Court of Appeals.

July 1825

January 1826.

Court of Appeals.

Thursday 21st July 1825.

Prest.

Ch. Just. Reid. ~~Mr~~ The Hon Wm Smith. John Coltman
John Hale & M. H. Perceval —

A Commission was read appointing Ch. Just. Reid, President of the Court in the appeals from Quebec, & from Three Rivers when the Ch. Just. of the Province could not sit. —

Friday 22 July 1825.

John White }
Thos M White }

St Real for appellt

Buchanan sold to White - who sold to Thos. White - who promised to pay B. the balce to 2500 — The legatees of B. prosecuted the Lessee and also appellt. for a payt. on the bond — On this appellt. pleaded Thos White as garnishee — To this action Thos White pleaded payt — in consequence of a decree voluntary. & in consequence of a claim made by the Creditors of John White — Then Creditors afterwards withdrew their opposition — in consequence the money in hands of the Sheriff belonged to Thomas White — The payt. of £15 00 instead of £2500 into hands of Sheriff is no payt — whereas the obligation of Thos. White was to satisfy the claim of the Legatees of Dr Buchanan — The legatees of Buchanan having withdrawn their opposition. did not preclude them other rights. the insolvency of the Sheriff was the Cause of this but they could abandon this & pursue their right in another way — but there is no proof of the insolvency of the Sheriff. and if he

were

were, the Respondt — paying the money into the hands of Sheriff does not exonerate Respdt nor ought the loss to fall on the appellt —

This was a private contract as to the Decree, and a decree voluntaire is diffo from force — Dum. 3. Vol. p. 195. —

On question by Mr Hall — At time of the contract the law in regard of Decree Voluntaire was not passed —

The mo. of Lanpedon, in a folle enchere, cannot vary the Case — as the decree was made at his instance under the agreement between the parties

Mr Black for the Respondt —

The appellt being indebted to Respdt gave the property in question, but it was agreed that Respdt should pay the heirs Buchanan. — For this purpose there was a decree voluntaire stipulated to be made in order to purge the sale — & in case any oppos to should be made for debts, that Appellt should cause them to be withdrawn, except as to claim of heirs Buchanan. The heirs Buchanan made their opposition — who are not supposed to know whether it was a voluntary or forced sale — and by the Judge of Distribution a portion of this money is adjudged to them —

It is conceded, & was agreed that the money of the adjudication should be paid into the hands of the Sheriff, & there to be applied to pay off — hypothecary claims on the land — the part of this

this money into the hands of the Sheriff was a discharge pro tanto to the adjudicataire — the adjudicataire was bound to pay the money into the hands of Sheriff, and this must be considered as a payt. to the appellt in made under the agreement for the Decret
Poth. Obl. Nº 513 — D. Depot. of 4th 103. 4. 5

There is no evidence of any action having been instituted by the heirs Blutteman agt the appellt — The copy of Decret filed not authentic —

Had the part of the money into the hands of Sheriff been a voluntary act of his, it might then be questionable whether he would not be held to pay the loss — but without this part to the Sheriff, there would have been a forth enchere —

Mr Vallieres in reply —

There is sufficient evidence on the record to shew that there was ground to maintain the action en garantie —

But the Respondt has not complied with the terms of his contract on the two points stipulated, viz.t to pay heirs B. £2500 — & to save appellt harmless in this respect —

The heirs of B. were not parties to the Decret and the payt of the money by Respdt could not

not affect them — and altho the heirs B— made their claim — yet from the moment they withdrew their claim, they could not be considered as before the Court — There was a projet de distribution but not final Judgt thereon nor any order respecting the same — so that the monies are now in the hands of the Sheriff subject to the right of him entitled to it. —

Saturday 23d. July 1825

Pres.t
as above. —

James M.c Callum
vs.
Our Sov.n Dr. The King

St Real for appell.t —

Action for exhibition of titles & part. of Seig.r right — on hearg. & enquête no evidence was adduced, but a certificate signed by Jos. Planté — by q.l he appears to have exhibited his title — but if this had not been proved — yet the Court below has ordered appt. to exh. a title of he has already exhibited, and which was filed at the office of the Prothy. for 6 months —

But

But this is not the only point complained of, the Court allowed Att'y Gen'l to take new conclusions, which were not served on the appellt, and as appellt took no notice of this, the Att'y Gen'l was allowed to proceed ex parte as the appellt and the appellt was not in default he had pleaded in the Cause, & had interests to support — the Cause ought to have been regularly inscribed and proceedings thereon. —

The obligation to answer to the new conclusions can be peremptory only after notice of the motion to the adverse party —

The King has obt'd a Judgt for Costs as the appellt — The King never takes costs, nor does he pay Costs. — N. Denizt vo Dispens. — 2. p. 240 — & No 13. and this in the Case even of Seigneurial demands, particularly when the Att'y Gen'l prosecutes for the King — 3 Vol. ch. 24. p. 400 — The English Statutes allowing Costs do not apply to the King 24. Hen. 8. ch. 8. 33. Hen. 8. ch. 39. — which apply to Specialties. —

The Att'y Gen'l. for the King —

The mere delivery of a title to the Seigneur cannot exclude the right of action in restitution

as such previous delivery may be occasioned by many other accounts than the exhibition required by the law. — But there is no proof of such exhibition — the mere signature of Planté is no proof, he is no public officer whose signature is to be taken as proving itself — nor can he well be considered as the officer to whom such exhibition should be made. —

