Court of Appeals.

July 1826.

January 1827.

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Thursday 20 July 1826

Present

Ch. Just. Monk
Mr Hale
Mr Perceval
Mr Perrault
Mr Delery

Hart appellt
vs
Hammond dat Respt

Mr Andrew Stuart for the appellt

Mr Hart had a claim by mortgage on a lot of land — this land was sold by the Sheriff at the suit of the respondents as the property of the Defendants, — who were not in the possession, nor were the proprietors of the lot — to secure his rights the appellt made to annul the seizure, as being a Creditor of Nicholson, who was the proprietor thereof —

2 Pigeau 481 — 1 Pigeau 408 —

Mr Bowbrick for the Respondt — The appellt had no right to oppose the sale of the land, all he could claim was his opposn — afin de conserver — altho' the Creditor can exercise the rights of his Debtor when he neglects to do it, yet it must be consistent with the intent the Creditor has in the object —

Repse vo — Creame. p. 156. —

The

The appellant should have claimed to be subrogated in the rights of the Debts to enable him to come in and maintain his right — vide Repr subrogation
The conclusions of the Oppost are here double — that the Surgeon be declared null & the land be dis'hart from the Surgeon — qt. latter is admitting a legal surgeon to be made —

Mr Stuart in reply, it is an evident injury to the appellt that the Respt assumes a right to sell property illegally, on which the appellt has a claim — Were a subrogation specially to be prayed for was not necessary, it being a particular case when the rights of the Creditors were affected — as to the additional conclusion in opposit it is at most but surplusage —

Maynard appt
Gregoire. Respt
& Burgess —

Mr A. Stuart for appellt —

The appellt seized & sold a lot of land under Exón — an opposn was made by Gregoire, pm. oqué — who claimed the ~~lot~~ proceeds of the lot, as being her property, — the opposn was not authorized to make this oppn — She stated that the lot of land came to her by right of Succession of this she gave no evidence — She filed no contestation on the Judt of Distribution made up by the Partys The Judt of Distribn was made out on 16 Septr & the contestation opposd only on the 22d. but was rejected

rejected by the Court — yet the Court has acted upon it — The party also applied to be allowed to file further evidence in the Cause which was also rejected — The Report of a Practicien which was filed gave no new evidence in the Cause, but is a mere repetition of the matters contained in the Opposn Marriage Contract — The Court allowed the amending the Report of the Notary which was wrong, as this report was made in another Cause yt had been determined The party was in default to appear the homologn of the Propt de Distribution, and cannot have another day to repair the loss —

It does not appear that the oppost had renounced to the Community — this S. to be filed —

Mr Valliers pr Respondt — By the Mar. Contract of oppt she is common en biens — The clause d'ameublissement is stricti Juris. Rennes Instn Ch. 6 — Sec. 7. N. 16 — This therefore cannot be construed to biens futurs, but to such property only as the parties had at the time — Poth. Comté N. 304 — N. Denizt vo ameublissement. p. 525 — §. 4 — Société de tous biens applies only to the property the parties had at the time of the stipulation — Repse p. ~~525~~ 369 vo ameublissement to shew that if this property never fell into the Comté there was no necessity for a renonciation thereto to enable the oppt to claim it —

That appellt was acquainted with the oppn of the Respondt — on the contrary, he filed an oppn en sous ordre of the Respondts opposition — By the first

Supn —

Jugt of Distribn the Oppost was collocated for a certain sum for her reprises matrimoniales which was an object of the same nature as the present demand of the Oppost the Appellt even moved for the homologation of the Jugt of Distribn in this Case — It has been objected that the Oppt did not object to the hom. of the last Jugt of Distrn but altho' this was not done, it does not follow that the Court was bound to homologate a Jugt which was wrong, and contrary to the principle on which the prior Jugt had been given acknowledging the Oppost right —

Mr Stuart in reply — says, that he finds no Renonciation of the Oppost — The land here is seized as the property of Bugeron, and no ~~proof~~ evidence whatever that the property came to her by right of Succession — Separation de biens, are closely to be looked at. — The property here in question appears to have fallen into the Community & was so considered by the Oppost herself — ~~Repn~~ Denizt vo ameublissement — refers to Lebrun on Commte — liv. 1. ch. 5. sec. 1. dist. 2. No 11 — The Oppost has always treated this property as having fallen into the Commte & she cannot now change her position — There is no proof of the Oppost claim, and the Court cannot supply the proof ~~[illegible]~~. The Court rejected the application of Oppost to be allowed to adduce further evidence, but ordered the facts to be made

out

out under a different course — by the amending the Report of the Notary — but even this report when so altered could not be considered as making evidence of the appellt — it was only the title, which could constitute such proof — The oppos.n en sous-ordre, admits only that the principal opport — is indebted to the person making the Oppon en sous ordre, but never contemplates the nature of the principal opposition — The plea en oppn en sous-ordre is often a matter of prudence & may be made at all times —

Friday 21st July 1826.

There not being a sufficient number of Members present, no Court was held this day —

Saturday 22d. July 1826

Present
Ch. J. Montreal
M. Hale
M. Duval
M. Delery
M. Stewart.

St. Le Francois. appellt
& —
Nadeau — Respt

Mr Gugy for Appellt — action in the Court below by the Respondt — of the appellt. for a quantity of Cider said to be sold for Cider sold & delivered & for peare & sold — only question as to the Cron, there being proof that peare were pd for — The cider was sent by Nadeau to Le Francois to sell for him on Commission, and was not a sale made to Le Francois — But the Court has condemned the Appellt. upon the action of assumpsit, whereas their action should have been an action of act. of him as his Agent or Mandataire — & the evidence goes no further —

2 Bos. & Pull. 243.

Mr. Duval for the Respondt — This was a sale not a delivery on agency — the Cider was said to be at the risk of the appellt from the moment it was put on the wharf. The Respondt has given credit

credit for £38. 10— not specifically for the press, but on the demand generally.—

McNider. Appellt
vs
Fortier & ux— Respdts

Mr. A. Stuart for appellt— This was an action in the Court below of the Defendr now appellt— on an action of account, as Tutor to Plffs wife— Defdr was condemned to pay a large sum of money he never owed & never received, but merely for a neglect in the discharge of his duty—

The amount due to each of the Children as established by the account is admitted by all parties—

After the sale made of the property subject to the Dower, an applications ~~was~~ were made by the appellt being then an Opposr— in Com. with other Creditors of the said Sale— No. 36— & No. 43 but without success—

The Dower however was afterwards in part only upon Sale Hanna's property, that is £80 upon the home lot No 1. & the other Dower was attached upon the property of the husband the brother of the Minors on of they had no special Mortgage

The appellt— has used all necessary care and diligence about the affairs of his Minors— he cannot be made responsible for the Decr. of the Court in

regard

in regard of the Dower, which broke in upon the rights of the minors —

The Tutor here was bound only for *Lata culpa*
1 Bouy. p. 48. a gross neglect in respect of the recovery of monies due to their minors — altho' in general they are bound for *levis Culpa* as to other matters —
Voet. Pand. Lv. 27. p. 186 — — Merlé Jr. Min. p. 318 & 328 —

Refers to the conduct of the Major heirs and the Creditors, whose oppos^n were filed at same time with that of ~~Respondt~~ Appellt and Fortier one of Respondts joined in the oppos^n so made by Appellt for the minors —

On the marriage of the minor, her husband Fortier became a party to the suit — see N^os 36 & 44 — p. 35 . . N^o. 16. of record —

The Sentence of the Court of Justice ordering the sale of the property subject to the Dower, was a matter binding on the Tutor — The whole facts were before the Court, and the Tutor had no right to interfere to tell the Court what the Law was —

How a discharge was granted by the Respondents, and no complaint but as to the sufficiency of this discharge & it must hold good till suff^t allegation be made as to it — a restitution as it should have been demanded. —

M^r

Mr Guyon for Respondt The mismanagement of the Tutor arose on the Judgt directing that a partage should be made of the property belonging to the Minors, as he did not follow up their interests in this respect —

Hanna made an assignment of his moveables to Trustees for the benefit of his Creditors, to this act McNider became a party as a personal creditor of Hanna but he made no claim as Tutor for the Minors — here was a neglect of duty — 2nd. by Court — has the money been paid away by the Trustees to the exclusion of the Minors? — not pretended —

It would appear that the parties to the suit consented to the Judgt for sale of the property subject to the Dower — here it was the duty of the Tutor to have been a party so as to prevent the collusion —

Both parties agree that this Judgt was wrong & the Tutor should have exercised greater diligence to secure the rights of his Minors under the order for the partage — he should have come forward on the first seizure of the property & claim a suspension of the sale until the rights of his Minors were ascertained — he might have made an opposition afin de charge & kept the money in the hands of the purchaser —

The

The oppositions made by the Tutor were made merely a fin de conserver, and not to set aside the Just. given in regard of Mrs Hanna's Dower — these oppositions were made some years after the Just was given —

The reglt of the Tutor was gross — & not the care of a bon pere de famille, or such care as he took of his own affairs — witness the becoming a party to the deed of assignment as one of Mr Hanna's creditors — but the Tutor was bound not only for act of Commission, but of omission also —

The discharge in question, is merely an admission of the attorney that a certain balance of money was paid by the Tutor to Foster & wife — but not a discharge to the act of Tutelle, as pretended. —

Mr Stuart in reply — general reflections cannot be admitted — this case rests upon particular facts — these alone must be examined to determine the Case — The allegation that the Tutor paid more attention to his own interest than that of his Minors in the accedes to the deed of assignment by Hanna to his Creditors is without foundation, as this act is merely the giving a delay to Hanna of 15 years to pay his debt —

That no Individual was collocated prior to the Minors — except Saul, who has a privilege prior to theirs —

But there is no Just. of Distribution, but merely

merely proper de distribution — as Tutor gave Security and the money dont a rapporter —

The Tutor not bound to appeal — but the party Respond. might have done it as well, as he had become a party —

The Respondents have adopted the proceedings taken by the Tutor, by Intervening in the Cause & following up the remedy the Tutor had taken —

The Judgt. awarding the Power is not rendered by consent of the parties —

Rob. Dalkin appellt
v.
Gillam — Respt.

