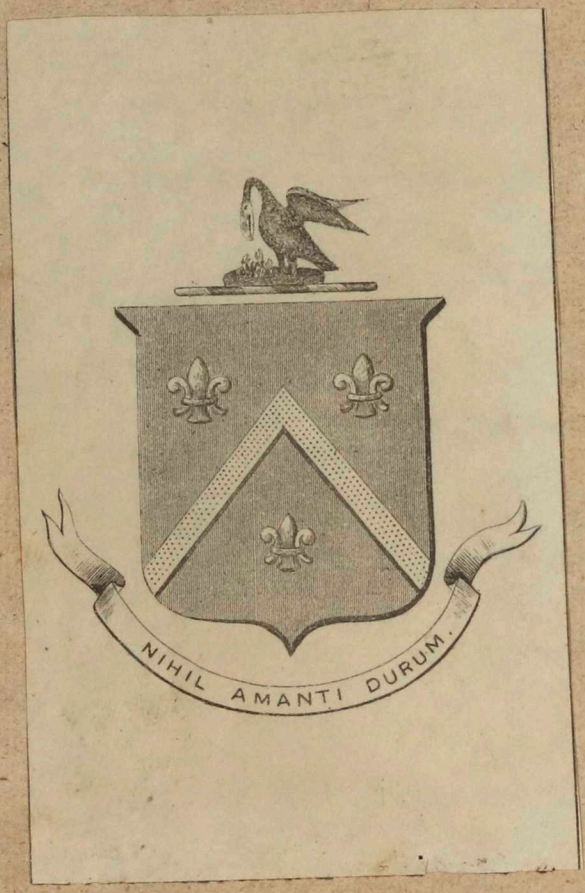
Kings Bench. Montreal.

Civil Pleas.

1811

13 Dec. 1820.



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No 834.

McKenzie, Tutor &c
vs
Halloweell + 3

Action of Debt on Deed of Fidei comm$

The dec$ states, that on 8$ June 1811, by a certain act or deed in writing, made and executed before I. A Gray & his colleague Notaries, the said Alex. McKenzie the Pltff did give & grant to the Defnd$ his heirs, assigns and legal representatives, the sum of £1000 for the uses and purposes therein mentioned, that is to say, on condition that the said Defnd$ would pay to Ann. McKenzie, wife of the said Pltff, during her natural life, the yearly interest of the said sum of £1000, on the 8$ day of April of every year, the first payt of such interest to be made on 8$ day of April 1812 — and that on the death of the said Ann McKenzie, he the said Defnd$ his heirs & assigns should pay to the children, or child living of the marriage of the said Ann McKenzie w$ the S$ Pltff the said principal sum of £1000, and the interest which might then be in arrear and unpaid, all which the said Defnd$ in & by the said act or deed bound and obliged himself to do & perform.

That afterwards in the year 1818, at Chantottenburg in Upper Canada, the said Ann McKenzie, died, leaving two minor children of her marriage w$ the S$ Pltff, viz$t$ Alex$ McLeod McKenzie, and Mary McKenzie to w$ minor Children the said Pltff was duly appointed Tutor on 21 Janv$ 1819 — whereby the S$ Defnd$ hath become liable to pay to the said Pltff in his S$ capacity, the said principal sum of £1000, and interest thereon from the 8$ day of June 1818 then & there in arrear on the said principal sum — Wherefore —

Plea - Peremptory exception to the sufficiency of the declaration — and further, that in and by the act or deed of trust (fidei-commissum) it was stipulated covenanted and agreed, that in case of the death of the said Ann McKenzie, leaving alive any child or children lawfully begotten, the property of the said principal sum of £1000, should belong to such child or children and be payable to him or them only, and should belong and become payable to the said Pltff only in case no such child or children should then remain alive — and that the said Pltff hath, and could have no right to claim and demand, in the capacity of Tutor, or any other manner whatever the part of the said principal sum of £1000, during the life time of the said child or children and further that Defend. is not indebted in manner form &c —

No. 619.
Forcier v. Morrison.

On question, whether renonciation to the Succession of a living person, & with his consent, is valid

The principal authority for the affirmative of this question is to be found in Ferr. Dic. Droit. vo "Stipulation"

see opinion of Lebrun cited by Poth. Succ. p. 32. in 2nd. 1e and p. 35.

Le pacte qui seroit fait touchant la Succession d'un hom. vivant, est pareillement nul, etant contre les bonnes mours, s'il n'est fait de son consentement – cites the Roman Law –

Mais la convention seroit valable si elle etoit faite du consentement de celui de la succession du quel il seroit question –

The Repre. de Jurispde. – vo "Droits Successifs" would seem to adopt this principle, but in reading the whole sentence and comparing it with what he says under other heads, the contrary must be admitted –

see p. 550. – Quand une succession est echüe, il est certain que celui à qui elle est acquise peut en disposer en tout ou en partie avec la meme liberté qu'il peut disposer de ses autres biens. – Nous disons, "quand elle est echüe", parce qu'on regarde comme contraire aux bonnes mours, de disposer par anticipation, de l'heredité d'une personne vivante sans son consentement: On ne tolere cette liberté qu'au sujet des Contrats de mariage dans certaines Coutumes, ou une fille peut, moyennant une dot, renoncer aux successions futures de son pere & de sa mere, & quelques fois meme de ses collateraux sans leur participation ni leur consentement –

Same author. vo Renonciation aux successions à echoir." p. 136. says – Quoique la Renonciation à une succession future soit contraire au principe qui rejette les Conventions relatives à la Succn. d'une personne vivante, notre Jurisprudence a neanmoins admis les Renonciations de cette espece dans les Contrats de Mariage – but nothing is said in regard of any other Renonciation with the Consent of the person whose succession is in question –

Pothier. Obl. No. 132. – Cette regle que les choses futures peuvent être l'objet d'une obligation, recoit une exception par les Loix Romaines à l'egard des successions futures. – Ces Loix proscrivent comme indecentes et contraires à l'honnêteté publique toutes les Conventions par rapport aux Successions futures, soit celle par laquelle, une personne traiteroit ou disposeroit de sa propre succession future envers une autre personne

à

a qui il promettoit de la lui laisser, quand même cette convention se feroit par un Contrat de mariage. L. 15. Cod. de Pact. Soit celles par les quelles des parties traiteroient de la Succession future d'un Tiers, que les dites parties, ou l'une d'elles s'attendent de recueillir. L. fin. Cod. de Pacte. - à moins que ce tiers n'intervint, & ne donnat son consentement à la Convention -

So far the Roman Law - upon this Pothier says. Dans notre droit François, la faveur des Contrats de mariage y a fait admettre les conventions sur les Successions futures - And at the close of the paragraph he adds - Hors les Contrats de Mariage, les Conventions, les Conventions sur les Successions futures sont rejettées par notre Droit François, de même qu'elles l'étoient par le Droit Romain -

Poth. Suc. p. 31. §. 3. Les Renonciations aux Succ. futures sont contraires au principe, qu'on ne peut repudier un droit qui n'est pas encore ouvert - et à cet autre principe qui rejette les Conventions touchant la Succ. d'un hom. vivant; neanmoins notre Jurisprudence a admis ces Renonciations dans les Contrats de Mariage, qui selon nos usages, sont susceptibles de de toutes sortes de conventions -

= See also. p. 162. -

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Poth. Vente. N° 526. -

Suivant les Lois Romaines ces Conventions étoient interdites, même dans les Contrats de mariage. L. 15. Cod. de Pact. - Dans notre droit, la faveur de ces Contrats les y a fait admettre - mais nous ne les admettons pas ailleurs - vfes to Traité D'ob. N° 132 +

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Poth. Introduction au Titre - Des droits de Successions. Cout: D'Orleans p. 595. N° 66 - and 579. N°. 3. -

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1. Despeisses p. 18. N°. 5. La vente de l'heredité d'un vivant, est nulle, quand même elle seroit faite de son consentement - cites. Louet & Brodeau. Lettr. H. Som. 6.

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Louet & Brodeau. Let. H. Som. 6.

En la Cause entre Antoine de la Couture. Demdr et Louis de Blanchefour, Defr - il a été jugé que la Vente d'une heredité, bien qu'elle fut faite du consentement de celui de cujus hoereditate agebatur, étoit nulle - et les lettres obtenües pour faire Casser le Contrat furent enterinées, encore que le Vendeur et celui auquel on succedoit, eussent vecû longtems ---

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Lamoignon - arretés, 2 Vol. p. 414 - La Renonciations faites par les enfans mâles, aînés & puînés aux Successions non encore echûes des pere & mere et autres directes & Collaterales, ne sont valables -

Dict: d'arrets par Brillon. Vo Renonciation - Aîné. p. 813. —

Renonciation faite par le fils aîné à son droit d'ainesse, en faveur de l'un de ses freres, du vivant, et en la presence du pere, est nulle - arret du 21 Mars 1581 - Charondas. liv. 5. Rep. 7. —

Id. p. 816. Renonciation à Succession future Cassée, par arret du Parlement de Bretagne du 21 Avril 1562. - Dufail. liv. 2. ch. 155. —

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1. Bourjon. p. 909. Sec. 3. §. 35. - Les Renonciations a Successions futures, ont leurs regles particulieres - Dans la these generale, toute renonciation à Succession non ouverte est nulle - ce qui reoit l'exception qui forme la proposition qui suit - exception que l'usage et une juste convenance ont fait adopter. —

§. 36. Cependant cette Renonciation est valable, lorsqu'elle est faite par un Contrat de mariage dans les Circonstances & sous les conditions suivantes - voila l'exception annoncée, mais nul autre acte qu'un Contrat de mariage ne pourroit la faire valider.

Donegany vs Pickleval } On action by Indorsee of Note agt Indorser —

Qud. Can the maker be admitted as a Witness to prove that Note was given on usurious consideration —

The objection taken was on acct of the interest of the Witness. —

The principle upon which Witnesses are now admitted goes to the extent, that every one may be heard as such, provided the verdict to be given in the Cause cannot benefit the Wits — See Cases —

Peakes Ca. 6. Charrington vs Milner — } In an action agt the maker of a promissory Note the Indorser is a good Wits to prove it paid

Id. pp. 52. Humphrey vs Moxon — } The Drawer of a bill of Exch. may be a Witness for the acceptor to prove it paid. —

1 Camp. 55. Pool. a vs Bousfield } So in an action by the payee agt the acceptor, the drawer is admissible to prove, that ~~he received a valuable consideration~~ the bill has been discharged by an executed agreement —

7 Term Rep. 601. Jordaine vs Lashbrooke } In an action by the Indorsee of a bill of Exchange against the acceptor, the latter may call the payee as a Witness to prove, that the bill was void in its creation. —

Peakes Ca. 55. Pletcheon vs Whitmore } In action by Payee agt the acceptor, the Drawer admitted as a witness, to prove that the acceptance was conditional, & that the Defendt was not to pay the bill unless he should receive a sum of money due to Drawer —

Peake. Ca. 293 ~~224~~ — Rich v. Topping — The drawer of a bill of Exchange given for an usurious consideration is a good witness to prove the usury in an action agt the acceptor, upon being released by him — L^d Kenyon —

5 Esp. Rep. 119 — Brard v. Ackerman — In an action by the Indorser of a bill payable to the Drawer's own order, the drawer may be a witness to prove usury in discounting the bill — L^d Ellenb^h —

4 Taunt. 464 — Jones v. Brook — In an action against the acceptor of a bill, accepted for the accommodation of the Drawer — The Drawer is not a Competent W^s to prove that the holder came by the bill on usurious consideration without Release — because he does not stand indifferently liable to the holder & acceptor — For the holder can recover agt him only the contents of the bill; the acceptor is entitled to recover agt him both the amount of the bill, and also all damages he may have sustained, including the Costs of the action agt himself — Sc Cas —

1 Holt. Rep. 390 — Harman v. Lasbrey — A. who is indebted to B. gives him a bill of C. to get it discounted. — B. instead of discounting it holds the bill, as a Security for the debt of A., contending that A gave it to him by way of payment of his debt. — In an action upon this bill brot by B agst C. — A. is not a competent W^s to prove on the part of the Defendt that he deliv^d the bill to B, merely to get it discounted, & not as paym^t without a Release — because in the event of the plff's recovering he would be liable to the Costs of the action brot agt C. as special damage, in an action agt himself for the violation of his duty

1 Camp. 407. 8. Shuttleworth vs Stevens — } In an action by the Indorsee ag^t the drawer of a bill of exchange, drawn without consideration, the Payee who indorsed it to the Pltff in payt of goods, is a competent Witness to prove the ~~want of~~ consideration for the Indorsement. —

Peake Ca. 154 Adams vs Lingard } On Issue whether the Indorsee of a bill of Exchange is an admissible Witness to invalidate it —

No 178
Rouleau
St Julien

On question of prescription —

2. Gp. Cout. p. 536. No 6. — on art. 227. —

Puisque la fin de non recevoir est fondée sur la presomption du paiement, il s'ensuit, que si le Juge reconnoissoit que le Defendeur n'eut pas en effet payé la somme qui lui seroit demandée, il ne devroit pas le recevoir à son serment, mais le condamner à la payer

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No 1727
Armour
Yarker —

Action by Indorsee of Promy Note ag.t Drawer

The Note was drawn dated on 1 May 1820 for £30 payable to I B Noro, or order, and payable in 3 months. — On 7.r Augt — the note was protested at the instance of the Plff the holder — at that time the Indorsement on the note was in blank — when the action was instituted, the following words appd to have been written over the name of I B. Noro the Indorser — "Montreal 1 May 1820. Pay the within sum to Mr Robt Armour value rec.d" The Defend.t pleaded Non-assumpsit. — Objection taken at hearing, that as none of parties were Merchants or Traders and the note had been indorsed in blank whether Plff could maintain his action —

No 369

Seminary of Montreal vs Wm Fleming

Action of Complainte for having disturbed Plffs in enjoyment of their right of banalité as Seignors of the Seigniory of Montreal by erecting a certain Windmill within same.

The action is brought in the name of Messire Jean Henry auguste Roux, Superior of the Gentlemen Ecclesiastics of the Seminary of Montreal, Seignors in possession of the Seigniory of Montreal in the district of Montreal in the Province of Lower Canada, and the said Gentlemen Ecclesiastics of the said Seminary of Montreal, Seignors in possession as aforesaid of the said Seigniory by Messire Jos. Bornemf their agent and Attorney, Plffs, complainers

Plea of Exception - That the Plaintiffs cannot have or maintain their action in the manner & form by them brot, because ~~in said~~

That at the time of suing out the writ of Summons in this Cause, there was not, nor hath there been at any time since, any Corporation, Body politic or Corporate or distinguished by the name of "The Gentlemen Ecclesiastics of the Seminary of Montreal; or by the name of the Superior and Gentlemen Ecclesiastics of the said Seminary of Montreal; or any Corporation, body politic or Corporate whereof the said Jean Henry auguste Roux, was or is Superior; Or whereof the said Joseph Bornemf in the said declaration named, was or is Agent or Attorney

And because the said Jean Henry auguste Roux and the said Gentlemen Ecclesiastics of the Seminary of Montreal, and the persons meant to be designated by such appellation, cannot in such their alledged incorporate or Collective name and capacity, legally

have

have or maintain any action or demand whatsoever in the Court now here — and this the said William Fleming is ready to verify — Wherefore he prays Judgment &c.

And for further peremptory exception, saith, That the said Jean Henry Auguste Roux and the Gentlemen Ecclesiastics of the Seminary of Montreal ought not to have or maintain their said action or because he saith — That the names of the persons by and for whom the said action hath been brought are not mentioned, nor are the said persons named in the writ of Summons in the said action issued or in the said declaration, and because the said declaration doth not set forth or shew, by or for whom the said action hath been brought — and this the said Wm Fleming is ready to verify — Wherefore &c.

And for further peremptory Exception, saith, &c. That the said Gentlemen Ecclesiastics of the Seminary of Montreal, have brought and prosecuted their said action by and in the name of Jos. Borneuf as their agent and attorney; And because the said Gentlemen Ecclesiastics of the Seminary of Montreal cannot by the Law of the Land prosecute have, or maintain their said action by or through the said Joseph Borneuf as their agent & attorney.

And for further peremptory Exception, saith &c. Because the said Declaration, and the matters therein are not sufficient in law to entitle the said Jean Henry Auguste Roux, & the Gentlemen Ecc. of the Sem. of Montreal to have or maintain their said action &c. in manner and form by them brought, to which

Declin

declaration the said Wm Fleming hath not any need nor is he bound by the law of the land to answer — and this he is ready to verify — Wherefore &c

And for causes of Exception — says —

1st That the causes matters and things in the Sd declr cont, do not, nor can by the law of the land, constitute the subject of an action of Complaint. —

2d That it is not shewn, nor doth it appear in & by the said declaration, that the said Jean Henry auguste Roux and the Gentlemen Ecclesiastics of the Seminary of Montreal ever acquired or became vested with any right of bannalité which might or could be infringed by the Sd Wm Fleming —

3. That it is not shewn, nor doth it appear in and by the said declaration, that the said Jean H. Aug. Roux & the Gentl. Ecc: of the Semy of Montreal, ever had any banal mill within their pretended Seigniory in the said declaration mentioned, at which the Censitaires or Tenants of the said Seigniory, might or could cause their grain to be ground. —

4d That the premises in the said declaration contained do not justify or warrant the conclusions or prayer of the said declaration. —

5d That the said declaration doth not set forth or shew a legal cause of action agt the Sd Wm Fleming —

6d That the said declaration is altogether irregular, incongruous and insufficient

Plea to merits — Not Guilty & matters & things alledged in the Declaration are false & untrue & unfounded both in fact and in law —

No 958.

Hondlow
vs
Christie

Qus. — Whether, cohabitation after a Judgment of separation de corps & de biens between husband & wife, has the effect of annulling & setting aside that Judgment in regard of Creditors ? —

See. Repre Vo Separation de biens — p. 220 —

" Dans le cas de la Separation de Corps, la Seule Cohabitation le constate d'une maniere legale & publique — il seroit inutile alors d'exiger d'autre preuve. — speaking of the intention of the parties, husband & wife to set aside the effect of such Judgment

Poth. Tr. Comte No 524.

Dans le cas de la Separation d'habitation, nous avons vû dans notre traité du Contrat de mariage No 524. que le retour de la femme en la maison de Son mari, suffit seul pour detruire la Sentence de Separation d'habitation, sans qu'il soit besoin qu'il soit passé pour cet effet aucun acte devant-Notaires ou au Greffe parceque ce retour de la femme en la maison de Son mari est un fait notoire qui ne peut être ignoré du public — Ce retour de la femme en la maison de Son mari en detruisant la Separation d'habitation, detruit aussi la separation de biens, qui est comme un accessoire — à moins que la femme ne proteste par un acte devant Notaires, qu'en retournant avec Son mari elle n'entend se departir que de la Separation d'habitation, et non de la Separation de biens. —

Poth. Cont. Mar. No 524 -

Tous les effets de la Separation cessent, lorsque la femme separée d'habitation, est volontairement retournée avec Son mari. — Le mari rentre dans tous ses droits sur la personne et les biens de la femme,

la

la Communauté de biens, qui etoit entre les Conjoints est retablie de plein droit — Tout ce qui a eté acquis de part et d'autre pendant que la separation a duré y entre comme si elle n'avoit jamais eté dissoute, et la separation d'habitation, quelque execution qu'elle ait eu, et quelque longtems qu'elle ait durée, est regardée comme non avenue:

No. 184.—

Th: Dubord vs. Ero v. Jos: Dezy

Touching right of Common, as between Seignior & Tenant.—

The grant to the Defendant's ancestors here in his deed of Concession, was, a droit de Commune, without other explanation — Qu'— how far this gives a right to cut down wood for use of Tenant?—

Henrion de Pansey. Dissertations Feodales. 1 Vol. p. 439— ve Commensaux" §. 1.—

The property in Commons he describes as of two kinds Ces proprietés sont de deux sortes— les unes foncieres, comme des bois, des prés, des pâtis; les autres consistent en droits Incorporels, tels que des servitudes sur le fond d'autrui—

On donne aux premieres, la denomination de Communes ou Communaux, les autres sont plus generalement connus sous le nom d'usages.—

Id. p. 440. §. 2.

L'origine des droits d'usage se presente très naturellement. Les Seigneurs avoient de Grands Domaines — des bois considerables, peu d'habitans — et le desir d'en augmenter le nombre. Pour y parvenir, le moyen le plus efficace, etoit, d'ameliorer la condition

condition de leurs sujets, en favorisant l'agriculture. –

Pour cultiver, il faut des bestiaux – il faut un batiment au Cultivateur — Mais les bestiaux exigent des pâturages: et comment bâtir, comment subvenir a mille autres besoins, sans la faculté de couper du bois dans les Forets ? — Les Seigneurs se trouvoient donc dans une espece de necessité de permettre a leurs habitans le pâturage sur les terres de leurs domaines, et même l'usage de leurs bois: C'est aussi ce que la plus part ont fait. —

Les droits d'usage dans les Forets, ont encore une autre origine le peu de valeur que les bois avoient autre fois. Dans l'impuissance de les exploiter utilement, les proprietaires les laissoient dans une espece d'abandon — chacun y coupoit impunement — et le tems a donné a cette tolerance le caractere d'une Servitude. —

Ainsi dans le nombre des Communautés d'Habitans, qui ont des Communes, et des droits d'Usage, les unes en jouissent en vertu de Titres — les autres en vertu de la possession Seule. —

Denizart. Vo Usage. No 5. Quand les Habitans ont droit d'usage dans un Forêt, ou sur d'autres heritages, ils ne peuvent en user, que pour eux, et pour leur necessités personnelles — Ils ne peuvent par exemple, vendre bois, herbes, ou autres choses quelconques croissant en l'heritage, dont ils sont usagers – cite Coutume de Nevers – Neanmoins ledit usage peut être amplié, ou limité, par titre ou prescription suffisante au contraire — Cela est conforme au Droit Commun, qui veut, que le droit d'usage soit reglé par les Concessions, les titres, et la possession des usagers. —

Freminville Traité de Gouvernement de biens & affaires des Communautés d'Habitans. pp. 30. 31 –

Quest. 2e – S'il y a plusieurs Seigneurs dans une paroisse un seul pourra-t-il demander le triage ? –

S'il y a plusieurs Co-Seigneurs de la Seigneurie, un d'eux seul ne peut pas demander le triage des Communaux ; il faut qu'ils le demandent tous conjointement – cités arrêt du 23 Nov. 1660 – rapporté dans le Journal des audiences – sans quoi il seroit debouté de sa demande –

N. Denizart Vo Commune § 6. No 6 –

S'il y a plusieurs Seigneurs qui aient des droits à reclamer sur les Communes, il faut que tous ces Seigneurs demandent conjointement le triage, pour qu'il leur soit accordé – arrêt du 23 Nov. 1660 – rapporté au Journal des audiences. Tom. 1. p. 917. – rendu conformement aux conclusions de M. Talon. –

Rules for interpretation of Contracts –
Pothi. Obl.

No 94. Ce qui peut paroitre ambigu dans un Contrat s'interprète par ce qui est d'usage dans le Pays. –

No 95. L'usage est d'une si grande autorité pour l'interpretation des Conventions, qu'on sous-entend dans un Contrat les clauses qui y sont d'usage, quoiqu'elles ne soient pas exprimées.

No. 1642

Galipeau v Gosselin.

On deed of sale – in q^h a sum of 2000^t – was reserved in hands of Defend^t. the purchaser, & to be paid to the daughter of Pl^{ff} when she should come of age, or should be provided for by marriage or otherwise –

"jusqu'à son age de majorité, ou qu'elle soit pourvue par mariage ou autrement"

The Minor dying under age, is the Pl^{ff} as her heir entitled to the pay^t. of the money –?–

There seems to be distinction taken as to the interpretation of a Term or condition of pay^t. of an obligation by contract, or acte entre vifs – and of a legacy or gift made by will or donation – In former case, the doubt is to be interpreted in favor of the party bound or Debtor, but in the latter a more favorable interpretation is taken by looking at the intention of the Donor – Poth. Obl. No 213. –

The stipulation here is to pay, at different periods, that is, the majority of the minor – q^h is a certain known period – and also at her marriage, q^h was an uncertain event – as to the words "autrement" it must mean to refer to something, where either the interest or necessity of the minor might require the pay^t. to be made – such as subsistence education or the like – The intention of the stipulation being to secure to the minor all the beneficial right in this money which the Law could give –

What rights are vested in the minor, by her death? – Can he demand more than the minor could have done? – Does not the heir take the Succession as it stood at the time of the decease of the Minor? – What entitles him to demand more? – Had the minor been married, or had she been in any situation to entitle her to call for this money – that right would have gone to the heir – but her death, seems to be a circumstance not provided for nor contemplated by the Contract –

The majority of the minor, is a fixed & certain term of pay^t. the other limitations of pay^t. are mere conditions, which have never happened

Warwick
Ermatinger

Gr. Com. art. 160. Glose 1re. N° 23. p. 1010—

Si le Gardien presenté par le Saisi n'est pas solvable peut passer pour solvable, quoique veritablement il ne le soit pas, l'huissier n'est pas responsable si les meubles ont été detournés par le Saisi, et si le recours contre le Gardien se trouve inutile et sans effet au Saisissant à cause de son insolvabilité— see also. Serpillon. p. 624—

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Impeys Sheriff. Tit. Trespass. p. 283—

The High Sheriff is answerable in damages for the trespasses committed by his officer in the execution of warrants, the law looking upon the Sheriff and all his officers as one person: he is to looke to his officers, and they to do their duty: for if they transgress, he is answerable to the party injured by such transgression, and his officers are answerable over to him—

see 2. 13 Last. Rep. 317. Saunderson v. Baker.

Id. p. 285—

If the Sheriff or his officers break the house of any person to execute process of fi. fa. against the goods or Capias agt. the person, at the Suit of the Subject, he is a trespasser and liable to this action.— 5. Co. 91. Seymaine's Case. —

No 1817.

Shuter
vs
Thayer

To see Doubeau &c

En matiere de Commerce les homologations des Sentences arbitrales doivent se faire devant les Juges Consulats —

Repr. de arbitrage. p. 549. 1st col. —

Peake, Ev. 81 If the parties think proper to submit their differences to an arbitrator his Judgment is as conclusive upon them as that of a Court established by the Law and though in questions respecting land he cannot absolutely convey property from one to another, but can only order it to be done; yet if he determine the right to be in one, this is conclusive evidence of the title, and cannot be disputed in an action of Ejectment

Evidence

refers to case of Doe on demise of Morris & al. v. Rosser. 3 Ea. 15 — when evidence to impeach the award was refused —

1 Bos. & Pull. 91. Ridout v. Pye. The Court will not set aside an award on the ground of the witnesses not having been examined on oath, if no such objection was made at the time of their examination —

8 East R. 344 Braddick v. Thompson Partiality and improper Conduct in an arbitrator in making his award without hearing the Defendt and his witnesses, cannot be pleaded in bar to an action on the Bond conditioned for the performance of the award, but is only matter for application to the equitable Jurisdiction of the Court to set aside the award — neither can a parol agreement between the parties to waive and abandon the award be pleaded to such action —

2 Wilson 148. Wells v. Maccarmick Partiality in arbitrators not allowed to be given in evidence —

among case at Law

1. Hemps. 438. Par l'ordonnce de Franc. 2 du mois d'aout 1560 et de Louis 13 du mois de Janvier 1629, encore que dans les compromis il n'y ait aucune peine, les sentences arbitrales sont juridiques, et doivent être executées, comme si elles avoient été rendues par les Juges ordinaires —

Bacon Ab. Tit. arbitrament & award — When an award is put in Suit at law, no extrinsic circumstance, nor any matter of fact dehors can be given in evidence to impeach it; If it be open therefore to any objection of this kind, the Defdt must apply for relief either to a Court of Equity by bill, or if the submission has been made a rule of any Court of Law to the Summary and equitable jurisdiction of that Court of which such submission has been made a rule — cites 2. Wils. 148 *

1 Salk. 71 on note (a) In the Case Lucas. ex dem. Markham. vs Wilson. 2 Burr. 701. Ld Mansfield said — The Court will not at all enter into the merits of the matter referred to Arbitrators, but only take into consideration such legal objections as appear upon the face of the award, and such objections as go to the behaviour of the arbitrators. — The same was likewise ruled in Waller. vs King. 2 Pr. Ca. Law & Eq. 63. Greenhill vs Church 3. Ch. Rep. 49. Brown. vs Brown. Ca Ch. 149. — 1 Vern. 157. —

In a written Case whether the submission be originally by rule of Court or by bond and afterwds made such, will the Court enter into the merits of the award, and examine into the reasonableness and justice of it? unless it appears manifestly from the merits that the arbitrators have acted dishonestly and corruptly?

When a submission is by Bond &c and not by rule of the Court, the only remedy agt an improper award is by bill in Equity, and it seems the grounds for relief are the same as on submissions by rule in Courts of Com. Law —

Kyd on awards p. 226 See other side — 8 East. 344. When the submission is by the act of the parties, then in order to be relieved against the award against any extrinsic circumstances, the defendant cannot make these a defence to the action on the award, or on the submission bond: he cannot give in evidence any thing to impeach the conduct of the arbitrators — the award is a determination of

Evid.

of Judges chosen by the act of the party himself, and nothing extrinsic to that Judgment can be offered in evidence to over-turn it — vide —

See p. 227. With us in such a Case, (enmity of the arbitrator) the only relief is in equity, which often sets aside awards and gives that kind of relief, which seems naturally to arise out of the circumstances — as by directing accounts or granting injunctions to stay all legal proceedings, which had been pursued on the foundation of the award being good — though bills of this sort are received wt some prejudice, because arbitrators are Judges of the parties own nomination, yet, if on partiality, a Court of Equity should not relieve — arbitrators would have too great a power, and might abuse it from corrupt motives. —

But except for corruption or improper conduct in the arbitrators, a Court of Equity will never set aside an award, where the submission is voluntary —

—

3 Atk. Rep. 529 Tittenson. v. Peat. An award being made by Judges of the parties own chusing is final unless there is collusion or gross misbehaviour in the arbitrators — (see case).

error in taking the account, or partiality & improper behaviour in the arbitrator —

Id. " p. 644 Ca. 252, Anonym. Unless there is corruption or partiality in an arbitrator the party cannot set aside his award —

Bowman v Galaway

On motion for a new trial for excessive damages

see Cases — contra —

Grant's Sum. 216. Ld Townsend v. Dr Hughes — 2 Mod. Rep. 150.

do — 218. Leeman — v — Allen — 2 Wilson. 160. —

do — 220. Huckle — v — Money — 2 Wils: 206. —

do — 225 Beardmore v. Rivington. 2 Wils: 248.

do — 231 Gray v. Sir Abr. Grant — Ibid. 252.

do — 234 Gilbert v Bertenshaw 1 Coup. Rep. 231. — H

do — 236 Leith — v — Pope — 2 Sir W. Black. Rep. 1327. —

do — 239 Duberly v. Gunning. A. T. Rep. 651. —

The King
vs
Solomons

On question whether Orders in Council of 29th May. 1815, — can be construed to abrogate the St. 41 Geo. 3 - ch. 14 — in regard of duties imposed on Snuff & tobacco imported into Canada from the United States. —

Quest. depends upon due interpretation of Statutes

sec. 19. Vict. ch. 1st. Statute (E. 6) Construction of Statutes —

Nos. 85 — 86 — also No. 132. & on note p. 525 —

Davis
&
Snow

Du. des arrets. Vo Arbitres, Sentences —

Quand il y a trois arbitres, et que l'un ne veut signer la Sentence, elle ne laisse pas d'etre valable —

Si de trois arbitres deux signent la Sentence, l'autre refusant, la Sentence est bonne — Jugé le 11 Dec. 1585 — Loret. let. C. Som. 3. —

Laberge & Doucet

Quo- How far a Carpenter can recover on his Count for a quantum meruit, without proof of a Contract

Poth. Louage. N°397.

Si l'ouvrage n'a pas un prix courant & ordinaire comme la façon d'un habit — puta — si je suis convenu avec un entrepreneur de me bâtir une maison suivant un certain divis, nous sommes censés tacitement convenus du prix que l'ouvrage sera estimé lorsqu'il sera fait. —

Id. N°37 in fine. — Neanmoins si avant que les parties se soient plus expliquées, le conducteur est entré en jouissance, le Contrat doit etre jugé parfait, et le prix laissé à l'arbitrage de la partie — tanquam in arbitrio boni viri —

Carmel v Hunters

On note ~~given~~ indorsed by Defts for the accommodation of Messrs Hoyroyd & Co

Chitty on Bills 87. & 203 —

When a Bill is given merely for the accommodation of the Drawer or payee & that is sent into the world it is no answer to an action brot on the bill, that the Defts the acceptor accepted it for the accommodation of the drawer, and that that fact was known to the holder — in such case, the holder if he gave a bona fide consideration for it, is entitled to recover the amount, though he had full knowledge of the transaction —

5 Taunt. Rep. 192. Fentum v. Pocock et al. —

No. 264.

Jn.Bte. Fournier
vs.
Louis Montpellier &
Beaulieu.

Action en Declaration d'hypotheque.—
Lacroix for Pltff. L.M. Vizer for Defendt.

The declaration states, that on 7th Febry. 1820, the Pltff obtained Judgt. in this Court, agt. one Michel Fournier, Curator to the vacant Succession of Clement Racicot, deceased, for £250, Cy. with interest from 22d. Augt. 1812 until paid, and Costs taxed at £10. 6. 3, as well in obtaining the said Judgt. as in sueing out execution agt. the personal and real Estates of the said Racicot in the hands of the said Curator, the said Writ of Exon. bearing date the 28 Febry. 1820, and 7 March of same year, and upon which exon returns of nulla bona & nulla ten. were made — Which said Judgt. was rendered agt. the said Michel Fournier in his said Capacity, for the amount of an Obligation due & owing by the said Clement Racicot to the said Pltff. & executed before Dumouchelle and his Confrere, No. the 22d. Augt. 1812, whereby a mortgage was created upon the property of the dt. late Clement Racicot from the date of the said Obligation —

That by deed of sale made and executed before Globensky and his confrere, notys. & bearing date 17 March 1818, the said Clement Racicot sold to the Defendt. a certain lot of land of which he the said Defendt. is now the proprietor & possessor, upon by means whereof he the said Defendt. is bound hypothecairement to pay to the said pltff. the aforesaid debt, interest & Costs — And Concludes accordingly —

The Defendant sued out an action en Garantie formelle agt. one Antoine Chenier

Plea of Louis Montpellier —

1st. That Pltff. declaration is insufficient, as it does not thereby appear that the Pltff ever acquired or had any mortgage upon the lot of land in question — That it is not even alledged in it by the said declaration that the late Clement Racicot ever was the proprietor or in possession of the said lot of land, upon gt. Pltff now claims a right of mortgage —

2dly —

2d. That the pltff did never in fact obtain, nor did, or could the said late Clement Racicot himself create upon the land in question any right of mortgage, he the said Racicot never having been the proprietor of the said lot of land — nor ever having been in the possession thereof —

That if Pltff has any right of action by reason of his demand aforesaid, it could be maintained only as a land which was belonged to the said Racicot, and now in the hands of Antoine Chenier, by virtue of a deed of Exchange, made between said Chenier & Racicot on 17 March 1818, passed before Globinsky N.P. & not as the lot of land mentd in the Declaration

On this Plea issue was taken by the Pltff —

The parties having been heard on the plea of exception to the sufficiency of the Declaration, the same was dismissed.

It appears, that by deed of Exchange made between Clement Racicot, and Antoine Chenier, dated 17 March 1818, the said Racicot acquired from Chenier the lot of land mentioned in the declaration, but it was stipulated, that he should enter on the possession thereof at the next St. Michel. 29 Sept. 1818 —

On the same day, 17th March 1818, Clement Racicot sells the lot of land in question, which he had so acquired of Antoine Chenier, to the Defendant, with the stipulation et a commencer la jouissance à la St. Michel prochain.

The objection therefore raised at the present action was that as Clement Racicot never was in poss. of the land in question, no mortgage, by reason of any act or debt of his could attach upon the land —

By the Roman Law, Hypotheque was not created by a

a simple Convention — tradition as well as stipulation was necessary — this was changed by the Pretorial Edict, from the difficulty attend[s] actual tradition — Tr. des Hyp. 419 —

L'Hypotheque etant un droit dans la chose, c'est une consequence qu'il ne peut etre accordé, que par celui à qui la chose appartient, et qui en est le Proprietaire; celui qui ne l'est pas, ne pouvant pas transferer à un autre un droit dans une chose qu'il n'a pas lui-même — Id. 427.