This Court must presume that the proceedings in the Inferior Court, as to new Conclusions when there appears to have been no complaint made to that Court of any irregularity — It is not usual to file affidavits or certificates to shew that there were regular notices to enable the Court to proceed ex parte. —

The mere filing of one paper in the Cause is no exhibition req^d by the law, there might have been other titles of appell^t was bound to exhibit and the declaration of the appell^t that such title or titles were the only titles under which the party held the property —

The right of the Crown to recover costs in case of this kind has always been recognized in all the Courts of the Country. — Instruments before Notaries must be considered as specialties in England, and as appell^t holds his property under an act of this kind, it must be considered as of equal value as a Specialty — the object was to facilitate the recovery of the settled rights of the Crown —

St. Real in reply —

Contends that the exhibition to ofr. he was condemned to make, had already been made by the title filed by Defr. ofr. was the only one he had, and ofr. he declared to be the only one and a tenant cannot be obliged to exhibit twice. Denizt. vo. Exhibition. No 13. —

The proceeding ex parte is evidently irregular contrary to all practice. —

As to Costs nothing has been shewn to establish the right of the King to obtain them. —

—

M'Callum
"
Bernier } action en exhibition de titres & titres nouvel. —

St Real for Appellt — The Defr. pleads that he had exhibited draws still ready to exhibit of which he prays acte — Cdr to 2d point of the action Defr. has ad nothg — On Enquete the Defr. attempted to prove exhibition, but in this he failed — he offered to exhibit his title but did not really exhibit it. — act of 19 april 1763. not Defrs own title — Defend was bound to leave his title in the hands of the Seignr — Denizt. vo Exhibition. §. 2. There is

is a difference between notification de titre and exhibition — the latter being a remise de titre au Seigneur —

The Censitaire is bound not only to make exhibn but to give take a new title — Denist. vo Declaration Supreniale — No. 6. —

But even supposing the offer made by the Defend — to be sufficient, have been made as he alledges, this will not exonerate the Defr — he must pay & not merely offer — and he must also be condemned to pay the Costs. —

Mr Hamel for Respondt

The Appellt complains that Respt did not exh. his titles — by the evidence adduced it appears that Defr did exh. the title under which he held his property —

Poth. tr. Cens. p. 344 — Censitaire bound to exhibit only the his lettres d'acquisition, but not any older titles unless in case of making a terrier, when Censitaire is bound to communicate when he has them in his possn —

5 Hervé Mat. feod. p. 565. action should be for the lods & ventes only, where exhibition has been already made —

Renauldon — Traité Hist. p. 160. 161. —

1 Bourjn. 270 + Decision Lapeyrere Dec. 15 Letter S. p. 409. when new title is fair.

St Real — the offer to pay is not a payment the Defr never made a tender of his title to the Pltff, and his offer still to exhibit, was ground of condemnation agt Defr —

The Appellt has also a right to a titre nouvel as he demands, to qt. demand Defdt has not answered —

The Lessee is entitled to have a new letter from his tenant — 5 Hervi' Mat. p. 559. & Seq. —
8 Hervi. p. 659. —

Monday 25 July.

McCallum
v
Racey — } action for damages done to Respt's Mill —

Vallance for appellt — two allegations, that by the proper act of ~~Respt~~ appellt — or by his negligence — so that it is not alleged with certainty whether by one or the other — Much evidence adduced — but all wits. agree that the floodgates were sufficient to discharge all the waters passing through the same — & it is evident that Appt. by his act did no injury to Respt — In Augt. last an uncommon fall of water happened so as to occasion an inundation of the rivers in general & of that in question — every effort was made to open the Sluices, but unsuccessfully, & they were cut down — There was negligence on part of the Respt as he saw the danger approach drew at no pains to prevent it. — It was a force majeure & he prevented

prevented the floodgates from being opened, for this Appellt is not responsible —

The Respt having alledged that he is proprietor and possessor in virtue of a title, but not having proved this, he had no right to maintain his action —

The quantum of damages too great — the Appellt not called to the estimation of them — the objects were fit matters to have been submitted to Experts —

N. Denis. Vo Domages. §. 1. No 2 —
Lacombe. Vo Eaux. No 5.
N. Denis. Vo Dom. & Interets — No 5 —
——— §. 6. No 3 —

1. Pigeau. 423 mode of estimating damages —

Mr Primrose for the Respondt —

The Appellt ~~could~~ ought to have availed himself of the insufficiency of the decln in the Court below — but decln is suffte —

This is an action founded on possession, & it has been proved, & has besides filed an authentic title —

The proof is strong in favor of Respt — there were five floodgates — & no attempt to raise them till the strength of men could not raise them —

The construction of the works by the Appellt —

have occasioned the damage, as he has turned
under the stream for the use of his mill, which
waters would have flowed in their usual course
without damage, had not this work been constructed

There was no demand by Appellt to send the
estimation of damages to Experts —

Mr Thompson for Respondt

1. No force majeure, here, as the accident could
have been foreseen & prevented —

Valliers in reply —

Thursday 28 July 1825

John Jones v. Jos. White } mo. for certiorari.—

Ker Lat v. Ouette dan } On return to writ of appeal—

Panet for appellt— Security offered for costs which Judges below refused—

Atty Genl. for Respdt— Security for value of property sold not requisite — as property remains and is to be sold again — and although at the risk of charges of the purchaser, yet this is not an object upon of— there is any actual condemnation, it is uncertain until another sale, is made what the defalcation may be.

