts as will in their own possession, as in the hands and possession of certain persons as Garnishees - The Garnishees having made their declarations James Hutchinson, merchant in Leeds in England intervened in the Cause and claimed the whole of the goods seized, as well those in the hands of the Defendants as of the Garnishees - Upon this intervention a number of Witnesses was examined by the parties, - and they were now heard upon the merits -

From the evidence adduced on the Intervention of James Hutchinson it appeared, that the Defendant William Hutchinson, his brother, had been established in Montreal since the year 1811, and had carried on business there in partnership with the said James Hutchinson, under the name or firm of William - and James Hutchinson. - That James Hutchinson was a cloth Manufacturer at Leeds, and made - shipments of goods to William, as the acting Partner in Montreal, who had the charge and management of the sales - William had no Capital, and his - only interest in the Copartnership was the half of the profits after all charges and expences were paid. This kind of business was carried on from year to year until October 1820, when William entered into - partnership with John Spragg the other Defendant. It would seem that James was opposed to this connection, but William thought it would be - advantageous for the concerns of William and

James

James Hutchinson, and a saving in regard of Storage and Commission, as he found that the goods forwarded to him by James Hutchinson could be stored in the warehouses of the new Copartnership without expence and that these goods might be sold by Spragg and Hutchinson without having recourse to another Commission merchant. The new partnership in consequence took place between the Defendants on the first of October 1820, and was carried on by them as auctioneers and Commission merchants under the name or firm of Spragg & Hutchinson — In this new partnership James Hutchinson had no share or interest — It did not appear what was the Capital or Stock of either of the parties in this new Concern — but immediately on its being formed, William Hutchinson broke up the establishment he formerly had in St Frans Xavier Street and went to reside in the same house with John Spragg and carried with him to the Stores of the new establishment all the goods he then had on hand to the amount of eight or nine thousand pounds, which were stored in a separate apartment from the other property of Spragg and Hutchinson. — That James Hutchinson still continued to ship and forward from England goods to William Hutchinson at Montreal in the name of William and James Hutchinson, which were addressed to William as the acting partner there, and generally under the mark W.H. which were put into the Stores of Spragg and Hutchinson, and were from time to time sold and disposed of by them as Commission merchants. — It would appear from the evidence that the books of account of Spragg and Hutchinson, which were kept by John Spragg, as his partner was an illiterate man, were not in all

respects

respects correct and did not contain a regular statement of all their transactions so as to distinguish the separate interests of the parties concerned, and from this cause it became a matter of strong contest on the part of the plaintiffs and the other Creditors of Spragg and Hutchinson, to shew that the goods so shipped and forwarded to William Hutchinson were on his own private account and not on the acct of the partnership of William and James Hutchinson, but the fact was otherwise, as it was evident from all the testimony adduced and particularly by that of John Woods, that the whole of these goods were the property of the partnership of William and James Hutchinson.

In the year 1824, James Hutchinson not having received any remittances nor acct Sales from his brother William, Sent his agent, the said John Woods to Canada, with a power of attorney to settle and close the Concern between him and his brother — When this Mr Woods arrived in Montreal in October 1825, he found that the Defendants had been declared insolvent and that their property was under seizure — he however proceeded to enforce the claims of James Hutchinson and after some difficulty, arbitrators were named to examine the State of the accounts between James and William Hutchinson, by whose award it appeared that on the 1st January 1826, there was a balance due by the partnership of William and James Hutchinson to the said James of £18,887. 16. 10 Stg — In consequence of this award, the said William Hutchinson by a certain deed of transfer and assignment dated 30th January 1826, made over to the said James Hutchinson

all

all his right and interest in and to the property both real and personal, which he had any right to hold or claim in the said partnership of William and James Hutchinson. — James Hutchinson being thus vested in all the partnership rights and property of William and James Hutchinson, thereby became entitled to — make the present demand for restitution of a part of the partnership property in his own name without joining that of his former partner — It may however at first sight appear objectionable, that at the time of signing the arbitration bond, and making the said deed of transfer, the said William Hutchinson was insolvent, and incapable to do any act affecting the interests of his creditors — but by these acts he did nothing that could affect the interests of the Creditors in this Cause — these acts were done by him as a — partner of William and James Hutchinson of which no person had a right to complain, except the Creditors of William and James Hutchinson, and the only Creditor of that Concern appeared to be Jas. Hutchinson. James Hutchinson had a right to compel his partner to account to him for the partnership transactions and to pay what he owed — this may be done voluntarily by an insolvent partner, as well as if solvent, as he is only fulfilling a legal obligation — The Creditors of Spragg and Hutchinson had no right and could make no claim upon the property of the partnership of William and James Hutchinson, merely on the principle that William Hutchinson was their debtor, because partnership property must be first applied to pay partnership debts, before any claims against individual partners can be admitted — and as the debts due by the partnership of William and

James

James Hutchinson were to be first paid out of the property of that partnership, it necessarily followed, that as there was not sufficient property to pay those debts, there remained nothing upon which the Creditors of William Hutchinson as one of the firm of Spragg & Hutchinson could exercise their claim.—

It must however be admitted that the Creditors of Spragg and Hutchinson are interested and may be admitted to shew, that at the time of the arbitration, award and transfer aforesaid, the said William Hutchinson was not indebted to the said James Hutchinson in any sum of money whatever, or that the Defendants in this Case had accounted for and paid to William Hutchinson or William and James Hutchinson the value of the particulars and merchandises claimed by the intervention of the said James Hutchinson, or that in the Copartnership of Willm and James Hutchinson there was a surplus coming to William Hutchinson, on which the Creditors of Spragg & Hutchinson would have a claim, and in consequence that the said Intervention would be ill founded — How does the Case stand in this respect? — In January 1826, some months after the insolvency of Spragg and Hutchinson, Willm Hutchinson one of that partnership and also a debtor as one of the partnership of William and James Hutchinson, consents to an Arbitration for the settlement of the claims of William & James Hutchinson against him; Now although the Creditors of Spragg and Hutchinson, had no right to prevent this, yet they had a right to see upon what grounds the award of the arbitrators was founded, because they had an interest to diminish all claims against their debtor, and to prevent fraud or collusion — It is said by Wood in his testimony, that the arbitrators proceeded to establish the account between James Hutchinson and the partnership of William

and

and James Hutchinson, partly by extracts taken from the books of account of Spragg & Hutchinson by their clerk, one Crossland, which were considered to be correct — this may be true, and ought to be so considered until the contrary appears — but ought not the Creditors of Spragg and Hutchinson to be allowed to shew, either from those books or otherwise, that there are errors or omissions which have not been noticed by the arbitrators, and which might have an influence on the present demand? — The books of Spragg and Hutchinson were unaccountably missing during the greater part of the proceedings had upon this Intervention, and were not found or produced in Court until after the enquête was closed, so that neither party had the benefit of them in evidence, nor can the Court now look at them until they are legally brought under their consideration as matter of evidence in the Cause —

It has been argued, and correctly, that the books of account of Spragg & Hutchinson can be no evidence in any contest between third persons, nor in settling the respective claims of the partners of another partnership, still however, if those books have been used as evidence by any of the parties in support of their respective claims it would seem fair and reasonable, more especially in a case of bankruptcy that all concerned should have the same advantage, and as these books, or extracts from them have been laid before the Arbitrators, to establish a claim against William Hutchinson, the same books ought also to be admitted to ascertain what might go to extinguish or diminish that claim. — A reference to arbitrators for this purpose will be the fittest course to be adopted, it ought however to be understood that any reference to be made in this respect

must

must be limited to the sole object of payments made by the firm of Spragg and Hutchinson to the said William & James Hutchinson or to the said James Hutchinson on account of his present demand, because the Court was satisfied that the said James Hutchinson had substantiated his his right to have the goods and monies in the hands of James Henry Lambe one of the garnishees, as well as the goods seized in the hands of the Defendants, as being the property of the late firm of William and James Hutchinson — this therefore cannot become a subject of reference, being a matter wholly unconnected with the said books and in regard of which they could afford no legal evidence —

Friday 18th February 1831.

No. 2478.

Hondlow vs McLane & al

Action against the Defendants as makers of a promissory note, and stated in the declaration to have been made payable by them, conjointement et solidairement. The note produced in evidence was in the following words — "In the month of August, "next we jointly promise to pay to Mr Silvestre Hondlow "or order twenty one pounds Halifax Currency, value "received" — This the Court held to be a variance in the instrument produced from that declared on, and dismissed the action. —

No. 874.

Guichaud & al heirs Dunn. — John vs Jones

Action en declaration d'hypotheque.

The declaration stated, that on the 31st day of August 1796, in and by a certain deed of Sale and Concession, the late Thomas Dunn for and in consideration of the sum of twenty pounds, did grant and concede to one Brewer Dodge a certain lot of land in the Seigniory of St Armand, of which he the said Thomas Dunn was then the Seignor & proprietor, as mentioned and described in the said declaration; That the said Brewer Dodge did in and by the said deed covenant promise and agree to pay to the said Thomas Dunn his heirs and assigns in consideration of the aforesaid grant, the said principal sum of twenty pounds on or before the first day of May 1804, with interest thereon from the 1st July 1799, and further that he the said Brewer Dodge would pay to the said Thomas Dunn, yearly and every year the sum of One shilling for quit

rent

rent for the said granted piece of land, the first payment thereof to be made on the first day of May 1800, and so to continue annually for ever, and for the payment of which said sum of twenty pounds and interest, the said Brewer Dodge did specially bind and mortgage the aforesaid lot of land.— And the said Thomas Dunn on his part in consideration of the premises, did in and by the said deed resign, give up, quit and release to the said Brewer Dodge, his heirs and assigns all the rights and pretentions which he the said Thomas Dunn had or might have as Seignor of the Fief and Seigniory of St Armand, to any mutation or alienation fine under the description of Lods & Ventes or otherwise, and also to the toll commonly called bannalité, and in general every other right and pretention as Seignior over his tene-tenant, except the aforesaid quit-rent of one shilling per annum — all which in and by the said deed or instrument in writing, executed under the hands and seals of the said parties thereto and by them afterwards deposited of record in the Office of Chabrilles, publi notary, to have equal force as if the said deed had been passed before him, and of which a notarial copy is now brought into Court — That the said Brewer Dodge did not on or before the first day of May 1804, pay to the said Thomas Dunn the said sum of twenty pounds and interest as aforesaid, nor any part thereof, but to pay the same to the said Thomas Dunn during his lifetime, or to the said plaintiffs in their several Capacities since his death, had wholly neglected and refused, nor had the said Brewer Dodge paid the yearly sum of one shilling for quit-rent as aforesaid amounting now to the sum of L1. 0. — which still remains due.— That the said John Jones the Defendant held and possessed the said lot of land as the proprietor thereof

thereof, which by law and by the said deed of Sale by the said Thomas Dunn to the said Brewer Dodge, was specially charged and hypothecated to the said late — Thomas Dunn his heirs and assigns for the payment of the aforesaid principal sum of twenty pounds and interest and annual rent aforesaid,— Whereby the said John Jones had become and was liable to pay to the said — plaintiffs in their respective capacities aforesaid, the — said principal sum of twenty pounds and interest and annual rent aforesaid, or to quit and deliver up the said lot of land to be sold according to Law — and thereupon taking the usual Conclusions as in an action hypothecaire Plea. First - a General demurrer, or defenses en droit — 2d Peremptory exception — That by the laws in force in — this Province before and on the 31st day of August 1796 and still in force, as well the said Thomas Dunn as all other persons holding holds a titre de Fief & Seigneurie were bound to grant and concede the waste and — unconceded lands - terres en bois de bout et non concédées for and in consideration of an annual quit rent, a titre de redevances only, without exacting or receiving for or by reason of such grants or concessions, any sum or sums of money whatsoever, and by the said laws are prohibited from selling any such waste or unconceded lands, or granting the same on any other terms than on simples redevances, under penalty of the absolute nullity of the Contract of sale or grant of such lands, and of the — restitution of the price stipulated, and also of the lands so sold being reunited en plein droit to the Domain of his Majesty to whom the redevances are to be paid — And the said Defendant did aver, that at the time of the execution of the act or deed of 31st Augt 1796, the piece or — parcel of land mentioned in the declaration was then part

or

or parcel of the waste and unconceded lands of the said Seigniory of St Armand, yet the said Thomas Dunn hath in and by the said deed stipulated for the payment of a sum of twenty pounds over and beyond the quitrent therein contained as and for the consideration for which the said grant or Concession was made, and did thereby sell and dispose of the said lot of land, and exact from the said Brewer Dodge the said sum of twenty pounds, by means whereof the said Contract is null and void in law, and the said plaintiffs cannot have or maintain their said action for the recovery thereof —

The Replication is general and forms the issue —

The following facts were admitted and received as evidence in the Cause. —

1st That the Seigniory of St Armand mentioned in the declaration was granted and conceded under Seigneurial tenure à titre de Fief & Seigneurie by His Most Christian Majesty, previous to the Conquest of this Province by Great Britain. —

2d That from and after the granting of the said Fief and Seigniory, the same was always held and still continues to be held by Seigneurial tenure, a titre de Fief & Seigneurie, according to the laws, usages, and Customs in force in the said province before and at the time of the Conquest thereof as aforesaid —

3d That on the day of the date of the said deed in the declaration of the said plaintiffs mentioned, the said late Thomas Dunn was Seignior & proprietor in possession of the said Fief and Seigniory. —

4th That the lot of land mentioned and described as well in the said deed as in the said declaration, was at the time of the execution thereof, a waste, uncultivated, and unconceded land — terre en bois de bout & non concédé of the said Fief & Seigniory of St Armand —

5th —

5th That the plaintiffs at the time of the institution of the present action and before, were possessed of and entitled to their respective qualities and capacities stated in the writ and declaration in the said Cause filed — and that the Defendant at that time was proprietor and possessed the lot of land in question. —

In this Cas it was contended on the part of the Defendt that the deed of Sale made by the late Mr Dunn to Brewer Dodge on 31st Augt 1796 was null and void in law, in as much as it was a sale of land en bois de bout prohibited by the Arrets of 6 July 1711 and 15 March 1732 — That the said late Mr Dunn had besides changed the nature of the tenure of the said lot of land, by giving up the rights of Lods & Ventes and of banalité to the tenant, which he could not do, as these rights were inherent in the Seigniory and could not be detached from it — That the Defendant was therfore exposed to have these rights demanded of him at a future day, as another Seignior could not be bound by the alienation of those rights made by Mr Dunn —

On the part of the plaintiffs it was argued, that the two arrets cited could not now be considered as law in the Country, being made merely for a momentary purpose, and not applicable to the present state of the Country — but allowing them to be in force nothing was done here upon which they could take effect — That the bail à cens like all other Contracts was susceptible of many modifications — The quantum of Cens is within the power of the Seignor, and he may also for valuable consideration transfer all his personal interests to the tenant, and he may in the same way renounce his right to the Lods & Ventes and to the right of banalité

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although he cannot convey them to another. — That the Deft has no right to complain until he be troubled, and he is sufficiently secure, as the Plaintiffs would be bound to indemnify him if he were troubled — but this question is not raised by the plea and the Court cannot take notice of it —

The Court said, that the argument had been extended to points not before it — that the only question they had to consider was whether the Contract of the 31st Augt 1796, was legal or not — it was called a deed of Sale and Concession, although strictly speaking it ought to be viewed as a deed of Concession only, as it conveyed to the Censitaire all the right and interest of the Seignior in the soil as effectually as any deed of Sale could do, but it was the terms and conditions of the deed that must determine its nature and validity — It is true that this deed restrains the rights of the Seignior to a trifling sum for Cens with the payment of a sum of twenty pounds & interest and gives up the right of Lods & Ventes and of banalité in favor of the Censitaire; yet this will not change the nature of the tenure nor alienate those seigneorial rights. The only question is as to the construction to be put upon the deed in question — if is to be considered as a Sale of land en bois de bout, it is illegal and void according to the laws of the Country, but if on the contrary this sum of — twenty pounds stipulated to be paid by the Censitaire, was the consideration for which Mr Dunn consented to give up his right to the lods & Ventes and banalité, it will be legal & valid, as he could abstain from demanding any of his rights as Seignior from his Censitaire upon a sufficient consideration — and the Court thinks that the latter construction ought to prevail, not merely because this Contract like every other should be so construed that it may rather stand than fall, but because they are of

opinion

opinion that the expressions in the deed seem to imply that this was the consideration for which the money was to be paid. The Court cannot here take up the question as to the future liability of the tenant to be troubled by another Seignior, and the consequent rights of the tenant thereon as the question has not been raised by the pleadings and cannot now be determined —

Judgt. was therefore entered for the pltff —

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No 2333.

Ansell. —
vs
Campbell. —

Action by the payee against the drawer of a promissory note — The note was in the following words — "Four months after date I promise to "pay Benjn. Ansell or order at the Bank of Burlington, — "Vermont, three hundred and seventy one dollars for value "received — Montreal 22 July 1828" — "James Campbell" — The plaintiff by his declaration demanded not only the usual interest and charges incident upon the non-payment of the note, but also four per Cent damages, as if it had been a bill of exchange drawn upon the Bank of Burlington — But the Court rejected this part of the demand, as the note could not be considered in anywise as a bill of exchange by specifying the place of payment. —

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Saturday 19th February 1831.

No. 2036.