Tr. Props. N°208 Il y a plusieurs clauses qu'on appose aux Contrats de Vente ou de donation d'une chose, ou autres Contrats semblables qui sont censées renfermer une tradition feinte de cette chose, telle est la clause qu'on appelle de Constitut. —

N°210 La clause de retention d'usufruit dans un Contrat de Donation ou de vente, ou dans quelque autre Contrat, renferme pareillement une tradition feinte de la chose donnée ou vendüe; Car l'usufruit etant essentiellement le droit de jouir de la Chose d'autrui, et personne ne pouvant, per rerum naturam, être usufruitier de sa propre chose, le donateur ou le Vendeur, en declarant qu'il retient l'usufruit de la chose donnée ou vendüe declare suffisamment, qu'il ne tient plus la chose en son nom, et comme une chose qui lui appartient, mais au nom du Donataire ou Acheteur, et comme une chose appartenante au dit Donateur ou Acheteur, lequel Donataire ou Acheteur est censé par la en — prendre possession par le ministere du Donateur ou Vendeur —

Cormier
&
Henryval
&
Baroness of
Longueuil & ppe

On question whether Lods & Ventes are due on a Sale void in law, but which has not been so declared, & the purchaser still holds poss.n ~~dit Purchaser can set up~~ —

Hervé. Theorie de Matiere feodale - Vol. 3. p. 7. Du Quint. —

Il en seroit de même d'un Contrat nul — Car un Contrat nul n'est pas un veritable contrat — Cependant tant que la nullité n'est pas jugée, le quint est exigible et l'acquereur ne seroit pas recevable à opposer la nullité du Contrat — mais aussi-tot qu'il a été declaré nul, le rapport du profit est dû, quand même il auroit été payé volontairement, et sans que le Seigneur l'eut exigé —

Prudhomme. ch. 18. p. 183 —

Quand un heritage a été vendu par quelqu'un qui n'en doit pas proprietaire, les droits ne sont pas moins dûs au Seigneur qui peut les exiger, parcequ'il n'est pas obligé d'examiner si l'acquereur a pris de son coté toutes les precautions necessaires pour acquerir avec sureté —

Il suffit que le Contrat de vente soit regulier en la forme, qu'il y ait un vendeur qui ait paru avoir intention de vendre, et que l'acquereur ait egalement eu dessein d'acquerir que l'heritage fasse l'objet principal pour lequel il y a eu un prix determiné ou payé, pour que le Seigneur soit fondé à demander à l'acquereur les droits de Lods & Ventes : Car une pareille Vente transfere à l'acquereur la possession civile de l'heritage, elle peut par consequent transferer la proprieté par le moyen de la possession non interrompüe ; puisque l'acquereur peut opposer par la suite la prescription s'il n'est point troublé, avant qu'elle soit acquise par le veritable proprietaire —

C'est pourquoi un acquereur ne peut se dispenser de payer les droits de Lods & Ventes au Seigr. à cause de son acquisition, sur tout quand il s'est mis en possession de l'heritage —

№ 258.

Bourret.-
&
Grandpré's

But when the verdict has proceeded on an error in point of law, whether committed by the Judge, or by the Jury, the Court will set aside the verdict - even for smallness of damages - 1 Str. 425.-

Grants Summary 211. 12.

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1 Mod. Rep. 2 on note. — The Court have a power in all cases of excessive damages to grant a new trial. 1 Term Rep. 277. — In personal torts, however, and in all actions where it is the peculiar and strict province of the Jury to estimate the extent of the injury, they will not disturb a Verdict, because the damages are excessive, except they appear to have been given from passion, partiality or prejudice —

see 1 Comp. 231. Gilbert v Bertenshaw

see notes & authorities referred to here —

Grants Sum. 240. In Ducker. v. Wood. 1 Term Rep. 277. which was an action of assault, Ld Mansfield said, there was no doubt, but that the Court had the power of taking the opinion of a second Jury in any Case where the damages were excessive. —

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Id — 241 In Jones. v. Sparrow - 5 T. Rep. 257. action of assault beg Trespass - cap. Master —

In Chambers. v Caulfield. 6. East-Rep. 256. - which was an action of damages for criminal Conversation the Court declared that if it appeared to them, from the amount of the damages given, as compared with the facts of the Case laid before the Jury, that the Jury must have acted under the influence of undue motives, or of gross error, or misconception on the subject, they would have thought it their duty to submit the question to the consideration of a Second Jury -

The Court in its charge to the Jury in this case weighed more upon the Circumstances which could attach culpability to the Conduct of the Defend^t than to the nature and extent of the damages in case they should be of opinion ag^st him — And in regard of the Culpability of the Defend^t the Court were disposed to think that as the Plaff was his domestic Servant, a greater degree of responsibility would attach to him, in regard of his conduct towards ~~the~~ her Plaff. inasmuch as he was bound not only to shew a good example in his house & family, but also to check any irregularity, or at least to discountenance it when it came to his knowledge — That the circumstances of familiarity appears between the Plaff & Defend^t which between persons not standing in the relative situation of master & Servant, might be considered as indifferent & innocent, yet when they tended to destroy the distinction of master & Servant, & of that superiority & subordination, which ought to exist between them they were presumptions as the master, as they were degrading to his situation & character, & gave room to suspect an illicit connexion by thus paving the way to it —

Upon further consideration of the above charge I see nothing in it which was incorrect, but the damages appear to be excessive — that is comparing this case with what has generally been adjudged by Juries in former Cases equally favorable, and am rather disposed to think that had the Court charged them more particularly on the Subject of the damages, they would not have given so much, but not being directed on this head they have been carried away more by their feelings than a steady and correct principle of decision — The reason for allowing damages in cases of seduction is upon the principle that it may have been effected through a promise of marriage, and therefore when the Defend^t is a married man this principle cannot be admitted and the damages are much diminished sometimes wholly denied, the only compensation allowed being to indemnify the Plaff for expences of lying in & other actual damages but nothing of a vindictive kind, as the presumption of Law is as her —

See. Repᵉ Vᵒ Grossesse. p. 338 Ed. Ed.
Ainsi on accorde une plus grande faveur à une fille mineure contre un Majeur &c — à une fille soumise par état à celui qu'elle accuse, qu'à une autre dont la Condition seroit egale.

1. Dareau. 187. Lorsqu'il paroit qu'il y eu promesse de mariage, ils, (les dommages) peuvent être beaucoup plus considerables; car une promesse pareille acheve souvent de consommer la Seduction.

Id. p. — 189. Lorsque c'est un maitre qui abuse de sa Servante, il n'est pas plus à l'abri qu'un autre des dommages & interets. — Il est presumé avoir exercé l'empire qu'il avoit sur elle, et il doit reparer le tort qu'il lui à fait. + On a noté — it is said —

Il est etabli au Traité de la Seduction, qu'il n'est point dû des dommages et interets à la Servante qui s'abandonne à son maitre, sans espoir raisonnable de l'epouser, neanmoins par commiseration, plutot que par exacte Justice, on en accorde quelquefois à de pareilles filles. +

Id — p. 195. Si la personne abusée a eu juste Cause d'ignorer l'etat du Seducteur, ses dommages & interets sont comme vis-a vis ceux d'un homme libre — si au contraire elle a connû son etat, elle paroit coupable d'une plus grande incontinence, dés qu'elle n'avoit aucun espoir de parvenir à des biens indissolubles avec lui — des lors l'indemnité doit être moindre —

On a noté + S'indemnité doit être moindre — Les bonnes mours voudroient même qu'il n'en fut point accordé du tout. Ce qui peut seul excuser la foiblesse d'une fille, et faire naitre la commiseration en sa faveur, c'est la supposition qu'elle n'a cedée aux efforts de son Seducteur, que dans l'espoir de le voir bientot devenir son epoux — Cette supposition est la Seule base raisonnable sur laquelle on puisse asseoir une demande en dommages + interets pour une fille abusée. +

Or cette ressource manquant absolument à celle qui s'est livré à un homme marié, à un prêtre, ou à un hom. d'Eglise la delinquante n'offre plus qu'une fille libertine & sans mours qui ne merite point d'etre plainte, et qui cesse d'interesser. —

See also Denizt. Vo Grossesse —

Traité de Seduction. p. 8. 66. 67.

Pearson. } How far it is necessary to shew, in an action for a
v. } malicious complaint & prosecution for felony, that
Vanderstuys } the proceedings have been determined —

11 East Rep. 514 — Acquittal by the Jury, when followed by Judgt
Note (e) of the Court, held suffe — ~~who~~ after Verdict, where
proof of such Judgt was made, altho' not specially
alledged — Hence it may be laid down that acquittal
by the Jury without Judgt by the Court would
not be suffe — see also same point. Willes Rep. 517.
Hunter. v. French vali —

Hammond's N. P. p. 251 — The practice is to shew by what
means the original action came to an end, and that such form
of pleading is essential seems to have been the opinion of the Court
in Lewis. vs Farrel — If the allegation that the original Suit,
Stra. 114 — is at an end is omitted, a Verdict will cure the defect, for the
fact must have been proved at the trial, or the Pltff could not
have recovered — cites. 10 Mod. 209. Helleys Rep. 166. Butts vs
Foster. —

Esp. Prac. Treatise on the Settling of Evidence for Trials
at Nisi Prius. — p. 277. On Ev. on act. for malic. pros" —

But in every case the pltff must prove the proceedings
which the Defendt instituted agt him to be at an end — as
in the case first put, he must shew that the Justice dismissed
the complaint — in the second his acquittal† — and in the
third that the Suit commenced by the arrest is at an end
either by a Verdict — non pros' — or Discontinuance — In
which case of a Verdict of Non pros' he must have an examined
copy of the Judgt Roll — in the second he must produce the
Rule — and all these proceedings must be proved by written
evidence and cannot be dispensed with. —

† What is meant by acquittal — see 2. Hale. 243 — "But it is
to be known, that there must not only be an acquittal by Verdict,
but a Judgment thereupon — "quod eat sine die" — for the bare Verdict
of his former acquital is not a sufficient bar without a Judgt —
pleaded also — though the acquittal regularly is a warrant
for entry of the Judgment at any time after. —

See many of Cases collected. 1 Bac. Abr. p. 96 — Tit. actions on Case — on note —

In actions of this kind the pltff must alledge that the original Suit wherever instituted is at an end. Doug. 205 — for otherwise the point would come to be tried too soon & disorderly Yelv. 117 — It must be legally at an end, and therfore in an action agt a Justice for an illegal commitment on a supposed charge of felony, the Court held an allegation, that the Pltff was discharged from his imprisonment, to be insufficient because there are various ways by which a discharge may be had without putting an end to the Suit — it ought to have shewn, "How discharged" — 2 Term Rep. 225 — Str. 114 — Hob. 206. 266. — 10 Mod. 245 — So in an action for maliciously holding to bail, it must be shewn what is become of the original action — 1 Salk. 15 — Dy. 285 — If it has been abandoned, it should seem that the action would lie, for abandonment is an indication of its being false & hopeless — W. Jones. 93 — So where the pltff suffered himself to be non-suited — 13 Bull. N. P. 13 — But a Nole prosequi by the Attorney General, is not such a termination of a Criminal Suit as will authorise an action. 6 Mod. 261 — 10 Mod. 219 — Gilb. Ca. 185. &c —

— Whether the defect of stating the original action to be determined may not be cured by a Verdict, or plea in bar — Raym. 418. 2 Keb. 456. 753 — 3 Keb. 781 — Saund. 229. —

See also —

Incledon. v. Berryval. 1 Camps. N. P. Ca. 203. note (a) The Pltff produced the record of acquittal — and proved, that the Defendt had abandoned the prosecution —

Wallis. v. Alpine — Id. p. 204. (note) Pltff proved that at the Sessions to which he was bound to appear, no Indictment was preferred — and that the Pltff was therfore discharged from his Recognizance. —

Brestow. vs Haywood. 4 Camps. N.P. Rep. 213-14. Even in an action for a malicious arrest in a Civil case, the suit must be shewn to be at an end —

1 Nouv. Pigeau. 160 — La demande de caution doit etre proposée avant toute exception — Si le Defend^r propose les autres exceptions sans exiger préalablement la Caution, alors negligeant la Seureté que lui accorde la Loi, il reconnoit trouver dans la probité de l'etranger, une seureté suffisante et renonce tacitement à la faculté d'exiger Caution.

Prim^se vs Robinson } On question whether Defend^t by pleading to the ~~Declaration~~ Juris dictionis has waived his right to obtain Security for Costs —

22 Vin. 530. 531 — When one pleads in abatement, & also in bar, the plea in bar waives the plea in abatement —

— If one is sued by the addition of Baronet, who is not so — yet if he appear & answer by that name, he is bound —

— Where matter is pleadable in abatement, the benefit of it is lost by pleading to issue —

— The mo. is in nature of an Excep^n Dilatoire. —
1 Pigeau. 166 —

Sous la reserve de ses autres exceptions & moyens contre ladite demande, requiert, que faute par le Demand^r d'avoir donné ladite Caution — il soit declaré non recevable en sa demande &c —

— Denizart. v^e Caution Judicatum Solvi — N^o 16. La demande afin de Caution, étant une Exception dilatoire, une espece de fin de non recevoir, puisque l'Etranger est non recevable à poursuivre jusqu'à ce qu'il y ait satisfait, devoit etre proposée avant le fond, même avant les exceptions peremptoires, pour y être préalablement fait droit — refers to art. 5. tit. 5. Ord^ce 1667 & to an arrêt 27 June 1705 — & Case in appeal. arrêt 8 Aout 1718. — —

John Wragg — Thomas Hunter & Isabella Cowen opp^ts

On opposition of the wife claiming the effects seized on Ex^on of the husband, as her separate property under a clause of exclusion of Communauté in her marriage contract. —

1 Bourj. p. 511. Ch. 2. Sec. 1. dist. 2. N^os 6. 7. 8 —

N^o 7. Le mari nonobstant cette exclusion de Communauté jouit de tous les revenus de sa femme, & fait les fruits siens, tout l'effet de cette clause étant d'exclure la femme du benefice de la Com^te — — lui en donner une autre ce seroit l'etendre au-dela de ses limites. —

N^o 8. En effet ces fruits lui sont destinés pour les charges du mariage, mais il n'en seroit pas de même s'il y avoit separation contractuelle; la femme en ce cas jouit de ces revenus, c'est le juste effet de cette autre clause qui frappe la capacité personnelle, comme ses biens. —

See also Poth. Com^te N^os 161. 2. 3 &c —

N^o 1852.

Turner — M^cNider & al.

Dic. Droit de Ferriere. V^o Marchand & Negociants.

Il faut remarquer que l'on peut assigner tous ceux qui sont associés pour fait de Marchandises au domicile d'un seul, et cela pour la facilité du Commerce; autrement ce seroit des longueurs infinies qu'il faudroit essuyer, par — l'eloignement de chacun des associés, s'il falloit les assigner chacun à leur domicile particulier. — Il y a plus, c'est que chaque associé pour fait de marchandises, est l'homme, et le facteur de la Societé — c'est pourquoi, il peut vendre & acheter recevoir l'argent & payer — actionner les Debiteurs, et par la même raison être actionné, et engager par la ses associés

N° 1852
Turner
& Niderdale

On service of process on one partner for all the others —

Old Denizt. v° associé. N° 27 — Il n'est point necessaire de donner à chaque associé ou interessé une copie des exploits de demandes, de significations, — procedures & contraintes qui se font contre des associés; une seule copie suffit pour tous. —

N° 28 — This principle applied to the Joint-Proprietors of the Canal de Briare

Repse v° Ajournement. p. 291 —

Quand on veut assigner pour obtenir une sentence contre plusieurs marchands associés, ou autres debiteurs de billets solidaires, les huissiers doivent avoir attention de n'assigner qu'un de ces debiteurs, tant pour lui, que pour ceux qui ont signé ou endossé les billets avec lui — la même chose doit s'observer pour les autres procedures, sans que sous quelques pretextes que ce soit les huissiers ou Sergens puissent en user autrement. —

Nouv. Denis. v° assignation. § 7. N° 13 —
same as in Repertoire, above cited —

Dic. Droit. v° marchand —

Old. Denizt. v° Societé. N° 27. 28 — see above —

Cours du Droit Commercial. 3. Vol. p. 120. N° 1040 —

Dans l'usage le nom de Societé est donné plus particulierement à l'union d'un petit nombre d'individus; et l'on appelle Compagnie une reunion d'associés nombreux pour un objet d'une haute importance & d'une grande etenduë — Ainsi on a connu autrefois la Compagnie des Indes — d'assurance sur la vie — ou contre les — Incendies &c —

see also 1st Vol. p. 42 N° 44. —

Maritime Insurance is considered an act of a Comonercial Nature Id. N° 47. —

No 981
M. Ch. Lemoine de Longueuil — & Franc. Charron

Action for recovery of Lods & Vents

The dem.r stated — That the Pltff is Seigneur Proprietor in possession of the Barony & Seigniory of Longueuil & as such entitled to all Lods & Vents & other Seigneurial rights & dues accruing thereon — That on the 19.th day of June 1812, by a certain act or deed made and passed before Cadieux & Privat Public notaries, Charlotte Vian widow of the late Franc. Charron deceased did give assign and make over to the D.r Defend.r her son by her marriage with the said late Franc. Charron a certain lot of land in the said Barony viz.t ou— which said conveyance was made by the D.e Charlotte Vian for and in consideration of the sum of a sum of 1400.tt— being for the balance of his rights in the succession mobilier of his deceased father, of which the D.r Defend.r in & by the D.r act did discharge and acquit the said Charlotte Vian and also for and in the further consideration that he the D.r Defend.r should pay to Messrs Franc.s Charron & Ancange Charron his sisters at their age of majority to each of them the sum of 3300.tt—, being the amount of their respective rights in the Succession mobilier of the said late Franc.s Charron their father, established & fixed by the acte of partage of the property of the Community which had subsisted between the said late Francois Charron & the said Charlotte Vian, bearing date the 11.th day of march 1812 passed before Cadieu & his Colleague Notaries, which said several sums of money make together the sum of 8000.tt— equal to £333. 6. 8— And the D.r Pltff saith that the said acte ordered of Conveyance is equivalent to a deed of sale & passed after the partage aforesaid and that there became due and owing by the D.r Defend.r for

for Lods & Ventes thereon to the Pltff the sum of £27. 15. 6 together with the sum of £2 paid for Copies of the said Notarial acts to support this action & filed herewith — Concludes to the pay of a sum of £29. 15. 6 & interest & Costs —

Plea — Nil deb — & further that Pltff cannot have or maintain her action & demand aforesaid for Lods & Vents on the deed of Cession in question, inasmuchas by Law the same carries no Lods & Vents, being an arrangement de famille and a Donation from a Parent to a Child on terms which give no claim for said Lods & Vents

Replication Issue —

Gerrard & Co
vs
Nickless & Co

Cases cited —

1 H. Bl. 81. Williams v. Millington —

An auctioneer employed to sell the goods of a third person by auction, may maintain an action for goods sold & delivered agt. a buyer, though the sale was at the house of such third person, and the goods were known to be his property —

Repse vo Revendication. — p. 619. —

Il n'y a regulierement que le proprietaire de la chose qui puisse intenter l'action de Revendication. — Il suit de la que l'acheteur, à qui la chose achetée n'a point été livrée, ne seroit point fondé à intenter l'action de Revendication, parceque la tradition d'une telle chose est necessaire pour en acquerir la propriété. —

and p. 621. — Au surplus, celui qui revendique la chose, et qui en a fait faire l'enlevement, est obligé de prouver son droit de propriété; si non celui sur qui l'enlevement a été fait, doit en obtenir main-levée, avec dommages, interets & depens. —

See Cases —

Cox. v. Harden. 8. East Rep. 211. —
Waring. v. Cox. 1 Camp. N. P. Rep. 369. —
Sargent. v. Morris. 3. Barn. & Ald. 277. —

see also — Evans — v. Marlett. 1 Raym. 271. — contra — but among cases there referred to see 12 Mod. Rep. 156 — where the principle of this action seems decided. — S. C. 3 Salk. 290 —

No 1836.

Carmel
Chisholm. }

Action on draft drawn by James Stewart James Holroyd & David Carnegie Low. merchts & Copartners under the name or firm of Stewart Holroyd & Co on the Defendt payable to the order of the drawers, and by them indorsed to Pltff, dated 22d Decr 1819, for £100.18.7 The same was afterwards indorsed by Pltff to R. Griffin, who caused same to be protested for non-payment, upon which an expence was accrued of £1.5 which added to principal sum forms that of £102.3.7 for which action is brot

Protest. dated 25th April 1820.

Plea Non-assumpsit.

2 Payment by acceptance of Wm & Thos Hunter.

3 Payment of 10/ in the £ by dividend of Defts Estate to Drawers Holroyd & Co

No 891—
De Longueuil
vs
Charron.—

The question whether Lods & Ventes are due on a cession by a mother to her son of a lot of land, in consideration of his paying to each of two sisters 3500# — due to them as their share in the succession mobiliaire of their deceased father & being quit of the sons for a sum of 100# due him on same act.—

The authority cited by Pluff from Pothier Tr. Fief. p. 153 is against him, as he appears to accede to the opinion of the De Livonniere & Guyot—

The authority from dº p. 155. 6, refers to general principle of transaction — but says nothing as to the particular kind of transaction between parent & child —

Prudhomme. p 257— if the debt paid could be considered as equivalent to the value of the land, in a donation en ligne directe — this would be considered as a Sale — & Lods due

But this fact not proved as to value of land

So however what this author says. p. 259— La donation
" faite par le pere à un de ses Enfans à la charge de payer
" les dettes de sa succession, ne donne ouverture à aucun
" droit — parceque les dettes d'une succession sont les charges
" des biens qui composent la succession"—

The arrets referred to as cited from Repe vº Lods & Ventes. §. 8. p. 616— appear to be cited only to shew the opinions of particular writers, or what former decisions had been, for this author, after citing them, says— "Mais ces Arrets
" quelque precis qu'ils paroissent, sont combattus par
" un grand nombre d'autres, qui ont enfin emporté la
" balance"— cites— Carondas.— Guyot— La peyrere — arrets du Parlement de Paris —

The arret cited from Grainville p. 261— was this— Si une femme donataire de la moitié des propres de son mari par son Contrat de Mariage, et qui en payement de sa dot et des dettes par elle acquittées, recoit l'autre moitié des propres par acte passé entre elle & les heritiers, et ce, ayant renoncé à la Communauté, doit des Lods & Ventes de la portion qui lui est donné en paiement — Judged affirmative —
She was not in line of succession to this property — & it is so by the Substitut du Procureur General, in his moyens,

arrêt du 31 Aout 1739. Cet arret est fondé sur le principe certain qu'un Coheritier Creancier d'une Succession, ne doit point de droits pour les heritages de la Succession qui lui sont delaissé pour sa creance + in speaking of an arret he refers to of 1648 - touching a Cession made by one Sister to another

+ The authority cited from Fremenville 5. Vol. p. 740 - is more decided & positive & refers to several decisions -

But see authorities on the other side

Hervé. Theorie des matieres Feodales & Censuelles. 2. Vol, p84. says - Toujours sur le même principe d'accommodement de famille, on decide encore, qu'il ne se fait point de vente, lorsqu'un pere donne un Fief a son fils, soit à la charge d'acquitter ses dettes, ou telle portion de ses dettes, soit pour s'acquitter lui-même de ce qu'il doit à son fils, par example, pour les reprises de sa mere, pour le reliquat d'un compte de tutelle &c - Deux arrets l'un de 1688, et l'autre de 1733, rendus apres partage d'avis, ont confirmé cette decision" —

Renauldon. Dic. des Fiefs. Vo Lods & Ventes. No 204

Il n'y a pas aussi lieu aux Lods & Ventes lorsqu'un pere fait une donation à son fils à la charge de payer ses dettes aliud dicendum - si une telle donation etoit faite en faveur d'un parent, ou d'un Etranger —

see after p. 46 - +

Boutaric, Traité des Droits Seigneuriaux - p. 145

Il reste deux questions importantes dans cette matiere. - La première, de scavoir, si ces trois sortes de donations lorsquelles sont faites par un pere à ses enfans donnent egalement lieu aux Lods - Et la seconde si elles sont sujettes aux Lods lorsque la charge ne regarde pas le profit du Donateur —

A

A l'egard de la premiere question, elle a eté diversement decidée par les auteurs et par les arrets — Duplessis rapporte deux arrets des années 1607 et 1661, par lesquels il fut jugé, que d'une donation faite par un pere à ses enfans pour demeurer quitte envers eux d'un compte de tutelle, ou de la dot de leur mere, il etoit dû des lods — Henrys rapporte un arret du 12 Juillet 1650, dont la decision a eté la meme, dans une espece ou il n'y avoit d'autre difference si ce n'est que le Contrat avoit eté qualifié de Vente ou Bail, en paiement de ce qui etoit dû aux enfans.

D'autre part, le Journaliste des audiences rapporte un arret du 12 Mai 1631, par lequel un fils, donataire particulier de sa mere à la charge de payer 9000^{tt} de dettes, fut relaxé de la demande du Seigneur — Basnage en rapporte deux du Parlement de Rouen des 18 Decr & 8 Janv^{r} 1672 qui l'ont jugé de meme et dans la meme espece — et M^{r} Guyot en rapporte deux autres des années 1688 et 1733, par lesquels, des donations faites à des enfans, pour demeurer quitte de ce qui leur etoit dû, furent declarées exemptes du droit de Lods.

Tous les auteurs qui ont ecrit dans ces derniers tems, se sont rangés à cette Jurisprudence —

Les donations faites aux enfans à la charge de payer des dettes, ou à la charge que le pere demeurera quitte des droits que ses enfants avoient sur lui ont eté regardées comme n'etant qu'une anticipation de ce qui devoit arriver un Jour, lorsque les enfans devenant les heritiers du pere seroient obligés de payer ses dettes, ou confondroient celles dont eux-memes etoient Créanciers. —

+ Renauldon, Traité des Droits Seigneuriaux liv. 2. ch. 2 p. 164. 5 –

Lorsqu'un heritage censuel est donné en paiement d'une dette, il y a ouverture aux Lods & Ventes, si toutesfois le paiement se fait d'etranger à etranger ; Car quand c'est du pere au fils ou Coheritiers on y met quelque difference. — Quand par example le pere donne un heritage Censuel à son fils en paiement de ce qu'il lui avoit promis en mariage, un tel delaissement ne produit point de Lods & Ventes : Il en seroit dus au contraire si le pere donnoit à son fils l'heritage Censuel en paiement d'une somme que lui auroit prêté son fils, [ou de ce qu'il lui redevroit pour reliquat de Compte de Tutelle]

Entre Coheritiers, lorsqu'il s'en trouve un Créancier de la Succession et qu'on lui donne hors part en paiement, un heritage Censuel, il ne doit point de Lods & Ventes — Il en est de meme quand on donne à l'un des Coheritiers un heritage Censuel à la charge d'acquitter les dettes de la Succession. —

Fonmaur. Jr. des Lods & Ventes. partie 3. ch. 17. p. 30. № 499. –

Les negoces des peres & meres avec leurs enfans doivent etre affranchis des Lods, selon Guyot. Entrons dans le detail des preuves de cette exemption +

see arrets he cites. №s 1. 2. 3. 4 & 5 –

see also. № 500. p. 32. —

Blackwood & Therien et al. { Quest. as to right of suing drawer & Indorser of a note in same action as solidairement obligés —

O. Denz.t v.o Endosseurs N.o 11 —

Le dernier porteur d'une lettre de change ou billet de Commerce, a pour debiteurs solidaires, tous les Endosseurs tireurs et accepteurs — mais il doit diriger son action dans les tems reglés &c —

Judg.t 19 Oct. 1821 — Rep.re v.o Endossement. p. 709 — bottom last column

Nous avons deja dit plusieurs fois, que le dernier porteur d'une lettre ou billet de change a pour garans solidaires, tous les endosseurs tireurs & accepteurs. &c

and p. 712. car in point. D.lle Vanackre v. Lazarde & Dinet —

Rep.re de Jur. de Merlin. v.o Ordre (billet). p. 837. 8. N.o 7.

Poth. Con. Change — N.o 115. — (162). 181 in fine — 212 —

= Rep.re — v.o Billets. p. 382. 3. — C'est pourquoi si le Debiteur du billet ne paye pas à l'echeance la personne qui en a la propriété à une action en recours, tant contre celui qui a endossé le billet à son profit, que contre tous les endosseurs précedens — elle est en droit de les faire condamner solidairement à la payer. —

Société —

Lorsqu'un marchand a fait banqueroute après la dissolution de la Société, les Créanciers de la Société n'ont un privilege sur les effets qui la composoient à l'exclusion des Créanciers particuliers du marchand, postérieurs à cette dissolution — 1 Arrets d'Augeard p. 736. —

Par arrêt rendu à la quatrieme Chambre des Enquêtes le 11 Juin 1692, jugé, una voce, qu'un Créancier de la societé est preféré sur les effets de la Société, au Créancier de l'associé, quoique ce Créancier fut antérieur à celui de la Societé. — Les effets n'étoient que des marchandises — Dec. des arrets de Brillon. V° Société N°7 (Société Dettes). p. 208 —

Eo. loco - p. 209 —

De la preference d'obligation sur le fond d'une Société — Jugé au même parlement de Grenoble le 22 Août 1637 que les dettes faites pour la Société, sont preferables aux etranzers, que l'un de la Société a contracté en son propre et privé nom, quoique antérieures à la Société — Basset Tom. 2. liv. 5. Tit. 2. Ch. 11. —

1. Montagu on Partnership. 131.

Dividend — The Joint Estate is applicable to the payment of the Joint debts, and the separate Estate to the payment of the separate debts; and the surplus of either estate must be added to the other deficient Estate. —

see cases cited —

Pardessus. Cours du Droit Commercial. 3 Vol. p. 17.

Une autre conseguence de ce principe, est que le Créancier ne pourroit venir faire saisir les effets et autres choses formant l'actif de la Société, sous pretexte qu'une partie indivise appartient à son debiteur — Il doit attendre la liquidation — se borner aux oppositions capable de conserver ses droits, & exercer seulement ceux de ce debiteur dans le partage des profits annuels — De meme celui qui seroit Créancier d'un des associés & debiteur de la Société, ne pourroit ni invoquer dans son intent la Compensation pour se liberer — ni etre repoussé dans les poursuites qu'il exerceroit contre son debiteur par l'exception de Compensation que pouvoit valoir celui-ci. —

Durocher ads
Beaubien

Or action of account agt. Defendr Exrs &
Trustees of late Jn Bte Beaubien —

Quest. whether the Grevé de Substitution for the usufruit only, can be considered as holding the property, and as the proprietor of the Estate during that enjoyment, so as to be considered as forming a part of the succession of the Grevé, on failure of the proper Substitutes. —

Poth. Tr. de Substitutions. Sec. 3. art. 1. p. 508. —

Regles sur l'interpretation des Substitutions, & sur celles de quelques Conditions, clauses, & termes qui s'y rencontrent. —

La principale regle est, qu'on doit rechercher ce qu'a voulu l'auteur de la Substitution, sans s'attacher aux termes. —

1st C'est en consequence de cette regle qu'il a été jugé par arret du 10 Juin 1719, rapporté au 7e Tom. du Journal et par Auzeard, que les termes dont se servent les Notaires ignorans dans les Substitutions, que celui qui en est grevé n'aura que l'usufruit des biens substitués, n'empechoient pas que le grevé ne dut etre considéré comme proprietaire de ces biens, et que le terme d'usufruit employé dans le testament, devoit s'entendre, non d'un usufruit proprement dit, mais d'un droit de proprieté, qui au moyen de la Substitution, devoit s'eteindre et se refondre en la — personne du grevé à sa mort, et qui à cause du — rapport avec l'usufruit qui s'eteint de meme, avoit été appellé usufruit. —

Id. art 2. §. 1. p. 513. Si l'auteur de la Substitution a prescrit lui-meme l'ordre dans lequel elle sera recueillie, et nommé ceux qu'il — entendoit preferer aux autres, on doit suivre, ce qu'il a ordonné, si non, ce sont ceux de la famille qui sont en plus proche degré qui doivent la recueillir —

Mais

Mais sont-ce ceux de cette famille qui sont les plus proches du Testateur, ou ceux qui sont les plus proches du grevé, qui doivent la recueillir ? — Il n'est pas douteux que ce sont les plus proches du grevé, et on n'a aucun égard à sa proximité avec le Testateur, mais à sa seule proximité avec le grevé. —

Id. Sec. 5. p. 541. De l'effet des Substitutions avant leurs ouvertures, et des Obligations du Grevé. —

Cette matière se reduit en trois principes —

1°— L'heritier, ou autre grevé de Substitution est, avant l'ouverture, seul proprietaire des biens substitués —

2°— Outre que le grevé est debiteur des biens substitués, ce droit de propriété qu'il a des Immeubles substitués, n'est pas une propriété incommutable — mais une propriété resoluble au profit du Substitué par l'échéance de la condition qui doit donner ouverture à la Substitution. —

3°— Le substitué, avant l'ouverture de la Substitution, n'a aucun droit formé par rapport au bien substitué, mais une simple esperance —

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art. 1. Le grevé de Substitution, etant, avant l'ouverture de la Substitution, le vrai et seul proprietaire, des biens substitués il suit de la, que les actions actives & passives de la Succession resident en sa seule personne —

Prescription will run against him —

p. 342 De ce que l'heritier ou autre grevé de Substitution, est, avant l'ouverture de la Substitution, seul et vrai proprietaire des biens substitués, il suit aussi, qu'il a qualité pour recevoir le rachat des rentes, et le prix des alienations forcées des heritages substitués, comme d'une licitation, et que les debiteurs sont libérés en payant entre ses mains —

Potth. Sub. Sec. 5 art. 2. §. 1. p. 560. Quoique le substitué tienne son droit de l'auteur de la substitution, et non du grevé, neanmoins il est vrai, que la mutation de proprietaire et possesseur se fait de la personne du Grevé à celle du Substitué, puisqu'effectivement, la proprieté et la possession des biens substitués passent du grévé au Substitué—

Droits de fiefs - regulated accordingly.—

D. Essaie De Savigny. Tr. des Sub. ch. 29. p. 175—

N.533 Quand le fideicommis s'evanouit par le deces de l'appellé avant l'ouverture, que devient la chose substituée?

N.534. Elle demeure au grévé, qui par la en est possesseur libre— Elle ne passe point à l'heritier du Substitué, puisqu'il n'y a point de transmission— Elle ne passe pas non plus à l'heritier du Substituant— car le Substituant en donnant d'abord cette chose au Grévé l'a preferé à son propre heritier; et ce grévé n'etoit tenu de la rendre qu'au Substitué.—

Ch. 32. p. 189 N. 568. 9 Il faut donc tenir pour constant que dans le legs pur, la proprieté de la chose leguée reside pendant un tems, sur la tête de l'heritier— Elle passe de la sur celle du Legataire au moment ou il accepte—

N.570. Puisque les fidei-commis sont gouvernés par les mêmes regles que les legs, il s'ensuit, que dans les fidei-commis purs, la proprieté reside egalement pendant un tems en la personne du grévé—

N.571. Le grévé malgré l'ouverture subite de ce fideicommis pur, est proprietaire jusqu'à ce que le Substitué le devienne par l'acceptation—

No

N°572 Cette vérité est d'autant plus incontestable dans notre usage qu'on y a toujours tenu pour regle indubitable, que la propriété ne peut pas être en suspens — et qu'il faut necessairement qu'elle soit assise sur la tête de quelqu'un.
=

576 Retenez donc bien, que dans ce fidei commis Conditionnel la propriété appartient au grevé jusqu'a ce que la condition dont le fidei commis dépend, soit arrivée — Tant que la Condition est pendante, le grevé est veritablement et pleinement proprietaire; toutes les Loix y sont formelles —
=

Raison

577 Le Substitué ne pouvant avoir la propriété pendant la Condition, il faut bien qu'elle appartienne au Grevé puis qu'elle ne peut pas être en suspens —

on note —

Un Testateur aura dit — Je legue la propriété de mes biens aux enfans a naitre de mon fils, voulant que mon fils se contente d'en jouir par usufruit sa vie durante — au décés du Testateur ce fils n'a point encore d'enfans — Quid Juris? — Par le principe que la propriété ne peut rester en suspens, elle appartiendra au fils, jusqu'à ce qu'il lui survienne des Enfans, malgré la clause, qui le reduit au simple usufruit —
=

Lacombe. Vo Substitution. Part. 2. Sec 1. N° 10. - p. 502.