Panet in reply— the Deft. is a debtor under the contract he formed to pay, & bound to give security for the whole purchase money.—

McCallum v. The King } On a re-hearing touching right of King to have Costs—

Vallieres for appellt— Neither in France nor in England, does the King pay or receive Costs. it contrary to the honor and dignity of the Crown

Repse vo Defens. —

1. Pigeau Proc. Civ. p. 415

Chitty on Prog. p. 310. & seq.

The stat — goes only to specialties. to the King — the demand here cannot be traced up to the original grant made by the King, so as to connect it with a specialty to the King —

If cost are granted to the King, he must be condemned to pay Costs when he sues as Superior but his character of Superior is absorbed in the higher character of King & Sovereign of the Country.

Attys Genl. for Respondt — The law of this Country ought to be basis of Judt — as early as 1324 by Ordr of Chas LeBel, costs given generally in all cases — this law till 1667 — The general rule, is liable to limitations, & this applicable here — where the ministere publique intervenes, no costs allowed —

Dic. Domaine vo Instance Generaux des Domaine intervenes only for preservation of the Domaine —

The Receiver des Domaine — Repse vo Administrs

Dic. de Domaine par Mr B — 1 vol. p. 434 vo. defens — where 2 arrets set aside on the Costs were given to the Receiver des Domaine —

Dic. Domaine 1762. 2 vol. p. 44. — same authority

Tr. des Domaine par Laplanche. 3 vol. p. 252. —

The Receiver general the only officer in these cases to

bring

bring the action, and when substituted for a droit Civil ~~was~~ Costs were adjudged —

The motives of public policy require that a litigious debtor should pay the Costs when the public revenues are in question —

The usage has been in this Country to give Costs in actions of this kind to the Crown, and usage is a mode of interpretation of the law and must be looked to as a rule to guide us. —

By English law — In revenue Cases Costs are allowed to the Crown — a liberal interpretation should be given to the word Specialty — deed under seal, so held — in this Country is of no avail but deed rec^d by a Notary may be considered same description, as binding the Estate, when it goes to the heir. — all property held of supreme of Crown is under Specialty or Deed before a Notary when M^c Callum's deed may be considered as a Specialty — The Stat. Hen. 8. also mentions term Obligation, ~~and~~ the Debt here claimed may be considered a debt due by obligation. —

Valliers in reply — the last interpretation is forced and inapplicable, as the Specialty the law had in contemplation was a bond or act under seal establishing a debt in favor of His Majesty.

There has been a distinction set up, when in France

Where the Revenue General prosecuted for the rights of the Crown Costs were allowed, but there were cases where that officer prosecuting in the name of right was condemned to pay costs but here it is the King in person who prosecutes and he cannot be condemned in Costs — The Crown farmed out the rights of Crown in France, & when Revenue Gnl. interfered it was for the benefit of the Fermier —
1. Pigeau. p. 415. Execution is directed as the Fermier in such case —

Burnet
v
Charay. } action to

Valliers for Appellt — two actions brot. by Mr Burnet — one for exhib. of titles — and one for erecting a chaussée de moulin, so as to — injure the lands of Respondt —

As to first action. Burnet contends he owes no exhibition as the land in question is within his own Seigniory — and 2d point. not guilty — a Surveyor was named to ascertain the limits of the Seigniory of Mr Burnet he found a part of land in Seigniory of Burnet another Surveyor named who found no part of —

of the land in the Defds Seigy — the Court confirmed the last — The evidence in the 2d Cause is that the work in question were erected by Defds predecessor, and therefore the action is informal, en action de nouvelle Oeuvre The Defend — only made some repairs to the Chaussée but the action was not for the repairs, but for the having erected the work, which was done several years before — Ferr. Dig. tit. 24. de l'interdit quod vi aut clam — tit. 25. interdit de intermission, where work not done within the year, the Pltff's action will not lie — nor was it done by Defd — but existed when Defd purchased the property at public Sale —

Mr Plamondon for Respondt — The authority cited does not apply, the action here is not for a nouvel Oeuvre, but a voie de fait — the complaint here is for a voie de fait, which was committed by the Defd, every time he repaired or altered the Dam in question —

In the Superior Court the action en exhib. de titres was not contested — Surveyors were appointed, the last of whom being more intelligent his report was adopted In the title of the Defend he acknowledges the land to be in the Seigniory of Pltff —

The work done by Burnet since he came to possession of the land is suffit to maintain this action —

4 Hervé. p. 248. q. 250 en regard of Rivers —

Dec. Renaudon. v Rivers No. 255 —

Attz Genl — for Respondt —

This not action en nonciation de nouvel Oeuvre

It was necessary that only a part of the Defts land was found within Pltffs Seig to entitle him to the exhibition in question —

The 2 action has been mis-named by Defdt but this action aquæ pluviæ arcendæ, when the water is stopped and made to flow over the land of neighbour —

Vallières in reply —

There is no evidence of Pltffs' being proprietor of the lots of lands overflowed, the Pltff. proves that he is Seignior, but the lands in question shews they were detached from the Seignior, and he has attempted to prove that he had purchased the lands from habitans since he became Seignior; but the proof is verbal & insufficient. —

2 Vol. Fr. Digest. p. 306 —

The proof is that Defdt ~~adduced~~ added to the height of the chaussée — in that case the Judgt should have been that Defd. shd remove what he had so added, but Judgt. is not go to this effect, but to remove the chaussée generally — which is error —

The Defdt — purchased the property with the chaussée erected on it — to this sale by the Sheriff the Pltff made no opposition, & Defdt. has acquired a right to maintain what he so purchased —

Perrault v. Oliva — & Perrault sup, par rep. d'Instar } Action of general assumpt

Mr.