Rutherford vs McKay. —

On an action of account. —

The declaration sets forth an agreement in writing sous seing privé between the plaintiff and Defendant of the one part, and Thomas Porteous of the other, in which after reciting a tender to Government for certain mason work from two to three thousand toises to be performed by the plaintiff and Defendant at Isle aux Noix, and for which Porteous had agreed to become their security to His Majesty's Government, on receiving one third of the profits arising therefrom, the said three parties did in consequence covenant and contract, that the Defendant McKay should unremittingly superintend the mason work, and the plaintiff Rutherford to exert himself in procuring all the requisite materials therefor and for these purposes both should reside at Isle aux Noix. — That Mr Porteous was to receive from the Government all the monies paid on the Contract, and for this purpose the plaintiff and Defendant were to forward to him all the necessary vouchers, and that Porteous should pay them the amount necessary to pay labourers &ca — and upon completion of the work a regular account was to be made and settled, and the overplus, or profits to be equally divided between the three parties, and this without any deduction or allowance for board, labor, or Commission, and that it was further expressly agreed, that neither Rutherford nor McKay should undertake any other work until this was completed. — The declaration then sets forth, that the Lachine Canal being about to be constructed, and the Defendant

McKay

McKay being desirous of contracting with the Commissioners for that undertaking for the supply of Stone, and the performance of certain parts of the work, on or about the first day of January 1822, at Montreal, a certain discourse was had and moved by and between the plaintiff, the Defendant and one Henry Griffin of and concerning the said Materials and work, when it was declared that the Commissioners would not contract for the same, unless Security should be provided and given for the fulfillment of the Contract, and it was thereupon agreed between the said three parties that McKay should offer to contract therefor and tender as Security such persons as the said Henry Griffin should procure, and might obtain, and the said Henry Griffin then and there undertook to give or to procure such security, and also to obtain the Consent of the said Thomas Porteous for the said McKay and Rutherford to contract for such materials and work, and it was further agreed that as soon as the Contract between the Commissioners and McKay should be entered into, the said McKay Rutherford and Griffin should become and be associated and jointly concerned and interested in the performance of such Contract, and that all the profits to arise therefrom should after the fulfillment thereof be divided share and share alike, and a true and faithful account stated and rendered by each party to the other of their respective doings therein — and it was also agreed that Rutherford should superintend the Masonwork at Isle aux Noix in pursuance of the first mentioned Contract and fulfill the same, and that McKay should superintend the Canal Contract and do all things necessary for the fulfillment thereof — And it was further agreed that the rights, duties and obligations of the said three parties by reason of such joint Concern, should as nearly

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as nearly as circumstances would admit, resemble those under the first mentioned contract between the plaintiff Defendt and Mr Porteous — That thereupon Henry Griffin did cause the said Mr Porteous to permit the plaintiff and Defendant to enter into such Canal Contract, and did procure James Leslie, Esquire, to be surety for the performance thereof: And on the 21st day of January 1822 by notarial Agreement before Griffin and his Colleagues notaries, made and executed by and between the Defendant and the Commissioners of the Lachine Canal it was covenanted and agreed, first, On the part of the said McKay, to quarry, furnish and deliver at Caughnawaga for the Locks of the Canal not less than 60,000 — nor more than 95,000, cubic feet of dressed Stone of certain classes and dimensions therein described, to be paid for at the rate of 5½ for each Cubic foot, and also fifty toises of Stone for foundations &c — of the description therein expressed, at the rate of thirty shillings ℔ toise, the delivery whereof to be regulated according to the progress made in building the locks, but that he should have a right to demand money for any stock remaining on hand of Stone so quarried — and in case a further quantity of Stone should be required, McKay agreed to furnish the same, at the same rates and prices, in which agreement Mr Leslie intervened and became solidairement bound with Mr McKay for the faithful performance of the said Contract. That afterwards on the 26th June 1822 by another agreement before the same notaries made by and between the said McKay and the said Commissioners for the Lachine Canal, he McKay did covenant and Contract to cut all the Stone that might be required for the whole of the Locks of the Canal according to the terms and Conditions in the said first instrument of the 21 January 1822, and agreeably to certain Specifications therein set forth — the said Cut Stone to be done in a workman like manner and delivered from time to time at the different buildings of the said locks, to be conveyed thereto

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by the said McKay at his own risk and expence, and in the manner therein particularly described, at the following rates and prices, that is, for every foot of Stone so cut 1/6½, with a further sum of ½d Cubic foot for each mile the Stone might be delivered beyond the regulating lock, and which the Commissioners agreed to pay by instalments, or on acc.t in proportion to the quantity of Stone cut and lying on hand, and the balance to be paid on the final completion of the respective locks, when the whole was to be measured cubically in the wall — to which agreement M.r Leslie again intervened and became said Agreement bound with McKay for the performance thereof. — The declaration then avers, that the said McKay did perform and fulfill all that he had engaged to perform according to the tenor of the agreement between them the said Rutherford, — McKay & Griffin, and subsequently to the said Contracts of the 21 Jan.y and 26 June 1822 and before the first Sept.r 1826, the said McKay in pursuance of the said Contract of 21 Jan.y 1822, and of the said agreement entered into by him with the plaintiff and Griffin, did deliver to the Commissioners the quantity of Stone mentioned in such Contract, that is, 94,000 Cubic feet or thereabout and fifty Toises of Stones for foundations, and also in pursuance of the said Sub ad of 26 June 1822, and of the said agreement entered into with the pltff and Griffin, cut and deliver to the said Commissioners divers large quantities of Stone — and that between the above periods he, McKay, did receive of and from the said Commissioners, large sums of money, amounting in the whole to £30,000, and that divers large sums of gains and profits were made and received by the said Defendant McKay, by reason of the Stone and Cut Stone by him delivered under the said two Contracts with the said Commissioners — Yet that the Defendant although often requested had refused to render to the plaintiff any account in the premises, whereby

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he has suffered damage to the amount of £10,000 And the conclusions are, that the Defendant be condemned to render a true and just account of the gains and profits aforesaid and of the monies by him received under the said two Contracts with the Commissioners of the Lachine Canal, and of the said joint Concern and Copartnership between them and Henry Giffin, and of his care and management thereof, and that he be held to give to the plaintiff communication of all books of account and vouchers relative thereto, or in default thereof that he be condemned to pay the sum of £10,000 for his the pltff's share in the profits aforesaid, and further that upon rendering the account he be condemned to pay to the Pltff one third part of the said gains and profits, the whole with interest and costs. —

The Plea to this action is. 1st That the pltff cannot have and maintain the present action, inasmuches that although the pltff and Defendant with Thomas Porteous, entered into the agreement first stated in the declaration as to the work to be performed for Government at the Isle aux Noix, yet the pltff could claim no right of action on account thereof, nor could it aid him in maintaining his present action, because by notarial Agreement of the 25 Augt. 1826, they the said pltff and Defendant and Thos Porteous declared, that they had met and settled after full examination of their accounts in regard to the said Isle aux Noix Contract, whereby it appeared, that after imputing to each his share of loss in that Concern, the Defendt stood indebted to the said Thomas Porteous in £51. 16. 3½, and the pltff in a sum of £737. 8. 11. which sums were then paid, and they did in consequence reciprocally acquit and discharge each other from every claim and pretention which they or either of them ever or then had for or on acct

of

of the said Contract at Isle aux Noix, by reason whereof the plaintiff could not ground the present action nor any other demand on a Contract so discharged, he the Defendr averring that the said discharge is a bar to the plaintiffs demand in so far as the same is grounded on the said Isle aux Noix Contract of the 15 March 1821 or on any other agreement since made and connected therewith, all which the Defendr was ready to verify —

2d That all the matters and things contained in the Pltff's declaration, save and except as to the making of the Isle aux Noix Contract between the pltff and Defendr and Thomas Porteous, are false and untrue — and therefore concludes that the plaintiffs action be dismissed —

The Replication to this plea is general —

Upon the issue thus formed the parties having proceeded to the adduction of evidence, which consists as well of documentary as of verbal testimony — The documentary evidence produced on the part of the pltff, consists in —

1st The agreement between the pltff and Defendr and Thos Porteous of the 15 March 1821 relative to the undertaking to perform certain mason work at Isle aux Noix, and which corresponds with the statement thereof given in the Pltff's declaration and as admitted by the Defendrs plea, for which Thomas Porteous was to become security, and whereof the profits were equally to be divided between the pltff, the Defendant and the said Porteous —

2d The agreement of the 21st January 1822 between the Defor McKay and the Commissioners of the Lachine Canal for quarrying and furnishing stone for the locks of that Canal, and which is correctly set forth in the Pltff's declaration —

3d The second agreement and contract entered into by the Commissioners of the Lachine Canal and the Defendr, for supplying and furnishing by the latter, cut stone for the building of the locks, & which is also correctly set forth in the Pltff's declaration —

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As in these two last Contracts with the Commissioners of the Lachine Canal, no mention is made of the Plaintiff Peter Rutherford, and that they are made solely in the name of the Defendt who alone contracts for the supply and delivery of the Stone for the constructing of the Lachine Canal, and for the due performance whereof Mr Leslie became Security, the plaintiff has had recourse to parol testimony to complete the evidence necessary to support the allegations of his declaration, and to establish the alledged Copartnership & joint interest of the Pltff, the Defendt and Henry Griffin in the profits of the undertaking in those two Contracts. — The parole testimony so adduced is of different kinds, and a number of Witnesses have been examined, and among others, Henry Griffin the alledged Copartner of the parties, and whose testimony if supported and admissible as legal evidence, must have great weight in deciding the issue, between the parties, whether a Partnership such as contended for by the plaintiff did, or did not exist in regard of these two Contracts with the Commissioners for the Lachine Canal, so as to entitle the Pltff to one third of the profits arising therefrom. — But in order to determine upon the legality, sufficiency and effect of the testimony before us, it is necessary in the outset to enquire and examine whether the subject matter of the present suit is commercial, for if it is, we must be guided by the English rules of evidence in regard to such testimony, to which rules we are by the Ordt of 1785, bound to resort, and this in exclusion of any rule of evidence of the French law in force in this Province, as it would be quite absurd to suppose that the rules of the two Systems, which are often in variance could be resorted to and applied in any one and the same Case — Now the Contracts in question and in which the plaintiff alledges and contends he was associated with the Defendant & Henry Griffin,

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were to quarry, prepare and deliver a large quantity of Stone and Cut stone of various descriptions and sizes, at certain fixed prices and rates, for the building and constructing of the mason work and locks of a Canal from Lachine to this City, for the purpose of facilitating and promoting inland trade and commerce, and the sale and delivery of the Stone and materials for a work of such extent in the way of trade, was evidently a Commercial transaction, and therefore if in the performance of these Contracts, and in the participation of the profits to arise therefrom, several persons were associated, — such association was manifestly in its nature and object, a Societé de Commerce, and the question of partnership or no partnership, is in this case a fact concerning a Commercial matter, in the proof whereof recourse must be had to the English rules of evidence — For although the Contracts were entered into by the Defendant with the Commissioners, and not with the mason who used and employed the Stones so furnished in the building and constructing of the Canal, yet in regard to the person or persons furnishing the Stone, and who sold and delivered it, the transaction was as much Commercial, as if the Stone had ben sold and delivered to the Contractor for the performance of the Mason work of the Canal, and with this only difference as to the other parties, that the Commissioners contracted for and received and the Mason employed the material and there cannot be a doubt, on consulting Toubeau Institutes du Droit Consulaire, that had the Stone ben sold and delivered to the mason, the case as it regarded both parties would have been clearly and exclusively cognizable before the Consular jurisdiction in France

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as a Commercial matter — for on reference to that work arrets will be there found cited, by which the Consular jurisdiction was extended as well to artisans as to — merchants — as between a book binder and a book seller, between a printer and a book seller — a Tin Smith and a wine merchant, and a marble seller and a Sculptor, because, says the author — "les choses que "le marbrier avoit fournies au Sculpteur, etoient une "espece de marchandises qui entroit dans l'ouvrage "qu'il avoit entrepris" — In order however to explain and to come to a correct conclusion upon this point of the case, it will be proper to observe that in the Judgt delivered in the case of Poser v. Mucklejohn in K. B. at Quebec, and which is fully set forth in the reported case of Hunt v. Bruneval (which last was a case of assumpt for Coals bargained and sold to a blacksmith) it was said, that in the interpretation of the before mentioned clause of the Ordinance of 1785, as to what was or was not a Commercial matter, it was a safe course to resort to the French law as to the extent of the Consular jurisdiction in France, and which had for the most part the — exclusive cognizance of Commercial matters, in order to ascertain what might or might not be deemed a — Commercial matter in the view of the provincial Ordce — and in that case it was held, that every matter which under the French law was considered as properly — cognizable by the Consular jurisdiction, must be deemed as to that Ordinance a Commercial matter, and therefore referring to that Case as reported, we would now add what may be essential — It is evident on perusal of the work before referred to, Toubeau, that doubts as to the precise extent of the Consular jurisdiction, had for a long period existed in France, which occasioned much

struggle

struggle and contest between the ordinary or Common law Courts in that Country, with that of the Juges Consuls, each had their supporters in the conflict, and therefore to put an end to all doubts relative thereto, the 4th art. of Tit. 12 of the Coml. Ordce. of 1673, and subsequent articles have expressly declared and defined the several matters cognizable before the Juges Consuls — the 4th article is thus worded — "Les Juges et Consuls connoitront des differends pour ventes faites par des marchands, artisans, et gens de metier afin de revendre, ou de travailler de leur profession, comme a Tailleur d'habits pour etoffes, passemens et autres fournitures boulangers et patissiers pour bled à farine, maçons pour pierre, moellon & platre &c. et autres semblables." — And Jousse on this article observes, that it must be there understood to extend to sales of articles by one tradesman to another, or by one merchant to another for re-sale or to be employed or used# — Here a quantity of stone, quarried cut and prepared was to be furnished to the mason through the Commissioners, or the Commissioners contracted for the delivery of the stone to be used in the mason work which they caused to be performed by a proper artist, and in either way we can discover no material difference between this case, and that of the marble seller and sculptor cited in Toubeau — Taking therefore the law of France as our guide as to what should or should not be considered a commercial matter in the interpretation and application of the Ordinance of 1785, and which was exclusively cognizable by the French Consular Jurisdiction, there can be no doubt, that the transaction now in question would have been deemed a commercial matter so cognizable — Yet although this may materially aid in determining the nature of the case before us and of many others — It is to be observed

in or converted into objects of ye. trade or manufacture. à fin de revendre ou de travailler de leur profession" and to these therefore the Consulr. Jurisdn. was confined as it did not extend to articles sold gh. were not destined to be so employed and manufactured & sold again, but purchased for the personal & private use of the purchaser, not even between merchts. as is declared by the 6th art. — It is however by the 10th art. declared that even in the case of farmers or others — selling articles the produce of their farms or Estates to merchts. or tradesmen who purchase the same for traffic and re-sale, the seller may sue either before the Juge ordinaire, or the Juges Consuls at his option, but Jousse thereon observes, that if the articles were not such produce but had been purchased by the seller himself in the way of traffic, in that case the cognizance thereof belongs exclusively to the Juges Consuls. — The Repre. Vo. Consul, 561, although he has indulged in criticising some positions of Toubeau & Jousse, yet confirms their doctrine in respect to the citations we have given from these authors — for after giving the art. of the Ordce. of 1673. he observes (and the exepn. he gives proves the rule) sous le nom d'artisans l'ordonnance ne comprend pas les laboureurs, fermiers. see also Bornier 2 vol. 596. Denizt. Consuls des marchands. p. 869. 409. 368 Col. 2. Sec. 1. & 2. —

observed that independant of this the Ordce of 1785. is couched in such general and extensive terms, that the interpretation given thereto in all the Courts of this Province has always and uniformly been that the Sale and delivery of goods and merchandises by a merchant or trader to any individual whatever, whether for re-sale, or for the sole use and consumption of the buyer was a commercial fact within the spirit and letter of the Ordinance of 1785 — The Stones were a species of merchandize, and the sale and traffic thereof, a commercial matter, and if a Copartnership therein — ded, as it is alledged exist, it must be considered of the same nature, and the fact of its existence may be proved as any other fact concerning Commercial matters according to the English rules of evidence — Such therefore being the opinion of the Court upon this preliminary point of the Case, the Ordinances of Moulins and of 1667. in force in this Country, and that of 1673 in as far as it may be considered as declaratory of the previous — existing laws, (it not having been enregistered in Canada) all of which were referred to by the Counsel in the — argument, need not on the present occasion be noticed these Ordinances in no manner operating upon or affecting the present Contest, and the delicate though important question, how far the memorandum in writing produced by Mr Griffin on his examination may or may not be deemed a commencement de — preuve par ecrit, although not proved to have been written or signed by the Defendant, yet adopted and acted upon by him subsequently to the delivery thereof by his Clerk, is thus obviated, so as to render it —

it unnecessary to give any opinion thereon, however desirable it might be that the question should be settled, how far under these Ordinances the Memoir so produced may be considered a commencement de preuve.—

Before entering upon the general consideration of the whole mass of evidence in this cause, and of its application, legal effect and sufficiency in the present contest, it will be first necessary in order to ascertain the legal extent of the testimony to be received and considered, that the Court should dispose of those objections made and raised in the course of the enquête, either to the competency of the witnesses, or to certain questions proposed to them, and which objections have been reserved for the decision of the Court, and in giving that decision, we must in the view we have taken of the present case, necessarily have recourse and be governed by English authorities and decisions — We shall commence with the Griffin, who is by far the most important witness produced and examined on the part of the plaintiff — On being examined on his voir dire, the witness declared, that he is the Henry Griffin mentioned in the plaintiff's declaration as a partner in the Contracts in question, but that he is not now interested in the event of this suit, for although he was formerly interested in those Contracts and in the matters set forth in the Pltff's declaration, yet is now wholly disinterested therein in consequence of a Notarial acquittance executed by him in favor of and accepted by the Defendant which put an end to all his dealings with the Dep^{t}

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in regard to such contracts, and further because the Plff and himself had executed mutual releases to and in favor of each other for and in respect to the matters and things stated in the plaintiff's declaration, which arguillard and releases he produced, and are annexed to his deposition as part thereof. — The defendant had objected to the witness as incompetent to give evidence upon the issue between the parties, but without stating any particular grounds; and this objection has been reserved for the decision of the Court, as also an objection made by the defendant to the examination of the witness to any conversations that took place between the parties relative to and previous to the execution of the Contracts between the defendant and the Commissioners of the Lachine Canal. —

On the first objection to the testimony of Mr Griffin upon the ground of incompetency, and which has been urged in argument on the score of his being an interested witness, the defendants counsel must have principally relied on the general rules of evidence of the French law in force in Canada, applicable to ordinary cases, and it must be admitted that objections to the competency of witnesses on the score of interest and soupçon de partialité have been allowed to a great extent in French jurisprudence, and this no doubt arising from that suspicion and mistrust of verbal testimony which seem to prevail throughout the whole of that law, and which no doubt gave rise to the prohibition of verbal testimony in proof of Contracts and engagements by the Ordonnance de Moulins, & subsequently by that of 1667, where no writing appeared; this though calculated to prevent perjury and the consequences that might result from incomplete and incorrect testimony, has on the other hand often destroyed many a just and equitable claim, and much of that confidence which would otherwise exist between man and man in their

mutual

mutual dealings, or has driven a party to take the oath of his adversary, when, if perjury is to be apprehended it is here more likely to occur — These restrictions however even in France were felt and considered as a great impediment to Commerce, and therefore those Ordinances have expressly declared the prohibition not to extend to Commercial matters prosecuted in the Consular — jurisdictions, and although the books furnish but scanty information upon the System of evidence, adopted in these purely Commercial Courts, yet there is great reason to suppose that it was not very dissimilar to that of the English Courts, making allowance for the variance in the mode of administering Justice, or of trial in the two Countries, and the peculiar — spirit which distinguishes the two Systems of Law.— The law of England is however more liberal in this respect than the general Common law of France, although a partial and just leaning to the French System certainly appears in the English Stat: of Frauds, but in respect to the incompetence of a Witness on the score of interest, although the English Courts might in this respect from time to time have varied in the application of a rule well defined, so as to occasion the observation of Mr Justice Buller, that there was no rule in more general use and none that was so little understood, yet it has been long settled by men to whose judgment and opinions the — profession must ever look up with respect & Veneration That no objection could be made to the competency of a witness upon the ground of interest, unless he derived a direct benefit or interest in the event of the suit, or could avail himself of the verdict or Judgment in the Cause, so as to give it in evidence on any future occasion

in

in support of his own claim; and that otherwise an objection upon the ground of future interest, went only to his credit. This rule laid down by Ld Kenyon in the case of Bent v. Baker, and in the case of Smith, qui tam, v^s Prager, and by Ld Mansfield and Ld Hardwicke in preceding cases, we are bound to adhere to on the present and all similar occasions, although in the application of it, it may be incumbent to use more caution in cases carried on before the Court without the intervention of a Jury, and where the Judges are necessarily called upon to decide not only the law but the facts of the case, and the degree of credit to be given to the testimony of witnesses in support of those facts. — The witness, Griffin, being no party to the cause, but called to prove a Copartnership of which it is alledged he was a member jointly with the plaintiff and Defendant, and upon the proof of which the present case rests, the plaintiff asserting, and the defendant denying the existence of such Copartnership. prima facie he has an interest and a very material one in the decision of the cause, and if the question rested here, the objection might not affect his credit merely but also his competency, as other or similar suits might be brought by the witness or by the Pltff and each serve as a Witness for the other, which would be an indirect mode of making them witnesses in their own cause; but if it appear in this case, that the interest which once existed in the witness has ceased and that he has no longer any claim subsisting against either of the parties in respect to such Copartnership, and that at the time of his examination he had no interest directly or indirectly in the decision of this cause, the objection to his competency must be over-ruled, and his testimony received, subject to such weight and credit