Mr Black for appellt — This case arises out of an order given by the appellt to the Respondt for the importation of some goods for him from England — this was done but the Respondt did not furnish the tradesmen's bills for the articles he so purchased, although he furnished an Invoice of the Goods he had so purchased — as an agent the Respt was bound to procure and produce to the appellt the Tradesmen's bills, which was the best proof of the transaction — The action in the

Court

Court below is that of the ordinary assumpsit on the original mandate between the parties, but to support this action the Respondt ought to have produced those documents, the Tradesmens bills, which constituted the proof of the demand — The appellt pleaded a non-assumpsit — and set up an Incidental demand in the nature of an action of account, upon the mandate given by the appellt in regard of the goods in question To comply with this demand, something more was necessary than the mere filing a paper as an account — but documents are necessary to be filed in support of it — of this there is no proof the only evidence at the Enquete being the value of the goods on which the Respondt trusted in support of his case — Refers to Contrat de Mandat. Nos 37. 46. 51 — 53. 69. 73. 80. 82 to shew the nature of a Mandat & the obligations accruing thereon — Paley. p. 46 — 35.

Mr Valliéres for the Respondt admits the liability of a mandataire to account — but here the account such as rendered by the Respondt was accepted by the appellt. The appellt furnished no monies, and when the goods came out & he saw them and the prices at which they were charged, he accepted them — and under all these circumstances he became bound to pay for them — refers to cases of Scolfield. v Leblond — & Scolfield. v Charet. —

Stuart in reply — Every person charged with a mandate to buy, must produce the original Invoice of the purchases made — this is reason, Justice, and consistent with common honesty — and according to the principles on which this transaction was founded, the Respondt — could not excuse himself from producing the original bills — and his sending an Invoice with the Goods, does not exonerate the party from the obligation, as it is presumed that the Invoice sent, is grounded on the orginal bills —

—

Wm Pentland
vs
Henry Vilet Wright } On writ of Error —

— Grigg for Plff in Error —

The process served on the Defendt was irregularly made — the objection taken to this was set aside, when he wanted to make an Inscription in Law after the return — this was also refused by the Court.

The other points complained of are, that in proceeding to trial, the appellant was refused the benefit of the evidence of Wit. to shew that the Plff in the Cause had a partner who was no party in the Cause — but this was refused by the Court and drove the appellt. to a trial without the benefit of the evidence in question —

Mr. Andw Stuart for the Respondt. The great objection taken here by the appellt was that the writ was not signed by the Prothy who he meant to say, that the copy served did not bear the signature of the Prothy — this being a kind of excepn to be strictly taken — the Court rejected it — as it was evident the original writ was signed — & also the mo. for Inscripn en faux —

This is a writ of Error, the law only & not the fact can be enquired into — the no cause of trial here, is a matter of discretion in the Inferior Court & from wch there can be no appeal — But allowing there were such appeal, there is no ground before this Court to allow the Exceptn

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Monday 24. July 1826.—

Prest

Ch. Justice Monk
Mr Perceval
Mr Hale
Mr Delery
Mr Stewart

Foretier
Lanaudiere

On mo. to grant writ of appeal for want of delayne —

Mr Vanfelson, writ sent out & notice given

of security, but none given that day, on this the Judges returned the writ not allowed — but the writ cannot be allowed till the security is given, all things remain as they were until the security is given — refus to Indicature act — There is no record before this Court and it cannot grant the motion —

Mr Valliers for Respt — The negligence of the party is evident, and the Respt must suffer in delay and in expense if this motion were not granted — The writ is suffte to give Jurisdiction —

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Laguerre vs Panchaud } Case ordered to be reheard owing to the absence of Mr Smith, and of Mr Stewart not having heard the Cause —

Mr Duhamel was heard for Appellt — no person appeared for the Respondt

—

Roi — vs Pozer — } Case in same situation. —

Mr Hamel for the appellant. — cites cas from Papon — Mornac. liv. 8. tit. 2 pa. 571 —

Mr Vanfelson for Respondt — submits the Case

Maitland Lal appellt
De la Gorgendiere Respts

M.r Black for appellt — action on charter party for freight resting chiefly on a clause of warranty in the charterparty — The Vessel went to Trinidad with a Cargo, and took in a return Cargo on the voyage she became leaky was carried into St Thomas, and was found the bottom was perforated by worms — Now this was not owing to the perils of the sea, but the inattention of the Defdts — The action is founded on the charterparty and charges the negligence and improper Conduct of Defdts — The Defendts pleaded 5 distinct & separate pleas — That by the act of Gods, and the state of the Climate & the navigation, the vessel became not fit to continue the voyage — The 2d plea may be considered as not within the present enquiry — The 3d plea — the part of the cargo having been sold by the Supercargo, this not the fact, as appears by the answer to the 23d Interrs proposed to Turnbull, the Master — The 4th. Plea — there is no proof of it — The first & 5th. grounds of defence are the only two to be considered — The 5th — That a Master cannot bind his Employers beyond the value of the vessel, qr. is stated to be £360 — but there is no law to this effect in force in this Province, the Ordr de la Marine was never enregistered in this Province as to its general extent, but only in regard of certain Courts of Justice to be held under this Law —

but the art. Ord. 2 Lt. 8. art. 2. referred to by Defts does not apply. 1 Valin 568 — The monies here were applied for the benefit of the vessel, & therefore the responsibility of the Owners does attach — Nor did the Owners abandon the vessel. —

The whole merits of this Case rest on the first plea — By. 7 Geo. 2. ch. 15. the damages limited to the value of the Ship. & freight — This law however applies only to the Kingdom of G. Br. & no Stat. applies to the Colonies without their being particularly mentioned but besides, the goods on board here were not embezzled or made away with by the Masters or Mariners without the knr. of the Owner, as one of the owners was present. The appellr can rest on the negligence of the parties Respts before the vessel left Quebec on her voyage to Trinidad, as she was not then Sea worthy —

1 Marsh. Ins. p. 156 — accidents & perils of sea are not to be presumed, but must be proved — refers to the opinion of Roccus — as strongly applicable — Nor is it to be presumed that the vessel was Seaworthy when she sailed — on the Contrary the evidence here shews that the sheathing of the vessel was absolutely necessary on such a Voyage — this was advised by Turnbull as the bottom of the vessel was old and the danger from the worms greater — which was verified by the event — The loss here set up, is the loss or injury sustained by the Ship, & not to the Cargo, was it competent to the owners of the vessel to lay hands on the Cargo and dispose of it to repair the Ship — Now the owners of the Cargo can have no remedy for this as their Insurance on the Cargo will not cover the injury accruing to the vessel — whereas the Owners of

1 Esp. N. P. Rp 445.
1 Wils. Reps. 281

of the vessel under their Insurance are entitled to recover from the Insurers — It is not law, that the Master can apply the Cargo for repairs of the vessel — the master ought first to endeavour to hypothecate the vessel — then the Cargo — & if he does not succeed to sell a part of the Cargo to effect the repairs — but in any Case the Owners must account to the — Shippers of the goods for such part of the goods so applied — 2. Marshal. 241. — the owners of the vessel are liable for all damages not excepted in the Charter party —

Mr Valliers for Respondt — This action is founded on the negligence of the Owners of the Ship — There is no value alledged of the goods stated in the declaration, the words pounds being omitted in several places, & cannot be supplied — In reciting the Charter party, the claims of ~~exception~~ exemption not being negatived, it must be presumed that the injury may have happened within some of the exceptions not negatived & for & Respdt are not liable —

The allegation that the vessel was not Sea worthy on the commencement of the voyage — but if the defect was equally apparent to both parties both parties were equally in fault — the want of Sheathing, if a defect, was equally manifest to both parties — if therefore this want of Sheathing was the Cause of the loss. it proceeded as much from the fault of the one party as the other —

The

the defects for wch the owner can be liable, are such as are not apparent—

Contents that worms, are a part of the dangers of the Sea — or rather of the navigation, from wch Respts are exonerated by the Ch. party—

Poth. Ch. partie. No 48— The master cannot bind wth part. Abbot. p. 185. & 119— La Forgendiere no party to the charter party, & could not be bound by act of his Copropriétor Boudreau, nor any action founded thereon— That the name of La Forgendiere is not even mentioned in the Charter party—

Abbot. 274— The owners not bound beyond the value of the Ship, nor the part owners beyond the part or share they hold— this general law of all commercial Countries — refers also to Stat. 7. Geo. 2. ch. 15— where same principle established— Now the Plffs. should have proved the value of the Vessel in order to entitle them to recover, this they have not done— Abbot. p. 256— the master alone bound when the vessel does not return— Id. 279 When the master is also a part owner of the vessel, this will not bind the other part owners for the personal misconduct of the master—