(2) Ainsi de ces termes — En quelque tems que mon heritier ou mon legataire meure, Je veux que mon heredité appartienne à tel - il y a fidei commis — Comme aussi lorsque l'usufruit est legué à l'un, et la propriété à l'autre. —

N°18

N°. 18. Si un Testateur ayant institué un heritier avec ces termes, sa vie durante, a institué un autre heritier apres la mort de ce premier — la seconde institution a force de fideicommis — De même, quand ces termes, sa vie durante, n'y soient pas, la seconde Institution, apres la mort du premier, est prise pour fidei-commis

(3) Id. dist. 5. N°. 3. Donataire institué, ou legataire d'usufruit, grevé de Substitution, est censé Donataire institué, ou legataire de la proprieté. —

Arrets d'Augeard. 2. Vol. p. 316 —
Affaire d'Estouteville et Lucheu. —

Q. Si Adrienne Destouteville, ayant donné par son Contract de mariage le Duché Destouteville à François de Bourbon, Comte de St. Pol, son mari, sa vie durante seulement, et apres lui, à leurs enfans à naitre, le Comte de St. Pol, n'a eu qu'un simple usufruit, ou la proprieté grevée de Substitution, et s'il a rempli le Degré de l'Institution. —?—

une seule reflection va prouver la solidité de ces decisions. Si dans l'espece d'une Substitution on admettoit qu'un premier donataire fut reduit au simple usufruit, il s'ensuivroit que — jusqu'à l'ouverture de la Substitution, il n'y auroit aucun — proprietaire. —

La proprieté ne pourroit resider dans la personne de l'Instituant, qui dans le cas de la Substitution testamentaire n'est plus en vie, lorsque l'institué recueille, et qui dans le cas de Substitution contractuelle, est presque toujours décédé — lorsque le cas de la Substitution arrive, et est de même de son vivant depouillé de la proprieté par la reserve ordinaire de l'usufruit, qu'on ne manque gueres de stipuler. —

Elle resideroit encore moins dans la personne du Substitué qui ordinairement n'est pas né, et qui n'a aucun droit, ni de proprieté, ni d'usufruit, avant l'ouverture de la Substitution

Il faut donc conclurre, qu'elle reside en la personne du Donataire chargé de Substitution, quoique la Donation qui lui est faite soit conçue en termes d'usufruit. —

Augeard, loco citato. p. 364. —

Un testateur institue Claude et Guy, ses peres, ses heritiers universels, à la charge de payer ses dettes, et d'acquitter ses legs; il ajoute, qu'ils jouiront de tous les fruits de ses biens, sans pouvoir aliener les fonds, afin qu'ils puissent appartenir à leurs enfans mâles procrées de legitime mariage. — Au defaut de ses enfans il appelle d'autres personnes de sa famille. — Guy meurt sans enfans mâles — Claude ne laisse que de petits enfans mâles d'un fils prédécédé

Il se forme deux questions — La premiere, Si les petits enfans de Claude peuvent pretendre la moitié des biens du Testateur, laissés à leur ayeul — La seconde, s'ils peuvent pretendre l'autre moitié laissée à leur grand Oncle. —

Sur la premiere question, Dumoulin ne forme point de doute Il decide que les petits enfans de Claude sont substitués & appellés —

La troisieme des raisons par lui alleguées, est, que le Testateur ayant dit expressement, qu'il vouloit, que les Institués eussent les fruits de ses biens, est censé avoir fait un fideicommis —

Confirmatur, quia expressé se dixit velle fratres suos facere omnes fructus suos, igitur ad vitam suam tantum; unde fideicommissum resultat. — En sorte que, suivant Dumoulin ces termes — ad vitam suam tantum, forment la preuve d'un — fidei commis. —

No. 1784.—

Ant. Ouimet & ux. }
Jn. Bt. Tetro. — } vs.
ux.—

action en rescision du Contrat de Vente.——

The declaration states, that by Deed of Sale made and executed before Mr. Delagrave & his confrere Notys the 11 July 1816, the defend.ts sold and conveyed to the Pltffs two certain lots of land therein mentioned, for and in consideration of the sum of 9000.# payable as follows — that is, 6000.# paid immediately on passing the said deed — and out of the remaining 3000.# it was agreed that the Pltffs should retain in their hands the sum of 1398.# 17.s 6.d being the share & right of the four minor children of the said Defend.t Tetro, with his late wife Angelique Dansereau, on paying interest thereon to the sd. Defend.t until the said children came of age — and that the pltffs should pay the remaining sum of 1601. 2. 6. in two years from the date of the said deed without, it being agreed that out of this latter sum the Pltffs should pay what arrears there might be due to the Seignior on the sd. Lots of Land

That by virtue of the said sale the sd. pltffs took possessn. of the said lots of land at St. Michel 1816, as the lawful owners and proprietors thereof, and held and enjoyed the same quietly and peaceably, until lately, when they were informed that one half of the said lots of land was not their property, and that the other half was mortgaged for large sums of money.—

That after the said pltffs had entered on the possn. of the said lots of land, they paid to the Seignior of Rouville, the sum of 852.# 16, for arrears of Cens & rentes & other Seigneurial rights due on one of the sd. lands, and to the Seignior Debartzch a sum of 73.# for like arrears due on the other lot of land — so that the Pltffs actually paid and disbursed on the whole a sum of 6925.# 13.s on account & in deduction of the said principal sum of 9000.# — leaving a balance in their hands of 2174.# 7.s which the Pltffs retained & were always ready to pay according to the stipulations in the said deed of sale —

That since, that is, in the month of May 1819, the Pltffs found out and were informed, that the sd. Defend.ts had never

been

been proprietors of the whole of the said lots of land, but that one half thereof belonged to Emily, Hubert, Louise & Estha Tetro the said minor children of the said Defendr by his said first wife Angelique Dansereau, the said lots of land being Conquets of the Community that subsisted between them, and which the said Defendrs were in power authorised to sell —

That the said Plffs have also found out, that at the time of passing the said deed of sale, the said lots of land, the same were mortgaged for the payt of several sums of money, and in particular for the payment of a sum of £500 — due to the said minors — for a sum of 175 — due to Joseph Pratt, for balance due on the sale of the said lots and of a rente constituée of 20 annually, on a capital of 400 — due to the Noisons, present, and to whom also there was due a further sum of 140 — for seven years arrears of the said rente, making with the said principal a sum of 540 — and further, that upon one of the said lots of land there was a deficiency of 3 feet in width by the depth of 40 acres, which have been estimated at a sum of 130 — 3 — and of which the Plffs would be entitled to a deduction upon the price of the said lots of land —

That the said plffs in consequence of their said purchase have made improvements on the said lots of land to the amount and value of £246 — which they are ready to verify. —

That although the said Defendrs have been often required by the said plffs since the months of may 1819 to cause the right of property of the said Minors in the said lots of land to cease and determine, and to furnish & procure sufficient acquittances and discharges of the mortgages upon the said lots of land for the payt of the aforesaid several sums of money, the said Defrs have always hitherto wrongfully refused to do so, whereby the said plffs are obliged to have their recourse at law and to demand, that as the said plffs are threatened to be evicted and are in fact evicted from the possession of the undivided half of the said lots of land so belonging to the said Minor Children and being also troubled in their possession of the premises by reason of the Mortgages with which they are known affected prior to the

the passing of the said deed of sale to the extent of the sum of 5243^{tt} – do therefore demand that the said deed of sale be rescinded and annulled by the Judge of the Court, and in consequence that the said Defend^{rs} be condemned to reimburse and pay to the said plff^{s} – 1st The sum of 6925^{tt} 16 – paid by the s^{d} Plff^{s} on account of their said purchase. 2^{dly} the said sum of 6246^{tt} for the value of the improvements made by the said plff^{s} on the said lots of land since their said purchase 3^{dly} a sum of 3000^{tt} – for the damages suffered by the said plff^{s} by reason of their being evicted of the possession of the said lots of land – or that the Defend^{rs} do cause the right of property of the said minor children in the s^{d} lots of land, the said mortgages, trouble & disturbance in the possession of the said Plff^{s} to cease and determine – Wherefore &c

Plea – The Defend^{r} state that on 29 Aug^{t} 1815, the Defend^{r} Tetro, as Tutor of his minor children of his marriage with his late wife Angelique Dansereau, on a petition by him for this purpose presented to The Hon^{ble} L^{d} Ch. Foucher, one of the Judges of the Court of Kings Bench for the district of Montreal, had been authorised to sell in the usual and customary manner the two lots of land in question, of which he the said Defend^{r} was proprietor for one half – That in consequence the s^{d} Defend^{r} caused the said lots of land to be cried and published for sale at the Church door of the parish where the said lots of land are situated, and on the 3^{d} Sept^{br} 1815, the same were adjudged to the s^{d} Defend^{r} as the last and highest bidder, the one for the sum of 3450^{tt} – and the other for the sum of 550^{tt} – as appears by the Proces Verbal de Greffe ordinaire of the adjudication thereof by Gabriel Catudal, made before L^{s} B. Delagrave this confirm^{d} on the s^{d} 3^{d} day of Sept^{br} 1815. That afterwards, on the 9th Oct^{r} 1815, the said Gabriel Catudal in the name and on the behalf of the said minor Children and Franc^{s} Dansereau, their subrogé Tutem, made a deed of sale of the said lots of land to the said Defend^{r} for the consideration of the sum of 4000^{tt} payable as mentioned in that deed – That by virtue of the aforesaid adjudication and sale of the said lots of land, the Defend^{r} considering himself the true

and

and lawful owner and proprietor of the said lots of land did in may, June and July of the year 1816, did ameliorate and improve the said lots of land, and lay out monies thereon to the extent of 5000^{tt}—

That the said Defend^{rs} answering himself the true and lawful owner and proprietor of the said lots of land, afterwards on 11 July 1816 sold the same to the said Pltffs for the sum of 9000^{tt}— on the terms & conditions mentioned in the said deed and in consequence of which the present action hath been instituted at the s^{d} Defend^{rs}—

That since the institution of the present action, the said Defend^{rs} hath caused a petition to be presented to the Judge of the Court of Kings Bench for this district, in order to name a tutor to the said Minor children who might intervene in this action on their behalf, and in consequence of which petition P^{re} Dancereau the maternal uncle of the said Minors has been named for this purpose, who hath this day filed his intervention on their behalf in this Cause—

Whereupon Defend^{rs} prays. that upon the said intervention of the said P^{re} Dancereau, he may be authorised to make & execute a deed of sale of the said lots of land to the s^{d} Defend^{rs} for the sum and according to the terms and conditions contained in the said Adjudication, in order that thereupon the s^{d} Defend^{rs} may be authorised to execute a good and sufficient deed and conveyance thereof to the s^{d} Pltffs—

Replication— That as Defend^{rs} by their own shewing never had a sufficient title to the land in question, therefore Pltffs are founded in demanding that deed of sale to them be rescinded— consenting however, in case Defend^{rs} can under any authority of the Court obtain a sufficient title to the premises, the Pltffs. consent to retain the same & to discharge Defend^{rs} from the present action on their paying the Damages suffered by the Pltffs to the present moment & the costs of suit—

Intervention

Intervention by Pre Dancereau, Tutrix ad hoc to the minor Children of Defendr s'en rapporte à Justice — adds further, that he has a personal knowledge of the adjudication of the two lots of land in question made to the Defendr the 3e Septr 1815 — for the sum of 4000# — which he considers to have been the just and true value thereof, and even more — and further that after the said adjudication that the sd Defendr make very considerable improvements on the sd lots of land

By an Interlocutory order of the Court of the 18 Apr. 1821 — it was directed that an estimation & just appraisement by Experts & sworn should be made of the lots of land in question at the time of the sale and adjudication thereof to the Defendr, and also the opinion & advice of the relations and friends of the said Minors, touching the rights & intent of the said Minors in the said lots of land — for which purpose Petrimonio Mre was authorised to receive the said avis touching the value of the said lots of land, and if it was for the advantage of the said Minors that the said sale should be confirmed, of all which the sd Petrimonio was directed to draw up an acte & to transmit the same to the Court —

On 30 Mai 1821 acte before Petrimonio containing the opinion & advice of the relations & friends of said Minors, which states, that the land in question was sold for its greatest value on 3e Septr 1815 to Defendr & for the intent of the Minors & therefore the sale ought to be approved — to this avis was annexed the rapport d'Experts of Joseph Grivaud & Villeneuve & Jean Bte Cessin, who declare that they know the value of the land in question, & that when it was adjuged to Defendr in 1815, 4000#. was its just value — and further that since the sale that sd Defendr built a barn thereon & made improvements exceeding 1000#. —

№ 433.

Franc Bleigny
& Jany. -
&
Pre Marmier,
Jn Bte Leonard, &
Joseph Robin dit
Lapointe -

Action to rescind a deed of Sale, for cause of Lesion d'outre moitié du Juste prix. —

The declaration states, that by deed of Sale bearing date the 19th Augt. 1809., the plaintiff sold to the Deft Pre Marmier, 2 certain lots of land mentioned and described in the declaration, for and in consideration of the sum of 6000th payable in 30 years from 1 July 1819, by sums of 200th annually, and without interest. —

That the Defendants Jean Bte Leonard and Joseph Robin dit Lapointe, are now in the actual possession of the first described of the said two lots of land, & claim it as their property —

That the said two lots of land were worth at the time of the sale aforesaid, a sum of 6500th ready money, the interest of which for 30 years would amount to a sum of £390, and that the annual produce thereof, cultivated en bon pere de famille, was worth 500th —

That the said Plff hath by the said Sale therefore suffered a lesion of more than one half of the true value of the said lots of land, and is therefore founded in demanding that the said deed of Sale so made by him to the S. Marmier, be rescinded and annulled, and the said Defdt adjudged to deliver up the possession of the said lots of land to him the S. Plff with the issues and profits thereof — Wherefore &c

Plea of Pre Marmier —

1. That action has not been instituted within ten years — & cannot be maintained —

2. That Plff ought to have sued all the actual proprietors of the said lots of land, which he has not done, not having sued Jean Franc Leonard, one of them — so that the prescription acquired by him, must operate in favor of Pre Marmier. —

3. That

3. That there never existed any lesion in the sale of the aforesaid lots of land, the same not being worth more than what they were sold for—

4. That there appears no evident or pressing want of money on the part of the said plaintiff to part with the said lot of land from the circumstance stated of giving 30 years for the payt. of the price, without interest—

5. That the pltff by having been in the actual possession of the said lots of land, and cultivated the same, was well able to judge of the value thereof at the time of the Sale better than Defendt who had never seen them before the sale—

Plea of Joseph Robin & Lapointe—

That he the Defendt and Jean Franc Leonard (whom the Pltff pretends to sue by the name of Jean Bapte Leonard) having held and possessed one of the lots of land mentioned & described in the declaration, for 10 years & upwards, by virtue of good and sufficient titles, the present action cannot be maintained against them— And supposing even that the present action had been instituted within the ten years, the same cannot be maintained without having made the said Jn Fr Leonard a party to the suit, as holding a part of the said lot of land with the said Robin.— That the Pltff admitting that the lands in question at the time of the Sale thereof were worth £500- and were sold for £600. shews he has no right of action, as the delay of payment without interest does not alter the price or value of land, but on the contrary shews that the pltff was not forced to make a Sale from want of money, but that Sale was made for the real value of the land, which Defendt is ready to prove— Further, denying the facts stated in the declaration.—

Replication to Plea of Pte Marmier— That the

action

action was instituted within the ten years as the said Pte Marmin which is sufficient to maintain the same —

2. That Pltff was not bound to sue the other Defendrs with Marmin —

3. That there is lesion in the said Sale —

4. That Pltff did not make any Gift to Defr but a Sale and the value of the money given for the lands sold must be considered as well as value of land — and that the long delay of payt with the annual revenue of the land must be considered, as the sum of 200th paid annually is not equal to the revenu of the land —

Replication to plea of Dr Robin. —

1. That he cannot claim the prescription he sets up, as the present action was instituted within the ten years of Marmin which is sufficient

2. That action is well founded & not vexatious —

3. That there is lesion in the Sale

4th as above —

The Defendrs filed two deeds of Sale, one by Pte Marmin of the first described lot of land to one Frs Hebert dated 15th Septr 1809, for a sum of 5000th — and the a deed of sale of same land by Frans Hebert to Jean Franc Leonard, dated 20 Novr 1809 — for £12.10 — & rents of £20 — annually —

Two wits prove that this lot of land on 19 Augt 1809 was worth 2000th — that it might produce an annual clear revenue of about 200th — one wit says it might be worth 2500th — one says it might produce an annual revenue of 100th or 150th — melt — Of the other land nothing is said except by one wit who says it is a wood land & worth 20s annually

The Defendt. will say — that Pluff is an intelligent man & knows value of lands — that he cultivated this land & must have known its value when he sold it — That at the time of the sale it was in bad order, both in regard of the house & barn as in regard of fences & ditches — & as to value there is a variety of opinion, some say it was not worth more than a 1000tt — & cannot estimate its annual produce — as to annual value, or a prime — keeping up fences & ditches was sufficient —

As to the action being instituted agt. some only of the purchasers — see Rpse. v° Lesion. p. 464 —

Si c'étoit l'acheteur qui eut laissé plusieurs heritiers le vendeur pourroit incontestablement exercer l'action qui resulte de la lesion d'outre moitié de juste prix contre l'un de ces heritiers, sans qu'il soit obligé de l'exercer contre les autres — et il en seroit de même si l'heritage avoit été vendu à divers acheteurs —

No. 127
Galusha
vs
Tecumseh.

Action on Promy Note.—

Defendt was arrested on Ca. ad resp. returnable 1 Octr 1821 and gave bail to the Sheriff

The Defendt did not appear at return of writ, nor on 4th and default was entd. against him —

4th Octr. Pltff moved for admission of evidence ex parte on 8th —
11th " — mo. for evidence on 12th —
13th " mo. for Judgt. on evidence admitted —
15th " Mo. on part of Defendt to give special bail —
" — " Mo. to enter appce for Defts by W Beaubien. —
" — Mo. by Defendt
1. That Pltff. give security for Costs —
2. That writ of Ca. be quashed, as facts in affd and of Pltff are not true — parties Citizens of State of N. York when Defendt had called his Creditors together to obtain a discharge — when Debt in question was contracted —
3. That rule obtd by Pltff on 4th & Pltff mo. of 13th be set aside as Defendt was not then a party in Court
4. That delai be granted to Defdt to plead to 1st Feby next.

Judt on Defts mo. —

17th " Pltff gave security for Costs —
" — Defendt filed an Ex cep. per. à la forme —
18th — Pltff filed answer thereto — ~~& mo. for hearg motions, rejected~~
19 — Defendt filed a Replegues —
for hearg motions — and 2d motion
20 — Pltff — mo. for hearg on motions & Exceptions filed by Defts on 2d Feby next. —

N°. 119

Mount
&
Healey
&
Healey oppt

Touching privilege of a clerk to payt. of his wages

1. Dup. p. 620— Les Serviteurs l'ont aussi pour leurs gages—

Ferrer. vo Domestiques— Domestiques sont ceux qui sont aux gages de leurs maitres, comme les Intendans les Secretaires, les Commis, les Laquais &c—

—

N°. 1021.

Mitchell
&
Russell & May

Question touching novation in Contract—

—Where there is no novation—

Repse vo Novation p. 231. end of last column

Il semble que ce soit l'avis de Domat. au liv. 4. tit. 3. sec. 1 des Loix Civiles, ou il dit avec Justinien, que les changemens fait par les Contractans dans une premiere obligation, ne font pas de novation, parcequ'ils n'eteignent pas la premiere dette— à moins qu'il fut dit expressement qu'elle demeureroit nulle—

Bretonnier, en ses additions sur Henrys. tom. 2. liv. 4. quest. 44. assure, que la disposition du dernier droit est, ~~mais~~ même dans tous les païs de droit ecrit— a l'egard dit-il de ceux du ressort du Parlement de Paris, j'ai ecrit dans un proces de Lyon, ou cela a eté ainsi jugé par un arret rendu en la Grande chambre de Grands Commissaires— au rapport de Mr. Meunier, le 23 Avril 1698—

Id. p. 233.— 1re Col. 2e sentce—

De même si le Créancier et le Debiteur font entre eux quelques changemens à une premiere obligation, soit en y ajoutant une hypotheque, une Caution ou un Seureté, ou en les otant, soit en augmentant ou diminuant la dette, ou en donnant un terme plus long, ou plus court, ou en la rendant conditionelle, si elle etoit pure & simple, ou pure & simple, si elle etoit conditionelle—

tous

tous ces changemens ne font que deroger à l'ancienne Obligation pour ce qui est exprimé, sans faire une novation parfaite, qui s'etende aux objets dont le dernier acte ne fait point mention. —

Tous les arrets connus sur cette matiere confirment les maximes qu'on vient d'etablir

—

Opposition afin de charges & de conserver

Thibault Jr. des Criées. — 2e. part. p. 71. 72 —

Rien de plus inutile dans les Decrets que les oppositions pour conserver les droits Seigneuriaux ou les cens Emphyteotiques, une telle procedure ruineuse pour le Debiteur et pour le dernier Créancier, est condamnée par le Reglement de 1614.

Un usage abusif qui semblait neanmoins en prescrire la necessité, avoit prevalu de Nos Jours, il paroissoit donc aussi juste que necessaire d'en arreter le progres — cet objet etoit bien digne de l'attention du Parlement; aussi n'a-t-il pas echappé l'occasion de donner de nouvelles preuves de son amour pour le bien public; Car en fixant par son reglement de 1748 sa Jurisprudence sur quelques points de cette importante partie de notre droit, il a ordonné l'execution de celui de 1614, et a fait defenses à tous — procureurs de faire ni signer aucun acte d'opposition ni d'en repeter les frais contre les parties —

Intervention — & Reprise d'Instance —

Demarets Nouveau Stile du Chatelet — p. 13 — La demande en Intervention est, lorsque dans une instance formée entre deux particuliers survient un tiers dans l'instance, soit pour prendre le fait & Cause du Defendeur, ou pour quelque interet particulier & different de celui des parties, mais qui y a rapport

Pothier. Pr. Civ. p. 40 — L'Intervention est un acte par lequel un tiers demandeur a été reçu partie dans une instance formée entre d'autres parties, soit pour s'y joindre au Demandr, & demander la même chose que lui, ou quelque chose de connexe, soit pour se joindre au Defendr, & combattre avec lui la demande du Demandr qu'il a interet de detruire.

Arrêts de Notorieté de Denizart p. 393 — note (a) — Il n'en est pas de même quand il y a veritablement une mutation dans les personnes de l'instance; La reprise est necessaire en ce cas — Ainsi par exemple l'heritier de quelqu'un ne peut pas de plano continuer de poursuivre en son nom la procedure de l'instance dans laquelle celui dont il est heritier etoit partie; il doit prealablement reprendre cette instance et se faire donner acte de sa reprise — C'est une formalité essentiellement necessaire et d'un usage universel. —

Ravant. 126 — Mais on peut douter qui sont ceux qui peuvent reprendre les instances commencées avec un defunt. — Il est sensible qu'il n'y a que ceux qui sont substitués à tous ses droits, comme sont les heritiers, et les donataires et legataires universels. —

Il

Il ne paroit pas que régulièrement les Successeurs à titre particulier puissent reprendre les instances, elles doivent l'être par les heritiers — et les autres doivent intervenir pour soutenir les droits qu'ils ont comme Successeurs singuliers. — Voy. Poth. Proc. Civ. des Reprises d'Instance. p. 82.

Clwaid — Arbitrage —

Potts — Burton — On question whether the Rapport d'arbitres ought to be pronounced to the parties — and signified to them —

Rep^re de Jur. de Merlin. v^o arbitrage. N^o 34. p. 340 —

Quoique l'ordonnance de 1667. ait abrogé la formalité des prononciations des arrets et Jugements, il faut neanmoins pour la validité d'une Sentence arbitrale qu'elle soit prononcée aux parties dans le tems du Compromis autrement elle seroit declarée nulle — Deux arrets du Parlement de Paris des 18 Juin 1698 et 20 Fev. 1713, l'ont ainsi jugé — ☞ Cette Jurisprudence est fondée sur ce que c'est la prononciation qui assure la date de la Sentence.

But where there was no Greffier to receive the Sentence how is the date of it to be ascertained. — Co. Low. refers to V. Compromis. N^o 4 —

Id. V^o Compromis. N^o 4 — on an appeal in Cassation upon an objection taken, that, le droit des arbitres n'etant pas des Officiers publics, foi n'est pas duë à leur assertion en sorte que la date de la Sentence ne peut être reputée certaine que du Jour de l'Enregistrement ou du depots^re —

Par arrêt — attendu que la date de la decision arbitrale est legalement etablie au Proces par la Signature des arbitres et qu'ainsi il est prouvé qu'ils etoient dans les delais du Compromis — le tribunal rejette &c —

Rep^re de Guyot. v^o Arbitrage. p. 548. 2^e col.

La prononciation doit être faite par le greffier qui a reçu la Sentence, il dresse un acte de cette prononciation &c

Dans les lieux ou il n'y a point de greffier des arbitrages en titre, il faut faire homologuer la Sentence arbitrale

dans

dans la Justice Royale, plus prochaine

p. 574 as to homologation — ainsi aucunes des parties ne peut empecher l'homologation, sous pretexte que la Sentence arbitrale est irreguliere, ou autrement vicieuse —

p. 578 Si l'une des parties levoit une expedition de la Sentence arbitrale et la faisoit signifier aux autres parties, cette signification tiendroit lieu de prononciation

Dec. de Rouen — v° arbitrages. §. 7. N° 54. p. 95. 2 col.

Un autre arrêt du meme Tribunal, du 19 Juillet 1603 — ne considera pas comme une nullité que la Sentence qui avoit été dressée par les arbitres, remise au Greffe signée par le Greffier dans le delai du compromis, n'eut été prononcée qu'apres —

Dic. de Droit de Fer. v° — Arbitre —

A Paris on remet la Sentence entre les mains d'un Notaire, qui en delivre expedition, laquelle est executoire sans que la Sentence soit homologuée — parceque les Notaires de Paris sont Greffiers des arbitrages, de sorte que le depot de la Sentence chez un notaire de Paris equivaut à l'homologation qui se fait ailleurs —

No 1557

Holmes
v
Gagnerval

action of debt on deed of Sale — agt Jos. & Jn Bte Gagner

The decln. states, that by deed of Sale executed before Desorgre & his colleague Notaries on 23 Sept. 1819, the Pltff sold to Defendt. Jos: Gagner a certain lot of land therein described for and in consideration of the sum of 2000.# to be paid by two equal instalments as therein stated — and that for the effectual securing the payt. of the said sum of money, the Defendt. Jn Bte. Gagner, did in and by the said deed become security, pleige & caution to the Pltff — by reason whereof the Pltff became entitled to demand & receive from the sd Defendts jointly and severally the said sum of money as being jointly & severally liable to the payt. thereof
That in March last there became due to the sd Pltff by virtue of the sd deed of Sale a sum of 866#. 13s equal to £36. 2. 2½ wt. interest from the sd. 23 Sept 1819 — wherefore &c

Plea of Jos. Gagner — That Pltff cannot maintain an action agt. him jointly with the sd Jn Bte Gagner, inasmuch as the said Jn Bte Gagner did not become bound jointly wt. him the sd Joseph, nor solidairement, for the payt. of the money ment.d in the sd. deed of Sale — and further denying all the facts stated in the declaration —
Plea of Jn Bte Gagner — That he the Defendt. never became bound, nor did he promise and undertake in manner & form as stated in the declaration — That he never became bound solidairement wt. Jos. Gagner for the payt. of the money demand by Pltff — That he the Defendt. become bound only as pleige & caution of the sd Jos. Gagner, and not as a principal obligé or solidaire, & therefore Pltff cannot maintain the present action agt him —

Replication Generale —

Frais de Justice – 1 Baquet. 21. N° 23 –

Quant aux Proces intentés & poursuivis à la requête des Procureurs du Roi civilement ou criminellement il n'y a aucune condamnation de dépens, ne frais de Justice – Pareillement n'y a aucune condamnation de dépens es proces civilement intentés & poursuivis contre les Procureurs du Roi – C'est pourquoi on dit que Fiscus gratis litigat –

The King
v.
Fraser
&
Stuart Intervs.

Quest. as to privilege of the Proprietor for house rent on seizure by the King. —

It is an established principle, that where the
Chitty on Prerog 290. 381. Kings right and that of a subject meet at one & the same time, the Kings shall be preferred. 16. Ves. 566. 7.
1 East. 338 — Detur dignioni, is the rule in the case of a concurrence of titles between the King & Subject. — 2 Vent. 268. —

But in Countries which though dependant on
De — p. 26 — the British Crown have different and local laws for their internal governance, as for instance, the plantations or Colonies, the minor prerogatives and interests of the Crown must be regulated & governed by the peculiar and established law of the place

The claim here set up by the Intervening Party, is for three quarters rent become due and in arrear at the time of the seizure, so that in this respect, although there was only a verbal lease, the right of privilege in regard of arrears of rent is the same as if it had been a lease by an notary. Rep. Ve Bail. 23. —

Before the Edit of 13 Augt. 1669 — there is nothing
see Edit. 1 Vols Fer. Gr. Comre p. 1490. — certain to be ascertained in regard of the rights of preference of the Crown in a conflict of privilege between the King & the Subject, although the preamble to that Edict would seem to imply a renewal of former privileges & the enforcing them by more positive enactments under the present law but — I have met with nothing satisfactory on this point. the following observations taken from the authorities cited would rather imply the non-existence of this particular privilege prior to the above Edict —

Avocat General en la Cour des Aydes —

Casual

Lebret. Tr. de la Souveraineté du Roi
49e autor. p. 556 —

Quest: Si le Collecteur a aucun privilege ou droit de preference contre le Proprietaire, pour etre payé de la Taille des fermiers ? —

Combien que la Taille soit une marque civile de la sujetion naturelle du peuple envers son Roi, si est ce neanmoins que nous avons observés, que le Collecteur d'icelle n'a aucun privilege ou droit de preference sur les particuliers pour s'en faire payer. — En sorte que s'il intervient un opposant qui demande le fermage de ses terres, sur les fruits qui en sont provenus, ou le louage de sa maison sur les meubles de son locataire, nous avons vû, que par vos arrets il a été preferé au — Collecteur, suivant la disposition commune de Droit qui lui donne ce privilege contre tous créanciers, jusqu'à le preferer même contre le benefice de Cession, quoique presque permis en toutes autres affaires. —

De fait, nous voyons tous les Jours qu'il est permis au moindre homme privé de se prevaloir contre le Fisque du benefice de division, de discussion, d'ordre, et de tous autres introduits par le droit, ~~et dont les exemples~~ —

Ce qu'etant ainsi, et que tous les droits du monde et la nature même, veuille que le proprietaire soit payé par preference de la moisson de ses terres sur les fruits qui en proviennent, nous sommes contraints, ~~de dire que la Sentence dont a été interjetté appel~~ (quoique tenus comme la voix du Fisque, d'en elever les droits en toutes autres choses) de dire que la Sentence dont a été interjetté l'appel, au quel on vient de conclure, ne se peut soutenir en ce que par icelle, les premiers Juges ont ordonné

que

que sans avoir egard à l'opposition de l'appellant, tendant afin d'être payé du fermage de ses terres, suivant le bail dont il faisoit apparoir les fruits de ses heritages seroient vendus, et les deniers en provenans baillés au Collecteur pour la Taille de son fermier — Ce qui est, comme nous avons dit, contraire à l'intention du Roi, a vos arrets, & aux anciens Reglemens de cette Cour —

Partant, nous consentons, qu'en emandant le Jugemt il soit dit, que les deniers provenus de la vente des dits grains, soient rendus et restitués à l'appellant jusqu'à la concurrence de son fermage, selon qu'il est contenu par son bail, et que le surplus demeure au Collecteur, et sauf à lui à se pourvoir sur les autres biens meubles du dit fermier, pour ce qui restera à lui payer de la taxe d'icelui. — Ce que la Cour ordonna par son arret de Janvier 1597. —

Shuter
Thayer
Thayer & Kay
Intw 3

The assignment under a separate commission passes all the separate property of the Bankrupt and all his interest in the Joint property—

When the assignment is made the partnership is completely severed — 1. Mont: Bank. L. 639—

2 Montagu. 97 — Execution sued out agt Joint Estate by a separate Creditor see — Eddie. v. Davidson. Doug. 627.

Baker. v. Goodair. 11 Ves. 78 —

Dutton. v. Morrison 17 do 193 —

1. Montagu on Partt. 74. — Upon a separate execution against the property of only one member of a firm, the plff is entitled only to the partners share of the partnership property —

" 75-6. The Sheriff must seize the whole of the partnership effects seizable under an execution, and sell an undivided moiety — (see cases cited on note) Heydon. vs Heydon. 1 Salk. 392

" Upon Judgment agt one Copartner, the Sheriff may take the goods of both in execution — 2 Raym. 871. Jacky. v. Butler. — where upon application to the K. B. by him agt whom the Judgt was not, the Court held, that the Sheriff could not sell more than a moiety for the property of the other moiety was not affected by the Judgt — nor by the Execution —

3. Bos. & Puller. 289. Chapman. v. Koops. where fi. fa. issued agt Deft — who was jointly concerned in a manufactory wt 25 other persons — —

L. Alvanley. Ch. J. when persons enter into partnership they must be aware that the separate concerns of each partner, may in some cases introduce a variety of claims

very

very inconvenient to the general partnership Concern — By the law of England, the Creditor of any one partner, may take in execution that partners interest in all the tangible property of the partnership, and will thereby become a tenant in Common with the other partners — This the plaintiff has done, and we are desired to restrain his execution because it is alledged that he stands in the Shoes of a partner who would not have a right to molest the other partners until all amounts between them had been settled — But if the other partners wish to take advantage of this circumstance, they ought to file a bill in Equity against the Vendee of the Sheriff, or they may buy in the property when put up to Sale —

—4 p. 78 see also Parker. v. Pistor. 3 Bos. & Pul. 288 —

see alw. Dutton. v. Marrison. 17 Ves. 201. —

2. Christ. Bank. p. 263. — 2. Eddie. v. Davidson. Doug. 627. — The Court directed that it should be referred to the Master to take an account of the share of the partnership effects, to which Birnie (the partner agt. whom ~~Execution~~ Commission had issued) was entitled; and that the Sheriff should pay a part of the money levied equal to the amount of such share, to the assignees. —

Id. p. 289. Taylor. v. Fields. 4 Ves. 396. In the case of a Judgment by a separate creditor, both the partners being solvent it has been held, that the Creditor may take by execution a moiety of a chattel, though he is only a separate creditor — It is clear a partner holds a chattel with his partner subject to all equities that partner has upon it

N°284
Brunet & Legault & Delaurier

On question whether an Execution can be sued out in name of the Creditor after his death, on a Judgt rendered in his favor

According to the 168e art. of the Custom, no execution can be sued out after the widow or heirs of a deceased person, until the Judgt rendered after the deceased shall have been declared executory after them — but this principle holds only in the Case of the Debtor but not in regard of the Creditor —

Poth. Introduction au Tit. 20. des arrets d'Executions sur la Cout. d'Orleans — N° 94 — says — "Non
" seulement la personne meme du Créancier au profit de
" qui l'obligation a été Contractée, ou le Jugt de —
" condamnation a été rendu, peut procéder par Execution
" ses heritiers le peuvent aussi — et même un Successeur
" a titre singulier à qui l'on auroit fait transporter de la
" dette, pourvu qu'il ait signifié au Debiteur son
" transport — &c — But can dissent as to Debtor —

Fer. Gr. Comre on 168 art. Cout — in his remarks on the article — the widow & heirs must be called in before Exon after them — "Il n'en est pas de même de l'heritier
" du Créancier, qui peut executer de plein vol, la
" maxime etant constante parmi nous, que le mort
execute le vif, et le vif n'execute pas le mort. —

Loisel. Instite Cout. liv. 6. Tit. 5. art. 2
= Denizart. Vo mort. N° 2. —
= Fer. Instit. Cout. liv. 4. tit. 4. art. 13. p. 474 —
= Questions de Droit de La Mothe, Vo Mort. N° 23 of Letter M.
p. 282. 3

Experts.—

Ought they to be sworn before operating?—

Fer. Gr. Comre Introde au Titre, Des Servitudes & Rapport des Jurés — 2e vol. p. 1485.—

3e— Ces Experts doivent faire le serment devant le Juge, avant toutes choses, a ce voir faire, les parties appellées.—

art. 184.— and p. 1500. No 11. Le serment est requis tant par les anciennes ordonnances, que par cet art. 184 de notre Coutume, de sorte, qu'il ne seroit ajoutée aucune foi au rapport des Experts s'ils l'avoient fait avant que d'avoir fait le serment pardevant le Juge ou Commissaire commis pour procéder à la nomination des Experts, et recevoir leur Serment et rapport.—

1667. L'ordonnance oblige indistinctement tous Experts nommés de prêter le serment avant que de faire la visitation & leur rapport — ainsi tous Experts quoiqu' officiers &c—

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1 Pigeau. 304— seems to point out a similar course—

Ravaut. Prov. Cout. du Palais. p. 108.—

Desmarquets— Nouv. Stile du Chatelet — p. 76—

Il faut que les Experts prêtent serment devant le Juge de bien & fidelement proceder à la visite, & estimation &c—

N. Denizt. Ve Expert. §. 2. No 10.

L'art. 184. de la Coutume de Paris, et l'article 8 du Tit. 2 de l'Ord. (1667) exigent en general que les Experts fassent serment devant le Juge avant de procéder à leurs operations.—

Bout. ou Ord. 1667. Tit. 21. art. 8. 9. 10— p. 211.—

Les Experts ne peuvent proceder qu'ils n'ayent plutôt prêté serment de vacquer fidelement à leur fonction et notre Ordonnance est en cela conforme à la disposition du droit.—

Denizt. Ve Experts— No 17. mais quand ce sont d'autres Experts sans titre, ils ne peuvent faire leur rapport qu'apres avoir prêté serment devant le Juge, de bien & fidelement y proceder &c c'est un usage invariablement observé au Chatelet, et il est de droit commun dans tout le Royaume.—

Experts

2. Bour. p. 30 – Tit. 2. Des Rapports d'Experts – §.3. –

Nul rapport ne peut etre fait, qu'au prealable les Experts n'ayent prêté serment de faire la visite fidelement &

L'ordonnance oblige indistinctement tous Experts nommés de prêter serment avant que de proceder aux visites et rapports d'ou il s'ensuit, que tous Experts qu'oique Officiers au –

No. 63.
Gibb & al v. McPherson –

Action for value – on lost bill –
Evidence that bill had been removed from an open desk and believed to have been destroyed – The payee had indorsed it by a Special indorsement –

See Chitty on bills. p. 155. 6th Edit. – If however it can be proved, that the bill has been destroyed, the party who was the holder may recover at law – So if the bill was not negotiable – or has not been indorsed – or has been only specially indorsed, the party who lost it, may proceed by action on such bill, and secondary evidence of the Contents may be admitted –

Hart
vs
Raymond

On question touching regularity of service
& manner of pleading same —

Lacombe. Vo Competence —

L'on doit comparoitre à toute assignation
meme devant Juge incompetent, pour ne pas paroitre
mepriser son autorité — Ce n'est pas approuver la
Juridiction que de demander communication de
l'exploit de demande. —

Tit. 5. art. 5. Ordo 1667 - Dans les defenses seront employées
les fins de non recevoir, nullités des exploits, ou autres
exceptions peremptoires, si aucunes y a, pour y être pré-
alablement fait droit. —

Jousse. - Ces nullités se couvrent par les defenses de la partie
assignée —

Si la partie assignée pretendoit n'etre pas assignée devant
un Juge competent, il faudroit avant tout qu'elle declina
la Juridiction — Voir

sur les moyens de nullités as proposé un 1 Pigeau. 160. —

Archambault
dal
+
Fullum dal

Quest. as to right of discussion — whether it is to be considered as a plea of dilatory or peremptory to the action —

Refer. Vo Discussion — see model of plea &
Just — apres arlto Pigeau. 1 Vol. p. 186. 187. —

Id. Vo Caution — p. 773. first col.