Vanfelson for Appellt. of the several items of demand two are proved forming the sum of £450 — for checks on the Bank — if checks are proof of money paid & rec.d the Judt. of Supreme Court is wrong — Checks on the Bank are like a bill of Exchange — and when being proof that Defdt. received it he ought to be condemned to pay it —

On the Incidental demand no proof whatever was made — yet Judt was given in favor of — part — Counts even that Court had dismissed principal demand but in that Case the Incidental demand ought to be, dismissed also —

Vanderen for Respondt —

The checks deliv.d to Defdt. must be considered to have been in consideration of value or of what Pltff owed to Defdt —

Vanfelson in reply the confession of Pltff cannot be divided, and

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5 Taunt. 245. Randle & al' — Assignees of Anderson a Bankrupt. & Blackburn. —

The whole of the account which the party gives of a transaction must be taken together and his admission of a fact disadvantageous to himself shall not be received, without receiving at the same time his Cotemporaneous assertion of a fact favorable to himself

2 Tr. & Pais. 363 –

The confession of a party must be taken whole, and not by parts — as if to prove a debt it be sworn that the Defendt confessed it, but withal said at the same time that he paid it, his confession shall be valid as to the payment as well as that he owed it. — 1 Hale. Ch. I. — And so is common practice. —

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4 Esp. N. P. p. 9. Cary. v. Gerrish. —

The receipt of money by the Defendt on a cheque drawn by the plaintiff on his banker prima facie, imports a payment, and not a loan, and is not evidence to go to a Jury, unless the plff can give evidence of money transactions between himself and the Defendt from which a loan can be inferred, or of some application by the Defendant to borrow money. —

Stat. 33 Hen. 8. ch. 39. sec. 54 –

John White
Thos. " White } Judgt. reversed —

McCallum
" Bernier } Judgt. reversed — order for further proceedings

McCallum
" Racey } Judgt — confirmed

January Term 1826.

Tuesday 10th Jan'y.

Present

His Ex'y The Earl of Dalhousie,
John Richardson
M. H. Perceval
Will'm Smith
John Hale
Ch. Just. of Montreal

As no Commission had been granted by His Excell'y the Gov'r in Chief appointing a president of the Court, he sat in person.

Adams
"

Mr Weddarn moved for a rule to shew Cause why a writ of appeal should not be granted from an Interlocutory Judg't of the Ct of K. B. for the District of Quebec rendered in Oct'r last. He admitted that the motion ought to have been made last Term, but in Nov'r last the Court was not competent to receive the motion, and he now comes in time to obtain this rule. That regularly the present motion should be accompanied with Copies of the pleadings & Judg't which were not yet ready, but were preparing, & begged the indulgence of the Court till to morrow to produce them.

Mr Stark opposed the granting of the rule, as the application was too late. Altho' the Court was incompetent in Nov'r last, yet in such case it is usual to fyle the papers & notice of the motion, & then stands in course for hear'g. But al. all events the want of necessary documents at this moment precluded all hear'g of motion under rules of practice.

The Court over ruled the motion.

Wednesday 11th Jan 1826.

Present

Ch. Just. of Montreal
John Richardson
~~M. H. Perceval~~
Wm Smith
John Hale
Mr De Lery.

a Commission was read appointing the Ch. Justice of Montreal President of the Court.

There was no business before the Court.

Thursday 12th January.

Prest

Ch. Just. of Montreal
John Richardson
M. H. Perceval
Wm Smith
John Hale
Mr De Lery.

Jones. — }
vs. }
White. — }

On mo. for a certiorari & order for appeal to King in Council —

Mr Blair moves that order be granted for Certiorari reserve to determine as to right of Appeal as was done in Case of Jones vs Woolsey —

Rule granted for 14th

M^c Cullum
vs
Racey —

on rule to dismiss appeal, as no reasons of appeal have been filed within the time prescribed according to the rules of practice —

M^r De Valliers, states that the appellant is dead & no Justice can be given to him —

M^r Thomson — The appellt was not dead at the time the foreclosure was incurred — but the Court has a right to dismiss the appeal without intervention of either party — There are strong reasons here why the appeal should be granted —

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Borgia apt
vs
Ross —

action in Court below for a malicious arrest of a minor, represented by Appellt — the declr stated two counts, but did not contain the words without probable cause —

M^r Urquhart for Appellt — The want of probable cause not a necessary allegation — but enough to shew there was such want of probable cause 2^d the Defd has admitted the sufficiency of Declr by pleas vpon. per. un droit. —

The writ of Ca. ad resp. is the usual process in England — here it is an extraordinary remedy under Ordr — This Case decided on English authorities — Pts cst of action is want of probable cause in England but here if the debt be due, yet more must be

sworn

sworn to that Defdt. is about to leave the province
considers want of probable cause, rather as a mode
of defence than a necessary allegation that there was
probable cause —

2 That if such allegation be necessary, it is sufficiently
alledged in the declaration — the words falsely and
coupled wt words maliciously, are of as much force
as words want of prob. Cause in England —

3 The fact of want of probable cause has been put
in issue by Defdt — a plea to the action — which
covers the defect if any of insuffc declar —

The case in the Court below was heard upon
all the pleas at once, which was admitting that
suffs declar —

cites Gardner v Johnson — at Montreal

Dr Rayl. 387 — 4 Burr. 1971 — 2 Chitty 284 —
2 Wils. 376 — malice & falsehood is suffc without allegation
of probable cause — 2 Wils. 145 — Chapman v Petersgill