The action cannot be maintained without proving the ~~Sea~~ vessel was not Sea worthy — but this was apparent that the vessel was not sheathed to knowledge of both parties—

No value of the vessel — no value stated of goods No proof of return of Vessel.—

Mr Sheret for appellts The appellts have lost their property without any act or default of theirs, & it has been said to have been applied for the benefit of another & the appellts have had no share in the transaction of this is no recovery, the case is new in law—

As to the omission of the word, proved, advantage of it ought to have been taken by exception—

As to the question whether Lagorgendiere was bound by the act of Boudreau, in making the charter party— by the sale by Boudreau to Lagorgendiere, the latter constituted Boudreau the Capt & agent in all matters regarding the Vessel see No 60— in a word the agent of Lagorgendiere see also No 68— where the answers of Lagorgendiere on fact & articles, shews he had a know. of the Charter party in question— now does Lagorgendiere by his plea deny the Charterparty being his act, Valen 622 a Charter party made by the Master may be tantly acknowledged by, and binding on the owners according to Circumstances—

The goods shipped have not been delivered at the port of Quebec in the terms of the agreemt— and none of the exceptions of that agreement exonerate him The ship has arrived, but not the goods— the reason alledged that they were sold to repair the Ship— this was not within the power of the owner under the charter party— this however is a power growing out of the necessity of the Case, & that there were no other means for procuring the Ship & completing

the

the voyage, but by selling a part of the Cargo but this necessity not made out, nor does it appear that the sale & expenditure of goods was limited to the necessity of the Case — Defts thereon are liable.

But the Defts are also liable on the score of want of Sea worthiness — this s^d. to be apparent — but the owner of the Ship is not bound to ep. the Vessel the owner stipulates for the Seaworthiness of his vessel, he alone knows this fact & is bound first,

1. Dow's Rep. 32.

If worms are a danger of Navigation — the Insurers are liable — but the Contrary is established. see 1. Esp. N. P. Rep. 445 — but if it were a danger of navigation yet the Cargo remained safe, no loss on it —

It is laid down that to render a vessel seaworthy for a voyage of this kind, must be sheathed — the Seaworthiness depends on the nature of the voyage to be performed — the Defts Boudreau was apprized of the necessity of sheathing the Vessel before selling out, but he chose to run the risk saying he had not time —

See Ep. of Hon Gov. Forsyth to shew that the vessel had returned —

It has been contended that the owners are not bound beyond the value of the Ship — and as the Plffs have not proved the value of the Vessel, they can have no Just^t — But all the monies laid out are alledged to have been laid out on this Vessel the vessel therefore must be worth ~~the~~ at least the money so laid out on her, this value Plffs demand, but as to value, it is an exception in favor of the owner to shew value to get discharged of the damage —

Thos. Hunt v. J. Pepin dit Lachance

Action on a Contract to build a Wharf for the Appellant —

The Appellt. pleaded a peremptory excepn stating the insufficiency of the work —

There was a reference to Experts, who stated that the work was not sufficient — on 2d Report it appeared they found same value as if work had been suffi. The experts not sworn — nor

Ellis v. Deganard — work. The parties not heard before 2d Report made —

As the work was not done, the Pltff ought to have been dismissed till he had shewn the work done — at all events ought not to have recovered for what was not done. — —

Mr Lagueux for the Respondt. — The reference to experts was made at the request and by the consent of the appellt. — The objection now taken that the 2d Report ought not to have been ~~set aside~~ homologated

2 Lousse p. 352 Tit. des cantes sur les lieux. — as it was made without hearing the parties — but unless it had been so ordered, there was no necessity for the presence of the parties, so held by Practiciens. —

7 Poth. p. 51. art. 3 § 3. —

Serpillon. p. 356. 357 —

As to the objection that Experts were not sworn, the presumption is that they were, at all events the appellt cannot avail himself of the defect having moved for the homolagn of first report

Mr Stuart for the appellt in reply — The Appellt. contends that the 2 reports are contradictory,

and

and contrary to Justice and reason — When it appears that the work to be performed has not been completed, how can Experts allow the whole sum as if the whole Contract work had been done according to the Contract.—

It has been held in the Case of Ellice v Pinsonnault that Experts are witnesses, and must be sworn —

Tuesday 25th. July 1826. —

Pres.
Ch. Just. of Montreal
Mr Percival
Mr Hale
Mr Delery
Mr Stuart. —

Gugy
vs
Blacklock

On rule to shew Cause why an appeal should not be granted from an Interlocutory Just.

Mr Plamondon — Action for Seduction — To this there was a plea of exceptions en droit, or demurrer, and then the general issue. — The Court dismissed the Demurrer — from this Just. as an Interlocutory Just. the mo. is made for an appeal. —

Mr Gugy for the mv. contends that the Just. in question

question is one of those from which by law an appeal is allowed —

Boivert & Denechaud

On mo. for an appeal from an Interlocutory Judgt. —

Mr Plaisance for Plff — this is a Judgt on a demurrer, from wh there is no appeal — the matter may be rectified by the Court at any subsequent period —

Mr Valleris for mo. — the Interlocutor Judgt determines a great part of the Defendts right, which cannot be rectified by the same Court, as they will compel the party to act on this Judgt — That it is no cause, that the atty was not present to support his demurrer —

Patterson et al vs Bennet —

On Respdts mo. to shew Cause why appeal should not be dismissed, as they have complied with the Judgt rendered in the Court below —

Mr. A. Stuart for appellt The Respdt made no objection to the allowance of the writ of appeal — 2° The acquiescence of appellt not specifically stated — not until motion made — 3°. The Respdt agreed to the hearing this Cause on the Merits, as the Inscription is signed by the Respdts Counsel — This is a waiver of any right to annul the appeal —

That

That the party was entitled to have had a previous notice of this motion — according to 25. Rule of practice
The bill of Costs pd. by one of pltffs ought not to injure the rights of the other parties —

1820.
p. 357. 2d Vol
Cont. Rep.

Mr Guthrie for the Respondt — refers to case of Rivers vs Guy, where an appeal was dismissed under similar proceedings. — There is no waiver of this right by Respondt — there could be no objection made before the Surrogate Judge before whom the writ was allowed — the Respondt has reserved all his right in point of form as well as substance — The consent of the Respdt here is not a consent to the Inscription, but at most only an acknowledgment of having received notice of the Inscription

—

Levy
Hall — }

Mr Guthrie for Appellt — action brot for 2 promy Notes & also for an act for Medical attendce the first note payable to order 3 months after date, the 2d not payable to order, these 2 notes make £20 — the act £5. 10 — the Appellt was arrested on 21 ~~Last~~ 1st Nov 1825 — one month before the first note was payable & more than two months before the 2d was payable — It was specially pleaded that on this act the action could not be maintained — there is a variance between the 2d note given in evidence & that declared on, as it is declared as given payable to order — but is not payable to order — 1 Chitty on pleading 303. 4 — a variance in description of the Instrument — The Pltff besides declares the Indorsee of 2d Note — qd he could not do as, the note was not payable to order — The

There is no date to the Indorsement of the note The action was instituted before the notes were due and the Appellant was arrested before the right of action accrued.—

It being suggested by the Court whether this appeal will lie—

Mr Willan for Respondt— The sum in contest being here under £20 Sh, conceives the appeal will not lie—

On the merits. The question here is whether a Ca. can issue before a debt is due — here there was a debt existing— Poth. Obl. Nº 230- 234.— the case where a debt may be demanded before the expiration of the term— admits that no action could be maintained as to 2d note, from the variance alledged and the Court below gave no Judgt on it — as to the informality of the Indorsement, none was necessary beyond the Signature of the payee, he being a trader— the payt. here to payee after indorsement not binding on holder. Chitty on Bills. pp. 6—

Gregg. for Appt. cites case of McCrae & Carr. v— Mason, where action was dismissed in case of an action instituted before right accrued, where there was only the affidavit of the Plff to support the fact —

Patton. }
Adams }

Action on a bill of Exch. drawn by Adams on one McAlpine & indorsed to Patton, all parties being traders — the bill was accepted by McAlpine.—

On

On 28 Oct last bill drawn payable 4 M°. after date & accepted on same day & became due 3d March 1826 it was presented for payt — at the Common Good when M°Alpine was, & protest for non-payt — notice of this was given next day to Adams. — on 9t March 1826 the present action was instituted on the bill at Defrs instance and a Saisie-arrêt was used out at Defrs —

The Defd — states that the Note was given as a security to save Pltff to save him as having become bail for Defend — as set forth Tuesday —

The N°. 22. shows a kind of receipt for the above bill, which he agreed to give up upon his being released from the bail entered into for Defd — now the Defend — says, that the Pltff has not been called upon for his bail, nor has any Judt been given in the action on of the bail was so given — But still the action is open to Pltff, as the bill contains no condition, it was an authority for Pltff to receive the amount — and that since the action commenced ~~an action~~ Judt has been given at Adams & the Pltff obliged to pay a large sum of money for him, and the Defend. besides by his conduct has shewn that he will be exposed to damages unless he recover. Now as the Defend — has not released the Pltff from the Bail he gave, he was therefore entitled to bring his action —

Poth. N°440 — When the Debtor is in failing circumstances the Creditor is entitled to proceed at once even although the Debt be not due — Here the Defd. was in failing circumstances — the Pltff proceeded thereon — he has — alledged it and proved it — see Obl. N°234 —

Mr. Willan for the Respondent — There is a distinction between a Term and condition — here there was no debt

until

Poth. Chitty 470

until the condition shall be performed — the Plff had no action till then — Even had Plff rec^{d} the money from M^{c}Alpine before the Condition arrived, he would have been liable to refund it to Adams — Chitty on bills p. 470 — This action was commenced before any Suff was given aft^{r} Adams, so as to open a right of action to him — The action is not brought to indemnify Plff on any Specific grounds — In case no Suff had ever been given aft^{r} Adams, how could Plff pretend to maintain this action —

Poth. obl. № 218 — 234. — № 198 —

Gurgy in reply — The bill in the hands of the Plff was a security to him and entitled him to recover the money — he was warranted to have rec^{d} the money from M^{c}Alpine — a release to him by Defend^{t} was the only means to arrest his proceedings — The Creditor even under a Condition, yet in case of the failure of the Debtor, the Creditor may use all the means of contrainte, after conservation, & diligence as in case of a debt due on a Term. — see auths. in margin. —

Poth. obl. № 222.