Lorsque la Caution est attaquée il depend d'elle alors de demander la discussion — Car cette discussion n'est duë que quand elle est exigée par la Caution. —

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2 Bourjon. p. 432 —

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Vo Baillé. v Brunelle. 4 Orb 1810 —

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Poth. Obl. No 410 —

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It is called a benefice —

Le benefice de discussion doit être demandée avant la condamnation definitive & ne peut être supplée par le Juge
Auzanb. 394. aux arretés —

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avancer les deniers pour faire la discussion —

=

2 Argou ch. 13. p. 475

Le creancier n'est pas obligé de faire cette discussion si elle n'est pas demandée par la Caution ou le Tiers Detenteur Il ne suffit pas même qu'ils demandent la discussion, il faut qu'ils indiquent des biens du principal Debiteur qui puissent être discutés ; car s'il n'y en avoit point inutilement opposera-t-on la discussion ; ils sont-même obligés d'en avancer les frais, sauf a les reprendre sur les biens discutés —

Obsrv. sur quest. 34 d. Henrys. liv. 4.

Suite. p. 84 —

№ 959.

H. Russel & Co
vs
Wm. Teasdale & al
&
Divers Appts

On question whether Plff on sale of the moveables in case of a deconfiture, is entitled to the Costs of obtaining Judgt ag.t Defend.r in preference to other Creditors as necessary Costs in effecting Sale —

Olivier de Le Vert - Comm.r - sur les Cout. de Maine & Anjou - 4.e Vol. p. 446 - Celui qui a fait saisir est seulement privilegié pour les frais de l'execution et de la Vente. —

2 Bouj.e - p. 684. Tit. Des Executions — $ 50 -

Voici la Cause du premier privilege. — Les frais de la vente et ceux faits pour y parvenir se prennent sur les deniers de la Vente par preference à tous — Ce privilege l'emporte sur tous les autres — Ces frais sont inevitables, et c'est par ceux que les privilegiés meme peuvent parvenir à leur paiement. —

Duplessis - Des Executions - p. 619 -

Frais de Justice — sont ceux faits, tant pour la vente des meubles, que pour leur garde —

Fer. Instit. Cout.e Liv. 4. Tit. 1. art. 74. p. 58. —

Les frais de Justice faits pour la Saisie, execution et vente des meubles, vont les premiers, et sont preferés a toutes autres dettes. —

Pothier Proc. Civil. p. 191 -

La créance la plus privilegiée est celle des frais de Saisie, de garde, et de vente — Car ils sont faits pour la Cause Commune de tous les créanciers. —

archambault dal
&
Fullum dal

Ou question of discussion —

S.t Vast- Com.re sur les Cout. d'Anjou & du Maine 4. Vol. p. 377.

L'exception de Discussion, est une exception que les Tiers Detenteurs ont droit d'opposer contre l'action hypothecaire pour l'arreter, jusqu'à ce que les Créanciers ayant discuté les biens des debiteurs et des Cautions —

Cette exception, n'est pas une exception peremptoire mais seulement dilatoire, car elle ne detruit pas l'action et le Créancier à qui cette exception est opposée, peut, après la discussion, si elle ne lui à pas procuré le paiement de sa dette, suivre son action — C'est pourquoi cette exception, comme toutes les autres exceptions dilatoires doit être proposée avant la Contestation en Cause. —

Ravant. Pro. de Chabllet. p. 21. —

Il y a encore une autre exception dilatoire qui est accordée aux Cautions et aux tiers detenteurs, c'est la discussion —

In B^t Levreau
Geo. Birch

On question whether in an action petitoire Petit ought to set out the title under which he pretends to be proprietor.

Ravaud. Prv. du Chatelet — p. 10.

Les actions reelles sont celles par lesquelles on demande la chose qui se trouve entre les mains d'un autre — On doit conclure à la restitution de la Chose et exprimer le titre en vertu duquel on est proprietaire. —

2 Pigeau 113 — see formule.

N° 1980
Smith
Beers

On Wagers — Gageures

1. Despeisses. p. 264 N° 2 — Or, les gageures sont valables, non seulement lorsque la chose, dont on a convenu pour gageure a été actuellement deposée entre les mains d'un tiers — mais aussi bien qu'elle n'ait pas été baillée, mais que seulement on ait promis de la bailler.

Denis^t. V^o Gageures. N° 2. Les Juris consultes tiennent de même, que les gageures, ne sont permises ou defendues qu'en tant que leur objet est bon, ou mauvais, et que leur cause est honnete ou deshonnete —

Id. N° 6. Quoique les gageures soient nulles, si le depot a été delivré au vainqueur, il ne peut être repeté. —

In England —

3 T. Rep. 694 Good. vs Elliot M. L. Grou.

It is there held, that wagers are not void, qua Wagers — and that the restraints imposed on certain species of wagers by acts of Parl^t are exceptions to the general rule, & prove it —

a wager wh. wd. be an incitement to a breach of the peace
or tending to immorality -
or one that wd. affect the feelings or interests of a 3d person, or
expose him to ridicule, or libel him. —

These are considered not only as injurious to a third person
but as tending to disturb the peace of Society —

Wagers agt. Sound policy —

But where the bet is not equal, as to the uncertainty of
the point in question, it would seem, the wager is void —
see — Danty. Ch. 10. N. 16 — wager between Cleopatra &
Marc Anthony —

— Fer. Dic. de Droit. Vo Gageure. — L'injustice rend aussi
une gageure illicite, comme lorsque de deux parieurs, l'un
est certain de son pari, et l'autre est incertain du sien. —

Poth: Con. Jeu. N. 20 — in fine — Mais cet avantage que
je vous fais, etant un avantage que je ne puis ignorer
et que je vous fais de mon bon gré, et avec une pleine
connoissance — ne contient aucune injustice —

~~A. 669~~
N° 1740

Jas Henderson
Pltff
vs
Dft

action on lost note, made by Defr to Pltff for £100.— dated in Oct. 1817. payable in May follows — The Pltff indorsed the note to Messrs Porter & Frost for value recd — the indorsement not full & not such as wd be a suffr transfer, as Dft was not a merchant, a trader &c — on this Indorsemt Messrs Porter & Frost brot their action agt the Defendt — but it was dismissed, from the defect in the Indorsement — An action was afterwards instituted by the present Pltff agt Defendt on same note; as the payee, but on his declaring that he had no interest in the note, and that it was not for his benefit nor at his risk the same was instituted the action was thereupon again dismissed, there being no Plaintiff substantially before the Court — The present action is brot again by the same pltff as payee on the same note, but under different circumstances — The Pltff in consequence of the value recd from Proctor & Frost considering the beneficial right to the note to be in them by a special transfer in writing dated 23d March 1820, conveys to ~~them~~ Robt Frost & ~~them~~ and ~~their~~ his assigns all his right & interest therein, & authorises them to prosecute the payment thereof either in his or their name or names and on 9th Sept. 1820, Robt Frost transfers all his rights under the said assignment to his partner Wm M'Nish Porter — And by a memorandum on the back of this instrument, it is stated that the present action is brot at the request, and at the proper Costs & charges of the S. Porter —

It is clear enough that by these instruments the right of Henderson the pltff, to recover the amount of this note

note is vested in Mr Porter, and the Pltff when examined on oaths, admits that he has no interest in the suit, which constitutes the main point of defence in this action — The question therefore seems to rest here, whether Mr Porter can maintain his action in the name of Mr Henderson, either by operation of law, or under the special transfer made to him, without any allegation in the declaration that the beneficial interest being so vested in him, (Porter,) he is entitled to sue for the money in the name of the original payee — By the law of England, where a chose en action is transferred, the action must be in the name of the assignor, see Chitty on bills. p.7. except in case of bills &c — and by law of France — Le Cessionnaire peut agir par action utile en son nom, soit que l'action cédée soit personnelle ou réelle, ou au nom du Cedant. — Jacomb. V° Transport N° 5. — by which an option appears to be given to the Cessionaire, to sue in either right — There appears no reason here why Porter should not have sued in his own name — was he bound to do so — perhaps not — but does he deprive the Defend: of any right by suing in the name of the payee — I should think not —

This action is therefore materially different from the former instituted by the same pltff — as we here see the person at whose instance & for whose benefit the action is brot — in the former suit this was not the case — and there the action might have been brot by Henderson to put the money into his own pocket without the privity or consent of the real owner, after a transfer of all his right to that owner —

Pleas set ups-

1 Chose Jugée — If case varies in nothing from the former this will apply, — but this to be enquired into.—

2 Testimony of Froste & Pluckenett ought to be rejected this will depend much upon the nature of the evidence which governs the Case — whether accords to the law of England or not — Now a billet payable a ordre, is a negotiable instrument — see N. Denizart. Vo Billet de Commerce. §. 2. No 15 — "Quoique comme nous " d'avons dit, les billets à ordre n'entraînent la Contrainte " par Corps qu'entre marchands & pour fait de commerce " il n'est pas moins vrai que ces billets sont negociables " quoique souscrits par d'autres que des negocians " comme ils le seroient s'ils avoient été souscrits par " des negocians." — Henderson & Armour. Vs Diffenbach July 1809 — In appeal — The St. 34. Geo. 3. does not destroy this negotiability, but directs the indorsement to be made in a certain manner — and in regard of proof the excepn cont. in the last section of the Statute would seem to imply, that the notes only which are subscribed with the mark of the maker, shall require 2 Witnesses to prove them —

and see cases noted. p. 6. when parties to the bill may be witnesses —

3. As to exb. No 1. being rejected — This the Court conceives here to be a material paper — it shews who is the substantial Pltff — It is a transfer of the payee to Porter & Froste — with a right to them to sue either in his or their name or names for the amount and also a transfer by Froste to Porter — There seems to be no reason why this action might not have been in the name of Froste, but we see he is the substantial Pltff, he holds the interest and brings the action in the name of the present Pltff, at his own risk & expence —

No. 5.

Geo. T. Knower & Metcalf Haven vs Isaac Gregory

under firm of Knower & Haven

Action by Plffs as Traders & Copartners v. agt Defendt for defamatory words spoken of them as such Traders by Defendt —

"The words were - Knower & Haven, are not of a
" good standing in business — they have been guilty of
" an act as bad as robbery by inducing you (one Riegle)
" to become responsible to me (Dfpt) for the amount of
" the note — their business, is merely a floating
" business which appears good to day and will be
" bad to morrow — You, will do well to provide for
" the payment of the whole of the note, by the time
" it becomes due, for they, (the Plffs) will not be able
" to pay it." — Concludes for damages generally —

Plea of Demurrer - that action cannot be maintn for this injury by Plffs jointly, or as Partners without alledging a special damage —

The Cases upon this point in the English law are not numerous, and in the French authors none are to be met with — the English authorities incline rather to support the plea of Defendt — we must therefore look to principle to guide us in the decision of the question —

Joint Rights & delicts. —

The Rule to be followed on this subject seems very simple — where two or more suffer by an injurious act, and the damage to one is the same as to the other they are jointly entitled to repair it — applied — One loss only has been sustained, and therefore one satisfaction only is due — and to this satisfaction the one has not a better claim than the other,

of

of necessity when both are jointly concerned in demanding it.— But where the injury, or inconvenience to one is distinct from that to the other, their right of indemnification must also be distinct, since what affects the one is matter of indifference to the other

It is not the Injurious act which forms so much the Cause of complaint as its consequences

By the law of England many words are not actionable which would be so by the laws of Canada yet if a special damage is laid the action may be maintained, because if a Special injury arises by the act of another, although not inhibited by law, yet an action will lie— so would seem to be the principle of the Case from 3. Bos. & Pull. 150. Cook v. Batchelor

Let us see what the Editor of Saunders's Rep. says on the point— "Though there was special damage laid in the declaration in this Case, yet if words are actionable only because they were spoken of persons in the way of their trade, I conceive that two or more Partners may join in an action for the words though they had sustained no Special damage thereby.—

2 Saund. Rep. 117. (a.)

& the case from 2 Esast 426— states motive of special damage—

Now it is laid down that if Partners are slandered in their trade, the injury is joint, because the means of acquiring property is the object impaired, and in those all are concerned— If one partner sustains in addition to ~~a~~ general, a Special damage, he has in addition to the joint, a separate claim.—

Hammond on actions 41—

Where several are injured by a malicious prosecn or vexatious suit, they are in general separately aggrieved, since the damage to each is distinct — one does not suffer by another's imprisonment, by the diminution of his fame, by expending his funds, or by injuring his relative rights. — To this rule exceptions occur, where the suffering parties being partners are scandalized in their trade by the prosecution — and where they are joint owners of the money paid for defending it, as where borrowed on their joint account — and other exceptions which rest upon the same principles as these, may readily be conceived —

Archambaud, & Sullumval

On question whether the Cautions are bound by the Judgt. as the principal, to which they were not parties —

Poths. Obl. N° 908 - would incline to the opinion that they are - but by allowing that they can be admitted to a hearing in appeal and there to propose their objections as the demand, seems to admit their right to offer any new matter of defence of which the principal may not have availed themselves - and is conformable to what is said in N° 380 —

Repse — Vo — Caution. p. 774. Nous observerons que si le Debiteur avoit des moyens suffisans pour ecarter l'action et qu'il les negligeat, le fidejusseur seroit en droit de les opposer, parce que la caution ne demeure obligée, qu'autant que l'obligation principale peut subsister —

In vacation after Trin Term 1822.—

Scott & al
v.
Phoenix Insu. Co.

Action on Policy of Insurance for recovery of losses by fire
Plea — not Guilty — nil. deb. & statement that by Policy all matters in contest were agreed to be referred to arbitrators — Issue joined and demurrer —

The Defendr obtd a Rule on pltffs to shew Cause why all matters in dispute shd not be referred to arbitrators — Defendrs naming their arbitrator & calling on pltffs to name one &c

It has been argued that the right of appointing arbitrators by a Court, is a matter of public law, and as such ought to determined according to the Laws of England as the Law of the Sovereign State to which we belong — In ~~separating~~ the right of the Court to delegate a part of its authority to arbitrators ~~as to be considered in question~~ to be by them determined, this may be considered as a question of public law and be determined according to the principles of the public Law of England, but this question is not before the Court, as the parties have obviated that by their own act and consent — All the Court has here to determine is what is the effect to be given to this consent in this action and on the rule obtained by the Defendrs — In order to determine this point, were we to look to the Laws of England we find several decisions of the Courts there both at Law & in Equity which have judged, that an agreement to refer matters to arbitrators is no plea to bar an action, and that there must be a reference some say a reference & award to bar it — But this being a question of Civil right between the parties must be determined by the Laws of Canada — according to the authorities cited both from Pothier & Denizart, + Bornier the parties might claim a right to be sent before arbitrators, if the demand were made before contestation en Cause — these authorities, it is true, are taken from particular Laws or ordinances, the Code Marine & Code Marchand, neither of which are considered to be in force in Canada — Still the principles these laws establish upon this point appear reasonable, and may be found in the French Law, without reference to these particular Ordinances — The period of Contestation

Mitchell v. Harris
4 Br. Ch. Rep. 311
2 Ves. and Saw. 129.
Thompson v. Charnock
8 T. Rep. 139.
Tattersall v. Groote
2 Bos. & Pull. 131

en Cause. is intended to shew, that after this was had, the Judge or Court were seized of the Cause, and the party ~~would not~~ was considered to have waived all claim to demand his being sent before Arbitrators, or before another Jurisdiction — The question therefore is, what are we to understand by the Contestation en Cause — The 104e art. of the Custom says — it is, "quand il y a reglement sur les demandes "et defenses des parties, ou bien quand le Defendeur est "defaillant et debouté de defenses." —

Nouv. Denizt. Vo Contestation en Cause §. 2. No 1. 2. —

Par l'ordre 1667. tit. 5. art. 2. l'usage des deboutés de defenses, dont parle cet article est abrogé — c'est pourquoi cette ordre Tit. 14. art. 13. dit que, "la Cause sera tenüe pour "contestée par le premier reglement qui interviendra, apres "les defenses fournies, encore qu'il n'ait point été signifié" —

Sallé on ordre 1667. Tit. 14. art. 13. —

all the Commentators on this art. (13). agree that the contestation en cause cannot be considered to be complete — 1° Qu'il n'y ait eu des defenses fournies — 2° Que la Cause n'ait ensuite été portée à l'audience, et qu'il n'y soit intervenu un Jugt — soit Interlocutoire, soit definitif —

Valin. Ordre Marine 2. Vol. p. 154. art. 70.

The Cause here therefore seems not to have advanced to this stage of Contestation en Cause, and the Defendr come in time to make their application — As to the ~~power of the~~ Defendrs having pleaded to the action before making this application, it was perhaps better they should do so, because it enables the Court to see whether the points in issue are proper for the decision of Arbitrators, for it might happen that although the parties had a right to go before Arbitrators & had even agreed so to do, yet if the matters in contest, were not proper for them to determine, the Court would retain the Cause — but when this is not the Case, the points in issue will serve to direct the attention of the arbitrators to the objects contested — in this case it is said — "les conclusions des parties servent à fixer le point de la contestation comme devant un tribunal ordinaire." —

Pardessus. 4. Vol. p. 104.

Dic. de Jur. & de arrets. V° Arbitre N° 64. p. 109. —

Edict of François 2. Août 1560, directs that parties shall go before arbitrators in cases of divisions & partages, comptes de Tutelle & autres administrations restitution de dot & douaire — & les differens entre proches parens — and the ordonnance de Moulins rendue par Charles IX. en Fevrier 1566 — goes to the above & autres differens entre parens. —

Blackwood dal
vs
Guy. —

Action, ppr acct, ofr fruits issues & profit of real Estate held by Defend^t belonging to one Jos. Guy, the Debtor of Pltff, (an absentee) in whose right they claim to be subrogated —

Plea — that Jos. Guy and Defend^t w^h several others were Coheirs in the Estates in question, and that they agreed to a voluntary licitation thereof, in which one, Herriens, as Curator to the said Jos. Guy, then & still an absentee, joined, under the authority of the Judge granted on the advice of an assemblée de parens — on which licitation the Defend^t became the purchaser & now holds the property as lawful owner & proprietor thereof —.

Dup — as to power of Curator to alienate, or to join in the act —

Merlin's. Rep^re de Jur. v^o Curateur — §1. N^o 3 —

Guyot. Rep. v^o Curateur p. 194 —

Si l'acte de Curatelle s'etendait en general à toutes sortes d'affaires, sans aucune explication particulière, le Curateur n'auroit de pouvoir suffisant que pour les affaires ordinaires — Car s'il s'agissoit d'un mariage ou d'une alienation de fonds, le Curateur ne pourroit y consentir sans avoir pris auparavant un avis de parens. —

Denizt. v^o — Curatelle — §1. N^o 1 Curatelle est la Commission donnée a quelqu'un par la Justice d'administrer les biens d'autrui —

Denizt. Actes de Notorieté — p. 309. note (a) Dans l'usage actuel c'est le Curateur qui fait la vente en presence des Créanciers parceque la propriété reside fictivement en sa personne, c'est en son nom & à sa requete que tout se fait. — mais ce sont les Créanciers qui dirigent les demarches. —

Fer. Gr. Com^re art. 344. L'Heritier par benefice d'Inventaire ou Curateur aux biens vacans d'un defunt, ne peut vendre les biens meubles de la Succession ou Curatelle, si non, en faisant publier la vente devant la principale porte de l'Eglise de la paroisse, ou le defunt demeuroit, à l'issüe de la messe paroissiale, & delaissant une affiche contre la porte de la maison du defunt. —

See after, p. 103.

№ 608.

Thayer &c
v
Peirce & al

Action by Pltff as indorsee &c Defendts as payees & Indorsers of 2 promy Notes, drawn by H. & E. Curtis.—

Plea 1st It never they did promise and undertake &c that before the bringing of the present action have wholly paid the sums of money demanded by pltff in & by their declaration

2. Non assumpsit— under which plea they intend to prove

1. That Defendts lent their names to the Notes for the sole accommodation of Henry & Elijah Curtis
2. That they rec'd no value from the pltff for the 2 promy Notes
3. That Pltff as well as Defendts indorsed the s'd Notes in order to accommodate the said Henry & Elijah Curtis, without any undertaking express or implied, that in case of non-payt the Defendts should pay the whole or any part thereof to Pltff
4. That Pltff holds & possesses divers goods monies credits & effects of the said H. & E. Curtis by means whereof Pltff hath been, or might have been fully paid the amount of said Notes.— by means whereof Defendts are discharged from any responsibility.—

3. Notes indorsed without any valuable consideration given them by Pltff—

Incidental demand— for goods sold &c—

On 1st Febry. 1822— a Consent rule of reference to arbitrators to hear evidence which shd be reduced to writing by them, & returned into Court with their award—

Award being filed & evidence adduced returned— the Pltff dissatisfied thereunto contends that Court ought to set it aside and give Judgt for Pltff. & to examine the evidence adduced as well in Court as before the arbitrators—

This presents two questions— First, can or ought the Court to to investigate the proceedings before the Arbitrators, so as to correct their Judgt— in case the Court should be of a different opinion with them?— and

2d Does the evidence as stated before the Arbitrators warrant the Court in drawing a different conclusion from it than the Arbitrators have done?

On the first question, It may be observed that a reference to arbitrators to decide differences between parties necessarily gives them that power as effectually as the Court itself could exercise it — and if they proceed regularly, their Judgt is equally binding as that of the Court — It is true that Courts exercise a control over the awards of arbitrators and will occasionally set them aside, but this is done only where there is misconduct or partiality in the arbitrators — It is contended here that as the reference made to them contained an injunction on them to return with their award the evidence taken before them, that the Court intended thereby to exercise a right not only of examining their proceedings, but of correcting their Judgt - if they saw fit, if it appeared inconsistent with the evidence so laid before them — but this is a wrong presumption, as the Court are not bound to this investigation unless it becomes necessary from the misconduct of the Arbitrators, and the direction that they should return the evidence taken before them can be meant to inform the Court only as to the regularity of their proceedings — It is unprecedented for Courts to judge the Case over again after the opinion and Judgt of arbitrators, and if parties were let in to expect this of the Court, a submission to arbitrators would not only prove nugatory, but procrastinate a cause by useless proceedings & heavy expence — if in every case the losing party could claim a new hearing before the Court — When the arbitrators have proceeded regularly, & being Judges of the parties own chusing their award must be final

But

But supposing the Court were disposed to enter upon the investigation demanded, they are here enabled to say from what they have seen of the Case, that the Arbitrators appear to have formed a just and correct Judgment upon it — The action is founded on accommodation paper signed by the parties to assist a declining trader — and had it not been for the peculiar form of the instrument drawn up for this purpose, no such action could have been brought — the evidence adduced however gives us a compleat view of the transaction, and enables us to see that as between the Pltff & Defendt no value was given nor intended to be given as between them, nor was it ever contemplated that liability should attach upon the one in favor of the other, in a transaction in which they were cooperating to favor their common Debtor — and this is the more strongly to be urged as the Pltff, as he had been procuring by a variety of ways to get the property of this Debtor into his hands, to indemnify himself agt a responsibility he had contracted to the Banks — and although this property has not been so productive as he expected, yet his acts shew his views and intentions in laying hold of ~~what~~ the ~~Defendt~~ Debtors means, on which the Defendt had an equal right with himself —

Award confirmed — demand in chief dismissed and Judgt for Pltff on Incidental demand

William Peddie of Montreal, Merch. Plff

vs

John McNider of Quebec, Merch.
Louis Massue of do
Michael Scott of Montreal
Charles Bowman of do
August. Perrault of do
Turton Pemberton of do
Sam. S. Bridge of do
Sr Henry Gauvin of do
Joseph Gauvin of do
A. L. McNider of do
Robt. Armour of do
Nic. B. Doucet of do
Eleanor Hoyle of do
Henry Grasett of do
Foster J. Weeks of do
John Geo. Smith of do
John Smith of do

Action agst the Defendts as Copartners associated together for insuring against accidents by fire and carrying on business as such at the City of Quebec, & at the City of Montreal, under the name style or firm of the Quebec Fire assurance Company — for a breach of Covenant

By policy of Insurance of 9th May 1821, made at Quebec & signed by the president & one of the Directors of the sd Quebec Fire assurance Co (which said policy of insurance hath been since burnt & lost) the Plff paid into the Fire assurance Co 19/3 for insurance on Household furniture &c £300 — from 9th May 1821 to 8 May 1822 — That at time of policy & during its continuance the plff was possessed & entitled in household furniture in the house in question, to the value or amt of £220 — which was lost and consumed by fire on 15th Augt 1821 — contrary to pact — of £750 — damages —

Defendts pleaded to Jurisdiction which was over-ruled

Plea — That Defendts never signed any policy of assurance wt Plff — that action should be directed agst those only who had signed such policy — That Defdts owe any indemnity to plff, it can only be for a sum of £238. 19. 6, as the effects burnt were not the only part assured, but the whole effects of Plff were insured to the extent of £350 Cy, which cannot be demanded in this action inasmuchas the plff has saved the greater part of his effects &c, whereby the Insurers as well as the insured ought to benefit equally by the Contract, in regard of the effects which have been saved, as is

usual

usual in such cases, and in cases of Jetsam & accidents at Sea, where the effects saved contribute tow and the value of those lost or thrown over board ~~in~~ in order to indemnify the Insurers or proprietors of such effects, unless the proprietors of the effects lost or damaged will abandon the part which has been saved in order to recover the amount of the whole from the Insurers — That the plff here cannot pretend to demand the whole of the loss by him sustained in as much as he does not offer to abandon the effects which were so saved and therefore ought to be dismissed w[ith] Cost —

Further that Defend[ts] are not indebted to the Plff in manner & form as by him demanded —

Procureur — when liable for misconduct —

see. Denizart. v° nullité N° 25. 26. — 3

Arrêt de Soefve — Rep^e v° nullité. p. 260 —

Denizt — On pense aussi qu'un procureur est garant des nullités procedantes de son fait, qui se rencontrent aux procedures de son ministere dans les poursuites de decret — c'est l'opinion Commune du chatelet —

Rep^e — Dame authority —

Soefve — Soefve Cent. 1. ch. 99. p. 106 — also ch. 67.

Procureur tenu de representer un Prisonnier elargi par surprise sur une requête ~~presentée~~ signée de lui ou de payer la dette —

1. Desp. p. 171 — Procureur est tenu de toute Coulpe, grande & legere

Ferriere v° Procureur — Il est tenu de sa negligence quand elle est grossiere, et peut être considerée en quelque maniere comme dol — Car si l'on excusoit dans un Procureur une telle negligence, ce seroit donner à quelques-uns d'eux un prétexte de couvrir leur malice —

Soefve — Cent. 1. ch. 67. p. 66 —

Procureur est responsable envers sa partie d'une mangeure dans les procedures —

Lacombe v° Procureur 4 — cité above avec from Soefve —

(see p. 110)

Blackwood Guyot et

cont.d from p. 96.

On the note on this art. the Commentator observes thus — Cet article ne regle pas les solemnités qu'il faut garder en la vente des Immeubles par un heritier par benefice d'Inventaire: d'ou vient qu'on fait cette demande, savoir, s'il est necessaire d'y garder les solemnités du decret? —

opinion de Fortin —

Pluseurs l'estiment ainsi, je suis neanmoins d'avis contraire et crois que mon opinion est d'autant plus favorable qu'il est notoire que les frais qui se font aujourdhui aux criées d'un heritage en absorbent la plus grande partie — Aussi cette opinion n'est elle pas destituée de raison, vû que c'est une regle de droit que les solemnités surabondantes ne sont jamais absolument desirées, si elles ne sont particulierement prescrites par les Loix, ou qu'elles ne soient fondées en une necessité comme absoluë — Or en l'espece proposée, notre Coutume, ni aucune Ordonnance ne prescrivent point cette solemnité — et d'ailleurs on peut pourvoir par une autre voye à la Seureté des Créanciers, savoir, en vendant les — Immeubles publiquement en Justice, et par forme de licitation, Car pour lors, l'heritier ne pouvant être d'intelligence avec l'acquereur, la vente ayant été publique et en Justice, les Créanciers ne peuvent pretendre contre lui, ni contre l'acquereur aucune plus valuë des Immeubles qui auront été ainsi vendus —

The formalities required by this article are not adhered to, and when injury is made appear the Curator is bound for the just value of the effects sold — see N.o 2. & 3. on Glos. unique on this art. —

The Heritier par benefice d'Inventaire, is compared to the Curator to the Succession —

N.o 5. La Coutume ne parle pas des Immeubles, à l'egard des quels, il faut observer ce qui est porté en l'article 343. de celle d'Orleans, qui porte — "et quant aux Immeubles "n'en peut faire vente, si non, en gardant les solemnités requises "en matiere de criées d'heritage." — Neanmoins on se contente

contente souvent de faire les ventes et adjudications apres trois affiches et publications, pour eviter aux frais des criées– C'est le sentiment de M. Ricard, qui dit, que les heritages etant ainsi vendus, les créanciers ne peuvent pretendre contre l'heritier beneficiaire, ni contre les acquereurs la plus valüe des Immeubles ainsi vendus.—

Et d'autant que l'heritier beneficiaire est reputé maitre et Seigneur des biens de la Succession de même que l'heritier pur & simple, il s'ensuit– que s'il avoit vendu des biens du defunt, meubles ou Immeubles la vente seroit valable, et que les acquereurs en auroient acquis la propriété, sauf aux Créanciers leurs recours contre cet heritier, au cas qu'ils pretendissent que les ventes eussent eté faites à Vil prix – et aux Créanciers hypothecaires, leur action hypothecaire contre les acquereurs des Immeubles affectés & hypothequés à leur du.—

See art. 34: Cout. Fer. Gr. Comre — Difference between the Commissaire & Curateur to the Fief Saisi.—

The one is a temporary agent – the other possesses loco domini.– see Dumoulin's opinion. p. 629. N.° 2 – glose unique

2 vol. Gr. Cout. p. 909. N.° 8 — Secus en la personne du Curateur, le quel ne peut agir & soutenir les Interets d'une Succession, mais il n'en peut vendre les biens sans l'autorité de la Justice —

1.er Arrets d'Augeard p. 234 — Si une femme, qui a eté interdite pour cause de demence et qui dans la suite est rentrée dans son bons sens et dans la jouissance de ses biens, est restituable contre l'alienation faite d'une de ses Immeubles par son Curateur, en consequence d'un avis de parens et d'une Sentence de Juge.—

Que la maison sera vendüe apres trois publications au plus offrant &—

Pothier
Vo
Fonchiroal

Decisions de Fromental. p. 329. Vo Fideicommis —

Durocher-tal
&
Beaubrein-tal

Un mineur peut il faire une disposition entre vifs, ou une disposition a Cause de mort en faveur de celui qui n'a été nommé Son Tuteur ou Son Curateur que pour un acte particulier comme un partage, ou pour l'assister dans ses procès —

Recueil des Quest. de Jurisprudence proposées par Mr Dagueseau à Tous les Parlemens — p. 380 —

Banc d'Eglise —

Elles ne peuvent non plus etre faites que ~~apres trois~~ pour la vie des personnes aux quelles ils sont concedés, et pour autant de tems qu'ils demeureront sur la paroisse, sans qu'il puisse être concedé qu'un seul banc à la même personne, et au même chef de famille. — Jousse. Admin. des paroisses p. 56. 57. —

Voir aussi Code des Curés. 3e. Vol. p. 619. — Arrêt de la Cour du Parlement, concernant les Concessions des bancs dans les paroisses du Ressort de la Senechaussée de Baugé —

Loiseau — des Seigneuries. Ch. 11. N° 68 — Et quand il y a permission par ecrit des Gagers ou marguilliers encore est-elle revocable à toujours, comme un precaire pour ce, qu'ils ne peuvent obliger l'Eglise sans le consentement universel des paroissiens — toutesfois si elle est donnée pour argent entrée au profit de l'Eglise il faut rendre l'argent avant que d'oter le banc — Mais si elle est donnée par les habitans en Corps avec le Curé, elle n'est revocable qu'en vertu des lettres & en cas de lesion, ou bien que la place du banc fut necessaire à faire quelque batiment pour l'Eglise; et principalement quand cette permission a été concedée pour argent, il le faut toujours rendre. —

The King
v
Morill M'Goon

The Prisoner charged with two Indictments one for Forgery — and the other for Larceny applied to the Judges in vacation for a writ of Hab. Corp. in order to be admitted to bail. —

The Pris: alledged various grounds in support of his application —

1 The Judges in K. B. have authority to bail in all cases according to circumstances of Case. even after Indictment 4. Bl. Com. 298 — and even after conviction. 3. Hawk. P. C. 301. —
Persons indicted for Larceny by inquests taken before sheriff — may in the discretion of Kings Sup: Courts be bailed 3 Hawk. 206

2 The length and hardship of the imprisonment, 3. Hawk. 223.

3 In capital cases where there is any circumstance to induce a Court, to suppose the Pr innocent — and in every case where the charge is not alledged with sufficient certainty. — 3 Hawk. 225. —

4 The instrument forged of no value — issued by an illegal association — Montreal Bank. St. 1. Geo. 1. ch, 18. extended to the Colonies by 14 Geo. 2. — Instrument void on the face of it, no forgery. 2. East. 948.

5 Crime was committed by other persons viz a foreign Country in Vermont — Defs: Harvey — Wit on Indictm: must be so admitted also for Pr alls. if W. be a convict —

6 The charge insufficiently laid in the Indictment — no forgery sufficiently charged — No person clearly stated to have been defrauded. —

7 At most Pr could be considered only as an accessary before fact — and bailable —

8 Good & sufficient bail offered. —

1 Chitty 129.

Although the Kings Courts and Judges in the vacation may ~~exercise~~ a discretion in bailing prs on Habs. Corp — yet we find in the rules which they observe they are guided by a series of decisions, which limit and govern this discretion, so as to confine it within those limits, to which an honest man, competent to discharge the duties of his Office, ought to restrict himself

4 Bur. 2539.

de — p. 123. 1st. First then — we find that all Prs are entitled to claim the benefit of the Hab. Corp. act, — excepting however such as are committed for felony or treason plainly expressed in the warrant, as well as persons convicted, or in execution &c —

This would seem to exclude all discretion as to the excepted Cases — yet persons so situated may obtain a Hab. Corp. to enable the Judges to look into depositions to see if the charge is warranted — and if the facts there sworn to seem to amount to felony they will remand the party to prison —

Rex. v Horner 2 Leach. 270.

3 East R. 157. —
1 Leach 270. 484.

B. R. will not bail a person charged with a highway robbery, if the prosecutor attends and insists he is the man, notwithstanding many affidavits to prove an alibi.

Rex. v. Greenwood Str. 1138.

3 East Rep. 163.

Rex. v. Marks.

Ld Ellenb. as it appears from the depositions that there is a corpus delicti within the meaning of the act which constitutes it felony, it is our duty to remand the prisoners. —

Le Blanc. J. Yet if upon the depositions returned the Court see that a felony has been committed & that there is a reasonable ground of charge against the Prisoners, they will not bail but remand them —

Ld Mohun's Case — Salk. 104 — 1 Chitty. 129

If a man be found guilty of murder by the Coroner's Inquest, yet the Court of K. B. will bail him — because the Coroner proceeds upon depositions taken in writing which the Court may look into: Otherwise if a man be found guilty of Murder by a Grand Jury, because the Court cannot take notice of their evidence, which they by their oath are bound to conceal.

Rex. v. Acton. Stra. 851.

Nor will the Court at all admit of extrinsic evidence; so that they refused to examine, whether a man brought up before them had been previously acquitted of a charge precisely similar.

Vandershuys.. vs Bleury. —

Quest. How far an attorney is liable for irregular or vexatious proceedings, whereby a defend^{t} was wrongfully held to bail. —

See authorities cited p. 102. —

3. Wilson. 368 Barker, widow vs Barham & Norwood. —

Trespass vi & armis for false imprisonment lies as well against the attorney as against his client, who sues out at the suit of his client an illegal writ of Capias ad satisfaciendum against a Defend^{t} and causes such Defend^{t} to be imprisoned thereupon. —

1 Dareau. Tr. de Inj. p. 13A. 5.

An attorney and his client condemned solidairement in a sum of 500^{lt}. damages & all costs, for a Memoire published by the attorney reflecting on the character and reputation of the Complainant —

Fisher
vs
Lacasse
&
Lacasse
opp.