3. J. Rep. 27.
7. J. Rep. 60.

credit to which it may be entitled.— Now this Witness examined upon the voir dire, declares that he has no interest in the event of this Cause, having accepted and received from the defendant a sum of money in lieu of any share he might be entitled to in the profits of the alledged Copartnership, and that he has given a full and final discharge to the defendant in this respect by a Notarial act which he produces, and further that he has not, nor pretends to have any further or other claim in respect thereof, he has therefore become a competent witness qwad the Defendant— it has however been contended by the Counsel that a release was also necess any from the Defendant to Mr Griffin, but as the Defendant has not shewn nor pretends to have any claim against the witness, which it may be necessary to discharge, and his acceptance of the discharge given him by Griffin, is sufficient, and any further discharge becomes unnecessary and the objection made to the competency of the witness must be over-ruled—

Having disposed of the objections raised at the enquête, on the grounds then taken, we now come to the consideration of the main point in the Case, that is the validity and sufficiency of the evidence adduced by the plaintiff in support of his action, and its legal effect in the present Case, and as already noticed we must in this Case be governed by english rules of evidence throughout— It has been objected and urged on the part of the Defendant, that no verbal testimony could be received to establish the alledged partnership between the parties, and the English Statute of frauds has been invoked as declaring such testimony inadmissible.— It is not necessary that any observations should be made as to the correctness or otherwise of the policy which induced the passing of that Statute, some highly distinguished

Judges

Judges have doubted the general utility of the Statute, and have been disposed to relax as far as possible its rigid enactments, while others, and particularly in later times, have regretted that they should ever have been in the slightest degree departed from, and should not have been strictly observed — It is however in the correct application of this Statute to the case before us that our principal attention must be given, as it is part of those rules of evidence to which we must resort in proof of all facts of a Commercial nature, and the decisions of the several Courts in this Province have uniformly considered themselves in such cases bound by the Statute of Frauds, and to the interpretation given to it by the Judges of England both in the Courts of Law and equity; this Court having that equitable Jurisdiction which belongs not to the Common Law Courts of England — The Statute in the 4th Section declares that no action shall be brought whereby to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorised. Here the words are general and are applicable to all agreements and consequently to Contracts of partnership, and must be enforced when an attempt is made to prove a partnership inter se, that is, as between the parties to such Contract, but not as to third persons who may by verbal testimony prove such facts as may render a person liable as a partner to the Creditors of the Concern — Now it is evident that the Contract, whereof the plaintiff claims one third of the profits arising therefrom as a partner of the Defendant was one which could not be performed within one, nor within two years; the plaintiff's own allegations in his declaration establish this, as he therein sets forth the period which was taken to complete the Contract — it is

Therefore

therefore evident that under this Statute no verbal testimony could be sufficient to prove such an agreement of a Copartnership, and so it must have been considered by the plaintiff's Counsel, inasmuch as they have endeavoured by various documents and written papers to bring this Case out of the operation of the Statute — it is therefore to these written papers that we must now have recourse in order to ascertain, whether they bear upon the face of them that internal evidence of the partnership in question as to satisfy the provisions of the statute, for if they do not, it is impossible to admit of verbal testimony to supply any essential and material facts omitted in such paper writings, as otherwise the intention of the Legislature would be frustrated and evaded — The law on the presumption that an agreement does exist has declared nevertheless upon grounds of general and public policy that no action shall be brought to charge any person under such agreement unless the same, or some memorandum or note thereof shall be in writing signed by the party so to be charged or by a person by him lawfully authorised — of the law no man can be presumed ignorant, and if he contracts he must be supposed to have a knowledge of the law in regard to such Contract, and if he omits to use and take the precautions which the law has prescribed and deemed necessary to prevent frauds and perjuries, and trusts wholly to the integrity and honor of the person he contracted with, he must if deceived, blame himself and submit to the result however injurious it may be to him — Now in order to form a just estimation of the written papers produced as evidence of the alledged agreement of Copartnership, they must be considered by themselves independently of the verbal testimony

That

that has been adduced, except such part of it as goes to prove and establish the handwriting and authenticity of those papers — And first — Three letters from the Defendant to the plaintiff have been produced and proved — the first is dated in May 1822, in which the Defendant requests the plaintiff to get some employ for a person who had some claim upon him, having been injured in his service, he then adds, "I am sorry to say we are not getting so
" fast on with our work at the Canal as I should like,
" I have about as many stones cut as will finish one lock
" and the Engineer seems to say, that he will only do one
" lock this Summer whereas there might be three locks
" done as well as one on our part — I hope you are getting
" faster on with your work than expectation at the —
" commencement — I weary very much here on account
" that they do not get faster on — I hope I will have
" the pleasure of seeing you in town, or I will come —
" and see you on the Island, if I can get time to spare".
This letter is so incorrect and ungrammatical as — evidently to shew that the writer was not capable of judging of the extent and meaning of the words he made use of — although for the most part it is couched in the language of an illiterate man, yet the subsequent words would appear to strengthen an interpretation of the letter as contended for by the plaintiff, when he says — We are not getting so fast on as I should like, and speaking of his own part of the work, he says, not we, but I have as many stones cut as will finish one lock — but it must be admitted, that when he — subsequently states, that there might be three locks — done that Summer as well as one on our part, there is something more doubtful, as to what the word, Our, there implies — it is however impossible that from this any thing of an association between the parties can be established — Throughout the whole of this

letter

letter, nothing is to be discovered of that memorandum or note of the alledged agreement required by the Statute, and therefore of itself it can form no evidence of such agreement — the language of the letter is besides so vague, and inconclusive to justify the inference or conclusion that the Copartnership in question did in fact exist — That such a letter was written cannot be matter of surprise, when the intimacy which subsisted between the parties, and their association in regard to the Isle aux Noix Contracts is considered, and it is natural to suppose, that under such circumstances, that men whose pursuits were similar, would naturally communicate to each other the progress they were making — besides the defendant mentions the slow progress of the works on the Canal, more as matter of personal Complaint and annoyance to himself than as an acknowledgment of any interest of the plaintiff therein — The plaintiff at the time was employed at Isle aux Noix, and the Defendant at the quarries of Cochnawaga, quarrying cutting and preparing stone for the works of the Lachine Canal, and when he says, we are not getting on so fast with our work at the Canal, we cannot presume he meant himself and the plaintiff, but only those who were in fact employed with him on that work, which the plaintiff was not — and the letter so far from establishing, that he was getting on slowly with his Contract, declares the Contrary, and therefore the words, we, and our, may with more correctness be applied to the persons generally employed and engaged in the construction of the Canal, than to any joint interest the parties may have had in that undertaking — The second letter, is of the 30 July 1822, and is worded in the same incorrect and loose

stile

stile as the preceding — he therein says, — "I am happy to hear
" from Montreal by word of mouth from Capt. McMasters, sent by
" your brother, that you want more masons, which I have sent,
" but I am surprized that when you do want any men that
" you do not write myself in place of writing your brother
" as you know very well I should like to hear from you now
" and then, and if the Govern^t is in the spirit of going on
" briskly, I would be very happy — I am happy to inform
" you that we get on with more pleasure than formerly
" and will begin very soon to build, & probably will be wanting
" a few hands from you, altho' I am sending five to you just
" now that I do not want at present — I hope you are getting
" the works to go on to your mind both out of doors & inside
" of the house, and I likewise expect you are getting the draft
" of money for that last measurement" — This letter —
principally relates to the business of the Contract at Isle
aux Noix, in which, it is admitted, the parties were
jointly interested with Mr Porteous, the only part which
appears to relate to the Lachine Contracts, is that wherein
he says, we get on with more pleasure than formerly — now
we, must here mean, those actually engaged in the
work, and does not necessarily imply any association
in that undertaking — the Defend^t might superintend
but could not perform the work himself or get on without
hired assistants, nor can we therefore from this, nor from
an occasional supply of workmen by one to the other, —
conclude that they had as equal a concern in the Canal
Contracts, as in that of Isle aux Noix, and it is impossible
to consider this any more than the preceding letter, as
evidence of the agreement contended for, nor as that
memorandum or note thereof which the Statute —
requires to maintain the action —

The next letter is also from Coteau du Lac dated 27th Nov^r
1822, and principally relates to the Isle aux Noix Contract,
and the closing & settlem^t of the same, but commences wth stating,
" I am happy to inform you that I am well & busy making
" preparation for next Summer, that is, for Cut Stone for the Locks.

Now

Now this appears to be a short communication to the Pltf. of the Defendts. then employment, & from which nothing can be inferred of the Copartnership contended for, and contains less even to ground a presumption than the two former letters, as it was natural to suppose that the Defdt. would in writing familiarly to a friend, mention as he has done, in what manner he was then employed. — But whatever inferences might be drawn from these letters, they are obviously not that legal proof which the law requires, even if the existence of an agreement had been therein acknowledged, for it has been held, and no doubt correctly, even as early as the year 1724, in the case of Seagoode v. Mead & Leonard, reported in Bac: in Ab. 560. Roberts. 105, that a letter will never operate as a written agreemt. so as to satisfy the Stat: unless it distinctly specifies or ascertains the terms of the agreemt. and the reason is obvious, for if the letter acknowledges merely the existence of the agreement, the essential, which is the terms thereof would be left to be ascertained by verbal testimony, in direct opposition to the Statute. —

The next piece of written evidence is that which has been produced by Mr Griffin, and which he deposes to have received from the Defdt. who afterwards recognized it, and acted upon it. — It is as follows —

Amt. of Cash recd		£25.879. 6. 10	
Cash paid	£2,989. 19. 8		
Superintending	1382	23.371. 19. 8	2501. 7. 2
		1/3.	835. 15. 9

And it is this 1/3 being £835. 15. 9 which Mr Griffin deposes he received from the Defendt. and gave him a final discharge as to the concern he had in the transaction of the Lachine Canal. — Now however suspicions might arise in regard to the manner in which this memorandum is drawn up, from the circumstance of the nett sum being divided by three and that this may have been made in a view to the agreement of Copartnership contended for, yet independantly of its not being signed, nothing can be drawn from it, but what results from the figures, as no mention is therein made of the Pltf or of the Copartnership in question, and altho' 1/3. of the balance was paid to Mr Griffin, it does amount to an admission

that

that any part of the remaining 2/3ds was to be paid to the Pltff, or that he had any interest or concern therein. —

As verbal testimony cannot be admitted, it may not be necessary to say any thing in regard to the credit to be attached to the ev. of Mr Griffin, we are however inclined to believe that he has correctly stated his impressions in regard to the alledged association — he alone was pres.t w.h y.e parties on y.e occasion and it must be recollected that at y.t period he had a material interest and it is possible that whatever his own understand.g of y.e matter might have been, that such might not have been y.e understand.g of y.e Defd.t — now as all Contracts must depend upon y.e consent of the parties thereto, how can we be assured, that y.e understand.g of Mr Griffin was also that of y.e Defd.t — for should y.e Wit.s be in error in this respect, the greatest injustice might follow, to obviate which the Stat. was no doubt made, compelling parties to reduce their agreements to writing, that their consent and the nature & terms of the agreem.t might appear without danger of misinterpretation and not to allow it to rest upon the impressions of a bystander to a verbal agreement, or to the memory however strong & perfect of any man, much less of one who at the moment had in his own estimation a deep interest in the Contract. — If the association was really formed, it cannot but appear singular, that except in procuring security for the performance of the Contract, — neither Mr Griffin nor the pltff should have done any thing towards the performance of it — that the pltff should have entered into new engagements and kept a Commercial Store at Isle aux Noix, and that y.e Defend.t was to have given to them 2/3 of the profits of an extensive undertaking which occupied his undivided attention for a period of four years for 1/3 of the profits, and this without the shadow of available security or guarantee that they would support a share of the loss — In the prior Contracts at Isle aux Noix, both parties were actively engaged, and Mr Corteous rec.d & p.d away the monies, each party thus taking a share in the business of y.e Association, There can be little doubt, that if there existed before us any satisfactory evidence that the association contended for had in reality come into operation and been executed, this according to some of the English decisions would have taken the Case out of the Statute of frauds, but —

nothing

nothing of this appears — the Defendt. alone was actively employed in the performance of the Sachine Contract which he had solely entered into with the Commissrs. and this contract was executed before Mr Griffin as a public Officer, who now informs us that he had 1/3 interest in that very Contract — the plaintiff it is true remained at Isle aux Noix - but this only equivocal and not certain evidence of the performance of the Contract contended for, inasmuchas by the Contract in regard to the work at Isle aux Noix, he was bound to remain there during the whole period of that work — and how can the Court from such a circumstance, in the face of the Statute of Frauds, declare that the plff was associated in the Sachine Contract and entitled to one third of the profits thereof? The plaintiff may have an equitable claim for a remuneration in consequence of the Defendant's absenting himself from Isle aux Noix, but in this action we are of opinion he cannot recover, not having by legal evidence established the Contract upon which his action is founded —

April Term 1831.

Tuesday 19th April.

No. 2026.

Roi, Exer &c
vs
Giroux.
&
Segouin Gart.

Action en declaration d'hypotheque.

The action of the plaintiff was founded on a contract and sale made by one Pierre Sigouin of St Benoit to one Jean Bte Grenier dt Laviolette of four quintals of potash of the first quality, by a notarial act bearing date the 30th November 1821, the said potash to be delivered in the manner and for the consideration stated in the said act. — That the said potash not having been delivered as stipulated, the said Jean Bte Grenier instituted an action in the Inferior Court against the said Pierre Seguin, and on the 23d January 1823, recovered Judgment against him for a sum of £9.5. — with interest thereon from that date, and £1.0.2 Costs. That in consequence of an execution sued out on the said Judgment, a further sum of one pound seven shillings accrued for the Costs on that writ, the said debt and costs thereby forming a sum of £11.12.2

That on the 19th May 1830, the said Jean Bte Grenier for a valuable consideration transferred the said Judgment to the plaintiff, which transfer

was

was afterwards on the 25th day of the same month of May duly signified to the said Pierre Segouin. —
That the interest accrued on the said sum of £9. 5 up to 21 June 1830, amounts to the sum of £4. 2. 2 — which added to the said sum of £11. 12. 2 forms — £15. 14. 4 which is still due by the said Pierre Segouin.
That on the 30 Novr. 1824, the said Pierre Segouin was proprietor of a lot of land, mentioned and described in the declaration which had been given to him by his father Amable Segouin by act or deed of 7 October 1815, which by law became mortgaged to the pltff for the payment of the aforesaid debt interest & costs, and which lot of land is now held and possessed by the Defendant Giroux, against whom the plaintiff is entitled to have his recourse by his action en declaration — d'hypotheque — Conclusions accordingly —

Amable Segouin intervened in the Cause, as having sold the lot of land in question to the — Defendant, and took up his fait & cause as his garant formel, and pleaded for peremptory exceptn to the plaintiff's action, that he could not have and maintain the same against the said defendant — because that on the 17th day of October 1815, and long before he the said Amable Segouin had been and was the true and lawful owner and proprietor of the said lot of land, and by a notarial deed executed on that day, made a donation thereof to the said Pierre Segouin his son for and in consideration of a certain rente & pension viagere as therein was mentioned — That by virtue of the said deed the said Pierre Segouin entered upon the possession of the said lot of land, and held and enjoyed the same as the owner and proprietor thereof until the 15th day

of

of September of the year 1825, without having paid to the said Intervenant any part of the said rente & pension, and being then unable to pay the same, he the said pierre Segouin by act or deed bearing date on the said 15th. day of September 1825, retroceded the said lot of land to the said Amable Segouin in order to be discharged from the payment of the said rente & pension viagere — That by virtue of the retrocession so made, he the said Amable Segouin became again the proprietor of the said lot of land, with all the same benifits and advantages under which he originally held it, and without being liable to any of the burthens or incumbrances accrued or created thereon by the said Pierre Segouin whilst he was proprietor thereof either in favor of the said Plff or of any other person — Concluding that the action of the said plaintiff be dismissed —

Plea 1st general demurrer to the Intervention — and 2d Plea of exception, that besides exonerating the said Pierre Segouin of the arrears of the rente & pension in question, the said Amable Segouin had in and by the said act of retrocession bound himself to pay certain debts which were due and owing by the said Pierre Segouin, as a further consideration on which the said retrocession was founded

The Replication is general and concludes the issue.

On hearing on the demurer and matters of law, Mr Bleury for the Intervening party contended that he had a right to take back his property from his Son as the Condition on which it had been conveyed to him had not been fulfilled; that this

was

was one of the instances where it was allowed to the vendor to take back his estate without being liable to any incumbrance or mortgage created by the vendee, as by the act of resiliation the parties are placed in the same situation in which they stood before any alienation of the property took place — and that any undertaking of the Intervening party here to pay a debt for his son, could in no wise affect the rights of the said Intervening party or his title to the said lot of land — cited Domat. p. 44. sec. 12. N° 5 — 1 Bourj. 488. sec. 5 — 1 Desp. 33 — 13. p. 71. sec. 6. N° 2 — Des Cas des resolutions des Contrats Poth. Vente. N° 326. 328. 371. & 430. Rep. V° Vente. sec. 5.

Rollin for the plaintiff — Pierre Segouin became the absolute proprietor of the lot of land in question without any limitation or restriction — he had a right to alienate it and to mortgage it — that after several years possession the father, the Intervening party took back the land by a deed of resiliation, — without specifying the cause for so doing, and upon the condition that the father should pay certain debts contracted by the son while he was the proprietor of the said lot of land, this was a new consideration which the father paid, and he thereby acquired a new and different title to the land than that he formerly held, this new title he acquired from his son which made the land subject to all the mortgages created thereon by the son while he was the proprietor thereof — cites. Rep. V° Alienation — Poth. Hyp. 465 — C. Denis. V° Hypotheque N° 61 — Id. V° Revocation de Donation N° 12. Rep. V° Revocation de Don. p. 702 — Domat. Hyp. liv. 3. tit. 1. sec. 7. —

The

The Court were of opinion that the plea of the Plaintiff to the Intervention of the said Amable Segouin ought to be maintained — That if Pierre Segouin had so far become the proprietor of the lot of land in question that he could alienate and dispose of it, the voluntary act of retrocession made by him to the said Amable Segouin, would in law be considered more as a new sale, than a resiliation of the former sale, more especially, if any new stipulations were contained in the act of retrocession such as alledged in the said plea — A day was therefore given to the Pltff to establish the facts by him alledged —

see authorities cited by Pltff's Counsel —

No. 1432.

Jellé & ux. & al
vs
Langlois.