Journ. tit. 34. № 4. ar. 4. p. 627

2 Bouy. 417. 18.

From 3 Rivers

Shirtliff v Whitney

M^{r} Bostwick for Appellant — This case depends upon an opposition made after conservation — The opposition is wholly without sufficient grounds to maintain it — no averment that the oppos^{t} had any mortgage on the property sold by the Sheriff on which he had a right of claim — nor that at the time any debt was due by Goodhue to

to Whitney – By the rules of Practice the opposition afin de conserver must contain all the grounds to maintain it like any demand in a declaration – here there is no premises &c can maintain the conclusion To this opposition the appellant filed a general demurrer and contestation, not being able to enter into any contest on facts imperfectly stated – 1. Comf. Bor. p. 402. tit. 1. art 17 – the hypotheque implies a charge on the thing seized here none is stated. Every Inst. will not give a right to come in as a mortgage –

There is no allegation that there is any balance due to the Opposant –

That even were the contestation of the Pltff over-ruled yet the proceedings in this case appear to have been irregular, no service of the necessary notice even made on the Pltff, nor has any thing been done on the contestation although the general demurrer has been disposed of – The notice was posed up in the Court House, whereas it ought to have been signified to each of the parties interested –

Mr Gugy for the Respondt contends that the claim of the Opposant is sufficiently set out, and entitles Defendt to the balance claimed by him – The court below by its Judgment has recognized the service of the notice to have been made according to the rules of Practice –

Bostwick in reply – The mo. for the hom. of the Report of Distrib. was not demanded by the Pltff – might care only the rules would have applied refused to by the Court in its Judt – but the mo. was made by the Opposte in which case the general rules apply, by which a particular service of notice is requisite to be made to every individual having a claim with Court – p. 120. Rg. Prac. The mo. of requires no previous notice p. 120

p. 161. Rg. Prac.

The writ of Expon was returned the 4th day of the Term whereupon the Pltff could not suppose any projet de Distribution would be drawn up till the next vacation according to the general rule — but the Expon was retd on 16th March — and projet de — distribution on the same day — The homologation was moved for on the 21st March, —

—

Labbée
vs
Banfield

Mr Gugy for the appellant — The appellt — a Shipbuilder, engaged the Respondt as the foreman of his yard for one year — action was brot by appellt for breach of contract by Respondt — The Respondt had however demanded his discharge which was granted to him, wherefore appellt contended that the action was ill founded —

Mr Primrose for Respondt — There was a notarial contract entered into between the parties — There is no specific avowal of the conduct of the Respondt — No legal proof of any discharge — mere idle language but no consent proved — It is in evidence that the Respondt worked with the appellt after the term of the quarrel between them, which was a waiver of all former misunderstands — The discharge was never given by ~~Respondt~~ appellt — to the Respondt — it is produced by him —

—

Wednesday 26th. July 1826.

Prest.

Ch. J. of Montreal
Mr Percival
Mr Hale
Mr Delery
Mr Stewart

Patterson
v
Bennett.

Mr A. Stuart for appellt. This was an action of revendication for some logs of wood belonging to Pltff found in possn of Respt. The plea to the action, is first plea was a Conditional plea. This was over-ruled as being too loose and uncertain. The next was a plea of not guilty. upon this evidence has been adduced, which the appellt contends is sufficient to maintain the action. The Cullers who up and the wood, identify it, particularly by one of the marks not quite obliterated. altho' all the others evidently had been defaced & put out. The Cullers bill No. 12. & the logs thus marked No 3 & 4 were also recognized at the time of the seizure by Mr Donell. the Teller of the timber to appellt. speaks to the marks being defaced. put his initials to the bill opposite to the Nos 3 & 4. -

indented on log w an Iron instrument

The Respondt. attempted to disprove the identity of the logs. 1st. That they were shorter than those described in the Cullers bill. 2d That the logs were

then

there stated to be merchantable, some of them decayed was spotted — The variations in taking the dimensions of logs of timber may occasion a differ in the amt. taken — It is admitted by Respt. that in regard of one these logs it was cut shorter — As to what is merchantable or not there is a variety of opinion among cutters — there are also various modes of Culling wch may occasion a difference in the opinion of what is merchantable or not —

As to the purchase made in Marché Ouverte, the plea in this respect has been over-ruled by the Court but where the sale was here made was not a marché ouverte, refers to authorities cited in his Case — Bent even in marché ouverte — the purchase must be bona fide, whereas the defacing the marks carried a suspicion along wt it & Mr. Munn had refused to purchase them logs on this account — The seller was a Sawyer, a dealer in these small — matters and so far suspicious. —

Poth. p. 652. N°50
Fr. Chpltrs.

Mr. Gregy for the Respondt — The action not within the Jurisdiction of the Court, as the damages claimed is estimated at £1 — and that is the only sum on wch the Court below was called on to adjudge Poth. Louage. N°. 266. The purchase in open market is a safe title to the purchaser — It is in evidence that the logs were in the poss.n of Morris O'Hara a dealer for at least 15 days ~~for~~ prior to the Sale on the open beach, where similar kinds of timber are generally sold — refers to testimony of Haddens

Phillips

Phillips and one M'Lean a Cutter, whose evidence is admitted to stand as that of 2 Wits. The timber is generally marked by different owners as it passes through their hands — and the original Cutter of the timber may dispose of a variety of timber to different persons having the same mark — so that mark alone can constitute nothing certain — and in case of any uncertainty in the evidence the case of the Respondt is favorable, as being Causa possidentis. There is a difference in the measurement of the logs seized and that claimed by the Appellt as appears by the measurement taken — the timber claimed was stated to be merchantable whereas of that seized one of the logs was Damaged —

The plea of sale in marché Ouvert was dismissed as being no more than the general issue, and in consequence the Respondt was allowed to give evidence of it. —

Stuart in reply — the Cutters in measuring the log of — was a little damaged, made allowance for the damaged part which shews the reason of the difference between that seized and that claimed. — The Respondt does not produce a bill of parcels or a receipt for the money paid — but this may be made up, and therefore a bona fide sale must be paid. There is no proof of any sale whatever to Respondt the vendor is stated to have offered it at 1/3 of cost which cost the appellt a fortnight before 2/4 for it it was of a particularly large dimension & proportionably valuable —

Newton. vs Nau

On mo. for Respd to shew Cause why the writ of appeal should not be allowed reasons as on the Oppos^{n} from which the appeal is made is above £20 Stg — this not being an appeal from the original action, but from the opposition — Rolles de Droit. Coll 1742. p. 142. & 310. The opposite party has already had a similar advantage in this very Case —

Mr Vanfelson — The Judges have returned that the Cause appealed from is in a matter under £20 Stg, & is quite sufft to reject the present application —

Mr Willan in reply — the Oppos^{n} return of the Judges refers to the original action, but says nothing of the oppn

Chandler vs Follensbee

The Attys Genl for Appellt This action was for planks & boards alledged by Respondt to have been sold to the Appellt — The predecessor of appellt had given a right to one Carmel to build a saw mill on his seigny — Carmel assigned to Alexander, & the latter to Chaperon, who made a kind of Partnership wt the Respondt in the business of the saw mill — Of the boards sawed there, Chaperon & his predecessors were to pay a certain quantity of these boards to the Seignior for his rent on this mill — And since 1822 an account was opened at this Mill stating the different quantities of wood furnished from the

Mill — The Respondt was the person working the Mill, and all orders respecting the timber were sent to him — & here the wood sent to the ~~Respt~~ appt by the Respondt are charged as a sale —

There is no proof in the Court below of a sale and delivery by the Respdt to Appellt of any given value — and any sale that could have been made must have been in the name of the partnership — The evidence adduced consists partly in letters from Chandler to Follenbee, but from them no specific evidence of sale can be found — nor of any specific kind of wood, nor the price of the article — The statement given in by Chandler of wood received, is in the same state. no price or value is stated — But there is an admission of the Appellants Attys in the Court below qt it is said admits the quantity and value of the planks and boards the appellt received from the Respondt — but there is nothing in this admission to show that these planks & boards are those referred to in the deeds or have any connection with this action. —

But allowing the value and delivery of the timber in question, it is in evidence that the planks & boards in question were the joint property of Chaperon and the Respondt — there had been no division made of it and any sale of the property must be partnership property. Poth. Con. de Soc. c. V. 1.