Mr Plamondon for Respondt — In this Country
there must not only be a debt, but also that Debtor
is about to leave province — there are facts essential to
be shewn to issue an arrest — The exception in droit is
here well pleaded, & goes to shew that all facts
alledged if proved would not entitle Pltff to declare —
the words, falsely & maliciously, will not cover the
defect — the Case of Gardner v Johnson was so
decided — & it is the course of practice to allege
these facts & also to prove them. — The usual

course

course in the Court below is to file all the diff pleas at the same time & not filing them so cannot be taken as a waiver of any right—

The authorities in England are opposite here, it is a course of proceeding arising out of same practice — Chitty

Willan in reply — want of probable cause, not a material fact to be alledged, case of Scofield want of probable cause was alledged, but not proved — a case dismissed — but want of probable cause is matter of defence only — the allegation that Defendt had falsely & maliciously arrested Plff, is tantamount to want of probable cause —

Friday 13th Jany 1826.

Present —

Ch. Just. Montreal
John Richardson
M H. Perceval
Wm Smith. —
John Hale. —
Mr De Lery.

There was no business this day before the Court. —

Saturday 14th Jany 1826

Present

Ch. Just: Montreal.
Mr Richardson.
Mr Perceval.
Mr Smith.
Mr Hale.
Mr Delery.—

Daniel
Jn ~~Stanley~~ et al
Jos. Stilson

On application to obtain a writ of appeal from an Interlocy Judgt of the Court of KB.

Mr Vanfelson for ~~Plff~~ Defts. the plea of Pers Exempt. dismissed that Plffs were bankrupts & that a Commission of Bankrupt had issued in England of their Estate

Mr Primrose for Plff, says, that he does not oppose the motion, but leaves the matter to the Court to be satisfied if this is a Case within the Law where an appeal ought to be granted —

John Jones appt
Wait et al. Respts

On application for an appeal to His Majesty in Council.—

Mr Casgrain opposes the application, as there has been inattention & negligence in the party claiming such appeal—

Mr Plamondon— Judgt of 20 Jany. last— an appeal granted, on giving security within a month.

This

this Security not given — and therefore the party appears to have consented to the execution of the Judgt —

Mr Black for appellt — There has been no acquiescence to the Judt. nor any authority to apply here — the right of appeal cannot be taken away. — That this Court cannot proceed upon the merits of this mo. until the proceedings shall have been brought up from the Inferior Court according to the usual practice as laid down in Woolsey's Case. 20 Nov. 1819 — Here the party ought to have obtained an order of the Court declaring that the appeal has been deserted — In fact there has been no appeal yet granted — except conditionally —

20 Nov. 1819.
Denizt
Desertion of appeal
§ 5.

Plamondon — the 30 dec. Stat. 34 Geo. 3.
20 Jany last. the order for an appeal was allowed. —

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Dlles Ker —
Fx v. Duret

On mo. of Mr Duret, that the appeal should be dismissed from want of sufficient Security —

The Dlles Ker having pd. adjudication — order for an appeal — they offered Security only for the Costs — and the mo. now made is to reject the appeal. for want of sufficient Security —

In case the property should be lost or injured the appell^t ought to run the risk

The Att^y Gen^l for adjudicataires — there can be no security for any thing beyond the Costs — The condemnation here as the appell^t does not go further than to rescind the first sale, and to make another sale — there is no condemnation in any money — the Costs, charges & risk of a second sale, are not now in contemplation & cannot be known —

Perrault v. Oliva — Mr Vanfelson for Perrault cites case 5 Taunt. Rep. Randall et al v Blackburn — Poth. Obl. N^o 757.

Mr Vallieres for Resp^dt submits on the authorities submitted —

McCallum v. The King — Case submitted on arguments already had —

P. Burnet v. P^n Charay — Case submitted on argument already had —

K. C. Chandler
&
John Cannon

Mr Plamondon for appellt

The appellt became purchaser, & prays the Sheriff who made the return accordingly but this return was afterwards changed, and the Sheriff at the last only £50 & a folle enchere ordered — the purchaser then pd again the amount to the Sheriff — but this was not considered sufficient, and a demand was made for the interest on the purchase money which has been contested by the appellant — The interest is not always due on a purchase but according to the Circumstances — N. Denzt Vo Folle Enchere. 81. No 1 & 3 — by the affidavits on record, it will appear that it was at the earnest request of Cannon that appellt became the purchaser — all that was pd to former Sheriff has been lost. & it was fortunate the appellt had not pd the whole amount to him — The malheureux times is a reason given why the interest should not be paid — But if interest be due it is a question, what interest is due — The date of 13 Augt was no specific date — nor shd interest be given from the date of the sale, but only from the date of the Letters of Distribution in 1822

The Attv Genl for appellt — Sheppard was the Pltff in the Cause, and pursuant to Crées, & an appraisement had no right to set aside the proceedings

of

of Sheppard, and stop us & take up the proceedings the application of Cannon to take up these proceedings was irregular — 1 Pigeau. 782 — shews the proceedings must be by Huissier — 1 Hiricourt. 192 — Proc. Civ. Poth. ch 2. Sec. 6 — 1. Tr. des Criées p. 198. 199. — by Thibault —

That Cannon was never subrogated in the right of the poursuivant criées — & could not therefore legally take up the proceedings — the poursuivant must be put en cause — see Thibault 198. 199 — this subrogation cannot be demanded w^t out special authority by the Proc^r — See also Poth. Proc. Civ. Sec. 2. Ch. 2. de la demande en subrogation de la Saisie —