On question whether, a Defend. by making an ill founded opposition to the sale of his property or effects, is liable to a Contrainte par Corps, as for a Contempt. —

No authorities in support of this principle can be found in the antient laws of the Country, nor in those Courts where the practice of oppositions of this kind must have been well known and established — but in order to supply this dearth of authority, recourse is had to the principles of the English law, and it is attempted to be shewn from those principles, that whatever tends to obstruct the due and regular course of Justice, must be considered as a contempt of the Court and punishable as such —

The Authorities from the English law are to the following effect —

1. To impose on the Court by bringing a fictitious action — 1 Com. Dig. tit. Attachment. A 2. — and this kind of opposition has been compared to a fictitious action —

2. So an attachment lies against any one who abuses or does not pay obedience to the process or injunctions of the Court — Id. tit. Attorney. (B. 13.) 4. Bl. Com. 283. —

3 So the practising a fraud under colour of a legal proceeding and many other instances may be found which according to the practice of the English Courts would render a party liable to an attachment as for a contempt, but all these authorities proceed upon the principle that the means used to effect the illegal end, are prohibited and contrary to the course and practice of the Court. — But in regard of the particular object before us the making of an opposition by

by the partie Saisie both by the law and practice of the Courts of this Country are admitted and recognized — when I read this principle from the books of practice — "Il peut y avoir des oppositions qui
Rodier on ordre 1667. tit. 33. art. 12. p. 502. — " arreteront la vente jusqu'à ce que le Juge y ait prononcé
" ces oppositions peuvent venir de la part du Saisi, ou de la
" part des tierces personnes — Le Saisi peut demander la —
" Cassation de la Saisie, ou parce qu'il pretendra ne rien devoir —
" ou parceque le terme ne sera pas echu — ou parceque le
" Saisissant ne sera pas le veritable Créancier — ou parceque
" la Saisie ne sera pas faite dans les formes prescrites" —

According to this principle, the right of the partie Saisie to make an opposition, is as much recognized by law, as his right to bring an action or institute any other claim or proceeding in a Court of Justice — but it is argued that this proceeding is attended with bad consequences, is used for bad purposes, is ruinous to Creditors, and delays the payt of just debts — But if all the procedings which are allowed in our Courts, and which have more or less the same tendency, were to be considered as a Contempt of the Court, and visited with a Contrainte of the party — how would this operate in regard of the numerous exceptions which are made in the progress of a Cause, which are often ill founded, and frequently made with no greater hopes of success, than a temporary stay of a final Judgment — These exceptions like the oppositions are allowed by the law & practice of the Courts although both are discountenanced, yet the Judge must decide before their insufficiency is determined, the course of practice in regard of both has been as summary as Justice would permit — although in the Case of oppositions made by the Saisi, some of the commentators are of opinion
Lepitre on Tit. 33. art. 3. ordre 1667. — " Que toute audience doit être refusée aux debiteurs qui
" ne cherchent que des difficultés et des chicanes pour retarder
" le paiement de ce qu'ils doivent legitimement" — but none of those Commentators have gone the length to say, that

that the party making such an opposition should be liable to a Contrainte, for having made it, and certainly the frequency of these oppositions must have given ample room for dicating this opinion, had there been law for it — But on the Contrary, the opinion entertained, was, that as such an opposition was injurious to the Creditor, he might have his action of Damages or such reparation as the Court gave him for that injury +

Salle. Tit. 27. art. 7. Ordre. 1667

"Empêcher l'execution des Jugements par des "Oppositions & autres subterfuges, c'est une entreprise "temeraire, qui doit être reprimée par des dommages "& interets, et autres peines Civiles proportionnées" — and what are these peines Civiles — why we are referred to an Ordre of 1539. art. 96. — "Et ou le condamné

Id. on note (a)

"sera trouvé appellant, opposant, ou autrement frivolement "et indument empechant l'execution du dit Jugemt "ou arret par lui, ou par personne suscitée ou — "interposée, il sera condamné en l'amende ordinaire "de 60tt. parisis, et outre, en autre amende extraordinaire "envers nous, et en grosses reparations envers la "partie; empêchant indument ladite execution "condamnée à faire executer ledit Jugement ou arret "à ses propres Couts & depens dedans certain bref delai "qui pour ce faire lui sera prefix sur ces grosses peines "qui a celui seront Commis, et en defaut de ce faire "dedans ledit delai, sera contraint par emprisonnement "de sa personne" — Here we see the punishment determined for improvident oppositions — Damages to the party injured, and imprisonment for the payt of those damages — but nothing said or supposed, that the making such an opposn was a contempt of the authority of the Court; or gave room for a contrainte on this account —

That

That the Contrainte par Corps may be granted by this Court against pleaders or others whose indecent or otherwise reprehensible conduct may merit it, we entertain no doubt, but this proceeding is not to be adopted upon light grounds, and certainly not at any one for the exercise of a right which the law has permitted — By the ordre du moulins, we find that the Contrainte par Corps was granted as a Civil remedy for the payt of a Debt, after the expiration of 6 months — But by the ordre of 1667 Tit. 34 — all contraintes par corps have been abrogated except in Criminal & Commercial cases, and generally in all Civil matters except some particular cases mentioned in that ordinance — the 4th article is very express on this Subject — and one of the Commentators on this Title of the ordre observes — "L'homme tient "la liberté de la nature, et on ne peut l'en priver "legitimement que pour des choses qui blessent la "Societé, ou aux quelles la Societé a un intent direct "et immediat — Or bien loin que la Societé soit "interessée à ce qu'un particulier soit rempli par "un autre des condamnations prononcées en sa faveur, "elle l'est au contraire, à ne se point priver sans "une necessité evidente, des secours et de l'industrie "de Citoyens, que leur detention dans les prisons, leur "rendroient inutiles." — And we find also in the Recueil des actes de notoriété, an acte of 24 Juillet "1705 — qui porte — que l'on ne prononce plus de "contraintes par corps, sinon pour les Cas exprimés "par le Tit. 34 de l'ordre 1667 —

~~But even in cases of contempt~~

The constitution and practice of the Courts in England are different from ours, and what would be considered a contempt before them, would not be so in this Court. for instance — The non-payment of Costs awarded by the Court upon a motion — The non-observance of awards duly made by arbitrators on a submission made a rule of Court — which are cited merely to shew that the rule in England cannot be the rule here in all cases, and that we must look to our own laws and our practice to settle and determine what shall be considered a contempt, in regard of the Civil proceedings before us —

4 Bl. Com. 285

№ 404
Letourneau
St. Denis —

On question whether relations can be heard as witness to prove fact qe happened in the house of family of the parties — l'interieur de la famille —

Jousse on art. 11 Tit. 22. Ordre 1667 — makes this one of the exceptions to the general rule — 2° — Lorsqu'il s'agit de verifier un fait qui s'est passé dans le secret d'une famille, dont les etrangers n'ont pû avoir que peu de connoissance — cites. Lepître. Cent. 3. ch. 119. —

Bornier on same article, says, they may be examined "lorsqu'ils sont temoins necessaires". ——

Rodier — dr — says, relations may be exam[d] as wits. Lorsqu'il s'agit de verifier un fait qui s'est passé dans le secret d'une famille. —

1. Pigeau. 281. 3e Lorsqu'il s'agit d'un fait passé dans l'interieur d'une famille, et dont les parens seuls peuvent avoir connoissance. —

The Repre de Jurisp[ce] — would incline to a different opinion — see. re Temoinage. p. 66. —

Turner dal
vs
McNider dal

Points pleaded — that Defendt had a domicile at Quebec — whereonly they could be sued. —

This elected domicile, does not destroy the domicile established by law — but meant to extend it — as all Defts except 2 were resident at Montreal.

2. The President & Directors only persons only had a right to bind the partnership —

This is the private contract among Defendts Pltff. not bound by it — the general principle in partnerships, that every Partner is the agent of the others in the trade they carry on — As act The act of McNider in striking out words in policy — is in the usual course of the business — of Insurs — and he admits that he was warranted & authorized so to do —

~~The Conclusions of Declaration demand Judgt. of Defts jointly & severally — but by terms of policy this cannot be granted, as Defts stipulate not to be bound beyond their individual shares of Sum Insd~~

Peddie
vs
McNider dal

Defendt contend. 1st That service of facts & art. on parties not within Jurisdiction not binding —
service on President & Director by leaving copy of Interrogatories at the Fire Insurance Office —

This has been held sufficient in regard of the original process — parties legally before the Court. —

As to the liability of the defendt to pay the whole damage, as part of the goods were saved —

According to the principles of Maritime Insurance the person ensuring below the value of the goods, is considered as his own ensurer for the remainder and must contribute towards the loss in proportion. But it is said this principle does not hold in Insurances at Land office — And to shew what

the

usage is in regard of other Offices of Insurance on this point, the evidence of Mr Auldjo is adduced — In regard of this evidence it must however be observed, that what other Insurance Companies may do or direct, in this respect cannot well affect the Contract between the parties here — The evidence does not go far enough to reach the case before us — as it ought to have been made to apply to what was understood to be the general meaning and interpretation of some clause of the agreement between the parties — we are however induced to be of opinion that by the Policy in question the Defendrs ought to pay the whole of the damages — The words in the Policy are — That the Defendrs undertake ~~to pay, "all such loss or damage "as shall happen by fire to the property insured"~~ that in the event of any loss or damage by fire in the premises they will pay the same, on the conditions referred to — and one of the conditions referred to is — "That when any loss "or damage shall have been duly proved, the insured "shall receive immediate satisfaction, without allowance "of Discount, fees, or other deduction" These ~~terms~~ words ought to be strongly taken agt the Defendrs they are the terms they hold out to the world ~~as~~ upon wch they offer Insurance — and as the conditions contain a variety of exceptions in which they do not consider themselves bound, but this not being one of them, of paying only a proportion of damages when part of goods has been saved, must be considered, as falling within the deduction not intended to be made —

№ 512

Hunter dab
vs
Perrault, and
McKenzie

Action agt. Defend^ts for goods sold & delivered
Plea by McKenzie & Jay^t — and that Pltff. accepted the promissory notes of Defend^ts McK. payable at different periods, which was a novation of the debt —

N° 235

Lebrun
vs
Charles.

Ou action of separation de Corps et de biens
The Defend^r was by Sup^r of the Court ordered
to render an act^e of the Community that
subsisted between him and the P^ff, which he did
after repeated orders to this effect, but in so imperfect a
state as not to be considered as in any wise such an act^e
as required by law — The Pff instead of objecting
to the form or sufficiency, of the act^e filed debats de
Compte, and with it, a statement of what she considered
the state of the Community to be amount to £2938. 10. 2
and of which she claimed the one half — Upon these debats
de compte the parties proceeded to make proof — The Pff
produced 4 witnesses in support of her claim —

1^st Stewart Spragg — who states that since the action he
had sold goods at auction for Defend^r to amt. of £118. 5
and still had goods on hand, to amount of 27 —
That since the action he had seen goods in Defend^rs poss^n
to the value of £6 a 700 — In the garret, to value of £500 —
and deer Skins in the Yard to amt. of £3 a £400 — That
from the nature and extent of trade carried on by Defend^r
believes he must have had a stock of goods to amount of £2000
at least — and thinks his property moveable & immoveable
to be worth £5 a £6000 —

2^d John Russel p^r Defend^r house Rent for many Years
at rate of 25 £ month, since instit^n of action to 1 May 1822.

3 & 4^th Lucile Charles and Nathaniel Charles — two
Children of the parties — who state that Defend^r kept no
clerks or Servants but them — prove the full extent of the
statement annexed to the debats de Compte —

This was one objected to by Defend^r —

4. Jonathan Alger who values the Defend^{ts} goods at £2000 —

In regard of the real Estate titles are filed to support the debats —

~~Hereon~~ Two questions arise touching the amount of the moveable property, first, will the Commune renommée be admitted here, on the default of the Defr to produce and file the amount required? — and 2d Can the evidence of the two Children be admitted as competent in this Case? —

Blackwood }
Guy — }

see p. 96. & 103. —

1 Merlin — 8. 9

In considering the power and authority of a Curator in regard of the property which he administers, it ~~may be~~ must be looked on as the same as that of a Tutor over the property of the minor — Tutors and Curators are by law strongly assimilated, and the only distinction appears to be that the Tutor is principally appointed to the person, the Curator to the property — they derive their authority from the same source, they regulate their conduct accordingly, and what acts they do under this authority seems equally warranted — It is necessary to establish the similarity of right and authority in the Tutor & Curator, because in the arguments of the Counsel, a very material distinction was attempted namely, that the Tutor has a power over the property of the minor greater than that of a Curator, in this, that under the opinion of an assemblée de parens, he may be authorised to alienate the real Estate of the minor — but that the Curator, more especially to an absentee has no such right, nor can the opinion of an assemblée de parens in regard of an absentee, warrant such an alienation by the Curator — But this is not the Case, for if such alienation can be warranted in the one case it is equally lawful in the other + The Curator, even of an absentee, does not merely represent his person, but also his Estate, as much as the Tutor does that of the minor — and all proceedings to be had in regard of this Estate, whether by Creditors or others, must be had agt. him, as the fictitious proprietor — he possesses loco domini and is liable to all actions in regard thereof which the absentee himself would be, if present — Denizt. actes de Notorieté — p. 309 — Dans « l'usage actuel c'est le Curateur qui fait la vente en presence « des créanciers — parceque la proprieté reside fictivement en « sa personne — c'est en son nom, et à sa requete que tout se " fait — " — If therefore the Curator represents & holds the property how will the opinion of an assemblée de parens under the authority of the Judge warrant him to alienate? In Generally it is either the necessity of the case, or the interest of the party represented which induce the Judge to call for this opinion of the parens — and

+ they Tutor as well as the Curator is but an administrator under the authority of the Judge & the authority of the Judge is founded upon general utility, & his interference is warranted ~~upon~~ upon the principle of preventing injury ~~upon~~ promoting the advantage of the Minor, the absentee or persons interested in the estate under such administration

~~Denizt. vo Curatelle~~
~~§. 3. No. 3~~

and on this principle it is no doubt a prudent precaution when the estate to be alienated belongs to an insolvent debtor that his creditors should be called, as the persons most interested in this respect — as they cannot be considered as bound by an act to which they were not parties — perhaps the assemblee convoqued upon the present occasion consisted of such creditors although this may not be material here to enquire, as what was opined upon this occasion arose from the necessity of the case — And it appears that such advice or opinion may be received in the case of a Curator as well as of the Tutor — Rep^re v^o Curateur. p. 194 — says — si l'acte de Curatelle s'etendoit en general à toutes sortes d'affaires, sans aucune explication particulier le Curateur n'auroit de pouvoir suffisant que pour les affaires ordinaires — Car s'il s'agissoit d'un mariage, ou d'une — alienation de fond, le Curateur ne pourroit y consentir, sans avoir pris auparavant un avis de parens" —

N. Denisart v^o Curatelle §. 3. N^o 3. —

— This was not a proceeding had or to be had by the Curator to establish a debt of him, or to alienate his property in the payment of a debt, but to liquidate the rights of Coheirs in a joint Estate — although the interest of Creditors might be concerned, yet the interest of the family was acting principle upon which the proceedings were grounded and in such a case it would seem that the advice and opinion of the parents & amis may be received. —

The question then arises how far the Curator was warranted to accede to the licitation in question — to homologate it under the homologation of this avis de parens and the authority of the Judge — The Court is disposed to think the authority sufficient, when we consider what the general course and practice has been on this subject — but at all events we cannot look upon the authority so given, as a mere nullity — The Curator had the administration of the property of the absentee, and was subject to his conduct herein was subject to the control of the Judge, who is required to assist & direct the Tutor or Curator in his doings — The want of strictness of formality in Sales by Tutors & Curators has not always been the cause of setting them aside, the numerous instances in which we find the decisions of the Courts maintain alienations made without the strictness of

formality

formality, shew us that they often require that collusion, injustice or injury should also concur to set aside these alienations — And the present action would have stood on better grounds had it been brt. to set aside the sale made by the Curator under some of these allegations —

But the opinions of Courts have not alone been guided by the circumstances under which such alienations have been made, but some Commentators also on the Custom, in cases assimilated to that of the Curator, have considered the formality of Sale, as if made by a Decret, not to be requisite — I refer to what is said on the 344th art. by the Farrier — That article says — "Si l'heritier par benefice de l'Inventaire, " ou Curateur aux biens vacans d'un defunt, ne peut " vendre les biens meubles de la succession ou Curatelle " si non, en faisant publier la vente devant la principale " porte de l'eglise de la paroisse, ou le defunt demeuroit " à l'issüe de la messe paroissiale, et delaissant une " affiche contre la porte de la maison du defunt. —

No 246

Bouttillier vs Preston.

On action on Promissory note endorsed to Pltff — Pltff a mercht — Defts Silversmith.

Plea, 1st Note made at Albany in the United States and at time Defts was a Minor

2d Non assumpsit —

3 General Demurrer. —

Interrogatories proposed by ~~Pltff~~ Defts to ~~Defendt~~ Pltff

1. If Pltff gave any & what value for the Note
2 If the Property of note is not now in Defts
3 If the Payee indorsed the said Note on 1 Augt 1822 or at any time previous to the institution of this action
4 If the Indorsement & Signature thereto have not been written on said note since the institution of the action
5 If the said Indorsement & Signature or part thereof hath not been written on s[aid] Note subsequt to the institution of the action —

Hunter & al
Brown

On question — Whether Defd. who has given bail to the Sheriff, can come in after 2 defaults entered on him, & claim a right to give special bail & enter appearance & defend the action. —

6 Feby. 1822
20 do — 1 Just.

Cases cited by Defd — Galushia v. Freeman — 1 p. 64.

Hart. v. Goodhue. 10 Oct. 20 — mo. by bail to Sheriff that they be permitted to give bail to the action — Granted — 2 Str. 876.
1 Sellons Prac. 137. 167. 8
1 Barnes Notes. 369. —

Culver v. Woolsey — mo. by bail to surrender Defd on 5th. day after return. —

Sequestration of Profits of Office. —
see Impey's Sheriff. p. 189 — case of —

№ 1754.

Armour
Peddie

Our question, whether holder can sue the drawer upon non acceptance of the bill without waiting for the expiration of the time limited for payt —

Poth. Con. Change — № 70 — says, the drawer contracts the obligation in this case of being bound to give security or pay the amount of the bill, but this does not say that the Plff is bound to restrict his demand to asking Security only, he may ask for the payt — the giving security is a favor to the Drawer — because he has failed in his Contract with the holder, in this, that the drawer has not done what he the drawer promised he would do — accept the bill — This breach of contract, entitles the holder to recur to the drawer for his money — the giving Security, is a thing introduced for the benefit of the drawer, & at his risk that by waiting till the expiration of day of payt — the bill would be honored — but the drawer must run the risk and do the diligence to effect this —

According to Savary & other French Writers on bills, this action may be brot — for the payt. of the money —

1 Pardessus. 405
№ 382.

Le Porteur peut ensuite recourir contre le tireur et les endossens, qui sont solidairement garans du refus d'acceptation, et leur demander le remboursement du montant de la lettre, des frais du protêt & du rechange, il peut a cet effet poursuivre collectivement les divers obligés, ou s'adresser indistinctement à celui qu'il lui plait de choisir — et la personne ainsi poursuivie, doit donner caution ou payer —

No. 1663
McKenzie
Ritchie
& Eno oppt

The Plff having since sold a lot of land in the possession of the Defendt as his property whereas he held it only by bail Emphyteutique 2nd. Is the opposant, the proprietor of the fonds, entitled to claim the proceeds, as representing the fond which was so sold, there being still 80 years of the bail Emph. to run 5 —

N. Denisart. vo Decret d'Immeuble. §. 5. No 16 — says, that the decret in such case does not destroy the right of the proprietor to claim the fond at the expiration of the bail, and refers to an arret reported by Auzanet. Liv. 3. ch. 8 —

Poth. Proc. Civ. p261. Le quatrieme privilege est celui de ceux dont les oppositions afin de distraire, ou afin de charge, ayant été formées à tard, ont été renvoyées à l'ordre — s'il est jugé qu'ils avoient un droit de propriété ou rente foncier, ils doivent être preferés sur le prix de la chose sur laquelle ils avoient a droit, preferablement à tous autres Créanciers. —

Denis. Vo Opposition No. 23. ——— Mais quand quelqu'un a omis de s'opposer afin de distraire ou afin de charge, avant le congé d'adjuger, au Parlemt ou aux Requetes du Palais et avant l'adjudication aux autres Juridictions, et qu'il en est par la decheu, il peut du moins, comme tous autres Crianciers, s'opposer sur le prix apres l'adjudication pour y venir en ordre pour l'estimation de sa chose; auquel cas il sera preferé à tous autres Créanciers comme ayant privilege reel Cela est decidé tant par l'Edit des Criées de l'année 1551 — que par l'art. 356. de la Coutume de Paris —

see also. 1 Duplessis - 638 —
2 Bourj: - p. 724. §. 97. p. 725. §. 107 —

In February Term 1823—

№ 1715
Armour
vs
Therien—

This was an action on a promissary note payable to the Plaintiff, as Cashier for the benefit and in behalf of the association carrying on business in the name of the president Directors & Company of the Bank of Canada — The Defendt made default—

Duv— By Mr Justice Pyke, Can this action be maintained by the Plff Armour — and ought it not to have been instituted by the persons for whose benefit it is payable He considered, that if the Laws of England were to guide our decision, the present action was maintainable — 1 Esp. Rep. p. 123.— 6 T. Rep. 123.— but doubted whether by the French Law, this would be the Case —

The Court gave Judgt for Plff — The principle of this decision are conformable to what was held by the Court in the Case of Mc Tavish M Gillivrays & Co vs Parisien — 15 Feby 1819 — see M.S. Cases 3d Vol. p. 623.—

№ 1663
McKenzie
vs
Ritchie
& Ux opp.

see 1 Vol. Hericourt. p. 49. № 3.—

№ 477

Stacey. v. Ermatinger } On liability of Sheriff, on Escape of Debtor from Gaol.—

Imps: Sh. 48. Gaolers are also the Servants of the Sheriff, and he must be responsible for their conduct—

By St. 14 Ed. 3. c. 10. The Gaols shall be rejoined to the Sheriffs, and the Sheriffs shall have the Custody of the same as before; and they shall put in Keepers for whom they shall answer.—

51. As the Gaoler is but the Sheriffs Servant, therefore he may discharge him at his pleasure; and if he refuses to surrender up or quit possession of the Gaol the Sheriff may turn him out by force, as he may any private person. 6—

" If the Sheriff's Gaoler suffer a prisoner to escape the action must be brought against the Sheriff not against the Gaoler; for an escape out of the Gaoler's custody is by intendment of Law an escape out of the Sheriff's Custody.— 2 Lev. 159. 2 Mod. 124— 5 Mod. 414. 416.— Bac. Abr. Tit. Sheriff. p 159.—

Com. Dig. Tit. Escape B. 2. p. 598. The action for an escape shall be brought ag^t him who has the Custody of the Gaol.— Tho' he have it de facto only, and not de Jure.

Id. p 599 But an action for an Escape shall not be against the Superior, if the Inferior be sufficient

Id. (B. 3). But in all cases where the Inferior is insufficient debt lies against the Superior for the Escape—

If he be insufficient at the time of the action brought tho' he was sufficient at the time of the Commitment or Escape for that is the time to be regarded.— and

And therfore a verdict is not sufficient, if it does not find the insufficiency when the action was brought, though it finds him insufficient when he was keeper, or at the time of the Commitment or Escape —

(B.3.) p. 599 So it lies agt the Superior, though the Inferior was admitted by the Court. —

The Superior against whom the action ought to be brought, is he, who by his estate in office, or by his authority without Estate, has the power of putting in the Infor Officer

2 Inslit. 382 — { This 4th p. —

The Sheriffs of London are the Inferior — the Mayor & Commonalty who have the office of Sheriff in fee, are the Superior —

So debt does not lie against the Superior upon a general declaration for an Escape, but he ought to be specially charged for the insufficiency of the Inferior. — 2 Lev. 160 —

Bac. Abr. Tit. Sheriff. H. 5. p. 157. Although all Gaols and prisons regularly belong to the King yet the Sheriff shall have the Custody of all persons taken by virtue of any precept or authority to him directed, notwithstanding any grant by the King of the Custody of prisoners to another person. —

If the Gaoler cannot be considered to be the servant of the Sheriff in this Case, — he being appointed by the Crown & not answerable to Sheriff — how will this affect the question —

Imp. Sh. p. 147. — cites. 2. Bl. Rep. 1048. See case in Ca. temp. Hard. 310. 311 — where it was held, that as the turnkey was not the Wardens deputy, the escape in question, by the act of the turnkey could not affect the Warden so as to construe it to be a Voluntary Escape.

Impey — p. 157. And it is reason that he (Sheriff) put in such Keepers for whom he will answer. —

2 Inslit. p. 382 Nota (16) chap. 11. St. Westm. 2. (Et caveat sibi vicecomes, vel custos ejusdem Gaolæ si sit infra libertatem) This act extends to all keepers of Gaols, and therfore if one hath the keeping of a Gaol by wrong, or de facto, and suffereth an escape he is within the Statute, as well as he that hath the keeping of it de Jure. —

By St. 45. Geo. 3. ch. 13 — Act to provide for the erection of a Gaol — by Sec. 5 — it is directed that the Sheriffs of the said Districts for the time being, shall severally & respectively "have the keeping of the said Gaols" &c

Appointment of Defendt by Commission of 24 Decr 1810 — by which the prisons in his District, is committed to his care & keeping —

Writ of Capias of 20 July 1820 — Sheriff returns that he had taken the within named Alexr Grant "whose body remains in the prison of our Lord the "King under my custody" — &c —

N°27.

Maitland &c
vs
Forbes & al
Gerrard dal

On question touching the liability of the Fiers Saisi to account to the plaintiffs as Creditors of Dr & Wm Forbes, monies rec.d by the F. Saisi from Wm Forbes shortly prior to his decease —

Three points are raised by the pltffs as grounds on which ~~their action is grounded~~ they contest the declaration of the Fiers Saisi,

viz. 1. The insanity of Wm Forbes at the time he gave the Draft in favor of F. Saisi

2. The Insolvency of Dan.l & Wm Forbes at the time, & the consequent right of their Creditors to a share of the money. —

3. The special promise of Sam.l Gerrard to receive the money & account for it.

1st As to the first point, there is no evidence to establish the fact, the general belief of one or two of the Witnesses that they did not think the deceased in a state fit to transact business, is more than counterbalanced by the particular evidence of Mr Lesaulnier, of Dr Kennilly's certificate, and of the signature of Corbett the brother in law of the deceased to the Draft in question — can leave no doubt on this head. —

2d On the question of Insolvency of Dan.l & Wm Forbes — Here we have to regret the inefficiency of our Laws on this subject, and how little calculated they are to afford protection to Creditors, and ~~facilitate~~ secure their rights & claims on the property & estate of their Debtor — What shall constitute Bankruptcy — when it shall be said to commence, so as to tie up the hands of the Debtor from disposing of his property

should not ~~be left in doubt, nor~~ be of ~~a~~ an equivocal nature, or so difficult to ascertain, ~~as to cause~~ that doubts could arise in the minds of any, or delay be occasioned in securing the ~~interests~~ rights of all who have an interest in the Estate of the Insolvent Debtor — We cannot look at the Code Marchand in this respect, it has been held not to law in the Country, and if it were, its provisions on this particular point are too limited and inefficient to afford that prompt and effectual remedy which ~~the~~ Creditors would require in cases of insolvency of their Debtor — What is the consequence? Creditors are left to pursue their individual remedy agt. their Debtor, and of his property, until by a long course of litigation & proceedings at law, that property is wasted, or so much diminished, as to be of little benefit to those interested, But however defective the law may be on this subject, it is our duty to administer it such as it is, until the Legislature of the Country shall see fit to change it —

By the 180th. art. of the Custom of Paris we are informed what deconfiture is — Le cas de deconfiture est, quand les biens du Debiteur, ne suffisent aux creanciers apparens. &c Now what do the Commentators say on the interpretation of this article — Bourjon. 2d Vol. Titre des Executions No 32. p. 675 — La deconfiture est bien l'etat d'impuissance du debiteur de satisfaire tous les créanciers; mais elle ne se presume pas, tant que le debiteur est en possession de ses meubles, et qu'ils ne sont pas saisis et executés sur lui; ainsi au defaut d'une telle saisie et execution, le privilege du premier saisissant, ainsi que celui resultant de la priorité des autres saisies contre les saisies posterieures, ont toujours lieu — sauf l'exception ci-apres — what is it — cependant le décés du Debiteur & une apposition du Scellé, font presomption de deconfiture — c'est exception. —

Fer. Dic. V^o^ Deconfiture, says, that Deconfiture signifie l'insolvabilité d'un debiteur, dont les biens sont saisis et qui a plusieurs créanciers qu'il n'est pas en etat de satisfaire, apres discussion faite de tous ses biens. —

Il faut donc, pour qu'il soit constant, qu'un home est deconfis et insolvable, que tous biens, tant meubles qu' Immeubles, ayent eté saisis et vendus publiquement, et que le prix qui en est provenu ne soit pas suffisant pour satisfaire ses Créanciers saisissans ou opposans.

+ We have nothing in the case before us that comes within the notion or description of this insolvency, it is true we see the decease of one of the partners, but no proceedings taken upon it, that carry a presumption of insolvency, the very reverse is apparent, the survivor is allowed to remain in possession of all the partnership property, and what seems singular, if we can credit the testimony before us, was allowed to waste and destroy that property, when there were creditors on all hands, whose interest it was to have prevented it — Whatever the reason for this inactivity on the part of the creditors might have been, it was attended with this legal presumption, that there was no insolvency in the partnership business of D. & W. Forbes. The first step taken towards establishing this insolvency is the saisie-arret sued out in this Cause, but whatever may arise out of this saisie arret, taken nearly two years after the decease of one of the partners, it cannot have a retro active effect, insolvency can operate only from the day it is ascertained, no prior bona fide transaction can be affected by subsequent insolvency, if the transaction was not bona fide, then are other grounds & principles upon which it can be attacked & set aside — There does not therefore appear a shadow of right upon which this transaction can be attacked on the score of Insolvency.

+ How I would observe that Circumstances may often occur of wh. not require all this course of proceedings, and that although we do not adopt the Code Marchand in its form & practice, yet the substance there of are parts of it of a Court wd. be disposed to admit as containing principles of Justice and sound reason.

As to the 3d. Point — Whether S. G. the T. Saisi rec.d the money in question under a special promise to hold it as the property of Dr. & Wm. Forbes & be accountable to them for it — that is, whether it could be considered in the nature of a Deposit in his hands. —

The testimony of Corbett, is the only evidence we have on this head, and would certainly lead us to presume that the T. Saisi did not act as the Creditor of Dan.l & Wm. Forbes, but as a friend, as the depositary of the money — the conversation however as stated by this witness is somewhat desultory, and there is no precise stipulation or undertaking on the part of the T. Saisi — The T. Saisi is stated to have said, on one occasion, that it was no trouble to him to draw the money from the Public office & to receive it — on the 2d occasion when Wm Forbes swore to the acct. Dan.l Forbes was present — now Dan.l Forbes had a material interest in this money, and his acts & observations must constitute a strong feature in the Case — D. Forbes objected to Mr G. getting the accounts & vouchers. when the declared observed, that Mr G — was their good friend, and he had much rather the money should remain in his hands than in any body else — That Mr G — observed — "I do not know what D.r Forbes can mean by making objections to my receiving the accounts — I have no interested motives in taking this trouble, I merely do it for my friend Wm Forbes, who is not now in a situation to transact business, and if any other person will take the trouble I have no objections." — This language marks strongly the character of a friendly, disinterested motive in the T. S. and his receiving the money upon this principle would no doubt make him now accountable for it — This appears to have been on the 8th. Nov.r — by connecting this part of the evidence with the Certified copy of the account sworn to before Mr Caldwell — Between this day and the 22d. of Nov.r when the receipts were signed and the draft given by Wm Forbes to Mr. G — we have nothing to shew what took place between the

† nothing seemed then to have been concluded upon between the Parties

the parties, Dr & Wm Forbes may have talked over this matter, as being of interest to them, they may have changed their sentiments on this subject — on the 22d. Nov. when the receipt and draft were signed by Wm Forbes, we find Mr. G— holding himself out as a Creditor of the demand, at least as far as his communications went with Mr Lesueur and could we take up take up the answers of Mr. G— to the facts & art. he appears to have acted upon that occasion only in this character — but this being evidence in his own favor — cannot be relied upon as the legal means of establishing the fact — but what leads us to believe that Wm G— did act as a Creditor upon this occasion, & did receive the money on act due to him & his partners, on the subsequent declarations of Dan. Forbes, as stated in the testimony of John Fisher & Mr Dillesdernier, who ~~stated~~ admitted to them, that this money had been paid to Mr. G— on act. of what was due to him & his Partners by Dan. & Wm Forbes — This declaration of the Debtor with the fact in evidence that the money so received had been soon after applied to the satisfaction of a part of this debt, ~~soon after it was received~~ seem to establish sufficiently that this money was ~~paid~~ given and received as a payment, and not as a deposit in the hands of the T. Saisi. —

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Denizt. Vo Saisie-arret No 10. —

Ces sortes d'affirmations se font au Greffe par les Tres Saisis et le Saisissant est recu a prouver par ecrit le contraire de — l'affirmation; ce qu'on n'admet pas ordinairement en d'autres circonstances quand le Serment est deferé in litem. —

1. Pigeau. 658. —

Mais si l'on soutien que son affirmation n'est pas sincere, par example qu'il a moins payé que ce qu'il doit, ou qu'il n'a pas du le faire, qu'il ne doit point avoir de terme; alors de simple temoin qu'il etoit dans l'affaire, il y devint partie interessée, et peut par consequent demander sur cette Contestation à etre renvoyé devant son Juge naturel. — On ne peut pas lui opposer son affirmation comme une Soumission à la Jurisdiction ou il l'a faite, pour l'obliger a y rester parceque encore une fois, cette affirmation, n'etoit pas une defense de sa part mais un simple temoignage rendu à la verité. —

St. Marie
Dent

on a writ of Execution sued out of the Lands & Tenements of the Defendt the Sheriff seized and sold to the Plff. the following lot of land — "a lot of land situated in the Seigniory of Delery, in the first range of Concessions in the said Seigniory on the river Richelieu, containing sixteen arpents in width by 28 arpents in depth, with a house & other buildings thereon erected, commonly called Watson's Point, bounded in front by the said River Richelieu, on one side to the north by unconceded lands, on the other side to the South by land belonging to Thomas Jobson, and in the rear by unconceded land." —

The lot of land in question contained 18½ arpents in front by 28 in depth, was bounded on the north by the land of one Gabourian, & on the south by Thomas Jobson — The Defendt abandoned 16 acres on which the house & buildings were erected, but retained 2½ acres on the north side, as his property contending that the same had not been seized or sold Qud ? —

It is ~~said~~ established by legal decision that where there is a deficiency in the thing sold by Decret, there shall be a proportionate diminution of price to be allowed to the purchaser out of the purchase money on his opposition to this effect — The question however is, shall this principle apply in all cases, or does the law make a distinction when quantity is the thing sold, or where a certain object without consideration as to quantity or extent, is the thing sold —

If the thing here sold, called Watson's Point was of that certain and determinate nature, that no person could mistake it, had it contained only 13½ acres in front instead of 16, the purchaser would be entitled to no diminution of price, and if it contained 18½ the purchaser would be entitled to claim them — According to a received principle in the interpretation of Contracts, as to what shall be considered a sale of a corps certain, and what shall be considered a sale of quantity, it is held — qu'aux ventes, quæ incipiunt a corpore, on se doit plutôt regler par les confins que par la contenue, et que ce n'est que pour une plus grande expression qu'elle a été declarée —— qu'au contraire aux ventes quæ incipiunt à quantitate, le vendeur est obligé de maintenir la contenue que le contrat porte — According to this rule, the Plaintiff must fail in his action, for the sale here made is, of a lot of land containing 16 acres in front by 28 in depth — Then have been delivered to the Plff, and what right has he to more? — why because he says, that he purchased what was called Watsons Point, & all that belonged to it, but neither by the legal interpretation of the Contract, nor by the grammatical construction, can the words Watson's point be made to apply to any specific quantity of land — on the contrary the words, Watsons Point, would apply to the anticedent words, houses and buildings thereon erected, as the relative with qt they are connected — The words are (a lot of land &c —) whereas had watsons point, been the principal thing sold, it ought to have been thus described (a lot of land, called Watsons Point &c)

† with known limits & boundaries.