But in defence of the Cause, it was shewn in evidence in the Court below, that the boards & timber Respondt to, were delivered to the appellt as coming to him by the orders of Chaperon to the Respondt — see the answers of Mr Forgo on answer to Interrog as a witness

and by it it appears that the Respt. wanted to him to make an acknowledgmt of the timber as sold by Reporter to the appellt. See answers to Interrogatories proposed to Respondt.

Mr. A Stuart for Respondt. The only enquiry had in the Court below, & yt can be looked to in this Court is whether this was a delivery by Resp to appellt. was on act. of Chaperon or on his own act. The Defendts plea in the Court below meets this impression. does not deny having had the planks & boards in question, as he undertakes to shew, he had them from Chaperon but not from Respondt. The very admission of the Counsel for the appellt. shews the same thing. Taking the price and delivery ascertained. the fact is clear it was not on act. of Chaperon such delivery was made, but on his own act. refers to the written orders of Mr. Chandler, in one of yt. the circumstance of an op being stated shews a personal transaction between the parties wholly unconnected with Chaperon. There was no partnership between Respondt. and Chaperon. the paper produced was merely a lease, and the rent to be paid was the portion of logs the Chaperon was to receive. the mill was in the possn of Respt. under his sole management & Chaperon not known to any interest in it.

The evidence of Trigg, is loose & uncertain, it regards merely a loose conversation between him and the Respondt. No. 19. is an order of Chaperon

to

to Follensbee for a certain quantity of plank & boards to Chandler in Ap. 1824, prior to qt. Follensbee had delivered 600 boards & planks on acct of Chaperon & there is an acknowledg. of 5 Sept 1822 of 504 more having been delivd. in same manner—

But there is no proof by Tuff that what passed between him Follensbee respected the particular plank in question — whereas we have Mr Chandler's direct orders for these planks in his own name—

The Atty Genl. in answer— The answers of Chandler in his pleading or otherwise cannot be divided— The Respondt. was bound to prove a delivery & value of the timber to Chandler, before Chandler could be called upon for any evidence in his defence— here there is no proof of value — the admission referred to as proving the value is expressed in that way as not to apply to the boards & planks in question. The Contract between Chaperon & Follensbee is evidently a contract of partnership and not Lease and here the Case must fail — Follensbee was merely the acting partner and the order given to him by Chandler might well be called, your wood,—

Dumoulin & Laframboise & Ux } Mr Vallieres for the Appellt—

The appellant was appointed Exor of the last Will & Test. of the late Mr Cressé he had an administration of property under it, and on 16 Jany 1821 he rendered an acct to the Children and

and heirs of the late Mr Crossé, by which Appt was a Creditor of the Estate, appeared on 30 Augt 1823 he rendered a subsequent detailed account, which was discussed and finally approved of by the widow & heirs Crossé & an acquittance given to Mr Dumoulin — The same day the act was rendered a transport was made of 3 Constituts belonging to the heirs in consideration of a sum of £410. 8. 4 per Nos 11. 24. 25. 26 — The heirs not satisfied w this transfer afterwards sued the persons bound for the Constituts to pay Dumoulin, who in consequence prosecuted the heirs, either to cause the rent to be paid or to return the money he had paid for it — The reasons for alledging the nullity of the transfer to Dumoulin is taken from the writ as by that, the produce of the Assignats of Nicolet was to be laid out by Mr Dumoulin in Constituts — but even in this Case the heirs were bound either to continue the rent or refund the money paid for it — The Court below however deprived the D. both of the rents and of the money he paid for the purchase of the Constituts — Yet there was no proof in that Court that this money was the proceeds of the Assignats of Nicolet — It was ad. that this money sd to be paid by D. of £410 — was not money paid, but was a pretended Delegeat de Compte qt. he claimed — but of this there is no proof — On the Incidental demand — The heirs say, that D — has rd the revenue of the realty to the

amount

amount of £ 343. 10. 9, and taking advantage of their ignorance & incapacity had induced them to part with a part of the Succession of which he has disposed, — but this is too indefinite, nothing certain to which Mr D. can answer, nor upon wh a Judgt can be given — it is however said, that of all this he had never rendered any account, and concludes. 1st That all the acts passed between them and Mr D. may be declared null, and the D. be condemned to render a new account — To this D. answers he had rendered his acts wh had been approved of and that he had given up to the parties the documents relative thereto — of the fact of act being rendered there is proof in the Cause and of their being approved by the parties — the last act of 30 Augt 1823. by which Mr D. acknowledges to have rec. monies from Mr Baby for the sale of the Seigniory of Nicolet & of sundry other monies as therein stated — and by which he accounts for a small more even than the heirs pretend to charge him — Yet without any proof of irregularity bad faith or other Cause the Court condemn the D. to render another account without setting aside the accounts already rendered, which still subsist as good and valid — The act of Executor may be rendered to Minors by act before a Notary Old Denizt Vo Compte. p. 579. Nos 18. 19. & 20. — see also N. Denizt Vo Compte. No 3. §. 2. — Idem Vo Executeurs Testamentaires. p. 233. §. 6. No 6. —

In every case where a party wishes to take advantage of an act as being charged as null, there should be a demand & conclusion to declare it null. Arrest & Jugt Renon de Papon. liv. 16. Ch. 3. — arrt 11. p. 936 —

M. A. Stuart for Respondts

The late Mr Cressé directed by his will, that the interest of the monies placed on the Seigniory rebd to Baby should be pd to his children by way of aliment, and the principal to his grand children he appointed Mr Dumoulin his Executor, with powers to manage the property during his life - under this authority Mr D. came into possession of all the moveable effects of the Cressé, of which Mr D. never rendered any account, no Inventory of the Estate & Succession he came into - the Nr 47 states that these things amounted to a certain sum, but there is no formal account of these moveables such as the law requires - there is a partial act Nr 47, but it is not that act. req^d - Nr 13. of 30 Aug 1823. to this last act. Mad^e Cressé Respondt is no party - as to the ratification made by the heirs Dumoulin Cressé - The Nrs 8 & Nr 14 shew the monies of the Constituts arose from the Nivelt Estate - and the rents payable to him in his capacity of Executor - but this has been released to him as he says by the heirs -

In the act called by Mr D. a discharge by the heirs, it appears that there some things regarding which he had not accounted & in regard of which monies might come to his hands - And it appears that Mr D. accepts of an assignment of two of the Constituts from the widow Cressé - & it is said an act. of so much money paid to her -

Then

There is at the same time another act passed by the widow acknowledges to have received a sum of 300 or £400 - & renders herself accountable instead of Mr D. for that money & this transaction as affects right of minors is an absolute nullity 1 Mesle 145 this we hold in regard of all strangers - but Dumoulin was the agent of the Minors, the Executor of their father will - 8. Brown's Reps p. 42 - Their Constituts were the property of the minors & could not be purchased by the Exer - who was a special agent in this case acting under a special trust, and it was in breach of this trust that he took an Assignment from the widow - this property was to maintain the children & the Grand Children of Mr Grassé - as alimony, which cannot be assigned N. Denz. Vo Defenses d'aliment - Id. Vo Alimens §. No 8. - Id. Vo Donation §3. No 1 - 1. Four. Cod. p. 110 - Mesle p. 145 - In the Incidental demand there is a conclusion that these transfers be set aside as null - That no absolute or clear act was ever rendered by Mr D - the act No 14 purports to be an act of the monies arising from the sale of Arnold - which it appears there were other objects to be accounted for, "sans préjudice cependant" but none of these accounts contain any general discharge to Mr D - the discharge he produces, is merely as to the Solvency of the persons in whose hands he had invested the sum of £6078.44 then in his hands - it cannot be extended to a general discharge - The monies rec'd by Dumoulin

pres

to 30 Augt. 1823 is £7443.10.9, so that there is here a balance of about £1300 of which he has not yet rendered account; and more especially as it does not appear that any regular Inventory had ever been made by him of the goods & effects of the Estate, nor was any Inventory made of the deeds, papers & documents to be delivered up at the time —

The act. in regard of Minors where there is any cause of Suspicion, — here the mere taking the assignat is of itself suspicious — may a fraud —

As to the demand of Mr D. to restore the principal of the Constitut sold to him or to fair valoir the rents is demanded as if the act were valid — but the Court has considered by its Judgt. that at the time this transaction took place Mr D. owed money to the Minors, and there was him to render an acct of all those monies so as to bring this matter into the account — The Plea to the Incidental demand is very insufficient in manner & matter & does not answer sufficiently the demand —

Mr Valliers in reply — the payms to the Minors the value of what he received from them cannot be considered as doing them any injustice, & still less when Mr D. offers to restore what he so obt from them on their rendering the money be paid — If there was an error in passing this transfer of Constituts, yet there is no proof of fraud, as Mr D. neither has nor can derive any benefit from the transaction —

after

After all the acts which have been passed between the parties, it seems to be without any reason the present incidental demand has been made - the parties are in poss^n of all the papers, all the accounts and all they have shewn in regard of them is mere allegation, but no proof - tho' these acts are not such they were passed in good faith to do what they submit they carry faith of the transactions they contain - the Appellt has no act to render, nor any means to render any, as he has divested himself of all the documents which are now in the possession of the Respondents -

There is no proof that the Constituts purchased by Mr Dumoulin arose out of the means of the Estate of Cressé - but if this were the case, yet there is no fraud, Mr D. got nothing for which he did not give valuable consideration - & is willing to get back what he gave -

In the act. № 13 will be found an act rendered of the 2 sums of Respts contest have not been accounted for by Mr C -

The piece № 14 is decisive of the Case, as it leaves nothing to be accounted for except such monies as might arise from the domaine sold to Mr Hubert - and by № 27 - this money was paid a Constitution de Rente to the family Cressé themselves -

Thursday 27.th & Friday 28.th July.