Sec 2. Ch. 2. de la demande en subr. de la saisie

The right to call Mr Chandler before the Court by a rule of Court 3 or 4 years after the date, is questionable — the party could be called only by the Kings writ — under the law. 1 Pigeau 782. the form of the assignation to be given to the adjudicataire see also Thibault. Tr des Criées — & Poth. Proc. Civ. —

But on the merits of the Case — The petition presented by Cannon was to be considered only to extent of the Instr for the folle enchere, but for no new demand, for interest to which Cannon could have no claim — the motion for the folle enchere did not demand it should be sold at the peril, risque & fortune of the adjudicataire — under which only interests could be asked — how than could a new Instr be demanded, a new demand set up for interest, after the Instr for the folle enchere had had its effect —

The mode of Composition by Chandler with the Sheriff, was perfectly legal — see Pigeau — How can Chandler be considered liable for interest when in truth he appeared to have paid the money, and was not to be considered in default, until the second return of the Mr De Gaspé — even when he was no longer Sheriff on the score of equity the C — being in good faith, & not in mora could be considered liable to no damage — The money having been paid by the C. on the writ fa the folle Enchere with the consent of the parties, ought to be — sufficient to stop all further claim in regard of interest. —

M.r Blanchet fa Respond.t — The question has been branched out into points not in contemplation in the Court below — The matters of form were never considered in question — but in answer to the objections made — in mons state — That as to the form of proceeding on the folle Enchere has been settled by our Provincial Stat. of 1801 — this statute also declares the adjudicataire liable for all damages —

As to the Kings writ — not necessary — but all right to this waived by the adjudicataire admitting himself liable & pleading to right — the original parties were before the Court. Every party purchas.g property under a Sale by Kings writ makes himself a party to the Cause — The Stat. however says, the adjudicataire can be brot in on motion, fa the principal object of the Sale of the property was

must

must be equally liable as to all incidental or accessary matter, such as the interest. +

The appellt not entitled to any favorable consideration never paid the money to the Sheriff, but entered into a transaction w. the Sheriff, which was a mere nullity, and therefore a folle enchere was ordered. The appellt here has been receiving interest instead of being liable to pay. see transaction stated N. 67. + which discloses the whole transaction & shews that appellt was in possess. of the property & was entitled to have rec. the rent thereof. +

Repr. vs Encheres + interest due from day of adjud. N. Decis. 699. sec. 2. art. 2. vs Folle Enchere

It has been objected, that the demand for folle Enchere does not contain the words, at your peril & fortune but the Sheriff ordered to proceed to sale according to Law + which implies all the risk & consequences attached thereto — The Provl Stat. has established the damages due on non payt by the adjudicataire

The Attys Genl. in reply + There is no difference in case of folle enchere more than any other sale, that the poursuivant criées is the dominus litis, and no one can proceed to demand the folle enchere, unless duly authorised by law + the conduct of the Sheriff must depend on one individual only —

The Stat. of 1801 - is merely declaratory of the law as it stood before, but contains no new rules, nor varies in any way the ancient law + either party may proceed in the way here stated on being subrogated in the rights of the poursuivant criées +

The appellt by purchase the property was not giving up any right nor submitting to any proceeding

which he did not specifically consent — he consented no more to the authority of the Court than bail to the Sheriff, or Security in appeal who are not amenable by this summary course —

The pleading part as by Mr Chandler to the mo. for the payt. of interest, sufficiently denies the right of Cannon, without entering specifically into the grounds of it —

It is a material question whether Cannon can claim interest, after having demanded the folle enchere without any conclusion as to damages or interest — and demand as to the sale being made at the risque peril & fortune of the purchaser — there could be no new conclusion for interest — nor can the Court grant more than is demanded by the conclusions — It is a matter of Equity the granting of interest on a folle Enchere — see N. Denizt. v° Folle Enchere № 3. p. 671. — depending on the circumstances —

671
№ 3.

Interest can run only from the time the Sheriff was allowed to amend his return — & it ought not to be extended to the 28 June when the Sheriff acknowledges to have received the money — or the consent of parties, cannot make this payt. valid — particularly as the parties adopted the Sheriff's return & proceeded thereon —

Roi appe
Pozer — } On appeal from Judt of K. B. by the Defendt in that Court —

M Hamel for the appellt — The action was instituted by Pozer in the Inferr Court, en destruction de nouvel Oeuvre — being a covered gallery, and in default of Defendt removing same it be removed at the expence of Defdt —

To this the Defendt pleaded several matters of law and fact, & particularly that Defdt was proprietor of the lot of land on which the gallery was built — The Plff cannot succeed in this action — as it is in the nature of an action Confessoire because he says his view is obstructed which is necessary for the house of Plff —

This wd be a servitude on the property of the appellt but such servitude sans titre — the only one Pozer shews is his purchase from the Sheriff as he can grant no servitude, as no servitude was sold or granted thereby on Plff's land. — Jurisd on tit 13e p. 392. of Coutt. d'Orleans by Pothier — no one can acquire or make a title to himself — Lemaitre tit. of des Servitudes ch 1. p 223 — Pothier — above cited — 2 Bourg. tom 4. tit. sec 2. — Rep. vo Servitude p. 265 — Henrion ch. 8. of No. 13 — & Henrys — Desgodets. p. 43 & 44 No 5. — Lalaure. 272 & seq — a traité des Servitudes Every demand must set out the title on which it is founded — Here no title of servitude on Defdt's land was set out —