2 Henry. Lw. L. ch. 6. 2 Inst. 85. —

Watsons Point here seems rather to be an accessary to the thing sold, than to be the principal object of the Sale — it does not therefore come within any general principle, but rests upon the particular description here given —

See Cass 2e Vol. Thibault — Fr. des Créés — p. 139. 140 where he refers to Henrys — where the converse of the proposition was held —

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What does Boujon say on this head —
1 Vol. ~~Tabl~~. liv. 3. Tit. 4. p. 482. No 50. — he states in the preceding No — that where the sale is by measure the seller must warrant the quantity — & in this No 50, goes on to say — Cette garantie auroit lieu encore que le Contrat de vente contint les confins, et les tenans et aboutissans des 30 arpens vendus; c'est toujours certaine quantité vendüe, et qui doit être garantie par le vendeur, la delivrance de cette quantité etant l'objet et la fin d'un tel contrat — cette jurisprudence est fondée sur ce que dans le cas que la vente à la mesure, l'enonciation des confins est surabondante, et comme telle, c'est la quantité, c'est la mesure marquée qui predomine sur icelle &c —

Here the predominating thing sold was the measure, for not only is the name Watsons Point, a name of uncertain nature and extent, but the pretentions of the Pltff here go beyond the limits of his deed for he claims on the north line up to the land of one Gabourion, whereas the lot in question is stated on that line to extend to unpatented lands —

The case of Chaboillez vs Lavallée is very different from the present — see Ord. Term 1826 — 5th Vol. Ca. p. 188 —

un emplacement situé au Faux bourg St. Antoine de la contenance de 72 pieds plus ou moins de front sur 80 pieds plus ou moins de profondeur — prenant pardevant — à la rüe St. antoine, parderriere à ladite Dame Venderesse & à ses Enfans, joignant d'un coté à la rüe St. Marguerite, et d'autre coté aux representans de feu Dame Josette Guy veuve —

De Rouville
+
Fr. Gaucher dit
Bourdalais —

Quo. If the Procureur ad negotia can be examined by his Principal —

Alphonse Dumont, a witness produced on the part of the Pltff. ex. on his voir dire, said. that he has been for some years past (now) the Agent and Attr of the Pltff in managing the affairs of his Seigniories, and in transacting all matters concerning them, and lives in the Plaintiffs family —

Defend objected to Wr as being incompetent —

The 14e art of 22e Tit. of Ordre 1667 — says — Au commencement de la deposition sera fait mention du nom, surnom, âge, qualité & demeure du temoin, du serment par lui prêté, s'il est serviteur ou domestique, parent ou allié de l'une ou l'autre des parties, et en quel degrés. —

Rodier on this art. 2e quest —

Poth. ob. Nr 827.

L'ordonnance entend elle exclure absolument le temoignage des Serviteurs et domestiques? — Non — mais elle veut que le temoin declare sous la religion du serment s'il est parent, allié, Serviteur ou domestique sauf en jugeant a rejetter cette deposition, ou y avoir egard selon les circonstances —

Id. —
on 1st quest —

Serviteurs ou domestiques ne sont pas termes Synonimes Domestiques, sont ceux qui restent dans la même maison qui sont commensaux de la partie sans faire aucun ouvre servile — tels que les Commis, agens, Clercs,

Serpillon on 14e art. of the 22e Tit —

Precepteurs ou gouverneurs et pensionnaires — Serviteurs sont les gens distinés aux ouvres serviles dans la maison et qui y sont nourris et entretenus aux depens du maitre, soit qu'ils ayent des gages ou non. —

Poth. ob. 827 —

Les dispositions des Serviteurs ou des domestiques sont sur tout rejettées, lors qu'ils sont entendus pour et a la requête

de

de leurs maitres — On cite à cet egard la loi 6. ff. de Test. qui dit — Idonei non videntur esse testes, quibus imperari potest ut testes fiant. — Cette loi ne reçoit pas neanmoins une application parfaite — cela est dit des esclaves et des fils de famille qui etoient soumis à une puissance à la quelle il n'etoit pas en leur pouvoir de se soustraire au lieu que nos Serviteurs sont des personnes libres. —

Mr Jousse sur cet article observe, N°. 3. sur ces mots, Serviteurs, Domestiques — qu'ils n'y ont pas été mis pour rejetter leur temoignage, comme on le croit ordinairement et comme il est dit à l'egard des parens en l'art. 11 ci-dessus; mais pour y avoir egard par les Juges suivant les circonstances — et en effet, si l'ordonnance avoit eu intention de rejetter le temoignage des Serviteurs et domestiques, elle n'auroit pas manqué d'en faire une disposition comme elle l'a fait à l'egard des parens; et ne l'ayant pas fait de même à l'egard des Serviteurs et Domestiques, c'est une preuve qu'elle l'a laissé à l'arbitrage du Juge conformement à la disposition du droit —

The Court were of opinion to admit the testimony of the witness, saving such objection as might be made to it, according to the matters deposed to —

And here it would seem that when the evidence of the Domestique or Serviteur did not apply to certain facts, where they could be heard only as temoins necessaires their depositions were liable to be rejected —

see Denizart. v° Reproches —

" Pezian —

Sallé on ord. 1667.

Bornier —

No. 1974
Archambault vs. Fulliam & al.

On question whether the Defend^{ts} Masons and Entrepreneurs for building a Church, are answerable for employing in that building insufficient materials furnished by the Parish, by reason whereof the workmanship was imperfect, & a part of the building fell to the ground. —

vid. Rep^{re} V^{o} Maçonnerie —

Si on Juge ainsi contre un Entrepreneur quoique conduit par les plans et l'inspection d'un Architecte quoiqu' autorisé par les pouvoirs d'un proprietaire, qui peut-douter qu'on ne doive prononcer de même contre un maitre-maçon qui aura fait des ouvrages avec des materiaux fournis par le proprietaire? — cette circonstance ne peut l'affranchir de la garantie il est egalement-responsable pendant-dix ans des Vices de sa construction, parcequ'il a toujours à s'imputer les Causes de sa deffectuosité. —

En effet, ou les vices qui se decouvrent dans les dix ans, et-dont les suites se manifestent, proviennent d'un defaut-dans la bâtisse, c'est-a-dire, d'un defaut de liaison, d'un mauvais assemblage, d'une position sans soin et-sans proportion, ou ils proviennent de la mauvaise qualité des materiaux employés — Le premier cas est-constamment celui de la garantie parcequ'il y a ignorance ou negligence — le second cas n'est-pas plus favorable — l'entrepreneur peut

A être egalement argué d'imperitie, ou de defaut d'attention parcequ'il a du connoitre la mauvaise qualité, et-la connoissant, il a du refuser d'en faire usage, et-cesser absolument l'ouvrage. — Tel est l'usage constamment observé en la Chambre des batimens et-dans tous les Tribunaux de Paris — Telle est la

regle

regle observée par la Compagnie des Experts dans les visites et rapports qu'ils font. —

Des godets l. p. 273 —

La raison pour laquelle les maçons sont chargés de repondre en leurs propres noms des evenemens, despens, dommages et interets causés par le travail qu'ils font au mur mitoyen, est, qu'ils doivent savoir ce qui est de leur art et profession ; et la faute qui se commettroit proviendroit de leurs faits, soit par leur ignorance, ou par leur negligence, et ils ne pourroient pas alleguer pour leur defenses l'ordre exprés qu'ils en auroient reçu du proprietaire de la maison ou heritage ou ils travailleroient, parceque c'est à eux a avertir ledit proprietaire de ce qu'il doit observer à cet egard —

N°1064

Warwick et al
Ayllet et al
& Baudreau
Gardien

On question whether the Gardien is by law discharged from his responsibility, in the effects seized & committed to his keeping are not sold in 2 months after his appointment when there has been no opposition —

The 172. art. of the Custom says, "Les executans
" sont tenus de faire vendre les biens dedans deux
" mois apres les oppositions jugées ou cessées." —
Fer. Gp. Com. on this art. Glos. Un. N°s, says — Cet article decide la question, savoir, combien dure l'Execution et dans quel tems l'executant est-tenu de faire vendre les meubles executés, savoir dans deux mois du Jour de l'execution, au cas qu'il n'y ait point d'opposition formée par le debiteur saisi, ou par un tiers. —

The Code Civil. Tit. 19. art. 20. — says — "Les sequestres
" demeureront dechargés de plein droit pour l'avenir
" aussitot que les Contestations d'entre les parties auront
" été definitivement jugées ; et les gardiens et
" Commissaires deux mois apres que les Oppositions
" auront été jugées, sans obtenir aucun Jugement
" de decharge — le tout neanmoins en rendant
" compte de leur Commission pour le passé." —

Here the delay is evident — but it then becomes a question whether the Gardien shall be discharged without rendering any account "de sa Commission pour le passé" —

Jousse in his observations on this article says, that the sequestre shall be discharged whether the effects have been delivered into his hands or not — et
" il n'importe que les effets sequestrés aient été
mis

mis entre les mains du sequestre ou non — but this is in direct contradiction to the latter part of the article, qt says — le tout neanmoins en rendant compte de leur Commission pour le passé — and Jousse seems to admit this in a subsequent observation on the same article when he says — Les sequestres et gardiens sont contraignables par corps pour la reddition de ces comptes, comme etant depositaires de biens de Justice — And Fer. in his Remarques, on the 172e art† says — ~~en reporting~~ to an arrêt cité, cet arrêt, doit s'entendre quand les gardiens n'ont été chargés que de parole, et non pas quand les meubles leur ont été mis actuellement en main, au quel cas ils demeurent chargés de les representer pendant trente ans, si ce n'est qu'ils les ayent restitués, ou s'en soient fait decharger — Ainsi Jugé par arrêt du 31 Dec 1617. en l'audience de la Grande Chambre —

† and N. 3. of the Gloss. —

Rodier on this art — observes same thing as to discharge of the sequestre when the thing seized has been put into his possession —

Le Camus on this article puts the question in the right point of view. "Les Executans qui ne font deplacer les meubles ou —

No 674
Pichet & ux
v
Manning &
al

An arbon was appointed Curator to the Estate of Pltffs as bens vacants, the Pltffs having left the Country — The same day he was appointed Curator he presented petition to be authorized to sell a certain real property of Pltffs stating therein several grounds which rendered this necessary —

Upon the supposition that these grounds were well founded the Curator was authorized to make the sale after 3 criées at the Church door in the usual manner —

The Land was adjudged to one Eno, for 1400$ — The Seignior, Mr Cuthbert retreated the Land from Eno and afterwards sold a part of it to Manning one of the Defdts, retaining the rest for himself — under this sale Cuthbert & Manning have enjoyed the land since 9 Nov. 1811 —

It is now found that the authority given to the Curator for sale of property was not strictly pursued — as only one criée was made at Church door — and besides it appears that the facts stated in the petition upon which the authority was given are not true — and the land in question appears to have been sold at an under value — This has occasioned a suit to be brot by Pltffs to set aside the sale & re-enter upon their property — This will admit of no difficulty — but the question arises in regard of the improvements made on the property by the Defdt, Manning since he has been in possession — he claims to be reimbursed the amount of these improvements — Can he be considered a possessor in good faith — or can he

claim

claim from the Pltff. the reimbursement of improvements they do not want, and would never have made upon the property: supposing the Defend. to be a rich man who has built houses & barns and made improvements on the property, much beyond its value - Shall the Pltff be deprived of their Estate by this means, unless they can reimburse such improvements

But the nature & extent of the ameliorations is not as yet known - ought the Court to suspend giving Judt in favor of the Pltff. till this is ascertained? - or ought the Court to suspend the right of Pltff to enter upon their property, until this amount shall be previously ascertained? - But see ordr 1667. tit. 27. art. 9.

In regard of right of Depts to be reimbursed their ameliorations - see. N. Denis. Vo Ameliorations §. 2. No 3 - the 4e Case given in Case of Minor - p. 493. & p. 495 No. 3. -

Joseph Bouchard
Meunier à Ste Therese, Blainville
Inft Bte Bélanger, habitant
du même lieu.

Cause in the Inferior Court

The decision of this Cause rests upon the question whether the Miller is bound to return to the Censitaire out of the grain carried to the mill to be ground the same weight in flour, farine, as he received in wheat, allowing for the quantity deducted for mutur

The rules, regulations and Customs which were observed in France touching mills and millers were very numerous ~~and variant~~ and by no means uniform — Freminville in his Pratique des Terriers 2 vol. p. 291, observes as a general rule when difficulties occur — que quand il y a des doutes, il faut suivre " le sentiment de la Villette sur Peronne, & prendre le " moindre droit, par la faveur de la liberation —

This principle seems further admitted from that kind of interpretation which was put upon the different laws & ordenances made on this subject — The same author observes, p. 292. "Or les Loix et les ordonnances sont toutes — " uniformes pour la faveur de la liberation, en sorte, " qu'a supposer que s'en soit une de la part du sujet " de payer en argent plutot qu'en grain, il lui doit être " libre de se determiner en ce paiement à sa volonté, c'est " a dire de payer en argent ou en grain — Ver

Par l'ordonce du 19 Sept. 1839, les meuniers sont tenûs
Id. p. 300 — " rendre pareil poids en farine que celui du bled qui " leur aura été donné à moudre, excepté deux livres par " septier pour le dechet — art. 8. —

Le septier de bled, mesure de Paris, pese en froment 240 livres

p. 301 Par l'ordonce du Roi Jean 1er du mois de Fevrier 1350. tit. 6. il est ordonné, qu'il soit etabli des poids pour peser le bled quand on le portera au moulin, auquel poids sera pesé la farine qui sortira du dit bled

Un arrêt du Parlt de Bretagne du 15 Mai 1631 — ordering same thing considered a general law —

p. 304. 5. And by some Customs of France, the Seigniors are held personally liable for the defects or neglects of their Millars —

The law of this Country in regard of this object we must gather from local usages or particular regulations which have been adopted to regulate the rights of the parties — The first I find is an arrêt of the Superior Council of 20 June 1667.

2. Vol. Edits. p. 131 "Qui regle les mouture "à la 14e portion" — This arrêt was made merely to increase the amount of mouture, to the 14th part of what was ground, in all other respects it refers to the law as practised in France, as well before, as to be thereafter followed — observe what it says — "Sur la
" requête Civile presentée en ce Conseil par la plus part des
" Proprietaires des moulins de ce Pais, tendante a remontrer
" que les moulins de ce Pais coutent le double et le triple
" de ceux de France, tant pour les Construire, les reparer,
" et les entretenir, que pour gages et nourir les meuniers,
" en consideration de quoi, ils pourroient demander que
" le mouturage fut proportionné aux dispenses, et par
" consequent au dessus de l'ordinaire de France, neanmoins
" qu'ils se contentent que ce qui a été pratiqué en ce Pais
" dus son commencement, conformement aux Ordonnances
" et Edits Royaux soit continué dorenavant comme il a
" été jusqu'à present, et que la Coutume de Paris qui
" est seule reçue en ce Pais pour toutes choses, le soit
" aussi pour celle-ci — Le Conseil a ordonné ainsi —"

Reference is here made to the Royal Edicts & Ordinances of the Kings of France as the Rule of Law which had obtained and which was still to be observed in the Country — Reference is also made to a local Ordinance of Mr De Lauzon — but it is not to be found in the Collection of the Edits & Ordonnances and we cannot say what it was — Now by the Ordinances of the Kings of France prior to this period, certain

rights

weights and measures were established, and toll to be taken — and although this Arret, varies therefrom in regard of the quantum of mouture to be taken and that it was to be taken in kind, yet in all other respects, what was the law in regard of weight and measure in France, was held & should be continued to be the law in this Country — and indeed we find in this arret a part of the Law of France more particularly enjoined in regard of weighing the grain carried to the mill to be ground — see ordre de Jean 1re du mois de Fevrier 1350. tit. 6. —
see also. Denizt. vo Meunier. No 4. Il y a neanmoins une ordonnance du 19 septbre 1439. qui porte, que les meuniers seront tenus de rendre pareil poids en farine que celui du bled qui leur aura été donné à moudre excepté deux livres par septier (de froment mesure de Paris) pour le dechet — and according to Freminville above cited this septier is 240 livres pesant —
Repre vo Meunier. p. 507 — A Paris on paye la mouture en argent — les meuniers reçoivent les grains au poids, et rendent la farine de même, en leur faisant etat du dechet, qui a été evalué par les ordonnances à deux livres per septier —
see also Renauldon Tr. des Droits Seigneuriaux liv. 4 ch. 1. Quest. 7. p. 263. 4

The opinion of the Court therefore was that there should be allowed the diminution of 2lt. for every 240 for dechet, or waste — & as it appeared that double this quantity had been taken here, the action was dismissed —

Contrainte par Corps contre Femme mariée
su Decisions de Fremonville. Vo Prisonnier, p. 583

Chartier
Descelles
Descelles
mis en cause

On question touching conditions of Sale imposed by the Court.

Dec. de Royer. Vo Adjudication. . su. Charges & conditions. p. 765.—

On ne doit pas permettre des adjudications à condition par l'adjudicataire de se charger des evenemens d'un proces, parceque cela eloigne les encheres, et que par ce moyen les choses sont vendües et adjugées à vil prix, au grand dommage de la partie saisie et des Créanciers — On ne doit donc pas laisser à l'avidité d'un poursuivant le droit de charger un bref de clauses dures et derais onnables, qui tendroient à lui procurer plus vite la rentrée de sa créance, mais qui ecraseroient tous les autres interessés — Les charges imposées à un adjudicataire doivent être simples et legeres. —

№ 354

Beaujeu v Trisdell

On donation by one Susher to the Defendt of a lot of land, on condition that the Donee should build a house of the value at least of £200 — on the lot so given, & for his the Donees own benefit — 2nd. Is this such a charge for which lods & Ventes are due to the Seigneur

Fonmaur Tr. des Lods & Ventes.

№ 18. p. 16. — Cette origine du droit des lods, nous mene jusqu'a la source, et à la racine des principaux usages, et des regles fondamentales relatives à ce devoir — de la vient —

1° Que le vendeur en etoit communement chargé parcequ'il est attaché à la permission que lui donne le Seigneur de vendre, quoique par la nature de la chose cette charge dut regarder l'acheteur —

2° Qu'on a toujours dit, Lods & Ventes — et non pas Lods & achats — parceque la vente etant l'ouvrage de deux parties, la prestation des Lods, est attaché au fait du vendeur, et non au fait de l'acheteur

5° De la vient, que c'est une portion du prix que recoit le vendeur, et dont il profite, et non de ce qu'il en coute à l'acquereur, ex. gr. pour les etrennes frais de proxenetes & loyaux Couts. —

№ 591 p. 187 Les frais du Contrat, ceux des entremetteurs, les dépenses des voyages et autres loyaux couts de l'achat n'entrent pas en consideration, pour augmenter le montant des lods — c'est ainsi que la question fut jugée par un arrit du 31 Janv. 1557 — Cette Jurisprudence est fixée sur ce qu'il n'entre dans la fixation des Lods, que les objets qui tournent au profit du Vendeur, et non les loyaux Couts, qui sont communement à la charge de l'acheteur. —

2 vol. — № 663 p. 9

Hervé. Theorie de Mat. Feodales 3e vol. p. 167

Enfin on ne doit pas considerer les meliorations dont l'acheteur est chargé pour sureté d'une vente que le Vendeur se retient, parcequ'en c'est l'acheteur même qui profite de ces meliorations. —

Boutaric Des Lods p. 146 —

A l'egard de la seconde question, Mr Guyot a decidé qu'il n'y avoit point de Lods, si la charge apposée dans la donation n'est point en faveur du Donateur, ou ne tourne point a son profit, si elle a été stipulée pour l'utilité d'un tiers. —

Poquet de Livonnes Tr. des Fiefs p. 129 —

Les Lods & Ventes ne se payent que sur le pied du prix qui tourne au profit du Vendeur —

Ni pour la Constitution ni liberation des Servitudes —

p. ~~238~~ 238

Ni constitution de Rente —

Interrogatoire sur Faits & articles —

Nouv: Denis. Vo Faits & art. §1. No. 3 —

L'Interrogatoire sur Faits & articles peut-être mis en usage, soit pour acquerir une preuve soit pour completter celle qui est deja commencée soit pour detruire celle que l'on oppose —

No. 1866.
Perrault & Meilleur

On action of assumpsit & prost-thenon —

Sallé on Ordce. 1667 Tit. 2. art. 1.

Ce sont les conclusions qui constituent une demande; par consequent elles forment la principale partie d'un exploit d'assignation. — Mais ce n'est point assez de faire connoitre a quelqu'un ce que nous lui demandons il faut encore lui expliquer les motifs de notre demande et les moyens sur lesquelles elle est fondée — afin que si nonobstant ces precautions, il s'obstine à s'opposer à une pretention juste en elle même et bien justifiée, il ne puisse imputer qu'à lui la condamnation de depens qui est la peine naturelle des plaideurs temeraires —

Boutaric on do.

La raison pour laquelle toute assignation doit être libellée et contenir les moyens sur lesquels la demande est fondée est marquée en en la loi premiere ut sciat reus utrum cedere, an contendere debeat. —

Les anciennes ordonnances marquent une raison particulière qui obligeoit à libeller les citations, et a y exprimer clairement les moyens de la demande —

Ravaut p. 9 —

L'ord.ce Tit. 2. art. 1. explique, ce qu'elle entend, lorsqu'elle exige que l'exploit soit libellé, en ajoutant, qu'il doit contenir l'objet de la demande, et sommairement les moyens sur lesquels elle doit être fondée

Les demandes qu'on peut former en Justice, sont ce qu'on appelle Actions, et on les distingue en Réelles ou Personnelles —

Les actions personnelles sont celles qui naissent de l'obligation de la personne, et elles proviennent des Contrats — Quasi-Contrats — Delits — & quasi-delits, qui sont les sources des obligations des hommes —

Les Contrats sont toutes les Conventions par lesquelles on s'oblige de deliver quelque chose à un autre, ou de le faire pour lui — pour libeller un exploit fondé sur un pareil titre, il faut conclure à ce que celui qui l'on assigne soit condamné à deliver une telle chose, ou à payer une somme qui est due au Demandeur en vertu de la convention faite entre les parties, dont il faut expliquer la nature, et les clauses principales. —

Le quasi-contrat est un fait legitime, comme s'il y avoit une Convention — Telle est l'acceptation d'une succession, et autres choses semblables — En ce cas on conclut à ce que le Defendeur soit condamné à payer les sommes dont il est debiteur en la qualité qu'il a prise, ou en consequence du fait qui donne lieu à l'obligation. —

Rodier sur ord.ce 1667. de p. 14 —

L'assignation doit être libellée — c'est à dire, quelle doit contenir, d'un coté les conclusions que l'assignant ou — Demandeur veut prendre contre l'assigné ou Defnd.r — Quid petatur, soit parcequ'il faut que le Defnd.r connoisse ce qu'on lui demande, soit parcequ'il faut que le Juge sache sur quoi il a à prononcer, et que la Sentence doit être relative à la demande — Et d'autre part, l'assignation

doit

doit contenir, du moins sommairement les moyens de la demande, c'est-à dire, en quelle qualité, a quel titre, et sur quel fondement, on demande — Causam petendi, et cela pour les mêmes raisons —

1 Stark. N.P. Ca. 381. Walter val. v. Drakeford —

Woods. } On question touching misconduct
Vandersluys } of Jury. —

2 Com. Rep. 525 — Philips. v. Fowler. —

A verdict was set aside where the Jury cast lots how they should give it — S. C. Barnes. 441 — And. 383 — on affidavit of 2 of Jurors —

1 Stra. 642. Hale. v. Cove — Verdict set-aside where Jury drew lots — Costs to await event of a new trial. —

1 Term Rep. 11. Vaise. v. Delaval. — Affidavit of a Juror that the Jury having been divided in their opinion tossed up what pltff's friends won — ~~verdict set aside~~ — The Court would not receive the affidavit from the Jury themselves, as it was a high misdemeanor in them, but said, that in every such case the Court must derive their knowledge from some other source, such as from some other person having seen the transaction thro' a window or by some such other means. —

8. Geo. 2. Barnes. 438. Par. v. Seamesval — where halfpence were hustled in a hat — This matter not appearing on the oaths of any of the Jurors, but by affidavit, that two of them had confessed the same — The Court staid entry of final Judg^t to give pltff an opportunity to procure affidavits from some of the Jurors — but this the Jurors were fearful to do & declined it. +

2. Salk. 645. Dent v. Hundred of Hertford — New Trial was granted upon affidavit that the foreman declared the Pltff should never have a verdict, whatever witnesses he produced —

2. Lev. 205. Foster. v. Hawden. — & p. 140 — The King. v. Fitzwater. where verdicts were set aside, from Jury casting lots, but not said in what manner the Court were informed of the fact. —

2. Bl. Reps. 1299. — Where the Jury not being able to agree in their verdict, wrote the names of the Jurymen on slips of paper, and shaking them together, left the decision of the verdict to the first six which were drawn — The Court refused to grant a new trial, because this matter was only brought before them by the affidavits of the Attorneys to whom several of the Jury had confessed it — there being no affidavit of the Jurymen, or any other that was cognizant of this transaction. —

1 New Reps. 326. 1805 — Owen val. vs Warburton — The Court refused to set aside the verdict upon the affidavit of a Juryman that it was decided by lot —

Sir Jas Mansfield Ch. J. We have conversed with the other Judges on this subject, and we are all of opinion, that the affidavit of a Juryman cannot be received. — It is singular indeed, that almost the only evidence of which the case admits, should be shut out, but considering the acts which might be used if a contrary rule were to prevail, we think it necessary to exclude such evidence. — If it were understood to be the law, that a Juryman might set aside a verdict by such evidence, it might sometimes happen, that a Juryman, being a friend to one of the parties, and not being able to bring over his companions to his opinion, might propose a decision by lot, with a view afterwards, to set aside the verdict by his own affidavit, if the decision should be against him. — We are therefore of opinion that there is no ground to support this rule. —

№ 182.

Tavernier & Cuvillier & Aylwin opp.

On question touches validity of proceedings on Expon as Defendt after death of Plff — on Dpts oppos.

There seems to be a distinction to be taken between an opposition by a Defendt who has been condemned and a third person — The one has no right to raise objections to the right of proceeding on the Expon — as in regard of him be must execute the writ — but the other may have more substantial grounds to allege and ought to have a substantial person with whom to contend. —

This case seems to differ in nothing from what was determined in the case of Brennet v. Legault. see p. 78. —

№ 1754

Mc Armour val. & Peddie —

Action by Indorsee as Indorser of a Bill of Exchr

Bill dated at Kingston in U.C. 3d Janv. 1822 for £100 Sh by one Hall on Jas Aubrey at 60 days after sight — On 2d March 1822. bill was presented for acceptance and protested —

on 29th March 1822. one Alexr Millar, the Clerk of Defendt being at Glasgow in Scotland, was told by Robt Sheddan, one of Plffs that the bill had been protested for non-acceptce That 4 days afterwards Sheddan proceeded to Canada & Millar set out next day — & both arrived at Montreal on 20th May — Sheddan arrived on the Saturday evening — and called on Defendt on the next Monday or tuesday. wt the bill & protest — he returned them to Plff alleging as a reason for not settling it, was that the bill ought to have been presented for non payt as well as for non-acceptance

The objection now rests upon the delay in forwarding the notice of protest from 2d March 1822 — to time Sheddan left Scotland in April 1822. —

This objection however seems obviated by the principle held in the Case of Muilman val. v. D'Equino. 2 Hen. Bl. 565 — That the purchaser of a foreign bill of Exch. payable at a certain

certain time after sight, which is publicly offered for negotiation, is not bound to send it by the earliest opportunity to the place of its destination — It is sufficient if notice of a bill drawn in England on a person in the East Indies, being dishonoured, is sent to England by the first direct and regular mode of Conveyance, whether it be by an English or a foreign Ship — the holder is not bound to send such notice by the accidental, though earlier conveyance of a foreign Ship not destined to this Country —

The Writ says, that a mail leaves London for most parts of the United Kingdom every day, and that trading Ships proceed to New York once every fortnight

Dorions & al
&
Dorions &

On action by heirs at Law to be restored to the possession of the property of the succession of the late Jac. Dorions, their father, of which the Defendt took possession as Executor & Legatee under the last will & Testament of S.r Jac. Dorion. —

See Opinion of Riccard. Tr. des Don. Testifs Rep.se de Jur.e de Guyot. v.o Legataire §.5. p. 69. —

Il faut cependant remarquer que ce saisissement ne produit pas un grand effet — si un heritier (dit Riccard), demandait en semblable rencontre a être saisi reellement de la chose leguée, sauf à requerir par le legataire la delivrance de son leg, sans autre interet que de jouir du privilege qui lui est accordé par la Coutume et sans coter aucun vice contre le Testament, ni proposer aucune raison pour laquelle le legataire dut être en definitive privé de son leg, il ne devrait pas être recevable a vouloir evincer le legataire qui se trouverait en possession de la chose qui lui devroit enfin retourner, d'autant que la bonne foi de notre Jurisprudence ne souffre pas ces actions inutiles et frustratoires; mais suppléant par equité tout ce qui serait necessaire pour parvenir à l'accomplissement de la rigueur de la loi, et les circuits qu'il faudroit faire pour cet effet, elle feindrait en meme tems que le legataire et possessem de la chose qui lui a été leguée, en aurait ressaisi l'heritier, et puis, que l'heritier en aurait fait delivrance au Legataire, sans requerir que toutes ces Ceremonies s'executassent reellement attendu qu'il n'en resulterait aucun fruit ni utilité pour aucuns des parties" — L'usage est conforme a cette doctrine — cites some arrets —

Rep.s de Merlin v.o Legataire §.5. N.16.

Robertson vs Davis. —

On question, whether the tradesman is liable for alledged defets in his work, after it has been received & paid for upwards of 15 months —

Repse de Merlin. Vo Louage. No 11. Quand un ouvrage est achevé, le bailleur doit le recevoir, c'est à dire, l'approuver s'il n'y trouve point de defectuosité — Si au contraire il trouve l'ouvrage defectueux, et qu'en consequence il ne veuille pas le recevoir, le Juge doit en ordonner la visite par experts. — L'ouvrage est presumé reçu quand le bailleur a laissé passer un certain tems sans s'en plaindre et surtout, lorsqu'il en a payé le prix sans protestation. — Repse de Guyot. ea. vab. p. 47. —

Repse Vo Louage p. 46. —

Le Contrat de Louage d'ouvrage est un Contrat synallagmatique, qui forme des obligations reciproques; il a d'ailleurs beaucoup d'analogie avec le Contrat de vente. — Justinien dans ses Institutes, dit, qu'on doute, si certains contrats, sont Contrats de Vente, ou Contrats de Louage, et voici la regle que cet Empereur donne pour les discerner. — Quand c'est l'Ouvrier qui a fourni la matiere, c'est un contrat de Vente; si au contraire on a fourni à l'ouvrier la matiere de l'ouvrage dont on l'a chargé, c'est un Contrat de Louage — Si par example je fais marché avec un tailleur pour qu'il me fasse un habit, et qu'il m'en fournisse l'etoffe, c'est un Contrat de Vente — si je lui fourni l'etoffe, c'est un contrat de Louage. —

Kidd
vs
Raymond

On action hypothecaire -

Defr. purchased a house and lot of Land from one Arel for £75 - on which lot Plff had a right of mortgage unknown to Defr - The Defendt - subsequently built another house on s^d lot, valued at £200 - Plff brot - his present action ag^t Defr - who claims to be reimbursed his £200 by Plff. before he be held to give up the premises to be sold for pay^t of plff's debt -

The law makes a distinction between the different kinds of improvements, because the remedy for the money is differently favoured - there are 1. les nécessaires - or ~~absolument~~ requisite for the preservation of the thing - 2° - les utiles, those by which the value of it is increased - and 3° - les voluptuaires - or those of mere fancy or embellishment, without being considered either as necessary or useful -

In regard of the Tiers-detenteur, he is entitled to keep possession of the estate, until the Creditor shall reimburse to him the amount of the ~~dépenses~~ impenses or ~~dépenses~~ nécessaires, it being considered that by means of these expenditures the property has been preserved and the recourse of the Creditor thereby secured to him upon it - the same preference is therefore given to the Tiers Detenteur for these ameliorations as to the person saving property from loss or destruction by his means or exertion - and he would be entitled to retain the possession of the property till these expences were reimbursed Poth. Hyp. p. 439. §. 4. "Le tiers detenteur peut opposer par " exception contre l'action hypothecaire, qu'il a fait des impenses " necessaires à l'heritage hypothequé, et qu'il ne peut être contraint " à le delaisser qu'il ne soit remboursé des dites impenses - ou du " moins que le Créancier ne lui donne caution de faire monter " l'heritage à si haut prix, qu'il en soit remboursé sur le prix." -

As to the impenses utiles, under which head those in question may be considered, the Tiers Detenteur, was also entitled to be reimbursed – but the authors are not agreed as to the right of preference in this respect – Loiseau. Jr. du Deguerp. holds that in this case the Tiers detenteur has a privilege to be reimbursed only on, la plus value du prix, of the property in consequence of such improvements – others, that although the Tiers detenteur had a privilege upon the fond amelioré yet it was limited to the sole object of amelioration and not to the whole fond – this however might in many instances be impracticable, as in the present ~~instance~~, where unless by means of a ventilation, no actual separation could be effected The principle of Loiseau ~~however~~ seems to be that generally adopted, and that which the Court would be disposed to follow, could it be made to apply in the present instance,

The reason why the tiers detenteur is priviledged for his impenses utiles, is, upon the principle, that what he has been laying out on the property in this way should not go towards the payt. of another mans debt – neminem equum est cum alterius detrimento locupletari – but in this case the plaintiff does demand any of the Defendts improvements ~~but~~ demand does not extend so far as to reach these improvements – he demands only that out of the value of the lot as it stood before any improvements were made upon it, ~~that~~ he should be paid his debt; this is reasonable and right, and the Defendt can oppose nothing in law ~~that~~ to resist it – If the lot was worth more than would pay the pltff before the improvements were made on it by the Defendt can he compel the Pltff to pay these improvements before he can claim what was sufficient to satisfy him before any improvements were made? – Certainly not. – The Case would have been different had the pltff's demand been so great as to comprehend a part or the whole of those improvements beyond the original value of the lot, because it might then have been said, and with Justice, that the pltffs Security for his debt could not be considered to extend to what had no existence at the time – But it is argued

that if the Defendt abandons the lot, his improvemts will be sold with the lot, and he will thus run the risk of losing them, or a part of them — But it shd be considered that in this Case, these improvements are not sold to satisfy the pltffs demand, ~~but to satisfy the~~ necessity, ~~and~~ because they cannot be separated from the soil — † the whole produce of the sale † to the full extent at least of those improvements ‡ will go to the Defendt — and on this account it is not necessary that the Pltff should give any kind of security to the Defendt for the reimbursement of that upon which he makes no claim, and from the apparent value of the property, neither the demand of the pltffs, nor the charges of a decret, can be admitted as a ground for ordering this security — It may appear singular that in a question of right between the parties, any discretionary power should be lodged in the Court as a rule of decision — yet this appears to be the Case — Royer Dic. des arrets V° ameliorations. p. 448. says — "Dans cette matiere "tout depend beaucoup de l'arbitrage du Juge, "parceque, c'est plutot par un principe d'equité, que "par les regles generales du Droit, qu'un acquereur "evincé a droit de se faire tenir Compte des Ameliorations "de l'Immeuble qu'on lui enleve — C'est donc au "Juge à bien examiner les circonstances pour ne pas "priver l'acquereur des depenses raisonables, que le "proprietaire ~~en~~ peu, ou doit faire lui-meme, et pour "ne pas trop surcharger l'evincant" —

† after satisfying the Pltffs demand

‡ Poth. Hyp. p. 440

* this may account in some measure for the various opinions & decisions known on this point, grounded on the more or less favorable circumstances of the case

№ 1878.