The Court met for hearing appeals from the Court of K. B. at Montreal.—

Saturday 29.th July 1826—

Prest.

Ch. J. of Montreal.—
Mr Perceval.—
Mr Hale—
Mr Delery
Mr Stewart.—

Guillm Roi
&
George Poser

The Judgt of the Court of K. B. as to the principal demand reversed ~~with Costs~~ on the principle that the titles set out in the declaration of the Respondent in the Court below did not establish any right of Servitude on the appellants property — and the allowing the Respt to file titles at the Enquête to support his claim under any new right not so set out in the declr was irregular as it cut the appellant out of the means of answering thereto — recourse reserved — The Judgt on Incidental demand confirmed — the statement in declaration, "divers ouvertures", being too vague and indefinite to establish any certain Judgment upon it — recourse reserved. — Each party paying their own Costs. —

Lagueux & Painchaud

Judgt of the Court of K. B. reversed with Costs to the appellant, and Judgt in his favor for £19. 19. 10—

M: Hart v. Hammond Dal

Judgt of the Court of K. B. for the District of Three Rivers reversed w Costs— Plea of general demurrer pleaded by Respt overruled, & parties admitted to proof—

Mayrand apt v. Bergeron & Gregoire. Respts

Judgt of the Court of K. B. for the District of Three Rivers reversed with Costs, there being no sufficient evidence before the Court to support the claim of Gregoire, which had been adjudged to her thereby.—

Ls Le Francois v. Nadeau

Judgt of Court of K. B. confirmed w Costs— The Court here were of opinion that altho' the Order in question had been sent by Nadeau to Le Francois for Sale on Commission, yet Nadeau was not on this acct bound to institute an action of acct against him altho' he might have done so— the demand contd in the Declr for monies had & recd was sufficient to compel the appellt to

to shew that the monies he had so received were the proceeds of the agency under which he acted and to give in that Statement which could have exonerated him from the demand - he does not thinks fit to do so but rests his defence on a bare non-assumpsit - this is withholding from the Respondt that justice to wt he was entitled and gives room to presume that the appellte having received the money but declines to account - and therefore liable under this Count in the debt to pay what he is proved to have received. -

Paley. p. & Agent. p. 38. adv. Hunter v Welsh. 1 Starkie N.P.C. 224. -

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Rob: Dalkin
Gillam - }

On the Incidental Demand
Judgt. of the Court of K. B reversed
w Costs - and Judgt. that Respondt
do account within a certain time - the Court
considered that the appellt. by receiving the goods
with the Invoice was not a waiver of his right to
obtain an account from Vouchers in support of it
the acct. received was a mere merchants account for
goods sold - this was not the character of the account
which the Respondt owed to the Appellant - for the
Respondt could not change the contract he had
entered into w the Appellant to buy goods for him

and

and to constitute himself the merchant selling the goods — this might be a fraud on the appellt and could not deprive him of his right of action unless under a knowledge of all the circumstances he had consented to it — See Paley Pr. & Agent. p. 35. 36. Notes (p) (q) q —

Pentland v Wright — Judgt confirmed — The question of whether the trial should proceed or not was matter of discretion in the Court, in regard of which this Court will never interfere —

Hunt v Pepin & Lachance — Judgt reversed —

The Report of the arbitrators was not regular nor sufficient to ground the Judgt of the Court of K. B.

1. It did not appear that the Experts had been sworn — a thing of necessity —

2. The Report was so contradictory that it ought to have been set aside —

3. The Experts proceeded without notice to the parties, which was requisite in all cases — V. Denizt. vo Experts. §. 3. No. 2. —

Shirtliffe v Whitney — Judgt of K. B. of Three Rivers confirmed w Costs — The Court were of opinion that the Opposition set out sufficient facts to authorise the Court to maintain it

—

Levy v Hall — The Court dismissed this appeal as improvidently sued out by the Appellt the Judgt rendered being for a sum of only £15 — in which this Court has no Jurisdiction

—

Patton v Adams — Judgt confirmed. — the grounds upon which this action could have been maintained were not set out in the declaration; namely the failing circumstances & conduct of Respt

—

Labbé v Banfield — Judgt Confirmed. —

—

Patterson dal v Bennett — Judgt reversed — the Court considered the evidence of the property of Appellt to be sufficiently made out —

Chandler vs. Folensbee } Judgt. reversed —

Gingras. vs. Blaiklock. } action for Seduction —
Defenses en droit, dismissed by K. B.
Mo. for an appeal as from an Interlt. Judgt
Dismissed. —

Derechaud vs. Boisvert-dit } Similar Case. —

Foretier vs. DeLanaudière } Mo. to quash writ of appeal for want of diligence. —
Writ dated & Issued out 6 June 1826. - Retble 21st of same month. —
Service of notice by appellt. on 10th June that security would be given on 14th — " —
No security given or offered on 14th —
Writ dis allowed by the Judge & return thereof to this Court, dated 20 July. —
Motion granted —

White & al vs Cundale — } Motion granted —

Newton vs Nau — } Motion rejected — The opposition made by the Defend^t on the Execution sued out against him, cannot be maintained on the principle that the matter in contest exceeds £20 Sh — as this increase had accrued only in consequence of the Costs which were an accessory and must follow the original demand. —

Court of Appeals.—

Wednesday 10th January 1827.

Pres.t
The Ch. Justice of Montreal
Mr Perceval
Mr Hale
Mr Delery
Mr Stewart.—

There was no business before the Court this day.—

Thursday 11th Jan.y

Pres.t
As above.

Gagnon.—
& Curé & Marguilliers de St Roch.—

Mr Vallieres for the appellants—
The appell.ts title gives him all the quantity of land specified in his decla the Church possesses in the rear of appell.ts & the appellts being about to rent a part, was prosecuted by the Church by an action in nature of action possessoire, but the conclusions are petitory, and they have by their action cumulated the possessoire with the petitoire. Gagnon pleads his possession — to this a new answer & title is

set

is set up by the Church. The poss.n centenaire is a title of property. Jon this the action is petitoire. - At the enquete Gagnon has proved his having cut the hay on the spot in question for many years. the poss.n of the Church consists in the poss.n of a part only by pieces put up by the habitants to fasten their horses to - this could only be a servitude on the land of Gagnon, who has enjoyed the poss.n by reaping the fruits - there is no title for this servitude. the Church shews no title to this part of the land - he who reaps the fruits must be considered as the proprietor The fabrique de St Roch & the habitants of the parish of St Roch are very different things here the poss.n of the habitants was individually each for himself for the pieces he put up - the Appell.t could have no action of the fabrique for the acts of the habitants in trespassing thus on his property the action wd have been dismissed - The fabrique therefore has proved no possession, if any possession has been proved it is by the different habitants who put up these pieces - Poth. poss.n Nº 47. 4. 9. 56 & 76 to shew we can acquire poss.n only by ourselves & those proposed by us - Id. Nº 90 - to shew the kind of poss.n here of the fabrique could be considered only a servitude on land of appell.t - Arrets de Papon - liv. 14. tit. 1. arret 6.e - p. 833. arret 6.e & 4 to this point of servitude only - Because the habitants grass on the beach in front of appell.t land, it is

no

& Denizart. v.o possession Nº 5. - Poth. Prop. 266.

no proof of the property of the rest of the land — Denizart vo Domaine de la Couronne — The public have a right to pass on the grève & no presumption of right can arise from this as to the rest of land —

But supposing the habitants, or the fabrique by the means of the habitants had acquired a possession & right of property under it, yet this ought not to have been extended beyond what was so actually possessed and not to the whole lot of ground in contest —

The titles produced are strongly of the right of the fabrique — refus to No. 27. — the appellants title from the Seigneur — the title of the fabrique is the plan No. 11 — both are produced by the fabrique — this title is subsequent by 12 years to that of the appellant — and according to the terms of it the land granted is on S. W. side & in front running up the river, whereas it is contended it ought to have a totally different direction and upon this they claim the totality of the front of the land of the appellant, which he contends ought not to be allowed without title — The Inst. ap appellt — condemns him to abandon the possn which the fabrique says it is in the possession, and this in an action de complainte, which goes to recover the possn of that of the party had lost — The action is ap Louis Gagnon & Pre Gagnon is condemned —

M Hamel for the Respdt The action originally was en complainte and the conclusions are accordingly it is indeed true that the fabrique alleges a possession of several years, as every proprietor may do, but this does not cumulate the possn with the jus proprii — the fabrique concludes to be maintained in its possession, & not that Defendt be condemned to deliver up the possession — That the fabrique extends to the whole parish and the persons proposed to the care of it are like the Tutors of a

Mineur

Poth.

minor, and possn in this respect may be maintained either by the Minor or the Tutor, and so the possn of the fabrique may be maintained by the Marg. every parishioner —