Pozer here claims a right of view on appellt's property, qt he cannot have without title — The appellt if he has the fond must have the rept to build to any height he pleases — Pozer complains his view is obstructed — but this cannot prevail on the right of property in appellt — cites Dunod Tr. de Prescript. the obstructing the view of Respondt is no suffr ground —

2. Arrets d'Augeard p. 292. & suiv — cite much in point. —

3. The house of Pozer is about 3 or 4 inches from the gallery in question. —

The titles of appellt confer all the right to his property as set forth — and the possession of the appellt — is alone suffr to convey to him the property —

The predecessors of the Respt acknowledged by the tables the right of property of appellt — and the acte d'accord of 29 July 1739 — ascertains this clearly in regard of the imputation which had been made on the property of appellt by Cugnet. —

The window qt — is complained to have been ~~closed up~~ was always closed up with iron bars as not having a right of view on appellt's property. it is even agreed that this window shall be so closed — but because this reserved the right to use the window, did not give a right of view on appellts property —

Pot. Cout. d'Orleans, tit. des Servitudes, p. 389. 90 —

Mr Valliers for appellt — The action of Pozer need not be as the proprietor, we be right but the appellt. being proprietor cannot be restrained to

use

use his right of property as he pleases, and the injury complained of, cannot prevent him. The Respt. ought to have shewn that he had the right of view — or that he had the right to prevent the appellt "altius non tollendi" — neither of which is shewn. — The title by decret of Respt. is not suffte. to establish a servitude yt. did not exist before. altho' there was a window in the house when he acquired it, yet this confers no servitude —

1. Fer. Jur. Dig. p. 257. tit. des Servitudes. 8 liv. de Dig. Dumt can give no right of servitude. — and p. 260 — every one has a right to build to any height, if there be no title to the contrary. — although it was agreed that the auteurs of the Respt. should have a fenêtre grillée, this did not imply a renunciation of the person granting this favor to build on his property when she saw fit. — at all events this could only be a servitude de lumiere, but this did not imply the renunciation of altius non tollendi —

8 liv. Dig. tit. 1. law. 4. the right of view is diffte from that of non altius tollendi. — Pothi. Pand. Just. same topic — although the party may agree to admit the view of his neighbour as long as he does not build but unless the party has given up the right building up as this window a view, he is entitled to it —

In this Case the demolition could apply only to one window whereas there was only one window yt was in question —

The appellt has instituted an Incidental demand in nature of an action negatoire, which has also been dismissed, although the Respt. justified under no title —

Mr Vanfelson for Respondt contends that when the gallery was erected by the appellt was not the property of the appellt but of the Crown, that part where the blue angle on the plan is laid down being the property of the Crown. —

The appellt claims the beach lot under title & also by prescriptive right of possession, by the two pleas he has filed — in respect of the front lot there is no contest — the contest regards only the beach lot — The exhib. No 12 — not contested — but the beach lot is dispt — no specific quantity is conveyd, Dupont the seller ensures nothing by this part of the Sale, not even his rights — appellts only title is exhib. No 16 — which cannot be considered as any title — it is a mere copy of a copy certified by a single Notary, which is not sufft — Poth. Obl. Nos 772. 774. 5 — But if this was a valid act — it is a conditional grant subject to ratification by the Fr. King — but admitting its validity, the ground given to the antient of the appellt — is the land behind the house of Roi, which can be construed to extend only to the breath of the back part of the house & not of the front part of the house as it was the land behind the house & was given — so that the blue angle remained to the Crown —

In the first plea the appellt claims the lot by ~~prescription~~ title — & in the 3d plea he claims by prescription — now if there be a title, the

Appellt

appellt. cannot prescribe upon his title —

2. Duplessis tit. des Prescrip. p. 221 — the title and the possessn of appellt here disagree — his title No 16. gives him the ground on the rear of his house but over and above this he proves that he has been in possn of the blue angle wch is no part of the grant of the title No 16 — wch is a possession contrary to his title — the blue angle is the property of the Crown, and possessn in appellt can give him a title —

But admitting all the right claimed by appellt under his title No 16 — the Respt still contends he is entitled to his right of views he claims — refers to the Sheriffs title to him No 6 — wch alone does not give the right, but connected with this the title No 32. shew the right — when Sheriffs sale was made the views in question existed and had existed many years before. The exh. No 32 shews that ancestors of the parties uncertain to whom the blue angle belonged, came to a compromise & it was agreed that a wall should be built & that the views in the house of Respt should remain —

Mr Stanley in reply — although the sale was made by Dupont without garantie, yet this was no less a sale of this right — It is not for the Respondt to say, appellt is not propr — nor can the Respt set up the rights of the Crown in

defence

defence of his right. — a difficulty has occurred as to the interpretation of the words longueur, in regard of the quantity of lands granted by the letter No. 16. — the interpretation put on that letter by Cugnet is evidently the same as that claimed by appellt.—

That the prescription pleaded by appellt. is not contradictory, he can prove his title, either by possession or by deed — he may possess beyond the quantity of land in his title, and acquire right thereto — there is a difference to prescribe over & beyond the title and of the title — Instead of it being stipulated by the transaction w. Cugnet that he should have right of view, it is there given him as a condition, and limitation, but not a right of view —

See Arrets de Papon. — p. 520
Liv. 9. sec. 17. Des Preuves & Temoins. —

Monday 16th Jany. 1826

Present as before —

Clouet. Appl.
v.
Cringan et al Respds.