Martigny
vs
Choquet

If Donation for consideration of paying a rente Viagere Spension between father & son carry Lods & Ventes, even when that Spension could be considered as the value of the Land given —

See authorities in the Case of De Longueuil vs Charron
Feby Term 1822 —

Campbell v. Lepruhon

Action on Note — Plea prescription — offers his oath, qu'il ne doit rien au Demandeur —

Pothier Ob. N°. 718 — ces prescriptions sont uniquement fondées sur la presomption du paiement. —

Id N°. 719. Le Debiteur à qui le serment est deferé, est tenu de jurer que la somme qui lui est demandée n'est pas duë —

Pas due — must mean to say because the party has paid, not that he never owed, because prescription ~~assuming~~ w^t. it a presumption of pay^t. the oath of the party must extend to this fact —

Poth. N°. 718. — refers to 10^e. art. of 1 Tit. Ord^e. 1673 —

Pourront neanmoins les marchands & ouvriers deferer le serment à ceux aux quels la fourniture aura été faite — les assigner, — et les faire interroger —

Poth. wrote also on the Cout. d'Orleans — & the 265^e. art. of that Custom says — in fine — Neanmoins si celui qui se pretend créancier, veut du paiement croire sa partie par serment, elle sera tenuë prester le serment, et ou elle ne voudroit jurer avoir payé, en ce cas sera tenue payer, nonobstant ladite prescription, en affirmant par le dem^r. —

Bornier on the 10^e. art. Code Mar^d. tit. 1 says — D'ailleurs comme la prescription en ce cas n'est autre chose qu'une presomption de paiement — pour s'en servir il est juste d'affirmer le paiment —

See what the Commentator on the 126^e. & 127^e. art. of our own Custom says —

Neanmoins, parceque cette fin de non recevoir est fondée sur la presomption du paiement fait par le Defendeur, cet usage s'est introduit contre les termes exprès de la Coutume et de

l'Ord^e

2 Bouyon. 579

l'ordonce d'obliger le Defendeur à prêter le serment qu'il a payé, si non, de le condamner au paiement de la somme demandée ~~— la prescription n'étant pas introduite en faveur des personnes de mauvaise foi~~ D'ou il s'ensuit, que tout Defendeur opposant la fin de non recevoir doit alleguer le paiement par lui fait — et pour cet effet il ne doit pas refuser le serment de ~~—~~

Denizart. Vo Prescription. No 101 — Il vient d'etre dit que malgré la fin de non-recevoir resultant de la Coutume, on oblige le Defendeur d'affirmer qu'il a payé — Nous ajouterons qu'il faut même que le Defendeur dès l'origine de la contestation (et sans se departir s'il veut de la fin de non-recevoir resultante de la Coutume) soit dans le cas de pouvoir opposer pour defenses — qu'il a payé, qu'il ne doit rien, et qu'il offre de l'affirmer —

cites Case of M. le Duc de Bouillon —

But putting all these authorities out of the case what does our own Stat. Law say — "shall, if thereunto "required, make oath that such promissory note is bona fide "discharged and paid". —

As to right of compensation set up by Defendr in his answers, see Poth. Obl. No 677 —

The Statute of limitations proceeds upon the supposition that the debtor has paid, but after a lapse of time may have lost his voucher — and therefore where he acknowledges that the debt has not been paid, it takes the Case out of the Statute 5. M. & Selw. 76. & M. J. Bayley. —

Barsalou
vs
Orkney
&
Gray opp

Privilege of opposant on sale of house for rebuilding a part thereof on question of privilege between him & the bailleur du fond —

See Denizt vo Privilege No 33. to 42 —
Domat liv. 3. tit. 1. Se. 5. S. 9. —
2 Gr. Comm. on art 170. p. 1219. No 20. 21 —

No 20 says — En quatrieme lieu, le maçon, et les autres Ouvriers qui ont travaillé à la construction ou au retablissement d'une maison ou d'autre ouvrage, ont un privilege sur la maison ou sur l'ouvrage sans qu'il soit besoin de stipulation

No 21. En cinquieme lieu, la Loi Creditor, donne privilege à celui dont les deniers ont été employés à la construction d'une maison — creditor qui ob restitutionem ædificiorum crediderit, in pecuniam quam crediderit, privilegium exigendi habebit — et cela sans stipulation, quoique celui qui a prêté pour — l'acquisition d'une maison ne l'ait pas autrement que si il l'a stipulé — La raison de la difference est, qu'il n'y a aucune necessité qui oblige à faire l'acquisition d'une maison, comme d'en faire la reparation et le retablissement —

2 Bourjon Tit. 8 des Dettes. p. 733. No 155 —

Ce privilege a lieu en faveur des Ouvriers, selon moi, encore qu'il n'y ait aucun devis ni marché par ecrit, pourvu que les ouvrages soient constans ou que s'ils sont deniés, ils puissent être verifiés et que l'ouvrier ait agi dans un tems competent — sa qualité, ainsi que la cause de sa Créance — independamment du titre, fondent dans sa

personne

personne un juste privilege—

Nota— Telle est la Jurisprudence du Chatelet — voyez Duplessis des Executions liv. 1. p. 618— En effet, leur qualité et l'existence de leurs ouvrages qui ont augmenté le prix de la chose decretée, fondent un privilege, qui par la Cause certaine qui le produit, est independant d'un devis, leur qualité et la nature de leurs creances les mettant, pour ainsi dire dans la classe du Vendeur qui a un privilege incontestable sur la chose par lui vendüe, je n'y vois pas de difference—

Juzt. du 20 avril 1818— Mcnider & al. Vs Hazar et Bangs Oppt—

No 2
Bourdon
&
Sarrault
&
E. Contra

See statement made of Case

N° 1088.

De Rouville
vs
Gaucher et
Bordalais —

The declam states — That on 28. Mai. 1822. the Plff obtained Letters Patent from His Majesty authorising him to make a new Terrier of the Seigniories of Rouville and Chambly, the said letters Patent addressed to the Chief Justice & Judges of the Sr Court, requiring them upon the demand and requisition of the Plff, that they should make known as well by public notice and publication at the Church door of the parish or parishes within the limits of the said Seigniories during three successive sundays, as by notices fixed up in the common and ordinary places of public resort within the said Seigniories, that all vassals, Censitaires, tenants, holders of long leases, holders and possessors of lands or landed property, subject to any rights of Lods, Domaines, Cens, rentes &c or other seigneurial rights due to the Plff as Seigr of the said Seigniories, should appear before such notary or notaries as should be appointed by the said Judges, and within the time to be by them prescribed, in order to make fealty & hommage, and give in in writing aveu & denombrement, and a true and faithful declaration of the names, butts & bounds rents revenues and charges as well in fief as roture of the property and estate they possess, to produce the titles by virtue whereof they hold the same, clear themselves by oath as to the truth of all such aveu & denombt and declaration, and pay the arrears due to the Sr Seigr and/or while purpose that the said tenants & proprietors should be held and constrained by all legal course, and in case of refusal, opposition or delay, that the said parties be held to appear before the said Judges or others

competent

competent, in case the said pltff should maintain the said aveu, denombrement & declarations not to be true, requiring the said Judges to cause the premises to be measured in the presence of the parties, or after due notice given, and to fix boundries and limits where requisite — and that of the whole there should be made by the said Notary or Notaries, a register or papier Terrier, in which shall be entered and transcribed by him or them the declarations of all and every the Fiefs, houses, lands, meadows, vines, and other inheritances belonging to the said Seigniories of Rouville and Chambly, for such ends and purposes as to right and Justice shall appertain — By which Letters Patent it is also enjoined to all bailiffs of the said Court upon demand made, that for the due execution of the said letters patent, they should make all necessary commandments, citations & other necessary acts; and in order to ascertain the true amount of the said rights that Notaries, writers, Clerks, Prothonotaries & other public officers having in their possession any deeds of sale, transfer, exchange, donation, or other acts relating to the said Seigniories, that they be particularly required to exhibit & produce the same before the said Judges in order to be seen, compared, and copies thereof collated on the originals be given, in the presence of the parties or after due notice —

That by Sentence and order of the said Court, bears date the 13th day of June last (1822) upon the petition of the Plaintiff by his attorney, requiring the execution and confirmation of the said letters patent, ordered the said Letters patent to be enregistered in the Registers of the said Court, to be executed according to their form and tenor, and further ordered thereupon, that by

Mr

Mr Jean Bapt. Taché, and de his confrere, notaries, whom the Court appointed for this purpose, the said acts of foi & hommage, aveux, denombrements, declarations, acknowledgments and all other acts for renewing the rights and titles to the lands in the Seigniories of Rouville & Chambly, should be taken and received, with injunction to all vassals, Censitaries, tenants, holders of long leases & possessors of lands and landed estates in the said Seigniories, to appear before the said notaries in 15 days after the publication of the said letters and of the said Sentence, at the place in the said Seigniories to be designated in the said publications, and there to bring, exhibit and communicate the titles of their lands & properties and there pass their acts of fealty & hommage, aveu & denombrement, declarations and acknowledgments of all the property & estates which they possess in the said Seigniories as well in Fief as in roture charged with rights and revenues, and to declare the same by butts and bounds with their names, and the charges to which they are subject, on pain of forfeiture, and to be proceeded against them by saisie, and moreover to comply with the tenor of the said letters, which should be — for this purpose published and fixed up at the diligence of the said plff during three Sundays successively, as well by publication after divine service in the morning at the parish Churches of the places within the limits of the said Seigniories, enjoining all bailiffs that for the execution of the said letters they do all necessary acts & exploits in this behalf — which said letters Patent were in consequence on the said 13th day of June last enregistered in the Registers of the said Court in conformity to the said Sentence —

That

That in conformity to the said Letters Patent, and the said Sentence of the said Court, the Plaintiff caused to be published and fixed up during three Sundays successively, the said letters patent and Sentence, in the parishes of St Hilaire, and St Jean Baptiste west, on the 11th and 18th days of August last at the door of the Church or parish Chapel of St Hilaire in the said Seigniory of Rouville, and on the same days at the neighbouring Church viz. the Church of St Mathieu de Belœil, where the parishioners of St Hilaire attend divine Service, when none is held in their own church, and there being no mass said on the said days at the said Church of St Hilaire — on the 25th day of the said month of Augt at the church door of the parish of St Hilaire where mass was that day performed — and on the 18th and 25th days of the said month of Augt and the first day of the present month of Sept at the door of the parish Church of St Jean Baptiste in the said Seigniory of Rouville, with commandment as above directed —

That the Defendt possesses for several years past a lot of land or Concession en roture in the said Seigniory of Rouville in the parish of St Jean Baptiste, west — (lot described)

That the said Defendt hath not hitherto complied with the said letters patent and Sentence of Confirmation thereof but hath hitherto neglected to bring, exhibit & communicate the titles of his lands and property before the said Mtre Taché this confrere notaries at the place designated, and to make and pass before them his acknowledgments and declarations of all the property and real estate which he possesses and holds in the said Seigniory of Rouville whereby he hath incurred the pains and penalties of the Law —

Wherefore Plff concludes — that Defendt be condemned to carry, exhibit and communicate the titles of the said

lots

lots of land which he possesses in the said Seigniory of Rouville, before the said Mr Taché this confrere notaries or such others as may be hereafter appointed for the execution of the said Letters Patent, in the Seigneurial House of the pltff in the said parish of St Hilaire and there to make and pass at his proper costs and charges, his declarations and acknowledgments of all the property and estate which he possesses in the said Seigniory of Rouville and to furnish a copy thereof to the said pltff, and this within 8 days from the service of the order to be hereupon given — in default whereof that the Defendt be thereunto held and constrained, ~~in regard~~ and in this behalf the Pltff reserves to himself the right to take conclusions — and the pltff further concludes that the Defendt be held and adjudged to pay to the Pltff all the rights Lods & Ventes, Cens & rentes and arrears thereof that shall be ascertained to be due, either by the exhibition of the titles of the sd Defendt and his declarations and acknowledgments, or upon enquête before this Court, and in damages and interest to the Pltff to the amount of £50 — the whole with fine & Costs —

Plea — denies facts stated in declaration — that action cannot be maintained —

1st That proclamations stated in Declr were never made according to law, & in particular the Letters patent were never read & published at the door of the Parish Church of St Jean Baptt —

2d That supposing pltff's proceedings to be regular in regard of the proclamations, the Defendr on several occasions went to the Seigniorial house of Pltff, at a great distance from his place of residence, and remained there the 10th 11th & 19th

days

days of September last, in order to give in his acknowledgment and make his declaration of his titles and possessions which the Pltff is entitled to demand for the perfecting his Papier Terrier, which M^r Taché, the person appointed for this purpose did not think fit to receive, when thereunto required by the said Defts on the 19th Sept when the Defend^r offered to him a larger sum for doing so than by law he was entitled to demand, as appears by the protests made in this behalf as well as^t Pltff as as^t D. Taché—

3^ly That the difficulties which then arose between the parties were occasioned by the pretention of the Pltff to have new titles different from those he was entitled to demand by law, which however had been demanded and obtained from several Censitaires of the S^d Seigniory, the Defend^r having offered, as he now again offers to make the acknowledgment and declaration which by law he is bound to make of his titles and possessions and refusing to submit to the exhorbitant charges to which he is not bound and against which he hath he hath acquired prescription, having possessed by himself and his predecessors for ten and even for thirty years without having complied therewith—

4^ly That Defend^r prays act of the communication, exhibition and production which he now makes in this Cause of the titles he holds of the lot of land discribed in the declaration, as well as of certain other parcels of land which he possesses in the said Seigniory, which titles are mentioned and discribed in his list of exhibits hereunto filed and to which Lettres — the Defend^r at the same time praying act of the offer he renews ~~now makes~~ to make the declaration and acknowledgment which can be by law required of him in regard of his said possessions, under such delay and in such manner as this Court shall direct, it being well

understood

understood that the whole shall be at the expense of the plaintiff, as being the cause thereof —

5th That moreover the plaintiffs conclusions are irregular and vague on the score even of the communication and acknowledgment demanded, the Plaintiff not being entitled to demand that the said communication and acknowledgment should be made before any other person than Mr Taché, — and in this respect the conclusions do not accord with the premises stated in the declaration —

6th That the Plff has irregularly and wrongfully joined (cumulé) an action for Lods & Ventes, with an action for the exhibition of titles of the lands the Defendant possesses in the said Seigniories, the more so, as the plff has received the Lods & Ventes which were due to him by the Defendt upon the deed of purchase of the said lot of land mentioned in the declaration, which cumulation of actions can be only to create expenses in this Court, ruinous to the parties —

7th That Defendt owes no Cens & rents to the Plff being cleared and discharged of all arrears thereof as appears by the Plffs. receipt of the 8th Inst last, since which time no Cens & rents have become due to the said Plff —

8th That at all events this action is ill founded in this Court for a demand of large sums of money being due to plff for Lods & Ventes & Cens & rents. & for exhibition of titles, when nothing is due to plff, & when Plff has had exh. of titles made to him at time Lods & Vents were paid — wherefore &c —

For

To this plea a general answer was put in denying all the facts, and the insufficiency thereof—

The points raised by the plea may be reduced to the following —

1. That proclamations were not made, nor letters patents published as set forth in Declaration. —

2. A compliance by Defendt — with the requisitions of the letters Patent — his attendce at the manor House of Pluff on 10: 11: & 12: days of Septr — in order to make his declaration and acknowledgment — his offer to do so — and a refusal on the part of the Commissioners to receive his declaration — his tender of a larger sum of money to the Commissioners than he was entitled to demand — and Protests on refusal to accept

3. A claim on part of Pltff to have new titles from Defdt different from those he had a right to claim — the Defendt refusing to submit to the exhorbitant expositions, and charges made by Pltff — of which Defendt had argued presumption —

4 — Claims act of the exhibition & production of the titles of the lands he possesses in the plffs Seigniory — consenting to make such declarations & acknowledgment in regard thereof as this Court shall direct — but at the expence of the plff

5 — That conclusions of dedtr are inconsistent & irregular as Pltff cannot demand that Defendt should make his declaration & acknowledt — before any other person than the Juge — who is the person legally appointed for this purpose.

6 Cumulation of actions, 1st For Lods & Ventes & 2d for Expl. of Titles

7. Defendt discharged from all arrears by receipt of 8e Janvier last, since which time nothing has become due to Pltff

8. Action ill founded — as it concludes to pay of money what is not due & for expl. of titles, of which he had communication when Lods & Ventes were paid —

The facts of the case as they appear before us, are, that the Letters Patent, the Judt. of Confirmation, and notice to the Censitaires of the Dft, were published & notified in the manner time & place stated in the declaration, by a person calling himself Theodore Isidore Racicot, one of the bailiffs of this Court — in consequence of which many of the those Censitaires appeared & made their declarations — On the 10th ~~9th~~ Sept. last the Deptt in company with several other tenants to the number of 30 a 40 — appeared to make their declaration, but it was then too late in the day and they were directed to return next day — On the 11th they returned about 5 O'Clock in the afternoon, but either apprehending difficulty, or imposition, they were accompanied by a notary public, and again both severally & in a body required the Commissioner to receive their declarations and acknowledgments — One of them Deshautels gave in his papers — they were found defective, and returned to him — another of them Nadeau, gave in his, and it was found that in regard of one of his lands his papers were regular — on this his declaration and acknowledgment was made out, and was found to be correct and approved by him — but he refused to sign it — until he should be informed what he had to pay, and tendered 5/— which was not accepted — this refusal appears to have originated by the information that some of the Censitaires had paid 12/6 — in their declaration which was considered as an overcharge, and Nadeau conceiving he might be bound to pay the same thing in case he signed his declaration, refused

to

sign it — upon this it appears a protest which had been prepared was made in the name & behalf of all those persons and this protest contains a pretty correct statement of the facts as far as it goes, it may right to refer to it (Here take in protest) —

These Censitaires, of whom Deft is one, appeared again before the Commissioner on the 19th Sept and in it they again state their willingness & readiness to make their declarations and acknowledgments, which they say, could not before be done from the multiplicity of business then in hand at the manor House — they then state, that they had made out a statement and Inventory of all the deeds & titles, in order to facilitate the taking of the declarations & acknowledgts of each of them according to an annexed formulary, and that they are willing to execute new titles to the Seignior upon his paying the Costs thereof, they being ready & willing to pay three livres & no more for their acknowledgments for each lot of land they severally possess, which sum they offer to the said Commissioner — they acknowledge the obligation under which they are to make their said declarations & acknowledgments upon the Seignior complying with the law in force in this Province, that they hold all the deeds and titles of the parties according to the Inventory thereof, and now offer the same to the Commissr if he will take their declarations according to the above offer —

What was the answer of the Comr (see Protest.) —

It appears further in evidence, that the Defendt owed no rents or revenues to the Pltff, at the time of bringing his action and that at the time of paying his Lods & Ventes the Pltff received, had communication of the Defendant's Deed of purchase under which he holds the land in question. —

From this statement of the Case, the following questions are raised as an objection to the pltff's right of action.

1st —

1st That the letters patent and Ledt. directing their execution had not been duly and legally published & notified according to the requirements thereof, so as to compel the Defendant and the other Censitaires of the Plff to take notice of them —

This objection seems to be founded on a little informality of the Certificate of publication, it being stated in the body thereof to have been made by one Madore Isidore Raicot, but is signed by Marie Isidore Raicot, this informality may affect the validity of this act as an authentic act, and if the merits of this action depended upon this act, we might consider it insufficient to maintain it — This leads us to enquire, what the end and object of publication of the letters patent and Ledt. is to see if the alleged defect in the present instance be material —

to appear and make his declaration before the Commissioner.

Although the obligation of the Censitaire # is not established by any article of the Custom, yet it is recognized as a necessary and indispensible right arising out of the nature of the feodal tenure and of that connection which must subsist between Seignior & Vassal — The Seignior had [illegible] action at law agt. each of his tenants individually in order to compel them to recognize him as their Seignior and obtain from them the declaration & acknowledgt under which they held any part of his Estate — This was considered injurious and expensive to both parties, and recourse was had to the more summary mode of proceeding by calling upon the tenants in a body by a general proclamation and notice at the places of most public resort within the limits of the Seigniory, to appear and make their declarations — and to give authority & effect to this

4 Hew. 657

2d — 681

o mode of proceeding by action agt. every Censitaire of a Seigniory, often without necessity

7 Hewe. 688. q. 10

this mode of proceeding ~~seconds was had~~ letters patent were granted by the King, not merely as Sovereign, but as possessing the Legislative authority, & This made it imperious on the Censitaires after publication & notice at the Church door & other places, to appear & make their declarations before the Commissioner who had been appointed for this purpose — if they, × where obstinate and would not appear before this Commissioner, they were liable to different penalties, such as fine, seizure of their lands and the like — if they had good grounds of objection to make, these were brot. before the competent Jurisdiction & there determined — Now what was the object and intention of this notice & publication at the Church door? The authors say, it was to put the Censitaires en demeure — and to arrest the effect of prescription. for until this demeure was ascertained, the Seigneur could not use any of the extraordinary remedies granted to him under the Lettres Royaux, of fine or seizure of the lands — And the Pltff in this case proceeding in this extraordinary manner, the validity of this demeure under the certificate of publication & notice made by him, would have been a primary question — but where the Seignior proceeds by the usual and ordinary course of law, which he could have taken even if no Lettres de Terrier had been granted to him, can the Defendt avail himself of the want of notice by ~~a~~ over regular certificate of the publication thereof? he certainly might to a certain extent — he might have alledged, that had he been duly notified of the letters patent obtained by the Pltff — he would have complied with the requirement of these Letters without the necessity of an action, and upon this to tender that declaration and acknowledgment which he was bound like the bona fide debtor, who tenders what he owes — in that case it would have been matter of consideration how far the Censitaire should be harassed by such expensive litigation —

* of granting general Commissions to His Judges to call persons before them for the ends of Justice & for the particular objects of a Popish Terrier —

× failed to appear — or if they —

1 Form. 81 —

7. Henri 703. 706.

Repse Vo Terrier p. 93. —

But in this, as in every other action, where want of notice, or of a previous demand, is not the only ground of defence relied upon, but where other matters are alledged to exonerate the Defendt from the action, the want of publication & notice in this Case, like the want of a previous demand in any other, ceases to be a question anywise material for the decision of the Contest — And we therefore think, that as the want of the certificate But how is the fact in this Case, the Defendt not only avows that the publication in question was made, but his whole defence rests upon the principle that he had done, and was still willing to do, all that the Pltff was entitled to demand under the said publication & notice of his having obtained the Lettres de Terrier — This part of the plea cannot therefore be maintained —

On 2d point — This seems to contain the substantial part of the defence to the action — 1. as an offer to comply with the requirements of the Lettres de terrier — Defts attended at the Manor House of Pltff — during 3 days, the 10th 11th & 19th — Sept and a tender of money for payt of the Commissioners fees on taking the Defendt acknowledgment — The Defendt appears to have made common Cause with 30 or 40 other persons who had assembled for the same purpose, whose object it was to give in their declarations under certain restrictions, namely that the emoluments of the Commissioner should be previously ascertained, and on his refusal to state his claim a tender was made of 2/6 for the Defendt acknowledgment for each lot of land he possessed — The whole of the Defendt conduct seemed to be regulated upon this principle that he was willing to make his declaration but he would not submit to the unlimited or arbitrary charge of the Commissioner for his trouble — Had the

* The refusal of the Commissioner, & by his tardiness & delay, causing an unnecessary attendce by the Defts. & other Censitaires

the Commissioner made any charge, or had we any fixed rule to guide us in saying what he ought to charge, we could here determine the question - but there being nothing settled on this subject, the allowance to the Commissioner must depend on a quantum meruit, which cannot be known until the labor is performed - of this the Commissioner seemed to be aware, and declined making any fixed charge - The Defendt was certainly wrong in declining to give in his declaration, when he found this to be the case - and it was equally wrong to suppose that he could be liable to pay whatever the Commissioner should ask, after signing his declaration - as to the unreasonable delay occasioned to the Defendt by refusing to admit him to make his declaration & by obliging him to wait on the 10th 11th & 19th Septr; had this arisen from any fault of the Pltff or his Commissioner or by undue preference given to others, it might afford cause of complaint - but this delay was in a great measure occasioned by the Defendt himself, who chose to associate himself with a number of others and to act in a body, and they had a point to carry, they were assisted with the advice and ministry of Notaries - they had statements of their titles to draw up, and protests to make - and independently of the impossibility of so many persons making their declaration in a day, or even several days, it was the duty of the Commissioner to act with prudence and circumspection, when he saw a disposition to cavil at any oversight on his part. The Defendt had a duty to perform towards his Superior and nothing but the discharge of it can exonerate him - and although he might chuse to perform this duty in person, yet, if his time was of so great value to him, he had the means of substituting another to do it for him -

As to the 3d Point - there is no proof before the Court

Ag

as to the 4. point — Offers to make such exhibition of titles as the Court shall direct —

5. Point — Declaration — demands that Defend. should make his declaration before any other person ~~than~~ than Jacké — this not irregular as another might be appointed in the place of Jacké. —

6. point — Cumulation of actions — for Lods & Ventes — & for exhibition of titles. —

7th — Owes no arrears — The demand for arrears of Lods & Ventes & other Seigneurial dues being merely a conclusion consequent upon the declaration & exhibition of titles, the acquittal produced by Defend. will of course discharge this part of the demand —

8 — Action is ill founded, as it concludes for the payt. of money not due — and for the exhibition of titles of which Pltff had communication when Lods & Ventes were paid

But this exhibition of titles being made only in regard of that particular title on which the Lods & Ventes were paid, does not satisfy the demand of the Pltff, nor the obligation of the Defend. — which extends to all the titles in the Defend. possession up to the original bail à cens, so as to regulate the respective rights of the parties under the bail a cens, — besides the exhibition of title for the payt. of the lods & Ventes, did not preclude the right of the Seignior to demand a new exhibition in order to perfect his papier Terrier. —

№508.

Lacroix. —
Turgeon. ⁋

Action en retrait Conventionnel

Decl^r states that by Deed of Concession of 28 Mai 1761, Susanne Biot de la Lanzloiserie, Seigneuress of mille Isles, that is to say of that part of the Seigniory of Blainville, of which the pl^ff is now the proprietor and possessor, granted a lot of land to one Pierre Paschal, upon certain terms and conditions therein expressed, and among others, upon the following reservation ⁋ " et en cas de vente de tout ou partie " de la dite Concession, se reserve ladite Dame Seigneur " le droit de le retirer par preference, en remboursant " le Detenteur du prix principal de son acquisition " et loyaux couts."—

That on 16^th April 1765.— André Colin dit Laliberté as Tutor to the minor children of Pierre Paschal then deceased, and Marie Joselte Colin his widow by with the consent & authority of Paul Desjardins her then husband, sold the said lot of land to one Louis Urbain

That by act of 21 Aug^t 1768 the said Louis Urbain & his wife sold the said lot of land to one Jean Louis Delazy. —

That by deed of Cession of 28 Dec^r 1789, the said Jean Louis Delazis & his wife sold the said lot of land to Jos. Hubert Lacroix. ⁋

That by deed of 14 June 1793, the said Joseph Hubert Lacroix sold the said lot of land to one Franc^s Lapierre. ⁋

That by deed of Donation of 5 Jany 1807, the ~~widow~~ widow of the late Francois Lapierre, conveyed the said lot of land to Paul Filatreau, Franc^s Lapierre, Ant^e Maisonneuve the minor children of the late Ant^e Lapierre, and to Jos. Turgeon the Def^t.

That by Deed of 9e June 1814, the said Antoine Maisonneuve, sold their right in said lot of land to Jos. Turgeon, the Deft

That by deed of 31 augt 1815, the said Paul Filiatreau, & other Donees of the widow of the said late Franc. Lapierre, made over their respective rights in the said lot of land to the said Jos. Turgeon

That the plff as proprietor of that part of the Seigniory of Blainville in which the said lot of land is situated, and holding the rights of the said Susanne Piot, is entitled to exercise the said right of retrait Conventionnel as stipulated in the said deed of Concession, and thereupon concludes, that the Plaintiff be declared by the Court to be entitled to exercise the said retrait Conventionnel on the offre he now makes to pay and reimburse to the Sr Defendt within such delay as the Court shall please to appoint, the price and sum of money which he the said Defendt has paid, or is bound to pay for the said lot of land with all the costs and charges attendant on the perfecting the said purchase, the amount of which sum of money to be ascertained by authentic acquittances and that thereupon the Defendt be condemned to abandon and deliver up to the plff the said lot of land so purchased and acquired by the said Deft with all the deeds, titles, & rights thereunto belonging also to make and execute a good and sufficient deed of transfer and conveyance thereof before notaries to the said plaintiff, and grant an acquittance and discharge to the said Plff of the monies to be

paid

paid and reimbursed by him to the said Defendr and in case the said Defendr shall refuse to accept the sum of money so to be tendered to him by the said Plff, that the said Plff be authorised to deposit in the hands of the Prothy of this Court such sum of money as this Court shall be pleased to appoint for the price, costs & charges upon the purchase of the said lot of land so made by the said Defendr there to remain until the plaintiffs demand aforesaid shall have been fully complied with by the said Defendr and finally that on default of the sd Defendr complying therewith the Judgt of this Court be held and considered a good and sufficient title to the said Plff of the aforesd lot of land and that Defendr be condemned in Costs.—

Plea.— 1st of Peremptory exception — that the action cannot be maintained, even if the facts stated in the declr were true, yet the pretended right of retrait qr the Plff claims if ever it existed has become prescribed in law even according to the facts stated in the sd declaration That the droit de retrait claimed by the plff, not being a right established by the laws of the land but a mere faculté de retrait or rémeré, is liable to be prescribed in law, and the lapse of time which has occurred since the 28th May 1761 until the bringing of the present action is more than sufficient to prescribe the right claimed by the present action — which prescription the Defendr now hereby invokes as the said Plaintiff claim, which is only a personal right and prescribed in thirty years —

That the Plff cannot maintain his present action, inasmuch as the Plaintiff himself is bound in law to warrant and defend the said Defendr from and against all troubles and disturbances whatsoever in the possession and enjoyment of the said lot of land, inasmuch as the Ptff is the Boyr heir at law of the late Jos. Hubert Lacroix, Esq. his father and as such

holds

holds and retains the Seignory of Blainville — and that the said plaintiff cannot therefore exercise the said right of retrait conventionnel, inasmuchas the said Jos. H. Laevix in his life time, by act passed the 14 June 1793, before Chatillier & his confrere Notaries did sell and convey the said lot of land, with promise of warranty agt. all troubles, &c to one Francois Lapierre, without making any mention therein of the right of retrait now claimed by the Ptff, which is an unusual & extraordinary right, and not by law attached to the said Seignory of Blainville, he the said Jos. H. Laevix would be bound to cause the purchaser of the said lot of land to enjoy the same quietly without let or hindrance of any kind in conformity to the said deed of sale thereof so made by him, — the Ptff therefore as heir of the said Jos. H. Laevix is bound in law to the same warranty, and the said defendt. being in the rights of the said Lapierre to whom the said Jos. H. Laevix sold the said lot of ground, is entitled to the same warranty from the said Jos. H. Laevix, as he the said Lapierre would have been —

2°. au fond — Facts not true as alledged. — That Ptff & those in whose rights he claims having consented to the sale and alienation of the lot of land in question, without claiming the right of reserve in question, and by having given Saisine to the purchasers of the said lot, they cannot maintain the present action —

Reply to exception — That Pliff's action is well founded and Pliff is entitled to the retrait Conventionnel demanded

That the present action for a retrait Conventionnel is not liable to the 30 years prescription, nor do the facts alleged by the Defendr in his plea entitle him to plead or set up a prescription of 30 years as the claim aforesaid of the said pliff — That the 30 years prescription if it could be pleaded, can take effect only from the day on which the Defendr exhibited to the pliff, the titles of his purchase of the said lots of land — and further that the right of retrait Conventionnel mentd in the declaration is not the same as the droit de rehait or remeré, not liable to 30 years prescription. —

That the droit de retrait Convl is not liable to the 30 years prescription, inasmuchas at every new purchase of the property, the right of retrait Conventl becomes renewed in favor of the Creditor of that right, as it has in favor of the Pliff in this Case under the Defendrs titles.

That the pliff is not bound in law to warrant the Defendr as the right of retrait Convl claimed by the present action, because the said late Jos. H. Lacroix by the sale he made to Franl Lapierre of the lot of land in question, not being then proprietor or Seignior of that part of the said Seigniory of Blainville in of the said lot of land was situated, and not having sold or alienated the said lot of land as Seignior, did not therefore sell or alienate the same as free and clear of the said right of retrait Conventionnel, but on the contrary alienated & sold the said lot of land subject to all the rights reserves, as made and contained in the deed of Concession, and therefore as the said Jos. H. abat Lacroix could not in law be held as the Garant of the

said

said Defendt neither can the pltff as the heir at law of the said Jos. H. Lacroix, be bound to warrant the said Defendt.

The other parts of reply containing a general answer and denegation of law & fact alledged by Dfdt.

Dec.v des Fiefs par Renaudon Vo Droits Seigx. Nos 214-15. 17.

Les droits Seigneuriaux utiles, se divisent en droits Seigneuriaux Ordinaires, et Droits Seigneuriaux extraordinaires, ou exhorbitants.—

Les droits Seigneuriaux ordinaires sont ceux qui sont reglés par les Coutumes des lieux, et pour lesquels il ne faut autres titres que la Coutume dans l'etendue de laquelle sont situées les Seigneuries, comme sont, par exemple, les Rachats — les Reliefs, les Quints, les Lods & Ventes.—

Les Droits Seigneuriaux extraordinaires, sont ceux qui ne sont pas accordés aux Seigneurs par les Coutumes, mais qui sont fondés sur des titres — particuliers — tels sont les droits de Corvées, de foires & marchés, les peazes, et une grande quantité d'autres, qui ne sont pas de droit Commun, et que par cette raison on appelle droits exhorbitants.—

219 Il n'en est pas de même a beaucoup prés des droits Seigneuriaux exhorbitants — il faut pour les etablir des ~~bons~~ titres en bonne regle, et il faut que la possession soit absolument conforme au titre, sinon, elle y est restreinte.—

A distinction has been taken between the retrait conventionnel, in this Case, and the droit de remeré or faculté de rachat, .

There seems to be no material ground of distinction between these, as to the right accruing to the parties under this kind of retrait or droit de remeré — The appearance of a distinction seems to be taken by Mr Pothier in his preliminary article upon this kind of retrait, when he says. "par droit de retrait Conv^l
" nous n'entendons pas ici le droit de remeré — nous
" entendons ici par le nom de retrait Conventionnel
" le droit qui nait d'une Convention approsée lors de
" l'alienation qui a été faite de l'heritage, par laquelle
" celui qui l'a aliené à stipulé que lui vses Successeurs
" auroient le droit, toutes les fois que l'heritage seroit
" vendu, soit par l'acquereur, soit par ses successeurs, d'avoir
" la preference sur les acheteurs et de prendre leur marché."—
But by this observation Mr Pothier does not mean to point out any other distinction, than the one he thus expresses, namely the Condition upon which this right of retrait, ~~or remeré~~ was exercised, distinguishable in this respect from the droit de remeré, when the right can be exercised at the first purchaser — The true characteristic which ~~forms the~~ distinguishes all this kind of droit de prelation, consists in this, that it is founded in the special contract and agreement between the parties, and liable to such terms, conditions and modifications as they shall see fit to appoint — differing in this respect from the retrait lignage & retrait Feodal which ~~are~~ exist by the mere effect & operation of law —

4. Henrys 313. Plaid. 19
Bretonnier v^o Retrait. —

(Henrys. Bretonnier & others, describe the Retrait Conventionnel in this manner — " Le Retrait Conventionnel, s'appelle, faculté de rachat ou de remére — c'est le droit que le vendeur a en vertu de la Stipulation faite par le Contrat de vente de rentrer dans l'heritage par lui vendu en rendant le prix. —

1. Gp. Com^tie p. 435, art. 20. n^o 1.

But what do all these words, retrait, remeré faculté de rachat, droit de relation, mean — they apply only to the different modifications, terms and conditions upon which, a person alienating his property, may again take it back ~~again~~, and we find in the Rep^re v^o Retrait — one general definition which is made to apply to ~~the whole~~ every species of redemption of property whether by contract or by Custom —

It says — " Le Retrait en general, est une faculté " introduite par la bienseance, la Convention, ou " la Coutume de la situation, lorsqu'il s'agit du " fond, accordée à une ou plusieurs personnes " successivement, de se faire subroger à la place " de l'acheteur de la chose sujette a Retrait, en " remboursant à l'acheteur dans le tems fixé, le " prix principal, les frais, et loyaux couts legitim^t — " faits à l'occasion de l'achat, et à la charge " de requerir cette subrogation dans le tems fixé " par la Coutume ou par la Convention —

Cette definition embrasse toutes les especes de retrait — in all 21 in number —

But

But it is contended that the prescription pleaded by the Defendr will not apply, first, because no prescription can avail agt it, as it is a right attached to the soil, and because the Defendr by his deed acknowledges to hold it subject to all the conditions of the original grant or deed of Concession — and 2dly because the prescription of the 30 years will not apply or run from the deed of Concession, but only from the time that the Plff or the person whose right he holds could have exercised the right of retrait.

As to the first objection — the right here stated altho' it regards the soil as the object of it, yet being a right arising out of the convention of the parties and not by operation of law, prescription will take effect agt it, the maxim being, "que tout ce qui tombe en Convention, tombe en prescription" —

Renaudon. Dfs. Feod." Tit. Bannalites. p. 209.

This is not a Seigniral right, and no purchaser was obliged to take notice of it, unless by nor can he personally be bound thereby, unless he had purchased subject to this condition by express stipulation, and none of the deeds of sale subsequent to the deed of concession, appear to contain any stipulation to this effect — This retrait, being in the Custom of Paris a droit extraordinaire, is also subject to be resolved by the decret — And although the prescription pleaded by the Defendr cannot be reckoned to date from the date of the deed of Concession (28 May 1761) — yet it will run from the date of the sale made by the representatives of Pierre Paschal the orignal grantee to Louis Urbain, that is, from 16 April 1765, when the right of retrait

Poth. Retrait. N° 613

became

became open — from which time the 30 years prescription will have been acquired — That Louis Urbain & the subsequent purchasers of the land, by paying the lods & Vents & obtaining investiture on their respective titles, cannot be considered to have acknowledged a right which their deeds do not mention, and the present Defte is entitled to avail himself of the prescription which had commenced or been acquired during the possession of the prior purchasers, because the prescription of this right when once acquired cannot be again revived, but the land becomes for ever after exonerated therefrom — and in this respect a distinction is made between this and the other kinds of retrait established by law, which although a particular proprietor may acquire prescription of them, yet they revive at every new tenant — See Poth. Tr. Retrait Nos 611. 12. 13. —

As to the Garantie set up by the Defendt it is also a good plea to the present action the Pltff as heir of Jos. H. Lasseigne cannot maintain it, — Jos. Lasseigne by selling the land to Lapierre without stipulating the retrait Conventionnel, became bound to the warranty in question — when he afterwards became Seigneur of the Seigny. of Blainville where the said lot of land was situated, altho' he became vested with the right of retrait, there was then in his person a

junction

of the two rights active & passive or as it is called a Confusion — or when the two capacities of Creditor & Debtor unite — or, Lorsque le même homme se trouve à la fois Créancier et garant du Débiteur — ce qui equivaut a etre principal Débiteur — Here also we find the same distinction apply between the the Retrait Seign^e or Feodal, and the Conventionnel

N. Denizt. V^o Confusion §3. N^o 3.

Poth. Retraits. N^o 571 — Le retrait feodal etant etabli par les Coutumes, de même que le lignage, et le vendeur n'en etant pas garant, le Seigneur est admis au retrait feodal, quoique il soit devenu l'heritier du vendeur, ou Caution du Vendeur —

Il n'en est pas de même du Retrait Conventionnel; le vendeur est obligé de garantir l'acheteur, de même que de toutes les autres evictions, s'il n'a pas declaré par le Contrat que l'heritage etoit sujet a ce retrait. Il suit de la, que lorsque la vente a été faite sans cette declaration, celui à qui le droit de retrait Conventionnel appartient, n'est pas recevable à — l'exercer, s'il est heritier pur & simple du Vendeur, ou s'il est Caution de la vente, ou heritier d'un Caution —

No 935

Jn° Stewart vs L. McLean & Grece — Oppˢ

On opposition of John Wm Grece —

The claim of Oppost. is founded on a deed of Conveyance of the lots claimed from John Lynd, as attˢ of Deftr — by deed executed before Voyer & Lehoux, Notrs at Quebec the 16th Septr 1803 — It appears also by the evidence adduced that the opport — by himself & his Agents have been in possessn — since that time or soon after — There are some copies of bills of exchange and letters produced by the Opport — but they are not proved nor admitted —

The oppostn — title however appears defective in this, that there is nothing to shew that John Lynd was the Attorney, or had authority to sell the Estate in question — And there is besides a clause in the Deed of Conveyance†, which stipulates that Lynd was within 18 months from the date of the deed, procure from the Defendt a ratification and confirmation of said sale of conveyance so made to Oppostn —

† made by Lynd to the oppost.