Action for the Customary Dower. —

The declaration stated, that by a marriage Contract made and executed by notarial act bearing date the 29th September 1792, between Jean Bte Payet and Marie Anne Langlois dit Lachapelle, the Customary dower was stipulated in favor of the said Marie Anne Langlois and the issue of that marriage, which was afterwards solemnized on the first day of October 1792. That the plaintiffs are children of the said marriage who have renounced to the succession of their father & mother, now deceased, in order to claim the Customary dower. — That the said Jean Bapte Payet at the time of his said marriage was proprietor of and possessed a certain lot of land as mentioned and described in the declaration, which became liable to the said dower

and

and which is now held and possessed by the Defendant: concluding, that the Defendant be in consequence condemned to quit and deliver up to the said plaintiffs the one half of the said lot of land as their right of property therein for the said Customary dower. —

Plea of exceps. perempt. That the lot of land in question was by virtue of a special Stipulation in the said marriage Contract, ameubli, and put into the Community that subsisted between the said Jean Bapt. Payet and Marie Anne Langlois, and was afterwards by them sold to one Joseph Langlois, ~~who~~ the father of the Defendant who inherited the same as the heir of his father, and that by reason of the said ameublissement, the Customary dower did not attach upon the said lot of land. —

Answer — That such ameublissement cannot affect the rights of the children who have renounced to the succession of their father and mother. —

The Court held that the Customary Dower did not take effect on the lot of land in question, and referred to the decision had in the Case of Robert. vs. Toupin, & McKenzie, Oppos. — 19 June 1826 — The Defendant was therefore admitted to maintain the facts by him alledged in his plea, by evidence. —

— —

No. 948.

Bowman vs. Lee. —

Action for Nuisance, in having erected a blacksmith's forge, and carried on the trade and business of a blacksmith in the lower part of a half of a dwelling house sold by the plff to the Defendant. —

The

The plaintiff by his declaration complained of the filthiness of the Smoke, the unhealthy vapours of the Defendants forge, which penetrated the upper rooms of the plaintiffs house, which injured his furniture and victuals and affected the health of his family — and further that he was greatly disturbed by noise of the said Shop. — Concluding for damages and that Defendant be adjudged to remove the said forge from the said house — Plea not Guiltz —

It appearing in evidence, that the Defendant had erected a blacksmiths shop in the half of the dwelling house sold to him by the plaintiff, and the some degree of inconvenience was occasioned to the plaintiff and to his family thereby, the Court held that the Defendant was not justified to erect such forge in his part of the house being under the same roof with the plaintiff, without his Consent, and therefore adjudged the Defendant to remove the forge and to pay £5 — damages —

see Repre Batiment. p. 229. 1re Col.
N. Denize. vo Batiment. p. 301. §. 2. No 1. —
2. Gr. Comre p. 1547. —
Desdogit. p. 112. —

No 1035. & No 424.
Fraser. —
vs
Stevenson, Cur &c
and
Mantent. Cur
&
Brown — Oppr

Hearing on law on the Requête en Collocation filed by the Plaintiff, claiming to be ranked and collocated as a Creditor on the Estate of of the late James Whitford, from the day of the date of the Marriage Contract between him & his wife — Stevenson, the Defendt —

To this requete en Collocation a plea had been put in and an issue raised by which the Opposant Brown contested the right of the Pltff to the preference he claimed.

From the proceedings had in this Case it appeared that Brown had filed his opposition afin de conserver on the monies levied by the Sheriff on the sale of the lands and tenements of the late James Whitford, by which Opposition Brown established a right of mortgage on the property of the said Whitford from the 7 Novr 1821, being one day prior to the date of the Notarial Obligation of Whitford and his wife on which the Plaintiff had obtained his Judgment agt Whitford's Estate — The plaintiff contested the Opposition of Brown but by Judgt of 13 Febry 1830, Brown's prior right of Mortgage was established — The plaintiff afterwards moved to be collocated in the Judgment of distribution to made of the monies so levied as a Mortgage Creditor of the said James Whitford from the 14 July 1815 the day of the date of the Marriage Contract between Whitford and his wife Stevenson, on the principle that the said plaintiff was entitled to be subrogated in the rights of the said Stevenson and to exercise the same agt the estate of Whitford her husband, as she had joined with him and become bound to the plaintiff by the oblign on which the Pltff had obtained his Judgment — This motion was dismissed — Subsequently on the first of April 1830, the plaintiff renewed his application to be thus collocated by a requête en Collocation, in which are stated the grounds upon which he founds his right, and in support of which the marriage Contract between Whitford & his wife and other

documents

documents were produced, and the parties were now heard thereon as to the regularity and sufficiency of this Course which had been so adopted by the Pl'ff. —

The Court held that this requete en Collocation was irregular and contrary to the course and practice of the Court — Because it was introducing a new claim before the Court at a time when no such claim could be received, as the term allowed for filing claims and Oppositions had long expired — That in regard of the claim of the Plaintiff against the property of Whitford it stood explained before the Court by the Judgment which the plaintiff had already obtained, and in a matter already so evident, a requete en Collocation was neither requisite nor allowed. —

The Requete en Collocation was therefore rejected

Cuthbert. vs Arbour. — Arbour Opp'r

This was an action en declaration d'hypothèque in which the plaintiff had obtained Judgment against the Defendant, leaving to him the option to abandon and quit the premises mortgaged in fifteen days after notification of the Judgment — The Judgment in this Case was rendered on the 19th day of April 1830, and signification made of it to the Defendant on the fifth day of May following — The Defendant however made no delaissement until the 16th day of June 1830, of which no notice was given by him to the plaintiff — On the 14th day of August 1830 the plaintiff sued out execution on his Judgment against the Defendant and seized his effects — To this seizure the Defendant put

put an Opposition, claiming that main-levée might be granted of the effects seized, on payment of the Costs incurred by the plaintiff, and in consideration of the delaissement which had been made by him.

The Plaintiff contended that the Defendant was wholly in default, and that the opposition he had made must be dismissed — The Judgment had allowed an option to the Defendant to be exercised within a limited time, this he neglected to do, and thereby became personally liable to the plaintiff and the delaissement he subsequently made was of no avail, as he gave no notice of it to the Plff to enable him to proceed against the land — the right which reserved to the Defendant is lapsed and gone and can never be recovered, as the Defendant must abide by the consequences of his own laches. —

By the Court — There is no doubt, but that the defendant is in default, not only in regard of the time at which the delaissement was made, but also in regard of the manner of making it — the question now raised is, whether the Defendant can purge his default by the Offer he now makes — The Court was of opinion that he could on this principle that although the time had lapsed within which the delaissement ought to have been made, yet no injury had thereby accrued to the Plff beyond the Costs of the execution he had sued out, and in this respect he ought to be indemnified — that if on the contrary relief were now refused to the Defendant, it would prove injurious to him, and would give to the Plff a greater advantage than he originally held, as he would then have a right of recovery against the Defendant personally

personally, and would still retain his remedy as to the lot of land in question — the plaintiff was here contending de lucro captando, while the Defendant on the other hand contended de damno evitando, and in such a case justice required that relief should be granted to the Defendant; — The opposition was therefore maintained and main levée granted on payment of all costs by the Defendant accrued on the issuing out of the execution up to the present moment

No. 2050.

E. Parke on Petition of Jac. Robitaille.

This was a proceeding had on a petition of Jacques Robitaille for a decret volontaire of a certain lot of land belonging to him, the land had in consequence been sold and adjudged to the Petitioner himself, but not having paid the money, the Sheriff made his return to the Court accordingly — There were several Oppositions filed claiming a right of mortgage on the land, and a consequent right to be paid out of the amount of the money for which the land had been adjudged to the Petitioner — A motion was now made by one of the Opposants for a Contrainte par Corps against the petitioner, that he might hold and constrained by his body until he paid the amount of the said Adjudication — But the Court were of opinion that as the law had expired under which the Decret Volontaire had been had, they could grant no further remedy thereon, and as no injury could arise to the Creditors as the land still remained in the hands of the Petitioner without any sale having been effected, the Court thought they could not interfere, but that the parties must take some other course —

№ 1339.

Monjeon & al
v.
Monjeon.

In this case there was an inscription en faux against the last Will and testament produced and filed by the defendant as being the last Will and testament of Catherine Patenaude his late wife. — Moyens de faux had been filed and an issue taken thereon, and the parties were now heard on the merits and on the evidence which had been adduced. The only fact which appeared to affect the validity of the Will, was an omission made by the Notary of a limitation made by the testatrix in the devise made by her to the Defendant her husband as instead of devising to him the absolute property of all the estate left by her, it was in proof, that she gave it to him only during his life time, and that at his decease, it should revert and go to her children — but the difficulty was as to the moyens de faux, it not appearing that any of them applied to this particular fact — There were Six moyens de faux alledged and produced by the plaintiffs, of which the first five had no application to the above fact, the only one in respect of which there appeared some doubt, was the 6te — it was in these words —

6o "Parceque ladite pretendue minute est fausse,
" en autant qu'il y est faussement exprimé, que ladite
" Catherine Patenaude a disposé de ses biens, ainsi et
" de la maniere qu'il est exprimé dans ladite pretendüe
" minute, et qu'elle y a persisté comme etant son intention
" expresse et libre de derniere volonté; les dits Demandeurs
" en faux, mettant en fait, et etant prêts à prouver et
" justifier que ladite Catherine Patenaude n'a pas
" donné et disposé dans le tems que l'on pretend que
" ladite pretendüe minute a été ecrite et redigée, et
" depuis n'a jamais donné et disposé de ses biens ainsi
" et de la maniere exprimée dans ladite pretendüe

" minute

"minute du dit pretendu testament, lesdits demandeurs
"en faux mettant en fait, et etant prets de prouver et
"justifier que ladite Catherine Patenaude etoit alors
"derangée dans son esprit, ce qui la rendoit incapable
"de faire aucun affaire, et surtout de disposer de ses biens
"avec connoissance de Cause, la maladie qu'elle eprouvoit
"alors, et dont elle est morte la privant de l'usage de ses
"facultés" — Now the Court might from the evidence
adduced have been enabled to say, that the will produced was
not the last will and testament of the late Catherine
Patenaud, as not containing the dispositions she had
made, but not upon the principle stated in this moyen,
that the testatrix was at the time deranged in mind and
incapable of making any will whatever, the fact being
clearly otherwise, that she at the time possessed all her usual
mental faculties — without therefore new modelling this
moyen the Court could not adopt it as sufficient to set
aside the will, and they considered that they had no
right to do so but to adjudge upon the pretentions of the
parties according to the mode in which they were brought
before them — Moyens de faux were dismissed —

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No. 2472.

Pothier
vs.
Boston.

Action for payment of Constitut —

The declaration stated, that by a certain act or
acknowledgment made sous seing privé, bearing date
at Montreal on the 14th day of November 1827, the defendant
declared, that whereas he was then the actual proprietor and
possessor of a lot of ground in the Fief Lagauchetiere, belonging
to the Plaintiff as the Seignior thereof, containing twenty one
feet in front, and butted and bounded as in the sd declaration
mentioned, upon which lot of ground there was a Constitut
of five hundred livres payable to the said pltff as Seignior
as aforesaid, created by one Michel Dumoine by notarial
deed of the 14th December 1811, the Capital of which Constitut
was

was then due and demandable in very of an express stipulation contained in the said deed, and the said Defendant being desirous of having the effect of such express stipulation suspended, the said defendant did thereby oblige himself to execute in due form and at his own Costs and charges a titre nouvel of the said Constitut in favor of the said plaintiff under the same condition and stipulation expressed in the said deed, that is to say, that the said Constitut should become payable and be reimbursed to the said plff in case he the said Defendr should sell or otherwise dispose of the said lot of land, which titre nouvel should be given as above mentioned within two years from the date of the said acknowledgmt to wit, from the 15 Novr 1827, if the said principal of five hundred livres was not before the expiration of that period paid and reimbused by the said Defendr to the said plaintiff. — That on or about the 21st day of June 1830, the said Defendant did alienate, sell and dispose of the aforesaid lot of ground to one Antoine Thivierge, who since that period hath become and continues to be the owner and proprietor thereof, by reason whereof a right hath accrued to the said plaintiff to demand and have of and from the said Defendant the aforesaid principal sum of money with interest & Costs. Conclusions accordingly —

Plea — 1st a general demurrer to Plaintiffs declaration 2ds That by the deed of sale made by him the Defendant to Thivierge on the 21st June 1830, he sold the said lot of land subject to the same Conditions and stipulations in favor of the said plaintiff to which he the said Defendant was subject and liable, that is, that the said Constitut should be paid by the said purchaser to the said plaintiff, if demanded — and inasmuchas the said Defendant was not the proprietor nor possessor of the said lot of land at the time of bringing the present action, nor in any wise personally liable to the said

Plff

Plaintiff for the aforesaid principal sum of money, he the said plaintiff cannot maintain his demand aforesaid against him the said Defendant. —

The replication is general and joins issue on the plea. —

The Court was of opinion that the Defendant had by his undertaking of the 14 November 1827 become personally bound for the reimbursement of the principal of the Constitut in the same manner as the original grantee was bound to the Pltff, and having sold the lot of land in question he was thereby bound to pay the said Constitut — Judg for Pltff. —

No. 917.

De Beaujeu v. Chs. Leduc. pere

Action for Lods & Ventes & Seigneurial rights —

The declaration states, that by notarial act dated 7. April 1815, the defendant sold and conveyed a certain lot of land, mentioned and described in the declaration to Jean Charles Leduc his son, for and in consideration of the sum of 8500 livres; — That afterwards by another notarial act bearing date the 11th March 1823, the said Jean Charles Leduc declaring that he was unable to pay and satisfy to the said Charles Leduc the monies then due on the aforesaid purchase, made a retrocession to the said Charles Leduc of the said lot of land, on the following conditions, that he the said Jean Charles Leduc should be exonerated and discharged from the payment of a sum of 6500s. still due and unpaid upon the aforesaid purchase, that he the said Defendant should allow & pay to the said Jean Charles Leduc a sum of Six hundred livres for the improvements made by him on the said lot of land during the time he had been in the possession

thereof.

thereof — also that the Defendant should permit and allow the said Jean Charles Leduc and his heirs for and during the space of six years to pasture their Cattle on the said lot of land, and further that he the said Jean Charles Leduc should be permitted to retain the possession of the houses and buildings on the said lot of land for one year from & after the first of April 1823, which reserves the plaintiff estimates at the sum of 360 livres and with the before mentioned sums of 6500 and 600 livres form altogether 7460 livres, as the consideration paid by the said Defendant for the said retrocession. The plaintiff therefore claims his Lods & Ventes as well upon the aforesaid sale as upon the retrocession with the fine for the non-exhibition of title & Lods —

Plea — General demurrer — 2d admits the lods & Vents on the deed of 7th April 1815. to be due and consents that Plff have Judgment for the same, but denies that Plff is entitled to recover on any other object of his demand — Repr general —

Mr Bruneau for the Plff, contended that the Plff was entitled to his lods et ventes as well upon the deed of retrocession as upon the deed of sale — That the retrocession was made for a valuable consideration and operated a new sale and conveyance of the property in question — cited Repr de Lods & Ventes. pp. 660 & 708. sec. 6. & 710. 711. 712 Boutaric. p. 151 & 153. —

Badgley for the Defendant, denied the right of the plaintiff to have lods & Ventes on the deed of retrocession because it was no sale, but merely a desistement from the former sale. Sirovnere 217. Dum. on Cust. p. 217. No 19. and even when a part of the price has been paid, and a desistement, to be discharged from the remainder, has been held to be no sale nor to bear lods & Ventes. Loret — Tournaur indeed appears in one place to be against the

Defendt —

Defendant. p. 140. No 617. but he afterwards maintains a different doctrine. — cites also Guyot. 3e vol. 489. No 19. — Livoniere 218. — Poth. Fiefs. 168. & 335. — Cout. d'Orleans. 112 Introduction au Tr. des Fiefs. Cout. d'Orleans. p. 102. — and case of Montarville v. Bedard & al. decides last October Term

Mr Bruneau in reply — The sale in this case was perfected in every respect, and the Vendee held the lot of land for several years, and therefore the retrocession being a new Contract and a new Conveyance of the land bore lods & Ventes — But there was a further consideration in this Case which led to the retrocession besides the payment of a part of the price, which was the improvements made on the land by the Defendant's son, and for which the Defendt agreed to pay, this consideration has already been held by the Court sufficient to carry lods & Ventes in case of a retrocession. Dorions. v. Foretier. June 1828. — Dic. Droit. vo mutation. Duplessis. p. 98. — Bourjn 298. Repn Lods & Ventes 728 — and even when the resiliation is made from inability to pay the purchase money. p. 724. — Boutaric. 175. 6. 7. 8 — Poth. Fiefs. No 329. p. 590. —

The Court was of opinion that the act of retrocession in this Case must be considered as a new transfer of the property, being upon new terms and conditions variant from those contained in the deed of sale by the Defendant to his son, and consequently that lods & Ventes were due thereon to the plaintiff — That this jurisprudence appeared to be conformable to the general opinion of the law writers, and had been so held and adjudged in this Court — as in the case cited of Dorions. v. Foretier — Judgt was therefore given for the Pliff —

No. 2087.

Gibson & ux.
vs.
Hugues Heney
& Leocadie Foucher
his wife.

Action of assumpsit for goods sold and delivered.