Mr Plamondon for Appellt. —

Clouet owed a balce. of acct. to Schofield & Co & gave his note to their agents the Respds

Pigeau 69. 77 — Proc. cannot sue for his constituent —

The English authorities are in conformity to this Chitty on bills 342 —

The billet was usurious — as appt. of 9 on 10 p.c. cent is stipulated to be paid —

Mr Duval for Respt —

Poth. Obl. 247. The Respts were legal parties to prosecute the action It is not proved that Engman did had an interest in the note — Mallard, merely says, that he is ~~was~~ to state what his interest is — 1 Chitty. 123 — & case on note — & see p. 342. —

Tenb. v. Wellings. 3 Term Reps. 538 — variance between statement in the reasons alleged & the case as to usury of is fatal —

2 Constitution 495 —

3 Campbell 467. Bruce v Hunter — p. 52.

As to rate of Exchange refers to 2 T. Reps. & charges of remitting money —

The money always pd at par of Dublin —

Mr Vallieres on same side Chitty on bills p. 342 a note payable to one person for benefit of another refers to p. 231 — & 1 Mauld & Sel. 723 —

Scott. v. Gray — in Montreal —

Mr. Plamondon in answer —

Laguerre v Painchaud } Mr Hamel for appellt

Quest. whether, an avocat, as avocat can

can maintain an action for his fees — appellt was employed as the Procur of the Respd. in the Quarter Sessions — Panchaud & Blanchet came to an agreement — & it was insisted upon by Panchaud that appls bill shd be paid —

The demand of Plff is detailed in the account filed, & ytr is proved by the admission of the Respts to this demand there was no exception or fin de non recevoir was not pleaded, but a simple denegation of the facts — yet the Court refused a right of action to appellt — The authorities refused by the Court to. 10 aquiseau. p. 66. — Edit 17 Nov. 1728 N. Denizt vo avocat — 1. Editt De la Lamoignon. p. 11 all these authorities are subsequent to 1663 — but see Boucher d'argis, hist. abregé de l'ordre des avocats — 1 Lecamus Lettres. p. 451 — who states when the new doctrine was established — Bouchenl. vo avocat — shews that this action was allowed —

The reason of refusing to the avocat any action for his fees must be on the principle that it is difficult to put an estimate on his labors — but here the Client acknowledged the amount due to the appellt

Mr Vallieres on same side — the Court of K. B has considered the honor of the Bar, but not their interest — the client might look for the gratuitous service of his patron in Rome — but the principles at present day are different — the Counsel in England receives his fees by the hands of the Attys — but

in England the Attys has no action for his fees — In the Parl. of Paris, it might be considered the honour of the profession not to institute actions for their fees, yet this arrangement among themselves did not extend to Deprive them of the right of action although it might expose the individual to the Censures of the Body —

Rep. vs avocat p. 796 — It may be the police of the Barreau not to bring an action, but if the action is brot the Judge must determine not according to the police of the Barreau, but according to the law of the land —

N. Denis. vo avocat au Conseil — their right to sue their actions limited to 5 years —

4. Jour. D' Aud. p. 646 —

2. Jousse. Just. Cr. p. 462. — N 42. —

Nouv. Denis. vo Honoraire — p. 681 & seq. where the Procureur General obt an arrêt in his favor — p. 686. —

But the promise here of Respt to pay appellt must be obligatory — Poth. obl. N 464. — the consideration of the promise was here valid —

M Simon of Counsel for the Respondt

There is no acknowledgment nor promise of the Respt. to pay the appellt the sum demanded — the pretended promise relied upon is an account filed by appellt — which contains fees & disbursements on a prosecution in the Ds Sessions for the appellt — but the charges are extravagant & unusual — and not allowed in the Court of Ds Sessions —

1 Bornier. on Ord. des dépens. — p. 292. art. 12 —

Id. Ord. des Epices & Vacations. p. 559. art. 29.

Vallieres in reply — If the Respt. contested the demand of appellt. extravagant, yet he ought to have offered what he considered to be due — The appellt by asking too much did not lose all his demand. —

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Thos. Lee appellt
Robt Dalkin. } Mr Duval for appellt

Appeal from Judt of the Court of K.B of 19 Feby 1825 —

Action by Testamentary Executor of late Cathe. Lee widow of Pre Chicon Duvert ar Deft for a sum of £482. 14. 2 due to succn of Testatrix on a deed of sale — The appellt as Exr. has a right to recover all debts due to the testatrix under art. 297. Coutt — & 2d Pigeau liv. 3. tit. 2. ch. 2. Sec. 2, § 2. art. 2. No 1. p. 391 —

The Court below had no right to order an Inventory & act of gestion — see Denyt vo Exer Testr this is due only to heirs or Creditors & not to a debtor — 2 Vol. Pigeau. — the parties interested only can demand an act from the Executor but not a debtor —

It is not clear what the Court of K. B. meant as to the assemblée de Parens — Nouv. Denisart vo Exon Testr — security cannot be required of the Exer for the execution of the will —

But it has been S. that Caution of appellt was expired — Nouv. Denisart vo Exon testr § 3. No 5 — that exon of testament may be prolonged beyond the year & day The Legatee having usufruct, may enjoy it on giving security —

Repr vo Usufruit p. 394
Encombe. vo Usufruit sec. 2 No 1 — . Domat. p. 100. col. 2. No 7. 28.

Mr

Chitty on bills edit. 1826 — p. 288. 323 — part. 343. —