N.B. There is no Replication to answer to moyens d'oppn —

N°-959

Dumontval
vs
Forgeron
&
Garants

Action hypoth. af Defend for Lods & Ventes, & fin fine pr non exhibition of titles &c Plff as Seignr on Don. of 10th 1817 by Antc Charon to Jn Bte Charon his son.

Plea by Jn Bte Charon, arrier Garant, — That he is not bound to make any exhibition of title to Plff. the title in question being a deed of donation from father to Son, which does not carry lods & Ventes. — That Defendt as possessr of land cannot be condemned the fine for the personal refusal of him Charon, until he should have been previously obliged to pay the same — That the said Deed of Donation, contained a family arrangement & not subject to the payt of Lods & Vents —

By the deed of Donation of 1st Oct. 1817, Antoine Charon & wife, give a certain lot of land & moveables to Jean Bte Charon their son — in consideration of his paying them a certain rente & pension viagere — And further — " avec obligation en outre de la part du
" donataire, ainsi qu'il s'y oblige, de faire rapport à
" ses dits pere et mere, donateurs d'une somme de cinq
" mille livres de vingt-coppres en l'espace de dix ans de
" ce jour sans interets, par paiement de cinq cent francs
" Chaque année à compter de ce jour."

On the 15th Jany. 1822 the parties appear before the notary, and make the following declaration — "les-quels
" (Donateurs) vû le rapport à une somme de cinq mille
" livres au quel ils auroient assujettis Jn Bte Charon dit
" Cabana, disent et declarent par les presentes, qu'ils ne
" pretendoient rien en ladte somme de 5000f. et qu'elle etoit
" designée pour être partagée entre leurs Enfans pour observer
" une egalité entre eux & led. donataire, laquelle dite somme

" leur

" leur ayant été bien et duement payée par ledit Jean
" Bapte Chanon, disent et declarent en avoir fait le
" partage de leur vivant entr'eux dits Enfans — n'ayant
" pû leur partager la susdite somme, vû que la part &
" portion que chacun d'eux auroit eu en icelle, n'auroit
" pû se diviser, et auroit causé du trouble dans leur
" famille — —

If we consider the favorable ~~point of view~~ light in which family arrangements are viewed by the law, it will induce us to believe that Lods & Ventes ought not to be allowed on the Donation in question — and although in case of a sale between father & Son Lods & Ventes are due, yet this is allowed upon the principle that the Contract was made with the same view and intention as if it had taken place between strangers — The Pltff — contend that the Contract here in so far as regards the payt. of the 5000# must be considered as a sale, as a sum of money paid in order to complete the value of the land conveyed to the Defendt — The intention of the parties must determine the nature of the Contract, for if this was not a sale, there can be no Lods & Ventes — To judge of this intention we must consider the words used, they are peculiar, and do not convey to the mind in a transaction of this kind between father & Son the idea of a sale as between strangers — the Dfdt — " s'oblige de faire rapport à ses pere & mere" — these words are peculiarly applicable to rights of inheritance and succession, and contemplate a division among children or co heirs — and if ~~it had been said~~ in this

deed

deed of donation, instead of the words which afterwards follow, that this rapport was to be made, ~~in order to observer l'egalité entre leurs enfans to enable~~ the Donors, to enable them + it had been said "pour en faire le partage entre leurs enfans, et pour observer une egalité entre eux" — I believe the Defts would not have considered themselves entitled to any lots & Ventes upon such a stipulation — Now the parties have by a subsequent act, said, that this was their intention, and that it has been carried into effect, by the payment and application of the money in this way — To this it is objected, that the parties cannot by any such subsequent act, vary the nature of their Contract, nor deprive the Plffs of rights they might have acquired under the deed of Donation, — this principle is right, and if it applied here, the transaction would be of no avail in this respect — had this deed for instance appeared on the face of it to be a deed of sale, or any other transaction where money alone was the consideration, it would not be allowed to the parties at a future period to explain away their original intentions — but in this case, the words used by the parties are susceptible of that interpretation which has been put upon them, as the legal and just import of such terms, and it would be extremely hard if by the ~~occasional~~ accidental omission of this explanation in the deed itself, whether by the inattention of the officer drawing the deed or otherwise, the parties should be injured, ~~thereby~~ this, it is the duty of the Court to prevent when it can be done consistently with right — A case has been cited, viz. it is said this question has been determined at the Cty. — the case of Martigny v Beauchamps — Oct. 1820 — but there is a striking difference in the cases — In

the

the Case of Beauchamps, the father by the marriage Contract of his Son, the Defdt transferred & conveyed to him a certain lot of land, & he estimated at 5000th — part of which viz. 1500, was given as a donation en avancement d'hoirie, & for which the Defendt was to account and faire rapport to the future successions of his father & mother the remaining sum of 3500th — the Defendt became bound to pay to his father — and upon this latter sum the Court was of opinion that Lods Ventes were due to the Seignior — Were the intention of the parties was evident, this was a sale made of a property to the son for 5000th, and the stipulation that a part of this sum 1500th was en avancement d'hoirie & sujet a rapport made it evident that the remaining sum was to be paid as the value and consideration of the land, was not en avancement d'hoirie ne sujet a rapport — Now in this Case the sum to be paid to the Donors, is a subject of rapport which can be understood only to apply to that kind of family arrangement over which the Seignior has no control —

Authorities —

last — Fonmaur. Lods & Ventes — partie 3. Ch. 17. p. 30. N° 499 —
— Rep^re de Jur. v^o Lods & Ventes, p. 616. §. 8. —
— Hervé. Mat. Feod. & Censuelles — 2. vol. p. 84 —
— Boutaric. des Droits Seig^x p. 145. —
— Fonmaur. (above) —

№ 248

Duplessis & Cardinal & al' ——

Action en delivrance de legs, founded on a will made by the late Pre Cardinal, grandfather of pltff — ats Simon Augr Cardinal Jos. Robreau Duplessis & Marie Cath. Cardinal his wife, and Louis Duchantal & Marie ann Cardinal his wife —

Plea of Simon Augr Cardinal — That the last will and testament of the late Pre Cardinal, upon wh the action is founded, is null & void in law, & not made according to legal form. —

That it does not appear that the said testament was ever read, lue & relu, in the presence of the Wits said to have been present at the passing of the said testament. —

Answer to said Excepn — That the will is good and sufficient and made according to legal form —

Plea of Per. Excepn of Louis Duchantal & wife —

That the matters and things stated & set forth in the pltff's declaration are not sufficient in law to entitle him to maintain his action. —

1. Because the last will in question is wholly irregular, insufficient, informal & of no effect in law. —

2. Because the said last will & Testament is not made according to the forms prescribed in law, and the usages and Customs of the Province —

3. Because it does not appear and is not expressed that the persons ~~who were~~ before & in the presence of whom the said last will & testament was executed, were good, fit, and sufficient Witnesses & of full age, as required by law —

4 §

4th Because the said witnesses are not sufficiently — designated, nor discribed with sufficient accuracy and certainty, nor that they were of full age. —

5th Because the said last will & Testament was not, nor doth it appear, that the same was twice read over to the Testator, in the presence of the witnesses, before & in the presence of whom the said last will & Testament purports to have been made and executed. —

And for further plea demurs all the facts stated in the declaration —

Answer to said Exception is general & contends that same is ill founded & not applicable to the demand stated in the declaration —

The clause in the will stating the manner in which & before whom it had been executed was in the following words —

" Ce fut ainsi fait, dicté, et nommé, par led^t
" Sr Testateur au dit Notaire, presence du Sieur
" Bernard Lemaire St Germain, et St Jacques Delaunay
" temoins pour ce requis, et à lui dit testateur par
" ledit Notaire, lû & relu; qui a dit le tout bien
" entendre et y a persisté, revoquant tous autres testaments
" ou Codicilles qu'il pourroit ci-devant avoir fait, —
" s'arretant aux presentes dispositions qu'il declare etre
" ses vraies intentions et Ordonnances de derniere volonté.
" Fait & passé au dit Montreal au Coteau St Louis en la
" maison du dit St Pierre Cardinal, Testateur, l'an 1816,
" le 22e Jour de Juin apres midi, et a ledit St Testateur signé
" avec nous Notaire et temoins, lecture faite & refaite." —

The objections taken to the validity of this will are three —

1. That it is not said that the persons called to assist as witnesses, were fit and competent witnesses as by law required. —

2d. That the s^d witnesses are not designated or described in such manner, as the law requires —

3d. That it does not appear that the will was read a second time, lu & relu, in the presence of the witnesses & Notary, at time same was executed. —

The 289^th art. of the Custom on these points, states — « iceux temoins idoines, suffisans, mâles, et âgés de « 20 ans accomplis, et non legataires — Et qu'il « ait été dicté et nommé par le Testateur aux dits « notaires, Curé ou vicaire general, et depuis à lui « relu en la présence d'iceux notaires, Curé, ou vicaire « general et temoins, et qu'il soit fait mention audit « testament, qu'il a été ainsi dicté, nommé, & relu." &c.

Now altho' this law requires certain capacity in the witnesses, yet it is not required that it should be expressed in the will, that they possess such capacity nor that they should be designated in any particular manner — we find no decision upon this article of the Custom to this effect, nor that a will was ever set aside from want of such sufficient description of the witnesses — we can readily enter into the reason why such a description would be proper, not only as facilitating the knowledge of the residence, the character, and competency of the witness but as giving a stronger degree of authenticity

to

to the will itself — The mere defect of description of the witnesses cannot annul the act, it would require positive allegation of them as coming within prohibition of the law, to effect this nullity, — The arret cited from Pothier, Don. Test. p. 301 - says "un Testament "a été confirmé quoique la qualité des temoins — "n'eut été exprimé par ces termes — principaux habitants "de ce village" — but we are not to infer from this that if even these words of description had been wanting, that the will would have been set aside — The first and second objections therefore cannot be considered as sufficient to — annul the will, — The attempt by the Plff to make up this want of description of the witnesses by verbal testimony, is wholly inadmissible, as the validity of an authentic act in point of form cannot ~~now~~ be supplied by any external ~~fact~~ evidence the testimony therefore of the witnesses. — and must be rejected —

The other objection, that the will was not read over a second time to the testator in the presence of the witnesses, appears to be more material, because founded on the letter of the law, and ~~therefore to be~~ ~~shewing that thereby the~~ ~~considered as constituting~~ an essential requisite for the validity of the will, — The will before us must be considered as a Testament solemnel, and as such must be clothed with all the forms the law requires — If it cannot be considered in this light, it cannot be considered as a will at all, for the evidence of its execution comes before us as being such Testament solemnel only —

The presence of the witnesses with the notary seems to be required, not merely where this part of the ceremony of reading the will is gone through, but during the whole time of reducing it into writing, if we were to limit the presence of the witnesses merely to this latter part of the article - "il depuis à lui relu en presence de deux Notaires & temoins" - it would imply, that this was the only essential part where their presence was necessary, which is not the Case - but the objection now taken is, that altho' it appears that the witnesses were present at one time, it is not said that they were present at the particular time specified in the article as essentially necessary "- il depuis relu en presence des temoins" - But the allegation that the witnesses were present as stated in the first part of the sentence must apply to the whole of it, their signature with that of the notary confirms this fact - and it would have required an allegation on the part of the Defendt that the witnesses were not present when the will was read, and an inscription en faux to be permitted to prove it - That the will should be dictated by the Testator - that it should be read over to him - ~~and~~ that the witnesses should be present - # are essentials for the validity of the Testament Solemnel - but the particular arrangement of this statement, whether at the beginning or end of a will, does not seem so material, as to occasion the nullity of it altho' not in the order stated in the article - this we find has been so determined by the Courts on different occasions

and that this should all be stated -

see

See on Glos. 5e + No. 25. when this question is put,
" Si ces Solemnités requises pour la validité des testaments
" savoir, qu'il a été dicté et nommé par le Testateur aux
" Notaires, et à lui relû en presence des notaires, peuvent
" être mises ailleurs qu'à la fin du testament ?—

Il semble que non — parcequ'on ne peut pas ecrire dans la verité que ces formalités ont été observées, — auparavant que le testament ait été achévé, puisqu'il n'est pas vrai auparavant qu'ils y ayent été gardées

Neanmoins les arrets ont jugé le contraire — cites them.

La raison est, que le testament est un individu qui ne compose qu'un même acte, et dont par consequent la perfection doit être accomplie dans un meme tems.

1 Ricard. p. 343 No. 1518. 1519 + Ainsi il n'importe pas en quel endroit du Testament il soit fait mention qu'il a été dicté, nommé & relû parceque cette clause, en quelque lieu qu'elle soit mise à son rapport à l'acte, lequel n'est achévé que par les signatures des testateur et des temoins, et qui font foi de tout ce qui y est contenu — de sorte qu'il suffit, que les formalités soient observées auparavant les — signatures, et il importe peu, si c'est au commencement ou à la fin, pourvû que les solemnités y ayent été gardées. —

See also what is said on Same Glose, No. 29. in regard of the Custom of Amiens.—

La Coutume d'Amiens requiert que le testament soit relû en presence des temoins et sans suggestion d'aucunes personnes — Cette question s'est presentée en l'audience de la Grande Chambre, le mardi 16 Janvier 1646. si cette clause, relû, est suffisante — ces mots, "en "la presence des dits temoins", ayant été obmis ? —

Par l'arret, le testament a été declaré bon & valable.

La raison de douter est, que la Coutume d'Amiens requerant par forme essentielle dans les testaments

faits

faits en presence de temoins, qu'ils soient dictés et nommés en leur présence, et depuis aussi relûs en leur présence, il est necessaire qu'il en soit fait mention et cette clause ne peut point être supplée par equipollence, de même que les termes, "sans suggestion", suivant les arrets remarqués ci-dessus. —

La raison de la decision est, que la clause de "dicté, nommé, et relû sans suggestion d'aucunes "personnes" — sont essentielles dans la Coutume d'Amiens mais que ces termes, en presence des temoins, ne sont pas essentiels, vû qu'ils ne sont requis que pour la solemnité extrinsique du Testament — il suffit qu'il paroisse par l'acte et par la signature des temoins, qu'ils ont été presents au testament, sans qu'il soit requis de mettre que la lecture du testament a été faite en leur presence — ainsi quoique la Coutume de Paris porte en l'art. 289. — "et depuis à lui relû en la presence "d'iceux notaires, Curé ou Vicaire general d'temoins", on n'a jamais requis, qu'il fut fait mention que le testament a été relû en la presence des temoins —

M. Auzanet, dit, que la lecture du testament doit etre faite au Testateur, et que cela est très important, afin qu'il connoisse si son intention a été bien recueillie par celui qui a ecrit sa volonté, mais que les autres formalités de dicté, nommé et relû, passent à présent en style ordinaire, et ne servent qu'à tendre des pieges à des Curés et notaires ignorants, et a autoriser des surprises et des suggestions — que pour cet effet en abrogeant ces formalités, qui sont entierement inutiles, il seroit à propos d'ordonner d'autres formalités plus solides, comme la signature du testat— à chaque page, pour eviter le changemens des feuilles. —

See also what Riccard says on the same subject

and

and nearly in the same terms 1 Vol. p. 340. No. 1330. &c

These authorities are referred to by the Court not upon the principle that the words ~~&c~~ en presence des temoins are to be regarded as useless and may be rejected as such, but to shew in what estimation they were held even Centuries ago, and to warrant us in adopting any favorable construction of the terms used in the will as conforming with the requirements of the 289 ½ art. of the Custom — We know that the opinions of Courts have changed with the times, and we also know how strongly the opinions of the Courts influenced ~~upon~~ the Legislature in France, so as frequently to be the ground work of new Enactments & Regulations upon the Jurisprudence of that Country — The ordr of 1735 — made for regulating the form of making wills is a strong proof of this fact — as it has adopted the prevailing opinions of the Courts on this subject, and rejected much of the superfluous forms which were considered more as snares to entrap the ignorant practitioner, than as guards to protect the real intentions of a Testator —

№2095.
Dom. Rex
v
M^c Cordyal

On certiorari to remove P. Verbal of Gr. Voyer, dated 30 Janv. 1821, establishing a bridge and front road along the River Richelieu from the pointe à la Mule to St Johns in the parish of St Luke, Barony of Longueuil.—

Reasons for quashing P.V. and annulling Judgt. homologating the same.—

1st That Court of Quarter Sessions was not competent to hear & determine the matter &c in s^d P. Verbal, as on 26^th April 1822, the day the same was confirmed Chs. Wm Grant, one of the Justices who sat in Judgt thereon was an interested party, being one of the propr^s of land comprehended in the description of— "Tous "les propriétaires depuis les terres №s 41. 42 & 43, en "haut de P^te Lapalme inclusivement jusqu'à la "terre de Boudreau", and therefore the said Chas Wm Grant could not sit in Judgt on the said P. Verbal, and therefor Judgt. null and void

2^o That the said P. Verbal was not made by the Hon. Louis René Chaussegros Delery the Grand Voyer of the District— and therefore the said Justices had no power to proceed thereon— The said P. V— not having been made conformably to Law, in this— 1st Because on 20 Janv^y 1821, the said Gr. Voyer did not and could not visit the premises in question the same being then entirely covered with snow and could not be seen or viewed— 2^d Because on the said 20^th Janv^y 1821, the Gr. V. in drawing up the said P. V, fixed and appointed no day for the homologation

homologation of the s^d P. V. — and could not then intend to fix the 22^d April 1822 for such day — nor could the said Gr. V. legally fix so distant a day for the homolog^n of the said P. V. — 3^dly Because the said Gr. V. by his said P. V. obliges Tarrin & several others complainants to make above 30 aires of the front road of one L^s H^y. Gauvin one of the interests in the said P. V. — and 4^thly Because the homologation of the said P. V. was not fixed, demanded nor prosecuted according to law. —

3^dly Because the said pretended P. V. after having been deposited in the Office of the Clerk of the Peace for the homologation thereof, and before the said 26^th day of April 1822, was changed and altered, without the Consent of the said Court of Q^r Sessions, the said complainants stating and alledging, that when the said P. V. was deposited in the said Office on 12 Apr. 1822 the words — "les terres N^os 41. 42 & 43, en haut de", having been afterwards added to the said P. V. —

—

5. Term Reps. 338. King v. Liston. —

Held that the Court cannot take notice of any fact which does not appear upon the face of the Conviction itself, on the validity of which they are called upon to decide — It must either stand or fall upon its own merits, and the Court cannot take in aid any extraneous information, to support or quash it. —

N°2125.—

Durocher dit
vs
Beaubien dit
&
Bouttillier
intervs

On question whether a minor, aged 20 years can by will bequeath any thing of his property to his Tutor & to his relations

The 293e. art. Coutume, says, Pour tester des meubles, acquets & conquets immeubles, il faut avoir accompli l'âge de 20 ans — Et pour tester du quint des propres, faut avoir accompli l'âge de 25 ans. —

2

292. art. Toutes personnes, saines d'entendement, agées, et usans de leur droits, peuvent disposer par testament et ordonnance de dernière volonté, au profit de personne capable, de tous leurs biens meubles, acquets et conquets Immeubles, et de la cinquieme partie de tous leurs propres heritages, et non plus avant, encore que ce fut pour cause pitoyable. —

1er

276e. art. Les mineurs et autres personnes, etans en puissance d'autrui, ne peuvent donner, ou tester directement ou indirectement, au profit de leurs Tuteurs, Curateurs, pedagogues, ou autres administrateurs, ou aux enfans des dits administrateurs, pendant le tems de leur administration, et jusqu'à ce qu'ils ayent rendu Compte : peuvent toutefois disposer au profit de leur pere, mere, ayeul ou ayeule, ou autre ascendant, encore qu'ils soient de la qualité susdite, pourvu que lors du Testament et décès du Testateur, les dits pere, mere ou autres ascendans ne soient remariés

The British Stat. 14. Geo. 3. ch. 83. Se. 10 —

Provided also, that it shall and may be lawful to and for every person, that is owner of any lands goods or credits in the said province, and that has a right to alienate the said lands, goods or credits, in his or her lifetime by deed of Sale, gift or — otherwise, to devise or bequeath the same at his or her death, by his or her last will & testament; any law, usage, or Custom, heretofore or now prevailing in the Province to the Contrary hereof in anywise notwithstanding — Such will being executed either according to the laws of Canada, or according to the forms prescribed by the Laws of England —

By Prov. Stat. 41 Geo. 3. ch. 4 - entitled - "An act "to explain and amend the law respecting Last Wills "and testaments" — It is enacted —

That it shall and may be lawful for all and every person ~~and~~ or persons, of sound intellect, and of age, having the legal exercise of their rights, to devise or bequeath by last will and testament, whether the same be made by a husband or wife in favor of each other, or in favor of one or more of their children, as they shall see meet, or in favor of any other person or persons whatsoever, all and every his ~~and~~ or her lands, goods or Credits, whatever be the tenure of such lands, and whether they be propres, acquets, or Conquets, without reserve, restriction, or limitation whatsoever, any law, usage or Custom to the Contrary hereof in anywise notwithstanding —

according to the 276e. art. of the Custom, it is expressly prohibited to the minor to give by deed of Gift, or by will to his Tutor, Curator &c — and if this were the only law to be considered, the question must readily be determined — but it has been contended, that under the Prove. Stat. 41. Geo. 3, all impediments under the 276e. have been removed, and that the minor is entitled under this Stat. to make a will in favor of his tutor — that the words in that Stat. "being of age", simply, the age at which a person can make a will, and not the age of majority — and as the age at which a minor could make a will of his moveables was under the 293, being 20 years, he can claim the benefit of the Prove. Statute —

Ere better to understand this, we must examine what the import of the word "ages" is, as used by the Custom, which will assist us in finding out the intention of the legislature in the St. of 41 Geo 3. when the same word, or words of same import, are used, as being consistent with the legal interpretation to be put upon this latter act — #. Now it is evident, when the Custom, makes use of the word, "ages" — ~~with~~ unconnected with any particular age, it means and intends, the age of majority —

Let us first look at the 292e. art. before us — in reading it, every one must be satisfied that it means the age of majority — because none but majors under that Custom, have the power of alienation of the property described in this article — Let us next read the 293e. article, when a power of alienation is given to a person under age — it here expresses in express terms

The best interpretation is to make the Custom explain itself, by comparing different parts of it, when it uses the same language or expressions — to see if the same intention meaning is the same throughout, or if any ~~difference~~ variance occurs, that it should this variance should be accounted for. /

20 years –

terms the age, and the extent of the authority given – the alienation of meubles, acquets, & Conquets Immeubles – and the latter part of the article might have been omitted as superabundent, ~~as~~ and as sufficiently provided for by the 292e. art –

In other articles where the Custom is conferring ~~conveying~~ a legal capacity to persons under age to do certain acts, it does not fail to express the age and the extent of the authority – look at the 32e. art. Tout homme tenant Fief est tenu & reputé agé à 20 ans, et la fille a 15 ans —— quant à la foi & hommage, & charge de Fief –

See the 113te art. where the word, "agés", is used alone as descriptive of a particular kind of persons, ——

"Si aucun a joui et possedé heritage ou rente à juste
" titre et de bonne foi, tant par lui que ses prédécesseurs,
" dont il a le droit et Cause, franchement & sans inquietation
" par dix ans entre presens, vingt ans entre absens – âgés,
" et non privilegiés, il acquiert prescription du dt. heritage
" ou rente" —— here it is evident that the word agés means persons able to prosecute their rights – able to alienate them – or to lose them by non-user – and all the Commentators agree to say, that the word so used, means persons of the age of majority –

Fer. v° agé.

See also. the 120e art – 123e – dte 124e – & others where word is used in same manner & sense –

What do the Commentators say on the same subject –

Fer. Dic. V° âge – Nos Coutumes se servent de ce terme pour signifier un majeur de 25 ans – and refers to 113 art. above cited –

Rep^re V° "Agé" In speaking of the terms in the Coutume D'artois – "est reputé agé." says, les Coutumes qui s'expriment de la sorte, ne veulent pas dire que les enfans parvenus à l'âge dont elles parlent, sont pour cela majeurs, mais seulement qu'ils sont reputés tels – ainsi la majorité qu'elles indiquent n'est proprement qu'une emancipation. –

H

Il en seroit autrement si le mot "âgé", etoit employé seul, et sans aucun terme qui caractarisat une fiction, car alors, il devroit par la loi et abstractivement à la signification particuliere que pourroient lui donner les paroles dont il seroit précedées ou suivies, designer la majorité parfaite, l'âge de 25 ans —

see also the remarks of Maillart on 72. art. of same Custom — on words "agés & non privilegiés." — which are applicable here —

— The Custom of Paris therefore appearing to point out, where it means to vest any power or authority in the minor, that it is done by express terms, and not by implication, and in the Case before us it appears to vest ~~the right of willing~~ in the minor the right of disposing by last will and testament of certain portion of his property and estate, ~~but prohibiting~~ this disposition in favor of a Tutor — it comes then to be considered, how far the British and Provincial Statutes have removed this incapacity arising from the relative situations of minor and Tutor —

The British Statute of the 14th Geo. 3. ch. 83 — cannot be considered as extending the power of the minor in regard of disposing of his property by will — it says, that the owner of any lands, goods, or credits who has a right to alienate the same in his life time by deed of sale, gift, or otherwise, may devise or bequeath the same by his last will & Testament — Here the power to devise or bequeath by will was made co-effectual with the power to sell or give by deed — but what could the minor sell or give by Deed? —

nothing —

nothing, unless when ~~married~~ or emancipated, he could give his moveable property by deed — being of the age of 20 years — But the minor could dispose of more than this by will under the 293d. art. of the Custom before the British statute, which does not extend to him or benefit him in this respect —

Let us next consider the Provincial Stat. — It is certainly more general in its expressions and more extensive in its effect, but it does not appear to come in aid of the minor, but on the contrary to exclude him in express terms — all persons of sound intellect, and of age, having the legal exercise of their rights, have the most ample powers given to them to ~~give~~ devise and bequeath by will, but persons under age, although entitled to give by will, cannot by any construction, be considered as coming within this ~~Stat~~ description, unless we could suppose a few words to be added ~~after~~ the word, "age", so as to make the clause run thus, and of the age of 20 years, as stated in the 293d. art. of the Custom, for without this, the words, "and of age", are the words contained in the 292d. art., "personnes agées", and must be interpreted in the same manner # ~~that is, le mot, agé, etant employé seul, et sans aucun terme~~ and according to this interpretation, agées, c'est à dire majeurs — Car âge mis absolument, (as is the case here) est entendu de la majorité, et en droit, le mot, Agé, est entendu de l'age de 25 ans. —

and according to the general meaning and import of similar words used in other articles of the Custom

№ 217

Armour
v.
Wm Hunter &
Thos Hunter

Action of Debt on obligation —

Decl. states, that on 16th Sept. 1820 the Defendts made their certain Obligation by the Description of public Note & acknowledged themselves to owe & be indebted to the persons carrying on the Banking business at Montreal under the name and style of the president Directors and Company of the Bank of Canada, the said Plff acting for and on behalf of the said association and present & accepting for them, in a sum of £1179.13 — for value rec'd from the said association which said sum with intent the sd Defendts jointly and severally did bind & oblige themselves to pay to the plff or to his successor in office, by payments of £200 Cy pr an. & to be paid in quarterly pays of £50 — out of the rents of the Defdts house in Montreal, with the express condition that if the Defendts should fail in making the said quarterly payments as the same became due, on such failure the entire principal sum above stated & then unpaid should become payable on demand — That on the first Feby. 1822, the sum of £100 for two quarterly pays of the aforesaid principal sum of money became and is still due, whereby plff are entitled to demand the whole of the aforesaid principal sum of money & interest — & concludes to pay of £1200 —

The Defendts plead severally, and state —

for Plea of Peremptory exception.—

1st That the obligation in question was made without any legal cause or consideration stated or set forth in the declaration & is therefor null and void in law.—

2d That at the time of making the said Obligation there was not due or owing, nor hath there since become due or owing any debt or sum of money whatever by the said Defts to the said pltff

3. That by making of the said Obligation no debt became due or owing by the Defts to the pltff

4 & 5. That the Decln does not set forth a legal cause of action & is insufficient & irregular.—

2d Plea — Nil debet.—

3d Plea — matters stated in decln are insufficient in law to entitle Pltff to maintain his action.—

4th Plea — The association of the Bank of Canada is illegal, & Pltff cannot maintain his action.—

Replication, contains a general answer to the Plea

It has been settled as a principle of law, that stipulations made between two persons in favor of a third are legal and binding as between the parties stipulating, and that he who has the legal interest may enforce the contract in favor of him who has the beneficial interest — this has been settled in some of the Bank Cases, even upon blank indorsements on promissory notes, under which the Cashier of the Bank has been admitted to bring the action, for monies advanced thereon by the Bank.

Poth. obl. Nos 58, 59.—

although

although there appears no special contract to support the action — The case before us seems to be stronger, on account of the special contract to pay to the Plff. who alone is entitled to bring the action — For the president Directors and Company of the Bank of Canada had no legal existence, either to make a contract, or to enforce the performance of it — and if they had yet they are no parties to this obligation, & have only their equitable remedy of the Plff for what he may have received to their use —

The law of England appears to be the same in this respect. in the Case of Offy. v. Ward. 1 — Levintz Rep. 235 — Held, that an Obligation made to A. for the use of B — B can neither sue, nor release it — A case strongly analagous to the present is 12 East Rep. 400 Sir Theophilus Metcalf &al. v Brain — where a bond given to Trustees to secure the faithful services of a Clerk to the Globe Insurance Co who were no Corporation, may be put in suit by the Trustees — and it was there held that the intervention of the Trustees removed all legal and technical difficulties to such a contract made with or suit instituted by the Company themselves as a Natural body —

There has been a case adjudged in this Court

when

where the same principle came in question
Case of M^c David M^c Gillivrays & Co. vs Legendre dit
Parisien. Febr. Term. 1819. when a contract was
entered into between the Plffs & Defendt as agents of the
N. W. Co. & the Defendt that he should perform
certain Services as a Canoe-man for that Co.
and upon failure the Defendt was held liable
in damages to the Plffs. —

№ 125

Davis
vs
Ermatinger

On action agt the Defendt as Sheriff for the value of certain effects by him taken and seized under a writ of Saisie-arrêt sued out at the suit of one Joseph agt the Plff and which saisie was afterwards discontinued and withdrawn by the Plff in that Cause, and when the Saisie was taken off it was found that the Goods in question were missing — The bailiff who made the Seizure under the Sheriff's warrant, appointed one Burt, another bailiff, to be the Gardien of the effects seized — the Sheriff now addduces this Burt as a Witness on his behalf and at same time files a release to him of all actions in regard of the present demand Qua — If the Gardien under such circumstances can be a Witness for the Sheriff. —

N° 1594

Jn Lemieux
Lab^e & Thayer
&
Ogden oppt

On opposition afin de conserver —

On 4: Oct 1822. the pltff obt Judgt. ag^t the Defend^r for £60. 3. 7. for wages as a Seaman on board a certain Schooner. Lively belonging to Defd^r — This vessel had been attached and seized by virtue of a writ of Saisie arret prior to Judgt — and ag^t was adjudged to hold good thereon for the payt — and satisfaction of the pltffs claim

After the Saisie-arret had been made and prior to Judgt being rendered the Pltff gave his consent in writing, dated 6th May 1822, by which he gave permission to the Defend^r who had been named gardien under the Saisie-arret, to make use of this vessel, the Pltff reserving his recourse ag^t the said Defend^r as such gardien for the said Judgt in case the said Schooner should not be delivered up in time — In consequence of this permission the Defend^r made a voyage to the West Indies with the vessel in Summer '22, in ^q^l voyage the vessel was materially damaged and obliged to go into port at St George in the Island of Grenada in order to refit, where being in want of money to defray the payment of Seamen's wages, provisions and other necessary disbursements, the master disposed of a part of the Cargo to the amount of £374.. 5. which belonged to the Opposants — The vessel having returned

returned into port and having been sold under a writ of Execution by the Sheriff, the Opposts claim a privilege on the proceeds to be reimbursed the moneys wch had been so expended out of their Cargo on board, for the repairs — the Pltff on the other hand contends that he has a prior right to be paid before the Opposts —

Abbot on Ships p. 430 —

In proceeding against the Ship in specie if the value thereof be insufficient to discharge all the claims upon it, the Seaman's claim for his wages, is preferred before all other charges for the same reason, that the last bottomry bond is preferred to those of an earlier date — the labor of the Seamen having brought the ship to the destined port, has furnished to all the persons the means of asserting their claims upon it, which otherwise they could not have done

1 Holt on Ship's p. 443. —
1 Dodson. 40

The wages of mariners take precedence of bottomry bonds, the Sailor being entitled of all other persons to the proceeds as a Security for wages —

1 Bass & Ald. p 575

The Master of a ship has not a lien on the Ship or freight for his wages, or for his disbursements on account of the Ship during the voyage, or for the premiums paid by him abroad for the purpose of procuring the Cargo —
see Hussey v. Christie 9 East. 426.

Sr Wm Scott —

1. Dodsons Rps. 204. — case of the Rhadamanthe

In this species of Security (Hypothecation bonds) which is entered into under the pressure of necessity, the order of payment is very properly reversed, since without the subsidiary aid of a later bond, the property would be totally lost, both to the owners and former bond holders —

1 Dodson. 278 The Alexander

It is unnecessary for me to state, that bonds of hypothecation, are of a very high and privileged nature — they were invented for the purpose of procuring the necessary supplies for ships which may happen to be in distress in foreign ports, where the master and the owners are without credit, and where, unless assistance could be secured by means of such an instrument, the vessels and their Cargoes must be left to perish — It is important therefore to the interests of Commerce that bonds of this kind should be upheld with a very strong hand, and accordingly they have at all times been so upheld by this Court, when they appear to have been entered into bona fide, & with no suspicion of fraud. —

2. Emerigon. p. 569. 570 —

Les loyers des Matelots employés au dernier voyage seront payés par preference à tous Créanciers — see authorities cited —

Si le Capitaine a besoin d'argent pour l'expedition du navire, qu'il ne trouve personne qui veuille lui en prêter, et que les marchands n'en ayent point, il doit vendre des marchandises jusqu'à la concurrence de la somme necessaire, et ceux dont les marchandises auront été vendues pour ce sujet seront preferés à tous les autres, excepté aux Mariniers pour leurs Salaires —

Id – p. 571.

L'Ordonnance de Wisbuy dit. art. 45 – que le marchand auquel appartenoient les marchandises (vendues pour besoins du vaisseau) ou le creancier qui aura prêté, auront speciale hypotheque & suite sur le navire –

1 Valin. tit. 14. art. 16. p. 362.

Les loyers des matelots, employés au dernier voyage, seront payés par preference à tous creanciers; and on note. p. 363 – he says – apres les loyers des gens de l'equipage viennent les créanciers opposans pour deniers prêtés à la grosse ou autrement pendant le voyage pour les necessités du navire – de même ceux dont les marchandises ont été vendues pour même cause, qu'ils y aient consenti ou non –

Il sembleroit que des créanciers de cette nature sans le secours desquels le navire n'auroit pas achevé son voyage, devroient concourir avec les gens de l'equipage; cependant il est vrai de dire qu'en quelque endroit que le navire eut été retenu, ne pouvant plus continuer son voyage les matelots auroient trouvé le moyen de se faire payer de leurs gages sur le navire – ainsi la preference que cet article leur donne est juste à tous egards, d'autant plutot qu'ils contribuent plus efficacement encore par leur travail au retour du navire que tous créanciers fournisseurs ou prêteurs –

See also what is said in regard of the privilege of the Seller of Goods having a preference on a vessel before she goes to sea, but which they cannot claim afterwards –

A.

Liv. 1. Tit. 14 art. 17. — Si le navire vendu, n'a point encore fait de voyage, le vendeur, les charpentiers, calfateurs et autres ouvriers employés à la construction, ensemble les créanciers pour les bois, cordages, et autres choses fournies pour le batiment, seront payés par preference à tous créanciers, et par concurrence entre eux —

and

Liv. 2. Tit. 10. art. 2 — Seront neanmoins tous vaisseaux, affectés aux dettes du Vendeur, jusqu'à ce qu'ils ayent fait un voyage en mer sous le nom et aux risques du nouvel acquereur — si ce n'est qu'ils ayent été vendu par decret —

B.

G

Gardien — how des champs — 146.7

J. J.

See Letters. T. V. V W. – after C.