In this case Mr Justice Pyke delivered the opinion the Court, as follows.—

This action is brought by a marchande publique carrying on the business of a milliner & mantua maker in which action her husband has joined, against the Defendant and his wife, to recover a sum of £96. 10. 8 for a variety of articles of millinary and dress, and other goods made ups, furnished and sold by the plaintiff to the defendants wife, within the short space of four months and a half.— The evidence is sufficient as to the extent and value of the articles, but under a general negative plea put in by the defendant Hugues Heney, his wife having made default, it has been contended on his part, that the articles having been furnished without his order ~~&~~ authority or participation, and credit having been given to the wife alone, that therefore, he the defendant her husband, is not bound or liable to pay therefor.— The defence thus set up involves a question of some delicacy as it regards the parties, particularly as the defendants rank in this City may be considered among that of the first class of our Citizens — it is not for us — however to enquire into the motives which may have induced the defendant to resist the present claim, it is for him to judge of that, and of the necessity there may be of setting bounds to perhaps an extravagant and unnecessary domestic expenditure.— The case is of importance, both in a legal and a public point of view, and has received every consideration on our part, and the decision we hope will have the effect to check that growing and encreasing extravagance, which has destroyed, and if persevered in will continue to ruin and reduce many respectable families, whose means

must

must not always be determined by the rank they apparently hold in Society — The question which we however have to decide is, how far in law, the defendant is bound to pay the sum now demanded of him, he not having — authorised the purchases for which the present action is brought against him. — Now it is very clear that upon the General principle of our law, and the articles of the Custom, a wife cannot contract and bind herself in any way without the authority of her husband, upon this no contrariety of opinion can prevail; but this is not so much the question for our decision, as whether there are any acts of hers, by which she may bind her husband, and render him liable to third persons, without his express — authority or apparent participation, and the law in regard to this, appears to rest upon very just and wise principles, calculated at once to support a due authority and controul in the husband, without destroying that confidence which a husband may naturally have in a wife, and which the law supposes and presumes to be placed in her, and therefore in regard to all domestic — concerns, of the care and management of which, a large proportion necessarily devolves upon a wife, it has been generally held, that in her subordinate situation, legally speaking, she as the natural mandataire of her husband, may purchase whatever may be necessary for the subsistence or requisite cloathing of the family, — according to their rank in life, and that all such purchases being made for the family, the husband also, who is bound to furnish all such necessaries, is and must be liable to pay therefor, and they are therefore deemed to have been made by the wife for him, and on his account, the care and trouble of procuring which, he is thus relieved from by the agency and aid of his wife. — These principles are held by all the authors who have written upon the subject, and seem to be in accordance and to agree also with those of the English law, which renders the husband

chargeable

chargeable for all contracts made by the wife for necessaries while she cohabits with him — It is obvious therefore that the power and duty thus confided to the wife has its bounds, and no abuse thereof can be permitted or supported by a Court of Justice, nor can third persons be allowed to avail themselves of such an authority to encourage or draw into their views thoughtless and extravagant wives, or to induce them to purchase articles of luxury and not of necessity, and those to a large amount, to the ruin of their husbands — The extent to which a wife may thus bind her husband and may therefore be credited and entrusted by others without his express order and authority, is by none of the authors, who generally agree on the main principle more correctly defined and explained than by Le Brun in his Traité de la Com.té p. 183. N.os 43. 44. — The general principle here laid down, is supported by all the authors, among others by Poth. in his Traité de la puissance du mari n.o 73. N.os 59. and by Ferrière in his Gr. Com.re on the 23.d art. of the Custom. p. 165 — The latter cites an arret by which the action of a merchant was dismissed who had furnished to the wife rich stuffs to the amount of 250.t and to whom her husband made an annual allowance for her dress — but the author observes "cela depend des circonstances, un "mari est obligé de payer ce qui a été fourni à sa femme "par les marchands pour les besoins de sa maison, à moins "qu'il ne leur est defendu de rien donner sans argent, "autrement un marchand ne peut pas savoir si le mari "donne a sa femme de l'argent pour payer comptant la "depense — il en faut dire de meme des etoffes qu'elle prend "pour elle, quand elles ne sont pas trop somptueuses par "rapport à sa qualité" — There are however some authors who appear to weaken the principles here laid down, by saying that it is in the power of the husband to rebut the demand for necessaries &c.a by his affirming that he has furnished money sufficient for his household expences, or that he never gave any order for the delivery to his wife of the articles furnished — this will be found

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in the N. Denizt. Vo autorisation. §.3. No 5, and he is supported by Bourjn. 1 vol. p. 579. in notes. — And that such was to a certain extent, the practice of the Parlt. of Paris and of the Chatelet, is evident from the Repn. Vo Autorisation. p. 839, but the author adds in support of the general principle, and in observing upon this modification — "mais cette "jurisprudence paroit renfermée dans l'enceinte de la "Capitale, des raisons particulieres l'y ont introduite, et nous "ne voyons pas que le Parlement de Paris même l'ait etendu "au dela" — But in regard to this modification, were it correct to be adopted, and which is manifestly unjust, in absolving the husband upon his affirmation, that he had given no order for the goods obtained, yet it forms no part of the defence to this action; it is not alledged or pretended by the plea, that either sufficient money had been supplied, or that he had given no order for the delivery, or any offer of his oath to that effect, the plea being general and merely negative of the facts stated in the declaration; besides the Case is of a Commercial nature, and we see not how the oath of the Defendant can be taken or received consistently with the English rules of evidence, to which we are confined in proof of all facts concerning Commercial matters, by the Ordce. of 1785 — These authorities therefore so destructive of and contradictory to the general principle are not applicable to the present Case or to the issue between the parties, and the bare question to be now decided is, how far upon the general principles of law the Defendt. is bound — Reverting therefore to those general principles, we are of opinion that whatever in the present account, the amount of which is claimed by the plaintiffs, does not exceed the limits which we have endeavoured to explain, the husband is clearly liable, and consequently that whatever may have been purchased by his wife that may come under the head of necessaries, or

of

of what he is bound to supply his family, must be paid be paid for, and nothing more — And the author of the title, Autorisation in the Repv, observes, — Mr Lepresident Lamoignon a trouvé cette regle si juste qu'il l'a insérée dans cet article de ses Arretés. Tit. de la Com. art. 69 "Obligation
" de la femme sans l'autorisation du mari pour victuailles
" et provisions ordinaires de la maison, pour marchandises
" de draps, lingos, et autres etoffes servant à l'usage necessaire
" et ordinaire, est valable" + Now in regard to a Milliner's account, we would say, that generally speaking, these are articles of luxury, and more particularly in a young country where rank and means are so limited, nor do we conceive that any expenditure of that description for expensive articles of dress, is within the scope of a wife's delegated authority, but requires the sanction of the husband, as not being included under the genral term necessaries, or articles of ordinary and necessary use, to justify a purchase thereof without the sanction and authority of the husband, and although such a principle may appear injurious to traders of the description of the plaintiffs, yet it is better that their business should be restricted, than that a general licence should be given to wives to purchase luxuries and to indulge in extravagance of dress and equipment, to the ruin of their husbands — the principle once — established, traders are put on their guard, and if they will thus knowingly trust to and rely on the honor of the wife while in the Commission of such extravagance, they will then have only themselves to blame — We have therefore in this case only to distinguish between what may have been sold to the wife of the Defendt and which may be comprised under the head of necessaries which the husband is bound to furnish, from those of a contrary description, and to award the former and

reject

reject the latter.— It is true that upon the principles laid down in this Cause, the husband may sometimes be injured by the purchase of articles, which though of the description of necessaries, may not be appropriated to the use of the family under such circumstances. yet the law can afford no relief, if he has not notified that he will not be answerable for the debts she may contract, it is his misfortune to be united to an extravagant and imprudent wife, yet she is the partner of his choice, and he must support the loss thus occasioned, as it would be unjust to visit that loss upon an innocent trader, who may be presumed ignorant of their family arrangements, but with regard to luxuries and the extravagancies of dress, let the seller of such articles look to it, and not expect without the order or participation of the husband that he must pay for such; and in this case the observation now made applies in this particular case from the circumstance that it does not appear that the Defendant had the least knowledge of the purchases in question, on the contrary every precaution and artifice were used to prevent the same coming to his knowledge and to keep them out of sight — that he never dealt with the plaintiffs, and moreover that his wife was amply supplied with every necessary in point of dress suitable to her rank and situation in life — also that articles were furnished after the wife had announced her then inability to pay, yet asking for and obtaining a further credit, and no hope held out that the Defendant was to be the paymaster, and the plaintiffs appear to have relied more upon the honor of the wife and for the means of payment independant of the husband, than upon his liability; for had they looked to the Defendant for payment, upon application for a fresh credit, without payment made, they ought

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to have notified the Defendant of the excess of credit claimed and obtained his Sanction — the author in the Repsr clearly establishes this principle even in regard of necessaries, where the credit becomes excessive he says. "une autre exception " est pour les depenses qui excedent la Condition des deux " epoux et dont les marchands ont laissé trop grossir les " memoires sans en avertir le mari; cela est fondé sur les " regles qui ont été etablies pour les instituteurs ou — " Commissionnaires, et par lesquelles il est decidé, que ceux-ci " n'obligent pas leurs maitres s'ils ont excédé les bornes de " leur Commission; Car la femme excede aussi les bornes de " la sienne quand elle prend des marchandises qui ne " conviennent point à son etat, ou qu'elle en prend en trop " grande quantité — d'ailleurs c'est au marchand de " s'imputer de n'avoir pas averti le mari de cet excés et " du peu d'exactitude de la femme à les payer" — We must therefore say, that the defendant is liable only for the articles which may be deemed necessaries applied to the family use, and for the amount of which alone are the plaintiffs entitled to Judgment. — From the several distinctions now explained, the seeming — contradiction in the several arrets cited by the authors may be reconciled, each case must be decided upon its own peculiar circumstances, and such has been the reason of the supposed difference in the decisions — which have been given in this Court — In that of Phillips. v. Henry, it was proved that the plaintiff was expressly notified at the time of the purchase, that the articles were on the Sole account of the wife and to be — paid for by her alone, and that no demand was to be made upon the husband, who was not even to be notified thereof — no credit in that case had been given to the — husband, and the Creditor had himself only to blame, but, as before observed, every case must be decided according to its own peculiar circumstances, and had the plff in

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that case proved, that the articles had been really expended in the family, and the husband had thereby profited, there would have been little doubt of his liability upon the principle that they were articles he was bound to furnish, as no man ought to profit to the detriment of another, and the action in that case would not have been dismissed — In the other case of Farquhar. v. Heney, the Creditor prevailed upon the principle that the Defendant had established a credit for his wife in the shop of the Plff, and had without hesitation paid for articles previously sold to her, and without prohibiting a further credit, and as the purchase was but small and for articles which the wife was in the habit of wearing, and that the purchase was made in the absence of the husband, who, the Plff was informed would pay for them on his return home, Judgment under these Circumstances was given for the Plff — These were cases of small amount and decided in the Inferior Terms of this Court — as was also the Case of Woolrich v. Vigé in 1809, where the Plff sued the husband for articles purchased by the wife, but the evidence in that case having been taken viva voce and no record thereof remaining, we are unable to ascertain the particular facts of the Case, we must however presume that some particular circumstance in that action led to the dismissal of it, and are led to believe that at the time the husband and wife were living separate when the articles were purchased, and this to the knowledge of the Plff. —

In looking over the account upon which the present action is brought, and which was run up in the space of four months and a half to the enormous amount of £96.10.8, without the knowledge of the husband, we have rejected therefrom all that may not be considered necessaries, and award

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the payment of the remainder agt the Defendant alone, he being as well upon the principles of our own law as that of Engd and solely chargeable and not the wife, and as the wife had contracted for four months credit and without being then able to pay, was supplied with articles subsequent thereto, we reject the whole of that part of the account, say from and including the 24 July 1829. As to the parts of the account thus rejected, no claim can be made against either the wife or the husband, the former during coverture not being capable to bind herself without the authority of her husband, and the latter being bound only for necessaries contracted for by his wife — In selecting therefore those articles, which may be considered as necessaries and which a wife is presumed to be authorised to purchase, we find them to amount to £21.11.5½ for which the pltff will have Judgment, and the surplus of the demand is rejected — We would observe however, that if there are any articles of dress remaining in the possession of Mrs Heney, it would be but an act of honesty to restore them to the pltffs —

1 Comyn on Contr. 186.

Ch. Justice Reid differed in opinion from the Court, and held that he considered the husband liable for the whole amount of the plaintiffs demand, except that part which was contracted subsequent to the expiration of the four months — That he agreed with the Court in the principles of law laid down, as far as they went, but that they had been narrowed too much in their application to this Case — he held, that the wife, as in law the mandataire of the husband could contract and bind him, not merely for things which might be considered strictly as necessaries, but also for what was useful and suited to rank and condition of the parties in the Society in which they lived — This distinction is remarked not only by the authors cited and referred to by the Court, but in various other

decisions

decisions and opinions held as well in the Reps^ve as in other authors treating on this subject — It has been truly said that every case must be governed by its own circumstances, and it is from those circumstances he founded his opinion in this Case — these are to be found in the evidence before the Court, from which it appeared, that the Defendant is a member of our — Provincial parliament, which placed the Defendant in a highly respectable situation in life, and entitled him to rank with the first in our Society — that his wife was the daughter of the late the Justice Foucher, and as such, of equal rank with that of her husband, and that she visited and was visited by persons of the first respectability — that the articles of dress mentioned in the plaintiffs account, were such as the wife of the Defendant usually wore, and such as were suited to her condition in life — that she had on former occasions purchased similar articles from other milliners or — Mantua Makers, for which the husband had paid — that some of the articles of dress in question had been worn by the wife, in the view and to the knowledge of her husband, and particularly on an occasion of her going to an entertainment given by the Governor of this — Province when in Montreal — That such facts were in his opinion sufficient to condemn the Defendant. That he could not see upon what principle the Court could reject a part of the plaintiffs account, and admit a part of it, for if the Defendant was liable for any part, he was liable for the whole, nor did he understand how the Court ~~could~~ upon the bare inspection of that account, of its own knowledge, and without any evidence to guide it, could select and put aside — what was extravagant, and not suited to the use and wear of the Defendants wife — if all the articles of dress charged in that account were thus rejected, it was putting the Defendants wife here on the same footing with the wife of an artisan or Common labourer

for

for the mere necessaries of life — it is saying, that not only the wife of the defendant, but no married woman can have an article of dress made up by a mantua maker without the order or consent of her husband contrary to the very policy of the law which confides this kind of family arrangement to the wife alone, and is destroying what all the authorities cited recognize, the rank and condition of parties in Society.

Whatever care may have been taken to conceal from the defendant the different articles in question when brought to his house by his servants, yet we cannot presume that these articles could have remained or have been used in that house for four months or even a shorter space of time without his knowledge — The Defendt must have known, that the wants of his, as of every family, were frequent and often daily, and that during these several months they must have been supplied from some quarter with articles such as specified in this account, and although he appears to have made no enquiry, nor to have furnished any supplies himself, yet his inattention in this respect will be no excuse, but must on the Contrary be taken against him, as a tacit acquiescence in the management and provision made by his wife — and besides, as every master of a family has the controul and management of his own household, and must be presumed, as he has the right, to know and be informed of whatever regards that management within his domestic Circle, and if he disapproves of any part of it to check it, if he is indifferent or inattentive in this respect, his wife is certainly the person who ought to assume this management, as she appears to have done occasionally in the present case — He was therefore of opinion that the Plaintiffs ought to recover agt the

Defendt

Defendant to the extent of the four months credit originally given by them to the Defendants wife, but nothing beyond this, as the default of payment at the expiration of that period, would have required more precaution on the part of the plaintiffs than they appear to have used, before renewing that credit.

No. 2122.

Hart
v.
Mc. Ketchie

This was an ordinary action of assumpsit for the use and occupation by the defendant of a certain farm owned by the plaintiff in order to recover a quantum meruit, for such use and occupation; the English form of a declaration in such a case has been adopted by the plaintiff, by which he alledges the defendants use and occupation by his the plaintiff's suffrance and permission, and further alledges an undertaking on the part of the defendant to pay to the plaintiff the value of such use and occupation. The action is founded upon an implied assumpsit, in the absence of any express or written agreement, and this species of action is equally authorised and supported upon the principles of our own law as that of England being distinguished by the French Authors under the term of Convention presumée, of which description the subject of the present action is expressly stated to be, and wherein from the bare fact of possession the plaintiff is entitled to alledge an undertaking of the Defendant to pay, and therefore asks judgment for what may be deemed a fair rent for the land so used and possessed.

The defence to the action was, that the Defendt merely had the care of the land until a tenant or purchaser of it could be found, and this at the request of the plaintiff, and for his security and accommodation.

Here

Here therefore the plaintiff proceeds upon an implied assumpsit, and relies upon the proof of his case by verbal testimony of the fact of possession to entitle him to his claim for rent from the defendant, on the presumption of law, that he who occupies and enjoys the property of another is bound, or has tacitly consented to pay the yearly value or rent thereof to the proprietor, as no one can be permitted to profit at the expence or detriment of another; but this first presumption may be rebutted, and therefore in the present case, the defendant has adduced verbal testimony, by which he has proved that he possessed the land as the agent and not as the tenant of the plaintiff;— to this verbal testimony the plaintiff has objected as inadmissible, and containing proof of a Convention above 100^{ff}— and therefore prohibited by the Ordinances, and it is upon the validity of this objection that the result of this Case must depend.— Now it would certainly be strange and manifestly unjust if the Defendt in such a Case could not be permitted to shew what the nature of his possession was, by the same species of evidence to which the pltff has resorted in order to establish his demand for rent, particularly in a case wherein he himself has not taken the precaution of having a written Contract, and where he seeks to avail himself of his own laches and want of precaution to the detriment of the Defendant— Verbal testimony, it is true, cannot be admitted to contradict a written agreement, or to establish a Convention above 100^{ff}— but may certainly and with justice be

allowed

allowed to counteract and rebut other verbal testimony, for otherwise, the advantage would be altogether on one side — besides the allegation and proof on the part of the pltff of the fact of the defendant's possession, is of itself a commencement de preuve, sufficient to entitle the defendant, even under the Ordinances invoked to prove by verbal testimony the nature and cause of that possession — it would be manifestly unjust to permit the plaintiff to prove the possession by verbal testimony and not to allow the Defendant by the same species of testimony to prove the circumstances attending that possession to discharge a liability founded on a bare presumption arising from the fact of that possession — It is not however intended by the present Judgment to authorise a defendant to prove a specific convention, such as that the pltff had leased the premises for a sum less than what might be claimed as the value of the land under an action such as the present, but in that case it would not be the nature of the possession but the quantum of the rent to be recovered depending upon the express convention of the parties, and upon the acknowledged or undenied fact, that the defendt was the tenant of the pltff and consequently bound to pay rent — The testimony so adduced by the defendant being therefore regular & admissible under all the circumstances of the present case, and it appearing thereby that the defendant occupied the land as the agent of the plaintiff, and for the purpose of taking care thereof at the solicitation of the pltff — this action was therefore dismissed with Costs. —

N

Wednesday 20th April. 1831.

No 1042.

Bullis. vs Douglass

This was an action petitoire to recover from the defendant lot of land or farm possessed by him. To this action the defendant pleaded title in himself by virtue of a sale and adjudication made to him by the Sheriff, and further that he had made great and necessary improvements on the land which ought to be reimbursed to him. The Defendt not having justified his title to the satisfaction of the Court, but it appearing that he was a possessor in good faith and that he had made many improvements on the land during that possession, the Court by its Interlocutory order of the 18 June 1830 directed as follows —

The Court having heard the parties by their counsel, examined the proceedings and evidence adduced and deliberated thereon, it is considered, that the said James Bullis the plaintiff, is the true and lawful owner and proprietor of the lot of land in question (describing the lot) and it is therefore adjudged, that the said Robert Douglass the Defendt do quit, abandon, and deliver up to the said James Bullis the aforesaid lot of land and its appurtenances. And inasmuchas it appears that the said Robert Douglass entered upon and held and possessed the said lot of land in good faith, and with the belief that he had acquired a right and title in and to the same, and that since and during his said possession he hath made sundry useful and necessary improvements in and upon the said lot of land, for which he is now entitled to be paid

and

and reimbursed by the said James Bullis — It is therefore ordered, that the execution of the present Judgt be staid until the said improvements shall have been ascertained, estimated, and paid by the said James Bullis to the said Robert Douglass, and it is thereupon adjudged, that by experts to be named by the said parties, and by the Court on their default, the said lot of land and appurtenances shall be viewed and examined, and the value of all and every the said improvements so made in and upon the same by the said Robert Douglass, be settled and ascertained, as also the annual value of the issues and profits of the said lot of land since the month of December 1811 when the said Robert Douglass entered upon and took possession of the same, all necessary expences deducted — And further that the Experts should proceed after due notice to the parties, and to name a third expert in case of difference in opinion and report to the Court on or before the first day of October then next. —

The report made by the Experts not having sufficiently determined the objects submitted to them by the foregoing Interlocutor, the Court by a Subsequent Interlocutor of the 18th February 1831, directed as follows — That the said Experts do estimate the improvements made on the lot of land in question by the said Robert Douglass, that is to say, the encreased value of the said lot of land at the time of the institution of the present action in September 1827, by means of the labor, industry and expenditure of the said Defendant made and laid out on the said lot of land, over and beyond what the value thereof was in the year 1811, when the said Defendant took possession thereof, or what would have been the value of the said lot of land at the present day, had no improvements been made thereon by the said Defendant —

also —

also the annual value, during the said period of the produce and profits of the said lot of land, had and received by the said Defendant, all expences deducted — and further that the said experts do report the amount and value of the said produce and profits, under the like — deduction of expences, since the month of September 1827 up to this day. —

In compliance with this Interlocutory the Experts made the following report —

1st The improvements made on the lot of land in question by the said Robert Douglass, that is to say, the encreased value of the said lot of land at the time of the institution of the present action in September 1827, by means of the labor, industry and expenditure of the said Defendant made and laid out on the said lot of land, and also from the said month of September 1827 to the present day, amounts to £295. 5. 4½ the amount of the said encreased value would therefore be £140. making a difference of £155. 5. 4½

2d That the lot of land at the present day, had no improvements been made thereon by the Defendant is worth one hundred pounds

3d The annual value of the produce and profits of the said lot of land during the said period has and received by the said Defendant, all expences deducted, is worth £9. 3. 1½. —

For the plaintiff it was contended, that the natural encrease of the land being one hundred pounds, and the present increased value £140—, it would leave a balance in favor of the defendant on that point of forty pounds; but that the defendant is accountable to the plaintiff for the rents issues and profits of the land at the rate of £9. 3. 1½ p an. from September 1811. to

Sept.