The action was embarassed by the plea of Gagnon who pleaded the possn contrain under a title to this the fabrique answered, this was a chose jugée under a former Jugt in an action de bornage between the same parties — Denisart. vo Bornage. §. 2. No 3 — any person except a former may institute this action Gagnon's action en bornage was dismissed on the ground that the parties were not neighbours — The title of Gagnon bounds his property by the Rivière — & the title of the Church gives the rest of the point to the Church that the possession of the Church was at least equal to that of Gagnon in the point contested & much better —

2 Pigeau p. 12.

The Jugt in this case is right according to the conclusions see 2 Pigeau. p. 12 & Repse —

Repse v. complaints p. 29o —

The Attys Genl of counsel for the Respondt The action in the Court below was a complainte en cas de saisine a nouvelleté or action retinendæ possessionis. — The Plffs state they were in possn a certain number of years in 9t they were disturbed by Gagnon — and they conclude that they be maintained in the possn & the Defdt enjoined not to disturb them in future — The Defdt denies the possn of plffs sets up a possn in himself, & by a special answer of the Plffs they state the action of bornage instituted by Gagnon for the very property & the Jugt thereon 5 April 1824 — the trespasses complained of are subsequent in May 1825, so that Gagnon could have in the meantime have acquired no right of the fabrique — Refers to the proceedings on the action en bornage which are filed — the appellants declaration in that action comprehends the very point of land in question

of

of which he claimed the property and possession — to this action the fabrique put in a special plea in which they set out their title &c. included the point in question and under which they had possessed. — On this plea issue was taken by Gagnon, as well as to the title as to the possession, so that the Judgt rendered met the Case completely, — So that up to the date of that Judgt the question of possession and property must be considered as settled

But looking at the case as if no such Judgt had been given, in questions of contested possession, that which is accompanied with title ought to prevail — The act of the parishioners here must be considered as for their benefit of the parish at large in favor of the Fabrique which holds only for the benefit of the parishioners — The title of Gagnon confirms the right of the Church — &c. has been produced by the Church, was not shewn by Gagnon himself — and if Gagnon's title were to be interpreted in the way he wishes, it would extend to carry away a part of the buildings of the Church. —

That although the Judgt is not so accurately drawn as it might, the Defendt is described as Gagnon — whereas the name ought to have been Louis Gagnon — but it being certain as to the person, it is merely a clerical blunder — The Defendt is condemned to abandon the possession of the land to the Church. This is substantially right, although not accurate in point of expression as to the Case & conclusions in question — had the Judgt maintained the Church in the possession. —

Mr Valliers in reply — The Judgt in the action en bornage can refer only to title as to property, but not as to possession in regard of which the Judgt cannot be considered as having determined anything — The Fabrique can acquire for the parish, but the individuals of the parish do not acquire for the fabrique — the King acquires & holds for his people but the individuals do not thus acquire for the King — The interpretation of Gagnon's title must comprehend the land in question, &c. is bounded in front by the Fleuve and by the Ruisseau —

Macpherson
vs
Fulford

Mr Plamondon for the appellant
This appeal founded on a grammatical distinction between aurait & a —

Mr Prinrose for the Respondent — The law requires that a plff should set out in his declaration the time, place, persons & circumstances, which has not been done here — the Plff sets out his case as in a recital, but not of a positive demand — the State des huissiers is no this case an authority —

Mr Plamondon for appellt. cites ~~Rapr~~ Garand des Ordonnes. where the expression aurait is used for a

—

Garant dit
vs
Morin —

Mr Bedard for appellant. —
The action was instituted to obtain the rescision of two acts for causes of Lesion, being a marriage Contract of the Sisters of the appellants, & the deed of sale of the lot of land in question to the Defend. Morin — The marriage Contract stipulates that the real Estate of Marie anne Thimothe Garant her propres shall be put into the Community between her and her husband Regis Lacombe — The Defr did not plead, but called in his Security — the Court after hearing the parties dismissed the action — The facts of the case show the right of the appellts —

The

The alienation here was not made with the necessary formality, the avis de parens & the authority of the Judge and therefor null — This authority is required by the Civil & Roman law &c. has been adopted by our Laws — refers to the authorities cited —

Mr. Stuart of counsel for Appellt — states the facts of the Case — Morin allowed cause to proceed by default, but the Court were of opinion that in consequence of the clause of Don mutuel in the marriage Contract the Pltffs could not maintain their action, as under that Don the Defendt might have come to the property of the lands. — Here the lesion is manifest — the marriage Contract was — indiscretly made & without authority — The heirs of the Minor are entitled to the action of restitution — not doubted — There was no equivalent given to the Minor here for the property which she put into the Community — and in this case where the restitution en entier is claimed the whole marriage Contract must be set aside, & thereby the Don Mutuel as well as the other parts — the Contract cannot be good in part & bad in part, but must be destroyed in toto, as well the Don mutuel as the rest — 2. Here the Defendt holds under the sale from Lacombe as head of the Community, he does not plead a title under the Don Mutuel — 3. Nor could it be pleaded, for when the sale took place the Minor was alive. — 4. There is no evidence that this was ever insinuated — 5. The Don Mutuel takes place only on the Conquets of the Community & the Don Mutuel is only a usufructuary interest, & gives no right in the property —

Domat. liv. 4 tit. 6. §. 10. of 1st Domat

Mr Plaumondon for the Respondt — The conclusions of the declaration claims that the whole contract of marriage should be set aside as the Defendt who is a Stranger, who has no interest as to a great part of it, while the husband

husband is not in the Cause — The marriage Contract
1 Jour. Palais 927 is not null on acct of the ameublissement — cits Jour.
925. 926. — du Palais — There is a fatal variation between
the m.a. Contract produced & that stated in Declar
one being at S. Thomas the other at St Franc — which
are two different acts — The Court could not accept
the Contract produced not being that declared on —
There is no evidence of the filiation by certificate
of marriage & baptism of the heirs claiming — not
certified by the Curate, at least not said so —

The ameublissement is legal — the by the Contract
produced the minor was assisted by her mother &
brother — this brother cannot now come against that act —
2 Bretton. 746. v° Don Mutuel — the heirs in this case
cited, has consented — That Bazile Garant was a
party & cannot take advantage of this act — if he is not the
same person, one of the heirs is wanting & the action
cannot be maintained — The demand of rescision
of a part of a Contract cannot be construed to apply
Denizt. 8e Conv: to any other part — here the lesion of the ameublissement
Mut. §. 2 No. 12, only is complained of but not the don mutuel — cits
obs. No. 5. authority to shew that the clause only complained of
can be annulled & not the whole contract — In this
contract there is a Don. Mutuel, which must still
subsist — cits Denizt. Conv. Mut. §. 2. No 1 — 2d
v° Donation par Contrat de Mar. §. 1. No. 4 —
2 Arrets Loucet. p. 124. No. 6. —

Mr Stuart in reply. to authorities cited — that
from the Journal du Palais — is merely the opinion
of Counsel who argued the Cause & not the judgt of the
Court — The authority from Loucet — this is merely

the

the case of a Don. Mutuel in q.t there is no alienation of the property, but the ameublissement is an alienation. The authorities from New Denz.t contain uncontroverted truths — the Contract here is not impugned on the ground of immorality, but on account of interest, the lesion is here complained of — As to the cases where partial parts of Contracts have been set aside, it may be allowed in certain cases where the interests of Minors require it, but Courts of Justice as the protectors of Minors must — determine this how far they will or will not set aside the whole — Where all the formalities req.d by law of there is lesion, relief will still be granted — but where the formalities have not been compl.d with as here the relief must be granted — here all the parties knew of the Minority of the woman, & a precaution stipulated as to ratification of it on the Majority — the husband here was a beggar — had all the formalities of alienation been observed, the Court could not refuse relief —

If the clause d' ameublissement be set aside, how with the don Mutuel operate on the lands in question it would not apply, as the property was not any longer a conquet of the Community —

As to the variance of the Marriage Contract now alledged, it is of no avail, it is of same date, whether passed at S.t Thomas or S.t Jrs. is of little value — the Depos.ts have noticed it on the Superior Court — but in substantial Justice the Just given in the Cause would bar any other action — The certificates of the acts of Baptism & marriage, are sufficient — it is not requisite that the Curate should add his capacity in which he certifies — & besides the parties are in possession of the Etat of heirs — As to the authority cited from

Bretton

Britton to shew that Bazile Garant cannot claim of his own act in this Case does not apply, as it a Case of a Dower Barred, but not an alienation as in this Case — When the Marriage Contract was made Bazile Garant had no personal interest in the thing, in the alienation of the land — his subsequent right arose out of circumstances not then foreseen — but if this were fatal as to Bazile — it will not apply as to the other parties —

Friday 12th Janv. 1827.