September 1827, which forms a sum of £134.8, from which is to be deducted the above sum of forty pounds, leaving a balance in favor of the plaintiff of £94.8, and for which he ought to have Judgment.—

For the Defendt it was contended, That the improved value of the land as it now stands, over and beyond what it would have been worth without improvements is £140.— which was much below what those improvements had cost.— That it was a principle of law that the interest on the improvements must be allowed and compensated with the fruits and revenues of the land.— In this Case the revenue of the land according to the evidence in the Cause, was only three pounds per annum before the improvements made thereon by the Defendant — but that the experts had not distinguished in this respect, and had allowed the annual value growing out of the improvements so made, and had thereby encreased it to a sum of £9.3.1½ which is not correct.— That according to the true estimate to be formed on the report of the Experts, there will be a large balance due to the Defendant.—

By the Court— The report of the Experts is not so explicit and satisfactory in all respects as it might have been, but in adopting the objects it has determined, we are enabled to form a Judgment on the Case — It appears sufficiently evident, that the present improved state of the land by the industry & expenditure of the Defendant, after all deductions made, has been estimated and ascertained to be £140.— and the annual produce or rent to be £9.3.1½ but the Experts have not entered into the consideration whether the land was worth this sum of annual rent at the time the Defendant took possession of it, and we are enabled to see by the evidence in the Cause, that the annual

rent

sent on the contrary could not at that time exceed three pounds; but in their estimation the Experts appear to have thought fit to allow this rent during the whole period of the defendant's possession — according to the same principle, although it may be readily admitted, that the improvements made on the land by the defendant could not be the work of a day, but were made gradually; and that even the first year they did not amount to the sum of £140, yet we have nothing certain or determined on this point — Now it is a principle of law, admitted on all hands, that the interest of the value of the improvements, should be compensated with the fruits and revenues of the land as far as they will extend, the only difficulty here is how to apply that principle, and we consider it to be just and equitable, that if the defendant is bound to pay the annual rent as estimated by the Experts upon the land as improved by the defendant, during the whole period of his possession, on the same principle the Defendant should have a similar benefit on those improvements by allowing him the interest thereon during the same period, to be compensated with the said annual rent — According to this opinion the Statement will stand thus —

Potts. Prop.s No. 343. 344. 349.

Improvements made by Defendant —	£140 " — " —
Interest from Sept 1811 to Sept 1827. 16 yrs —	134 " 8 " —
	£274 " 8 " —
To be deducted —	
The annual rent of £9 " 3 " 1/2 dur3 same period	146 " 10
	£127 " 18

thus leaving a balance to be paid by the Plaintiff to the Defendant of £127 " 18, which the Court adjudged to him; reserving however to the plaintiff his right

to

to the rents accrued since Septr. 1827 — As to the Cens et rentes paid by the defendant, to the Seignior, he had no claim for them, being a burthen attached to that possession, and as to the Lods et Ventes paid on his supposed purchase of the land, his only recourse was against the Seignior. —

— —

Simard. —
vs.
Lynch. —
&
Gillespie & Co
Opp^t. —

In this case monies had been levied and returned by the Sheriff on the writ of execution sued out in this Cause, to the payment of which an opposition was made afinde conserver by Messrs. Gillespie Moffat & Co claiming a balance due to them on a notarial obligation made to them by the defendant bearing interest. —

The question now agitated was, whether the payments heretofore made on the obligation, ought to be applied first to the payment of the interest or of the Capital. — A majority of the Court held that the payments so made should be applied first to the discharge of the Capital and afterwards of the interest — referring to Case decided in April Term 1830 — of Dunn v. Campbell & Campbell Opp^t. — Mr Justice Rolland held on the contrary, that where interest accrued by the stipulation of the parties, it was to be first satisfied — referring to the authorities of law where interest was allowed to be stipulated, which he considered to apply here, as the law had permitted such stipulation on an Obligation. —

June Term 1834.

Friday 17th June.—

No 1183.—

Arnoldi.— }
Rolland.— }

This was an action instituted by the Plff as a Physician, for medical attendances & advice and for sundry medicines furnished and provided by the Plaintiff for the Defendt and his family — Upon a plea of tender for a part and non assumpsit, the parties had adduced their evidence and the Cause was heard on the merits. The Court finding that there was a difference of opinion among the witnesses examined as to the quantum to be allowed to the plaintiff for his services, gave an — Interlocutory Judgment by which they directed that the claim and demand of the plaintiff should be examined by experts, to be named by the parties who should report their opinion thereon to the Court — The Defendant in consequence named as his Expert Joseph Papineau of Montreal, public notary, to which nomination the plaintiff objected and moved that the Defendant should be held to name another person as expert in lieu and place of Mr Papineau. —

Smith for the plaintiff in support of his motion stated, that experts must be persons skilled in the matters submitted to their opinion, as otherwise the Court could not be rightly informed nor do Justice between the parties, cited — Dic. Droit. Vo Expert — Repse Vo Expert. pp. 220. & 222 — where an advocate was appointed to act in a matter in which he had no competent knowledge

and

and the appointment was set aside.—

Mondelet for the Defendant, contended that he had a right to name a bourgeois in this Case as his expert, as such nomination is favorably received, in order to avoid that suspicion of partiality which must arise by one professional man judging upon the claim of another of the same profession refus to Ordre of 1667. tit. 21. art. 11.— Dic. Droit. vo Expert.— 1 Pigeau 306. D. Denizt. Vo Expert. p. 380— Bornier on 19th art. of tit. 21— Repre Vo Expert cited by Pluff — and Actes de notoriété pp. 125.—

The Court held, that as a general principle every person named as an expert ought to be competent to judge in the matters referred — That a great latitude had been given in cases where artisans were concerned; as appears by the 11th art. of the 21st Title of the Ordre of 1667, from that kind of jealousy which the law entertains against one tradesman adjudging upon the claim of another— but in cases of that kind there was something tangible and visible to be examined, in which every bourgeois was supposed to be more or less conversant — but the Case before the Court was different, as it was to be there to be ascertained what was a competent reward to the man of Science for his skill, his time and his trouble, as well as for the mere objects of medicine furnished; in such a case, the bourgeois could not be considered to be a competent Judge without a knowledge of that science in regard of which he must give an opinion of what was due to it by the Community, when duly exercised — Here professional men alone could be the Competent judges, and as far as we have been able to find any decisions on the point, this opinion seems to be confirmed — The Plaintiffs motion was granted —

see. 2. Raviot sur Perrier. quest. 200. p. 62.—
Arrets de Jouet. ch. 4. p. 481. —

Saturday 18th June 1834.-

No. 461.

Donegani & al
vs
Donegani -

Action en petition d'heredité -

The facts as proved in this case appeared to be, that about the year 1794, the late John Donegani, the elder, an Italian by birth came to this Country with his family consisting of his wife Marie Galla or Gallie, his three sons, Jean, Daniel, and Joseph Donegani, and his daughter Therese Donegani, all of whom were also Italians by birth - That the said late Jean Donegani carried on business in this Country for some years, and in the year 1796, he purchased some real property in Montreal, which he improved by building thereon - That in the year 1797, the said Therese Donegani intermarried with one Joseph Donegani of Montreal tavernkeeper, by which marriage was issue the plaintiffs in this Cause. In July 1800, the said late Jean Donegani made his last will and testament, and thereby disposed of his property among his said Children, leaving to the said Therese Donegani, the mother of the plaintiffs the sum of £500 - and the rest of his property to his three sons before named. - About the year 1802, the said late Jean Donegani, having appointed as his agent and Attorney his son Jean to manage his property and affairs in this Country, returned to Italy with his wife, where he appears to have purchased some property, and where both he and his wife died some years afterwards. -

The real estate now in question appears to have been leased by the said Jean Donegani to his brothers, the said Joseph and Daniel Donegani in 1805, and Daniel Donegani having soon afterwards left the Country,

the

the property remained in the hands of the said Joseph Donegani the Defendant, who now holds and possesses the same.—

The present action is brought by Jean Antoine, Joseph and William Benjamin Donegani, children of the marriage between the late Joseph and Therese Donegani, grand children of the said late Jean Donegani, stating themselves to be his only heirs and legal representatives, and claiming that the Defend.t who is now in possession of the real estate left by the said late Jean Donegani, be adjudged and condemned to restore and deliver up to them the said real estate, with the fruits, issues and profits thereof, with all the monies by him received belonging to the Succession of the said late Jean Donegani and his wife, with damages interest and Costs —

To this action the Defendant pleaded, first, the general issue, and 2.ly an exception, that the said late Jean Donegani, made his last will and testament, as before mentioned, with a Codicil thereto, by which he bequeathed to the said Therese Donegani, his daughter, the sum of £500.— and left all his other property to his other children the Defendant and his brothers — That if the plaintiffs are entitled to claim as heirs of their mother, they can have or receive only the said sum of five hundred pounds out of the estate left by the said late Jean Donegani, which sum of money the Defendant has always been ready and willing to pay — and therefore concluding that the action be dismissed —

The plaintiffs by their Repliques — join issue on the first plea, and in answer to the matters pleaded by the exception, they state, that the late Jean Donegani and his wife were aliens and foreigners, and therefore he could not by last will and testament devise or dispose of his said property and estate, and that the plaintiffs as natural born Subjects are his only legitimate heirs in Canada.—

To

To this Repliques there is a reponse filed by the defend^r by which he states, that the plaintiffs can have no interest to alledge the incapacity of the said late Jean Donegani to make a will, by reason of his being an alien, as this must destroy their own right of action, for if the said late Jean Donegani was an alien, he could neither legally acquire or possess any real estate, nor dispose thereof, nor could the plaintiffs claim any thing in his succession, more especially as their mother also was an Alien and born in a foreign Country —

To this Reponse — there is another repliques filed by the Plaintiffs, whereby it is alledged, that the said late Jean Donegani, although a foreigner, could acquire and hold real Estate in this Country, but could not devise it by will — and that the plaintiffs, as natural born Subjects are entitled to claim the Succession of the said late Jean Donegani their grandfather and all the property of which he was possessed at the time of his decease. —

From this statement in the pleadings it becomes necessary to ascertain. 1st Whether the facts stated in the declaration &c^a — have been proved, that is, That the late Jean Donegani was an alien — that he acquired real estate in this Country — that he died possessed of these real Estates — That he devised and disposed thereof by last will and testament — and lastly, that the plaintiffs are his grand Children, and natural born subjects of the King. — The next enquiry will be, whether the said late Jean Donegani, as an alien, could purchase and hold real property in Canada? And if he could — whether he could dispose thereof by last will and testament? — And if he could not — whether the plaintiffs, as his grand Children, are entitled to claim his Succession. —

The Court

The Court considered the proof to be sufficient. — First as to the late Jean Donezani being an alien — It may often be very difficult, nay impossible, to prove the birth of a stranger in a foreign Country — nor is this always necessary, as presumptions may often be sufficiently strong to establish the fact — this kind of proof is admitted where the Crown is a party — And although stronger proof may be required in the present Case where relations are claiming, than if the Crown were the party, yet even in this Case the proof was sufficient. — It certainly must be presumed, that the Defendant must have had some knowledge of the place of his fathers birth, as well as of his own, and it was to be expected, that when interrogated as to this fact, he could, and ought to have answered satisfactorily or have given some good reason for his not being able to do so. — Yet in his answer to the 16th Interrogatory proposed to him by the plaintiffs on this point, he appears to avoid the question, by saying — that he — could not tell, and on being ordered to answer over, as to the best of his knowledge and belief, he refuses to — appear or answer, which must necessarily constitute a proof against him, by the admission of the fact — specified in that Interrogatory — This refusal to answer, so far admits the fact in the eye of the law as to constitute a commencement de preuve against the Defendant, and if any thing further were required it is very fully made out by the testimony adduced in the Cause, as well as by the several documents which have been given in evidence before the Court — And even without this commencement de preuve, the — circumstances are sufficiently strong to constitute a proof in favor of the plaintiffs, for it appears, that the late

2. Laplanche, p. 15, note (a) —

late Jean Donegani came to this Country as a Stranger, that he was always considered and treated as a foreigner and an Italian, and that he himself admitted and acknowledged that he was so — he thereby held out admitted what his état and condition was in the Society in which he lived — These facts are proved by witnesses — and as no title was set up to the contrary, nor produced on the part of Donegani to shew that he was a natural born Subject, or claiming any état or condition different from what was so proved, it would seem that verbal testimony may be admitted as sufficient in such a Case, particularly when nothing is adduced to shake or contradict it. —

N: Denzl. Vo Etat. No 15.

That the said late Jean Donegani acquired real property in this City, of which he died seized, and which is now possessed by the Defendant, and that he made a will and a Codicil, as stated by the Defend are facts too well ascertained, to require comment. —

That the plaintiffs are the grand children of the said late Jean Donegani, is also sufficiently proved by the following circumstances —

1st By the Defendants answers to the faits & articles proposed to him by the plaintiffs — 2d By the protest made by the Defendant and Daniel Donegani against Joseph Donegani the father of the plaintiffs, on the first of August 1811, in which the relationship of all the parties is stated, and by which also it appears that the said late Jean Donegani died at Moltrazio in Italy on the 16th March 1809 — 3th By the extract from the parish Registers of Montreal, of the celebration of the marriage between the said Joseph Donegani and the said Therese Donegani, at which the said late Jean Donegani was present, and consenting on the part of the said Therese Donegani his daughter — and 4th

by

by the extraits baptistaires of the plaintiffs from the said parish registers of Montreal —

The death of the father and mother of the plaintiffs is also ascertained by their extraits mortuaires, from the same parish registers. —

By this evidence all the material facts in the Cause appear to be sufficiently proved —

The next question to be determined is, whether the said late Jean Donegani, as being an alien, could acquire and hold real property in this Province — much of the case depends upon this ~~case~~ point, for if the law of England is to govern, as being the public law of the Empire applicable to the case, it is evident that the late Jean Donegani could neither acquire nor hold any real estate in this Province, nor could the plaintiffs — maintain their present claim; if on the contrary the law of Canada is to prevail, the case will be different, as by that law an alien may acquire and hold real Estate and may sell and dispose of it by acte inter vivos, but cannot devise it by will. —

The Court is of opinion, that the rule as adopted in England in regard of Aliens does not hold in this Colony, where the Common law of England does not obtain — although it must be admitted that those fundamental rights and principles on which the Kings authority rests, and which are necessary to maintain it, extend alike to all His Majestys — Colonies, as principles essential for the maintainance of the Constitution and of the Kingly office, and must be recognised alike in all parts of His Majestys — dominions, yet that right of prerogative which grants to the Crown the escheat of Lands purchased or held by an alien, cannot be considered to be of this description

and

and therefore subject to be governed on different principles.— If this prerogative is to be viewed as a system of State policy, it is little applicable to a Colonial Government, and not admissible here, because the British Nation has granted a Constitution and system of laws for the government of this Colony, and by these laws provision is made for regulating the rights as well as the disabilities of aliens— Every alien coming to this Colony must look to the existing laws in it for his guidance and protection, and it would be inconsistent with the interest as well as with the duty of Government, to set up a claim contrary to the established laws of the Country— nor do we find that such an attempt was ever made in regard of aliens holding property in Canada— it has on the contrary been the policy of Government to encourage emigration, and to facilitate the settlement of the Country by Strangers, wisely considering, that the greater the interest of the individual in the Soil, the more he must feel disposed to support that government that secured it to him,— and if due allegiance be acknowledged to the Crown it has never enquired whether the Proprietor of the estate was a natural born subject or an alien. The law as respects aliens, even in its mildest administration is harsh and severe, as it appears inconsistent with natural Justice, that he who by his industry and exertion has acquired property of any kind, should not also be allowed to dispose of it in such way as he pleases.—

Where the Common law of England prevails, it will no doubt carry with it this right of the Crown to exclude aliens from holding real property, but this is peculiar to that law, and in so far only as this law obtains

obtains, can this prerogative be considered to extend for all prerogative, although intended for the benefit of the subject, must be supported by law — and it is held that the various prerogatives and rights of the Sovereign, which are merely local to England (that is growing out of the policy of the law of England) which do not fundamentally sustain the existence of the Crown, or form the pillars on which it is supported are not, prima facie, extensible to the Colonies or other British dominions which possess a local Jurisprudence distinct from that prevalent in, and peculiar to England. Now it cannot be said that the right of escheat of lands held by aliens, can be considered as a pillar of the Crown, or as one of its fundamental supports — it is at most but an uncertain and precarious right accruing from a casual circumstance, and such as must be ranked among the minor rights of the Crown like the case of Lods & Ventes, quints, and other casualties which must be regulated and governed by the established laws of the Colony where it occurs — To the laws of this Colony therefore we must look for the decision of the present question, according to which the late Jean Doregani, although an alien, was entitled to purchase and hold the lots of land in question, although he could not devise or dispose thereof by last will and testament, and we must therefore consider his last will and testament and the Codicil made thereto, as wholly null and void — a principle, according to the law of Canada, too clear to require any authorities to be cited in support of it, as is the right of the plaintiffs as the grandchildren and descendants in the ~~direct~~ direct line from the said Jean Doregani to claim the property in question. — It may however be supposed, that the plaintiffs ought to have no better right than their mother, who was also an alien, and in whose right they

Chitty on Prerog. 26. —

they may be considered to claim; but this is not the case, the plaintiffs claim in their own right, as natural born subjects, lineally descended from their Grandfather, and the law does not take into account the incapacity of their mother to inherit — a principle supported by many authorities — see Louet. A. Som. 16. No. 5. —

Coquille on 24. art. Cout. Nw. ch. 34. Des Successions.
Loisel. liv. 1. tit. 1. Des Personnes. arts. 52. & 54. —
2. Poullain du Parc. Principes du Droit Franc. liv. 1. ch. 15. — De l'Aubain. No. 10. pp. 20. 21. —
2 Laplanche. Tr. du Domc. p. 128. & 161. —
arrets du Papon. liv. 5. — 4e arret. p. 243. —

Judgment was therefore entered up for the Plaintiffs

No. 2400.

Ferrie & al. — vs. Maitland & al. & Gates & al. opt.

In this case the plaintiffs had seized and taken in execution, certain goods and chattels in the house and possession of Geo: Auldjo one of the Defendants in the Cause, to which seizure an opposition à fin d'annuller was made by Horatio Gates and others, who had been appointed Trustees on behalf of the Creditors of the Defendants who were insolvent. — This opposition was founded on a certain deed of assignment made by the Defendant George Auldjo to the said Trustees+, as a supplementary act to the deed of Assignment made by all the said Defendts to the said Opposants as Trustees for the benefit and behoof of their said Creditors, and to which a majority of the said Creditors were parties and bearing date 29th July 1826, and inasmuch as by this last deed of assignment the household furniture and other effects belonging to George Garden and the said George Auldjo had been given up to them by the said Creditors, the object of the aforesaid supplementary assignment was to transfer to the said

+ dated 6th March 1827.

Trustees

Trustees the aforesaid household furniture and effects in order thereby that all the Creditors should be put on the same footing, and to prevent any preference to any of the said Creditors who had refused to accede to the original deed of assignment.—

To this opposition no plea was filed by the Plff and the parties were now heard thereon—the Plff however contending that the said opposition should be dismissed—

The Court held, that as the transfer and assignmt here made by the Defendant George Auldjo had not been carried into effect in such way as bind the rights of third persons not parties to that, or to the Original deed of Assignment, the household furniture and effects in question having always remained in the possession of the assignor, and thereby liable to seizure, and without entering upon the question as to the legal effect of such assignments, even when fully executed—Considered that the Opposition could not be maintained.—

No. 1204.

Turgeon. v. Paquet.—

On an action en declaration d'hypotheque.

This action was founded on an Obligation executed by Jean Bte Paquet the elder before two public Notaries, en brevet, bearing date 31 March 1824.—

The Defendant pleaded for exception, that the act in question, being executed en brevet did not carry a Mortgage on the property now held by him, cited case Belair vs. Gaudreau & ux: Pyke's Rep.—2 Prost du Royer Vo Acte. p. 64. 5. Poth. 452.—Repse Vo Hypque 627.—

The

The plaintiff contended, that the act in question was an Acte autentique, and as such carried a mortgage on the property of the debtor — compared it to a procuration en brevit which carried a mortgage on the property of the procureur who acted upon it — cites. Dic. Droit. Vo Notaire — Repre Vo Acte. 141 — N. Denize. Vo Brevet 772. and case decided in this Court in June Term 1825. Leblanc. & Lesage & Monarque & al. Oppts —

The Court were of opinion, that as the act or obligation in question had been executed before two Notaries and therefore an Acte autentique, it carried a hypotheque on the property of the Debtor — That as the controle was not in use in this Country, the want of it could in no wise affect the validity of any legal instrument — referred to the Case cited of Leblanc. & Lesage & Monarque & oppts and the authorities there cited — The Defendants plea of exception was therefore dismissed —

C. S. Delorme
N. B. Doucet & C. E. Panet oppt

On Opposition afin de charge of Catharine Eulalie Panet. —

In this case it appeared that the Defendant Nicolas Benjamin Doucet was indebted to Mr Louis Guy in a sum of £275 — for the balance due on the sale of a house made by him to Mr Doucet, which sum of money with the interest to accrue thereon, the said Louis Guy by a notarial act bearing date the 15th Sept — 1824, transferred and made over to the Opposant the said sum of money for a valuable consideration — That afterwards by deed executed the 26th May 1824, the said Defendant for and in consideration of the sum of two hundred and twenty five pounds, the balance then remaining due and in arrear of the aforesaid principal

sum

sum of money, did create and constitute in favor of the said Catherine Eulalie Panet, and in favor of Catherine Pommereau, widow of the late Merii Panet, now wife of Paul Hervieux, a certain life rent or annuity of twenty pounds five shillings to be paid to them quarterly during their life time, which said act was accepted by the said C. E. Panet as well for herself as for and on behalf of the said Catherine Pomereau - It being stipulated in and by the said act, that in consideration of the said annuity the said Defendant should be exonerated and discharged from the payment of the aforesaid principal sum of two hundred and twenty five pounds - It being also stipulated on the part of the said C. E. Panet that as the aforsaid sum of £225- had belonged to her, that she had made a gift and donation of the said annuity to the said Catherine Pomereau, the public notaries executing the said act, accepting on her behalf in the meantime and until a more formal acceptation could be made by the said Cath. Pomereau - That the said annuity should be paid in the first place to the said C. E. Panet during her life time, and afterwards to the said Catherine Pommereau in case she survived, and that after the decease of the said C. E. Panet and Catherine Pomereau, the said annuity should become extinct and be determined. The said Opposant therefore claiming and demanding that the house and lot of ground seized and taken in execution belonging to the Defendant and upon the right and priviledge of the Opposant attaches, be sold subject to the payment of the aforesaid annuity in favor as well of the said Opposant as of the said Catherine Pomereau when her right thereto shall accrue. -

The

The plaintiff by his written declaration filed in the cause stated by way of answer to the said Opposition that he neither admitted nor contested the same, but submitted it to the Consideration of the Court; he however suggested a doubt as to the opposition being founded in regard of the continuation of the annuity in favor of Catherine Pomereau, as she was no party to the Acte de Constitution, nor had she accepted it — and it might also be a consideration how far the Opposant could stipulate in the favor or on behalf of a third person. — Poth. obl. N° 55. —

The Court was of opinion, that as the Opposant here stood in the right of the bailleur de fond, she had a right to her opposition afin de charge upon the property in question to secure the annuity she had stipulated to be paid to her in lieu of the purchase money — That the parties interested might have been entitled even according to the stipulations in the acte de Constitution, to have reimburses the principal sum of money, so as to be exonerated from the payment of the annuity in future, but this was not offered, nor was the claim of the Opposant in respect of this annuity in anywise contested, and the Court did not conceive they were bound to raise objections of which the parties had not chosen to avail themselves — That in regard of the stipulation for the payment of the annuity to Catherine Pomereau, the Court thought that the opposant had a right to attach such conditions to the alienation of her property as she saw fit, and that it is equally legal to stipulate this annuity in favor of C. Pomereau, as in favor of herself, and as the Contract was entire that the Opposant was entitled to claim the execution of the whole —

No 556.

M. Hart. v Savage.

Action of debt on deed of Sale.—

The Defendant pleaded first that he was not indebted — and secondly — That immediately after the sale to him by the plaintiff of the aforesaid lot of land, he the defendant went to take possession thereof but found the same in the possession of one Robert Jones who claimed the same as having purchased it from the said plaintiff, and refused to deliver up the possession thereof to the said Defendant, that thereupon the Defdt requested of the said Plaintiff to put him in possession of the said lot of land, which he refused to do, and therefore Defendant is not bound to pay for the said lot of land until he shall have obtained the possession thereof —

The Replication joined issue on the plea, denying the facts secondly stated and also their sufficiency in law to preclude Plaintiff from maintaining his S. action.

It appeared in evidence that at the time of the sale of the lot of land in question, one Robert Jones was in the possession thereof, but without the knowledge or consent of the plaintiff — That the Defendant had obtained the title Deeds of the lot from the plaintiff, but had taken no steps to obtain the possession thereof, but merely acquainted the plaintiff that Robert Jones held that possession. —

Driscoll for the Defendant contended that the Plff was bound to put the Defendant into the actual possession of the lot of land, and that until this was effected the Sale was not complete. Potts. Vente Nos 42 & 51. —

Hart for Plff — Delivery was not necessary, as the Defendt had the means to obtain the possession if he had thought fit to exercise it —

The Court held that delivery was necessary to complete the Contract of Sale, but it was not necessary

that

that the plaintiff should go upon the lot of land with the Defendant put him into the manual possession of it - such a principle if true, would be a bar to every Sale where the parties were not in a situation to communicate with the premises — that there are different kinds of tradition or delivery of a fictitious kind, which from the necessity of the case have been admitted and received as sufficient and having in law the effect to complete the Contract of Sale, such as delivery of titles, of Keys, consenting by the deed that the vendee shall enter upon and take possession and the Vendor thereupon divesting himself of all right of possession in his favor, such acts are considered sufficient to vest the vendee with all the rights of the Vendor, and enables him to use those rights as effectually as the Vendor could have done — Here the Defendant had a right to enter upon and take possession of the land sold, but he never appears to have attempted to do so, nor to have demanded that possession from the person who is stated to have held it, and the presumption is, that had he done so the land would have been given up to him, as it did not appear that Sonis held it under any right or consent from the Plaintiff, but had it been refused, the Defend^{t}. held all the titles as well as rights of the Plaintiff and could have exercised them against any intruder or person not having a title thereto, and in any case the Plaintiff might have been called upon to warrant what he had sold —

Judg^{t} for Plff —

Monday 20th June, 1831.

No. 1209.
McDonell vs Cleghorn.

Action of assumpsit on a promissory note.

The declaration stated, that the Defendant on the sixth day of July 1821, made his certain promissory note, or acknowledgment commonly called a promissory note, and thereby for value received, promised to pay to the said plaintiff on the first day of January then next, vizt. 1822, five pounds Currency, and on the first day of January each succeeding year, while the said Catherine McDonell, the plaintiff, should remain unmarried, he the said defendant promised to pay to her or to her order, seven pounds ten shillings Currency, and then and there delivered the said promissory note to the said plaintiff — by means whereof the Defendt. became liable to pay &c. And the said plaintiff saith, that since the making of the said promissory note she hath continued to be and still is unmarried, and that since the making of the said promissory note, vizt. on the first day of January 1831, the sum of £72. 10, became and was, and is now due and owing by the said Defendant to the said plaintiff upon the said promissory note — and which Defendt. refuses to pay — Wherefore &c.

The Defendant pleaded a plea of defense au fond en droit, and contended that the plaintiff could not maintain his action —

The court were of opinion that the action could not be maintained, as the Instrument stated in the declaration could not be considered as a promissory note, as it was an obligation to pay upon an uncertain event, and besides it was in the nature of a Contract on the part of the

Defendt.

Defendant to pay an annuity to the Plaintiff while she remained a single woman, which could not be considered binding as a promissory note - The Court thereupon maintained the Defendants plea and dismissed the action -

Stra. Rep. 1151. Beardsley v. Baldwin
4. Mod. 242 - & Chitty on bills.

No. 1160.

McNider et al
vs
Bank of Montreal. -

Action to compel the Defendants to transfer Stock to the Pltffs as Executors of the last will and testament of the late Alexander McKenzie Esqr. -

The declaration states, that the late Alexr. McKenzie at the time of his decease held as his own property forty shares of Capital Stock in the Bank of Montreal of the value of fifty pounds each - That the said A. McKenzie in and by his last will and testament, bearing date at Montreal the tenth day of February 1830, did among other things, give and bequeath to his Executors and the Survivors and Survivor of them, the Stock held by him in the said Bank of Montreal, being forty shares upon trust for the sole use and benefit of my adopted daughter Nancy Mackenzie, wife of William Cowie now residing at Missisaqué on Lake Huron, directing that all the profits, dividends and interest arising therefrom, should belong and be paid to the said Nancy McKenzie during her life time, and be divided equally among her children after her death, and in case of the death of such child or children, that the said Stock should be held in trust by the said Executors and the Survivor of them for John George McKenzie, his adopted son, in manner as stated in and by the said last will and testament. -

That

That under and by virtue of the provisions in the said last Will and testament, the said plaintiffs in their said Capacity of Executors and fiduciary legatees of the said late A. McKenzie had become seized and possessed of, and entitled to have claim and demand of the Defendants, the said forty shares of Bank Stock, and to assume the gestion management and controul thereof in conformity with the aforesaid provisions of the aforesaid last Will and testament - That the Defendants refuse to deliver over, transfer to, or place under the gestion, management and controul of the said plaintiffs in their said capacities the said forty shares of Bank Stock, or to pay over to the said plaintiffs the sum of £2000 the amount and value of the said Stock - Concluding that the Defendants be adjudged and condemned to deliver over, transfer to, and place under the gestion and management of the said plaintiffs in their capacities aforesaid, the said forty shares of Capital Stock in the said Bank of Montreal, and in default thereof to pay to the plaintiffs the sum of £2500 damages with interest and Costs. -

Plea - That the Defendants do not, and never did pretend to manage or controul, or to prevent the Plffs in their said Capacities from having the gestion, management and control of the said Bank Stock in conformity with the will of the said late Alexander McKenzie, nor is the Corporation of the Bank of Montreal interested in the said Stock and in the disposal thereof, except in so far as to see that the will of the said late Alexander McKenzie be fulfilled, to the end that no damage may result to the said Corporation by any act by it done or to be done in relation to the said Stock. - That the said Corporation according to the right thereto claimed by the said Nancy McKenzie under the said will, hath paid to her the

dividends

dividends and interest of the said forty shares of Bank Stock accrued thereon since the death of the said Alexander McKenzie, submitting to the Court whether the said Will of the said late Alex: McKenzie be or be not a sufficient and legal assignment and transfer of the said forty shares of Bank Stock according to the tenor of the said Will, and whether the said Corporation can legally deliver over, transfer to, and place the said Bank Stock under the gestion management and entire control of the said plaintiffs in their capacities of Executors as aforesaid — And in case any act is required on the part of the said Corporation to be done therein, whether it be any other than to insert in the books of the said Corporation the transfer by the will aforesaid made to the said plaintiffs in their said Capacities upon trust for the sole use and benefit of the said Nancy McKenzie — that is to say, that all the profits, dividends or interest arising or to arise therefrom, shall be the property of and shall be had and received by the said Nancy McKenzie, according to the provisions of the said Will — praying that the Court will render a Judgment in this Cause according to the true and legal interpretation of the said Will and the intentions of the said late Alexander Mackenzie, and that the Defendants may have their Costs awarded to them —

Replication — That the defendants have at all times before the institution of the present action, refused to place the said forty shares of Bank Stock under the control and management of the said plaintiffs in their said capacity but have hitherto retained and still do retain the control gestion and management thereof contrary to law and the express declaration and intentions of the said late Alexander McKinzie — That the said Defendants are not authorised or warranted in any manner to interfere with the said plaintiffs in the execution of

the

the trusts reposed in them by the said will, according to the provisions whereof the plaintiffs always have had since the death of the testator, and still are entitled to have the control and management of the said Bank Stock, it being the will of the testator, that the execution of his said will should be confided to the said plaintiffs alone. — That the portion of the dividends of the said Stock which has been paid to the said Nancy McKenzie since the death of the said testator was paid by the consent of the said plffs. and on their acquittance and discharge. —

By the Court — The present action contains no sufficient ground of complaint and is wholly unnecessary, as the plaintiffs as Executors of the last will and testament of the late Alexander McKenzie are vested with all the right and controul over the Bank Stock in question as fully as their testator held it, for the objects contained in the said will, and are thereby authorised to transfer, sell and dispose of that Stock if they shall see fit — To demand that the Stock shall be transferred and stand in their names in the Books of the Bank, would not, if done, give them any greater power or controul over that stock than they already hold by the will — The Defendants might have gratified the wishes of the Plaintiffs in this respect as a matter of ~~matter~~ private arrangement or for their mutual convenience, but there can be no action to compel them to do it — Had the Defendants refused to pay to the plaintiffs the dividends on the said stock or interfered in the management of it, there might have been ground of complaint, but here there is none. — The plea of the Defendants is equally bad, and the pretentions it sets up are unwarranted — they have no right to interfere with the plaintiffs in the execution of the will, nor to enquire in what manner they execute it. The Plaintiffs are alone responsible for this and not the Defendants, — they are however responsible to the Pltffs for the dividends and for all matters touching the said

Stock

Stock, which if paid without the consent of the Plffs will be done by the Defendants in their own wrong. The action therefore must be dismissed but without Costs, as both parties appear in the wrong.—

No 1623.

Mitchel. } This was an action of trespass for cutting
Mandego. } down and carrying away a quantity of cedar and pine trees from the land of the plaintiff.— The plea was general and negative, and the parties proceeded to the adduction of evidence thereon and were finally heard on the merits, when the plaintiff's Counsel moved for the rejection of the testimony of two witnesses examined on the part of the Defendant, by which it was proved, that the cutting and making of a certain quantity of cedar picquets by the Defendant on the plaintiffs land, was done with the express consent of the Plaintiff.— On the motion thus made it has been contended on the part of the plaintiff that no verbal testimony could legally be adduced or received to prove such consent and permission without a commencement de preuve par ecrit, such testimony being prohibited by the French Ordinances — But the Court held that such evidence was admissible in the present case, and that in an action for an alledged trespass or voie de fait, it is competent to a defendant to rebut the verbal testimony in proof of such trespass or voie de fait, by like testimony, and thereby to establish that the act complained of was done with the consent & knowledge of the Plaintiff.— It would be very different however if an action had been brought to enforce such consent

under

under a verbal agreement, in that case the Ordinances would have applied, and no verbal testimony could have been admitted to prove such consent and agreement; but it would be as unjust as illegal to allow a party to complain of and prove by verbal testimony a trespass, to which he has himself given rise, and to invoke the ordinances to prevent his adversary from proving also by verbal testimony that he had consented and agreed to the act of which he so complains — Now the only evidence bearing upon the case agt. the Defendant, is in regard to a quantity of 1000 pickets, which it is admitted were cut by the Defdt. or persons by him employed — as to the pine trees, the evidence clearly establishes, that they were cut by the Pliffts own son who sold and disposed thereof, and the proof of the consent of the pliff to the cutting of the Cedar pickets by the Defendant, completely rebuts any evidence adduced by the pliff in support of his action, which was therefore dismissed. —

No. 219.

Valois. — v. Robertson & ux & Coates. — Opt.

Under an execution at the suit of the plaintiff, the effects of the defendants were seized, and an opposition thereto, afin d'annuller, was made by Coates, a guardian appointed on a former seizure of the same effects under a prior execution issued at the suit of Moses Judah Hays and others against the Defendant, about one year previous to the second seizure now in question. —

The plaintiff moved for the rejection of this opposition

opposition on two grounds – 1st because it contained no election of domicile, and 2d because the Opposant had no interest to make this opposition, as he, as guardian stood discharged by the lapse of time since the former seizure was made under which he had become guardian of the effects seized. –

The Court declined giving any opinion on the first ground, as upon the face of the opposition it could not be maintained – The party making the oppos^{n} has now no legal interest as gardien, in opposing the second seizure – the effects of the Defendant being now seized a second time by the same authority and by the same officer as the first, had the first seizure still prevailed and were now in force, the Sheriff would no doubt have so returned, but at any rate such an opposition could be made only by the first seizing Creditor, and the duty of the gardien would have been in this case to have notified such seizing Creditor, and not to have taken upon himself to urge and claim the nullity of such second seizure, nor could he be otherwise answerable where he is by a competent and legal authority divested of his guardianship and possession of the effects seized: He might have an interest of another description, that of payment of his allowance for his care of the effects, and so far he might claim any reasonable amount which might be due to him, to be paid out of the proceeds of such effects, which the second seizure instead of militating against, would rather facilitate – besides the lapse of one year, without any proceedings on the part of the seizing Creditor, is a waiver of such seizure, and virtually and legally a discharge to the guardian of all responsibility he may in that capacity have

incurred

incurred, and we cannot even admit that the seizing Creditor could thus cover the effects of his debtor from all other Judgment Creditors, how much less then the gardien, when for aught he knows, the seizing Creditor may have been fully paid and satisfied and having no longer any interest in such seizure. — Whatever claim therefore the Oppost may have, he cannot be admitted to urge and avail himself of the principle of Saisie sur Saisie ne vaut, as this can be urged only by the first seizing Crr and who not coming forward on this occasion, it is fair to presume he has abandoned any right he might have acquired under the first seizure, and the more so as the Sheriff, has notwithstanding such first seizure, certified a second without any mention of the first, which he could not correctly have done had such first seizure still existed. —

The Plffs motion was granted, and the opposition dismissed. —

No 2045.

Lane. —
v
Teulon. —

Action by the Plaintiff as indorsee of a promissory note against the defendant as maker. —

The note was made and given by the defendant to one Joseph A. Hagerman Esq. for the sum of £47 — and bore date at Bytown 21st Feby. 1829 — and bore the following indorsement — "Pay the within amount "to Mr James Lane or order for value received. signed. J. A. "Hagerman" —

To

To this action the defendant pleaded that the Pltff had obtained possession of the note unjustly and illegally, and without having given any value or consideration for the same — And further that the said note was made and delivered by the said Defendt to the said Joseph A. Hagerman, as a guarantee or security for the payment by the said defendant of the just dividend on a certain debt due by one John Oliver to one Duncan McLean, whenever a sufficient amount of monies therefor should be collected and realized by the said defendant out of the estate of the said John Oliver, then insolvent, and the said Joseph A Hagerman by a certain acknowledgment or instrument in writing dated 26th Febry 1829, promised and obliged himself, to — deliver the said promissory note to the said Defendant whenever the said Dividend should be so paid by him. And that the said Jos. A. Hagerman without having demanded the said dividend, indorsed and transferred the said note to the said Duncan McLean, without having received any value or consideration for the same, but — fraudulently and illegally with intent to injure the defendt — and that the said Duncan McLean knowing that the said note had been so fraudulently and illegally indorsed and transferred, afterwards delivered the said promissory note to the said pltff as his agent or attorney ad negotia without any value or consideration given therefor by the said pltff, or having acquired any property therein — and lastly, the general issue of non-assumpsit. —
The replication joins issue on the plea. —

The evidence on the part of the plaintiff was merely the proof of the handwriting of the Defendant to the note and of Jos. A. Hagerman the indorser. —

The following instrument was produced and

proved

proved by the defendant, as having been made and given by the said Jos. A. Hagerman —

"Recd. this 21st Febr 1829, a note of hand of Mr P.
" Teulon for the sum of forty seven pounds, as a —
" guarantee that the said P. Teulon will deliver to
" Mr. McLean, a just dividend of J. Oliver's property
" against which the said McLean has issued a
" writ, upon the receipt of which dividend, the said
" note is to be returned. — signed) Joseph A. Hagerman".

It was further given in evidence, that the said Duncan McLean had a claim against the estate of one John Oliver, a bankrupt, which claim he lodged in the hands of Mr Jos. A. Hagerman an attorney in U. Canada, in order to prosecute and recover the same — That the defendant assuming an interest in Oliver's estate for the benefit of his creditors, had given the — promissory note in question to Mr Hagerman to — secure McLean's proportion or dividend in that Estate, and it was understood, that Hagerman was to retain this note in his own hands until the said dividend was paid by the defendant, and was not to transfer or negotiate the same — That Hagerman indorsed the note in blank and delivered it to McLean then in U. Canada, and McLean inclosed the note in a letter to the Pltff, who was then his agent in Montreal, it was uncertain at what time the indorsement on the note was filled up, but no consideration was proved to have passed between any of the parties in the — transfer thereof —

The Court held that as by the plea, as well as by the evidence adduced, the consideration given on the transfer of the note was put in question, the Plaintiff ought to have shewn what consideration

he

he gave for it.— That the defendant in this case had shewn by several circumstances that no consideration whatever had been given by the plff, who could be considered only as the agent of McLean, who was the only person interested in the note, as both — Hagerman and the plff could be considered in no other light than his agents and acting for his benefit, and as such they could deal with the note as their own property, nor could they claim any greater interest in it than was due to McLean out of the Estate of Oliver — The action was therefore dismissed. —

see Chitty on bills. p. 401.—
2 Starkie. 347. Green v. Deakin.—
Espinasse on Settlemt. of Es. 21. 22. & Cases cited.

October Term. 1831.

Wednesday 19th October.

N°. 2692.

Blacklock
v.
Irving.

This was an action of assumpsit on a promissory note made by the Defendant

The Defendant was arrested on a Ca: ad respondm to obtain which the plaintiff made the following affidavit. — "That the said Defendant (John "Irving) is personally indebted to the said Deponent "in a sum exceeding ten pounds Sterling, viz.t in the "Sum of £19. 8. 9. Current money of Lower Canada "with interest thereon from the 20th day of June now "last past — That this deponent is credibly informed "and hath every reason to believe, and doth verily and "in his conscience believe that the said John Irving "is immediately about to leave the Province, whereby "the said Peter Blacklock, (the plaintiff) without the "benefit of a Capias ad respondendum against the "body of the said John Irving may be deprived of "remedy against the said John Irving"

This affidavit was sworn to before one of the Prothonotaries of the Court. —

The Defendant by his counsel now moved, that the writ of Capias issued in this cause should be quashed and set aside, inasmuchas the said Defendt was

was not about to leave the province of Lower Canada at the time of the suing out of the said Writ, and because the allegations contained in the affidavit upon which the said Writ hath issued are false & untrue.—

Mr Grant for the Defendant in support of the motion contended, that the mere allegation of a belief in the mind of the plaintiff, or of a vague and uncertain information, always unworthy of belief was insufficient to warrant the suing out of a writ of Capias against a Defendant, and the plaintiff ought to be held to shew by sufficient evidence what the nature of the information was which he had received to warrant his belief in this respect, conformably to the practice of the Court in all cases of this kind.

Day for the plaintiff contended that the affidavit was sufficient, and made conformably to the Stat: 9th Geo. 4th ch. 8.— where the form of it is given—

The Court was of opinion that the affidavit was sufficient, and that any evidence in support of it was unnecessary — That before the Stat. 9. Geo. 4. ch. 8. was passed, the Court required, where the affidavit was founded upon information, that the party should shew what the nature of the information was, in order to determine how far it was reasonable to ground a belief thereon that a Defendant was about to leave the Province, inasmuch as the Ordinance of 1785. required a positive affidavit that a Defendant was about to leave the Provce to warrant the arrest of his body by Capias — but the Provincial Statute above mentioned, having established that kind of belief to which the Plaintiff had made affidavit, no further evidence was requisite, as the requisites of the law were complied with — The Defendt took nothing by his motion.—

No. 289.

Mann
vs
Herrick

Action of assumpsit on three promissory notes made by the Defendant in the State of New York, on which a Capias ad respondm had issued on the affidavit of the plaintiff that the Defendant was about to leave the province. —

Plea —

1st of Peremptory exception that the Plff cannot have or maintain his action agt the Defendt, because at the time the several promissory notes mentioned in the declaration were made, he the said Defendant and the payees of the said notes were citizens of the State of New York and were resident and domiciliated at Bridgewater in that State, at which place the said promissory notes were made and given by the Defendant, and therefore the right of action and recovery to be granted and allowed to the said Plff ought to be governed and determined according to the laws of the State of New York at the time the said notes were so made — And that by the laws of Lower Canada the plaintiff hath not acquired any greater right for the recovery of the said notes than could have been had and exercised by him in the said State of New York. —

2d That by an act of the Legislature of the State of New York, intituled, An act to abolish imprisonment for debt in certain Cases, bearing date the 7th day of April 1819, it is declared to be lawful for all insolvent debtors, upon making a Cessio bonorum or assignment of all their Estate in trust for the benefit of their Creditors, to obtain from the authority in that behalf lawfully constituted, an exemption for ever from the arrest of their bodies and imprisonment, and a discharge from all debts due at the time of making such assignment, which said act at the time and times of the making

of

of the said three promissory notes, was, and still is in full force and virtue —

3d That after the making of the said three promissory Notes the said Defendant became and was a bankrupt and an insolvent debtor, and being imprisoned at Albany in the said State of New York for debt, and availing himself of the said act of the 7th day of April 1819, presented a petition to The Honble James Lamereaux, one of the Judges of the Court of Common pleas in and for the County of Albany in the said State of New York, and being to that effect duly authorized to obtain his discharge under the said act, and did in compliance with the said act and under the authority of the said James Lamereaux perform what was required by the said Act, and did also on the 11th day of December 1824, make, execute and deliver in due form of law a Cessio bonorum, or — assignment of all his estate and property to one Richd Boote in trust for the benefit of his the Defendants Creditors, and the said James Lamereaux did in — consequence thereof afterwards on the said 11th day of December 1824, under his hand and seal at the City of Albany aforesaid, make and grant to the Defendant his discharge in due form of law for all debts by the said Defendant then owing or by him contracted, although payable at a subsequent period, as by the said discharge now produced and filed will appear. —

4th That the said promissory notes in the said declaration mentioned, had been and were made previous to the granting of the said discharge, and form a part of the debts from which the said discharge doth forever exempt the arrest of his the Defendants body for the payment thereof. —

5th That the plaintiff was not the lawful bearer of the said notes, nor of any of them before they became due and payable, nor at the time they so became due

and

and payable, nor at the time the said Defendant became bankrupt and obtained his discharge as aforesaid, but obtained the same without any valuable consideration. —

By reason of all which premises the plaintiff cannot maintain his action aforesaid against the Defendant, all right of action against him by reason of the making of the said Notes, having become extinct from and after the said 11th day of December 1824 by reason of the aforesaid discharge —

Therefore praying that the Special bail given by the Defendant be cancelled and annulled and the present action dismissed with Costs. —

The Replication to the said plea, was a general denegation of the facts therein stated and also of their sufficiency to discharge the Defendt or his bail on the present action. —

In support of the plea, the Defendant produced and filed the discharge of Judge Lamoreaux under his hand & seal, which was proved by the Judge himself on the Commission Rogatoire sued out by the Defendant, to be a sufficient and valid discharge of the Defendant from all arrest and imprisonment for his debts as stated in the said plea in conformity to the act of the Legislature of the State of New York of the 7th April 1819 —

Mr Day for the plaintiff contended that he was entitled to his Judgment against the Defendant. That the Defendant had alledged that he ought not only to be exonerated from arrest in consequence of his discharge but also that the action ought to be dismissed —

but

but the discharge, had it been proved, did not go so far nor were the conclusions of the plea consistent with the premises, as the Defendant thereby demanded that the special bail should be discharged, but not that the Capias should be quashed, — a matter not in contest by the issue.

The act relied on by the Defendant, as a release and discharge from arrest and imprisonment has not been proved — refers to 1 Ph. Ev. 499. & 500. — a Foreign Judgmt should be proved by the Seal of the Court and the Seal of the State or Country, where given — refers to case of Card. v Astor in this Court where this was done — also Ph. Ev. 510. — Here there was no authenticated copy of the laws of New York given in evidence nor any regular course of proceedings shewn by which the Defendant became entitled to his discharge under those laws. The only evidence here is an act under the private seal of the Judge, who is called as a Witness to prove his own authority — which cannot be admitted as legal evidence. That the identity of the Defendant is not established as applicable to the evidence before the Court. — At all events however the preliminary process used by the Plaintiff here to bring the Defendant before the Court must be held as legal, being allowed by the law of the Country against a flying debtor — That the exemption granted to the Defendant under the laws of a foreign state cannot apply nor be enforced here, for if the Defendt be liable here to the payment of the debt, he must be liable according to the course and practice established by law to enforce that payment — and if the exemption given to the Defendant from imprisonment will not screen him here from the usual proceedings by Capias to bring him before the Court, neither will it screen him from the necessary proceedings under that Capias for the payment of his debt. —

We

Mr Rositer for the Defendant, contended that the act of discharge produced by the Defendant had been sufficiently proved - it was the exemplification of a record of which proof was here to be made, but the act of the Judge, and of this the very best proof was before the Court by the evidence of the Judge himself, who was also competent to prove what the practice and the law was in regard of a discharge of this description - That the Laws of the Country where the Contract was made must regulate the rights and remedies of the parties under that Contract, and whether the relief obtained by the Defend. were partial as to imprisonment of his person, or entire, from the payment of the debt it must operate alike in all Courts where a remedy is sought on that Contract - That if the process by Capias be considered legal for bringing the Defend. into Court, yet as soon as it is ascertained that the Defendant is not liable to restraint under it, that process must cease to have effect - for otherwise the discharge obtained by the Defendant would be of no avail -

The Court were of opinion that the evidence adduced on the part of the Defendant was sufficient to establish the discharge he had pleaded to the plaintiffs action - that the act to be here proved was the Ministerial act of the Judge, who in compliance with the directions and requirements of the Law had granted the discharge in question - this act could not be better proved than by the Judge himself who had granted, although inferior proof might in such a Case have been sufficient - And as to the Law itself authorising this discharge the Court thought that there was sufficient proof made of it by the verbal testimony taken under the Commission Rogatoire,

That

That the discharge so given must take effect on the Contract between the parties, made under the Law which warranted that discharge and between persons subject to all the provisions of that Law, — and the remedy sought by the present, although in another County must be restrained within the same limits as it would have been had it been brought in the State where the Notes in question were made — That the process sued out by the Plaintiff by Capias ad respondendum was a matter of right and according to the course and practice of the Court, with which the Court could not interfere until the merits of the case came before them, when they were bound to restrain the effect of that process to a common Summons, as otherwise the Defendant would be liable to that imprisonment from which he had been discharged. The Court therefore gave Judgment to the plaintiff for the amount of the three promissory Notes against the Defendant, and discharging from his arrest under the Capias, ordered that the special bail entered into on the behalf of the Defendant should be cancelled and annulled.

J. A. Barrow
vs
J. Lacourse
and
Pre. Moreau
opp.

On Opposition afin de conserver.

In consequence of an execution sued out on a Judgment rendered in this cause on the 19th day of February last, directing the Sheriff to make and levy of the Defendants goods and chattels a sum of £34-1-1 being the amount of the debt and costs included in that writ, the Sheriff on the 16th day of April last returned, that he had received from the Defendant the said sum of £34-1-1, which he had ready as by the said writ he was commanded.

In consequence of this return an opposition afin de conserver was made by Pre Moreau claiming certain monies due to him for fees and disbursements as the Attorney and advocate of the said Defendant, and founded on the principle that the Defendant had been and still was in a state of insolvency & ~~of~~ confiture

To this Opposition the Plaintiff filed a plea of peremptory exception, alledging, that after the issuing out of the said writ of execution, and before the return of the said Sheriff ~~Dawson~~ and of his doings thereon made to the Court, the Defendants paid to the said Sheriff, as the mandatory of the said plaintiff on that occasion the amount of the debt and costs mentioned and contained in the said writ of execution in full satisfaction and discharge thereof, and which said sum of £34-1-1 the said Sheriff received and accepted for the said plaintiff as his mandatory on that occasion in manner as aforesaid, and is the same sum of money now returned before the Court by the said Sheriff, and upon and out of which the said Opposant claims a right to be paid ~~au~~ marc la livre for his said debt proportionably with the said plaintiff on his debt and costs aforesaid, but

which

which said opposition and claim is unjust and unfounded in law and cannot be maintained by the said Opposant.—

To this plea the Opposant replied by a general answer denying the law and facts stated by the Plaintiff.— And the parties having been heard on the law, the Court held that where a sum of money was levied and returned by the Sheriff into the Court upon a writ of execution addressed to him, the monies so returned were open to the claim of every man who set up a right thereto, and in case of the insolvency of the debtor, no distinction could be made whether the Sheriff received the money from the debtor by a voluntary payment, or whether it had been levied by the seizure and sale of the debtors effects, for such insolvency would be a bar to the preferable right claimed by the Plaintiff in this case.—

Mr Justice Rolland dissented from this opinion.—

see 2. Bourj. Tit. 8. art. 33. p. 675.—
1 Duplessis. p. 618.—

No 1730

Young
vs
Bingham

Action on Judgment rendered in the Inferior Court and on a Capias ad respondm sued out from this Court.—

The declaration stated, that on the 26th day of May 1834. the plaintiff recovered Judgment against the Defendant in the Court of Inferior Jurisdiction for a sum of £7. 10— with interest thereon from the 24th day of January 1831,

and

and Costs of Suit taxed at £19. 12. 10 — which said Judgment was still in force and not satisfied — That the Defendant was about to leave the province whereby the Pltff might be deprived of his remedy against him without the benefit of a Capias, and therefore praying that such Capias may be granted to compel the Defendt appearance before this Court, and that the aforesaid Judgment may be declared executory as to him for the amount of the aforesaid debt interest and Costs and the Costs of the present demand.

To this action the Defendant pleaded the general issue, denying the matters of fait stated in the plaintiffs declaration, and on which issue was joined by the — Replication —

At the hearing of the Cause, it was contended on the part of the Defendant, that no action could be maintained in this Court on a Judgment rendered in the Inferior Court, and that the pltff should be sent back to that Court to obtain the execution of his Judgment rendered there. —

The Court however held, (dissᵗᵉ Mr Justice Rolland) that the action in this Case could be maintained, and gave Judgment accordingly. —

No. 1314.

Beauchamps vs Sarrie. —

This was an action which had been instituted by Joseph Beauchamps of Montreal, trader, against Jean Baptiste Sarrie, also of the same place trader for a sum of one hundred pounds lent by the former to the latter, and in which action Judgt was rendered on the 18ᵗʰ day of June 1830, condemning Sarrie to pay to Beauchamps a sum of £98. 5. Wᵗʰ interest & Costs.

On

On the 14th day of February 1831. the plaintiff serve a copy of the Judgment on the Defendant, with a notice, that on default of his paying to the plaintiff in four months from that date a sum of £21. 7. 3 the amount of the Costs taxed and allowed against him the said plaintiff on the aforesaid Judgment, he the said plaintiff would apply to the Court and move for a Contrainte par Corps against him —

Accordingly on the 20th day of June 1831. the Plaintiff by his counsel moved for and obtained a Rule on the Defendant to shew Cause, why a Contrainte par Corps should not be granted against him, if in 15 days after signification of the present Rule if granted he did not pay to the Plaintiff the aforesaid sum of £21. 7. 3 the amount of the said Costs, and also the Costs on the said Rule — The Court granted the Rule for the first day of the present Term —

Mr Driscol on behalf of the Defendant contended that as the Contrainte in this case could not be granted for the principal debt on which the Judgment was founded, neither could it be granted for the Costs, which were only an accessary and must follow the nature of the principal —

The Court however were of opinion that according to the Ordinance of 1667. the Contrainte could be granted in all cases for the Costs where the amount exceeded 200 livres, and under the notice here given to the Defendant, made the rule absolute for £18. 15 — Costs on the same —