Present

The Ch. Just. of Montreal
Mr Richardson —
Mr Perceval
Mr Hale
Mr Stewart

Hart
Grieve
} on appellants mo. for hearing ex parte no answer having been given in by Respt

Mr Bostwick for Respt. moves to be permitted to type his reasons & cases & to a hearing on short days — no notice is requisite of this motion in this Case as it is founded on reasons appearing on the Record 1st the original inscription of the Case was irregular

the

the Cases not having been filed before the Inscription made under 21st Rule —

2. The reasons of appeal are altogether insufficient and cannot be admitted before the Court —

Mr Sol. Genl for the appellant — the Respt is in default, and he now shews no reasons why he did not enter an appearance, the appellt not bound to take any notice of him, and he can proceed without taking any notice of Respt — The Counsel must be first in the Cause before he can make any motion —

—

Jno Jones Jr
Wm White } mo. for Judt — on appellts mo. of 12 Jany last — for an appeal to the King in Council —

Mr Plamondon — this motion was granted in Jany. last. on diligence being used to give the necessary security, qt has not been done —

158. Mr Stuart for mo. states that on 20 Jany. last
234. an appeal was granted, but no security given — the record was remitted — but a new mo. for same hearing within the year was made in Jany last — & an Certiorari ordered to
244. issue to bring up the record — Court suspended giving any Judt. until the record was before it —

Sourdain
vs
Miville —

Mr Blanchard for the appellant — The question here is respecting the privilege of builders in general — The lands of Tetu were seized by the Sheriff, and an opposition being the 3d of his claim for work & labor as a builder on part of the property seized, for which a privilege is claimed — The Prothe. made a projet de distribution allowing to the oppst the full amount of his claim this projet was contested by Miville, and after hearing, an Interlocutor was made in June 1825 by the Court directs an act to be filed & the appellt to be heard on oath — afterwards Tetu came in and contested the claim & opposition of Sourdain — on this a reference was made to Experts — who made a detailed report, wh was confirmed by the Court and he was ordered to be collocated for the amount but not for the privilege claimed by him, but subsequent to the claims of the other opposts —

Dvn. Inst. quot. liv. 2. ch. 4 — establishing the different distinctions of Debts. Rep. vo Hypothèque p. 661 — §. 8. The builder has a privilege and hypoth. Repos. co. rub. §. 7. p. 657. — Id. vo privilege. p. 690 —. Dic. Droit. privilege de maçon qui a bâti une maison — 2 Bourg. 657 — Art. 8. No 94. 95 — and this without devis or marché par cent & it being certain that the work has been done — & the demand followed up in time — Dispasses des Contrats p. 3. Art. 2. Des Ep. sec 7. & 8 — p. 702. ou 4th — 1 Pigeau 810. 683 — D'Hericourt

p.

p. 207. Sec. 1. §. 7 — Poth. des Hyp. qui produit la loi saisie, reps to the bailees mortgage — Basnage Ch. 13. p. 282. 291. 292. edit. 1702 — Chavondes. Reps. 79e — In 1 Journal du Palais. p. 922 — a case where money was lent to be invested in buildings — and a privilege given to the lender —

There is no prescription pleaded to the right of the s. Jourdain, but generally denied — and when the right of action subsists, the privilege of appellt as an accessary thereto must also subsist — there is no prescription to the privilege as separate from the right of action —

2 Bourg. p. 464. Tit. 7. dist. 4. Nos 86-87. 88. & 89. — are conclusive authorities in this Case — to shew that the acknowledge of the Debtor keeps alive & even revives the privilege agt the Debtor & all third persons —

Basnage p. 290. ch. 14 — where after the year & day the debtor acknowledged the debt, even after the seizure made, & the privilege allowed

Mr Hamel for Miville the Respondt —

The claim here set up was opposed by Miville on the ground that Jourdain had no privilege for a créance qu'he had not got liquidated before the dest, & consequently had no mortgage for it — on the opinion of Tutor, experts were named to ascertain the demand without a voice heard, as Miville being a party, or having been required to name any Expert —

Reps. v. Hyp. §. 8. p. 661. 2e — to shew that those who have a mortgage are preferred to persons having a simple chirographary privilege — Poth. Pand. Lv. 20 tit. 4. art. 4 — No 26. & No 30 — There is indeed a difference between

† Respondt seemed to rely much on this authority as the principal in the Case

between the personal right, and the right on the thing itself — he who has a mortgage has a right on the thing but without hypoth. there is only a personal claim — pere Loudain allowed his claim to lie over for years which deceived the other Creditors who presumed he was pd Ladraud their money in consequence —

There is no French law which allows the privilege in favor of Masons, if the appellt. relies on the Roman it is of him, as those have a mortgage must pass before him —

Basnage ch. 13. in fine — Vinnius lw. 2. ch. 63. de partitionibus Juris — hypotheque is preferd to all others — Charondas. Rep. 79. —

Poth. 453. Tr. d'Hypoth. when claim is not made within the year, the privilege must be founded on special contract, so as to affect the right of third persons, — although it may be good as the Debtor — The action of the mason ought to be instituted within the year, wch is reasonable in regard of the right of third persons — and if they cannot afterwards bring their action, how can they have a privilege — it falls with the action — Lest otherwise Creditors of good faith would be exposed to much fraud & injustice — N. Denz. Vo Hypoth. §. 1 No. 1. — Had the property been alienated & in the hands of another person, Loudain could not have an action hypothecaire of such Tiers Detenteur

Loisel. Liv. H. Hypotheque p. 754. 755 — Loiseau des Offices — No 28. to 36 — p. 193 —

The

The person who lends his money to build, must observe certain formalities to be entitled to his privilege — 1 Despeisses p. 51. 52. & Basnage p. 320 —

D'Antoine Rules de Dr Cw. 196 — in explanation of what privilege is —

Mr Strcart in reply. The question here is whether the Appellt had not a tacit privileged mortgage on the property sold — One great reason in favor of the privilege here claimed, is to encourage the encrease of buildings and in the public improvement — the previous creditors are not injured by it, his security may be encreased by the work of the builder — In cases where money is lent to be employed in repairs greater precaution is necessary otherwise frauds might be committed, but this is a case more distant from that here claimed — and the greater part of the authorities cited by the Respt apply to this case of money lent to build or repair — particularly Loret, Loisean —

2 Bouy. 597 — Note on 154. § — shews distinction between the lender of money & the workman who lays out the money,

Lacombe. vo Subrogation. No 16 — & all the books shew that the builder has a tacit privileged mortgage for all the improvements made by him — The business of Devis & marché being required, applies only to loans of money for building —

The Respt ought to have pleaded the prescription if he meant to avail himself of it, it cannot be supplied by the Court — the Appellts claim stands clear, ascertained & not paid for — The Respt alledges only that the claim has been paid — is exhavagant — is not proved — and does not carry a Mortgage — Now the claim has been ascertained, and it is evident the money has not been paid

can

Can the privilege be refused where the facts are apparent — The lapse of time can give rise only to a possibility of fraud — but no fraud is here alledged — The acknowledgt. of the debt revives the privilege even after a lapse of time — see 2 Bourg. Civil —

Bourg. Ch. 4. tit. 4 sect. 3. Dist. 4 — N-86

Stewart vs Stilson —

Mr Valliers for appellt — The action was embornage in the Court below — The Defendt consented to a boundary being run according to the demand & a surveyor was named for this purpose — a report & plan was made, by wh it appears the appellt has wants a part of his land, as well as the Defendt — & the question now is whether the Pltff ought to have his title completed the Defendt pleaded his possn. & prescription for ten years — As to the prescription the Defdt. had renounced it by agreeing to the running a line of division and the Defendt has also pleaded that the Pltff was minor all the time of the possession, which destroys his plea — the plea also alledges that the Pltff was present, wh is a requisite of the prescription, but of this he has made no proof, and as Defdt alledged this he was bound to prove — Pothier. tit. 12. art. 34 — The prescription of 10 years does not hold in the case of bornage — 2. Poth. p. 621. Fr. de Soc. 2 Vol. Henrys. 541 — same point — The plea of prescription being set aside, the titles must then be considered The lands of the parties were sold the same day by the Sheriff. the Pltff's title first being No 9 & the Defendts

being

being № 10— the first contains an upset quantity the latter a certain quantity or thereabout. —

3 N. Denis v° Bornage §3. № 4

The lines of the Pltff's land are not straight, & he has a less width at the rear as at the front of his land— the presumption in law is that the same width should hold throughout — there is no mention made of fences in the sale—

N. Denis. V° Bornage §. 4. № 2 The action of bornage cannot be prescribed against— The Court below have erred in not giving to the pltff that boundary which in their opinion divided the property of the parties —

Mr Vanfelson for the Respd— The appellt calls this an action en bornage, but it is not so— we can see this from the definition laid down by Fer. Dic. v° Action en bornage— Rep^re co. V° The conclusions of the plaintiff's declaration says nothing about boundaries it is rather an action pétitoire — founded on an alledged encroachment of the Defend^r— The Defend^r considering the action en bornage agreed to boundaries being placed according to titles, fortunately this consent was rejected by the Pltff— The Defend^r afterwards pleaded the general issue, and also the plea of prescription the plea was put in after the filing of the report of the Surveyor, whose operation had been made under the consent of the parties — The line A.F. on the plan is the line of the Defend^r adheres to, and the line parallel to it— by wh he has less than his title gives him— This line it is proved has subsisted for 24 years— The plea of prescription here is sufficient without the words non agens & privilegies — & as to the presence of the party it must be presumed —

Mr St Real in reply — The action here is an action en bornage en the third terms — the plea insufficient —

Saturday 13th Janv. 1827.

Prest.

Ch. J. of Montreal
M. Richardson
Mr Perrault
Mr Delery
Mr Stuart

The King
Edwards — } no. In an appeal to King in Council —

Hart
" } Debarats } Mr Bedard for the appellant

Action of account was brot in the Inferr Court on an agreement between the parties — the Court dismissed the action on hearing on law — The contract between the parties was respecting a partnership in certain Townships, the proceeds & profits thereof The Pltff alledged a sufficient obligation on the part of the Defendant to hold him to account — but it was said for Defend — that the Contract was between three persons, and only two of them are in the Cause — but the third person Saml Montmorency

Montmoulin was no partner of the pltff. nor did the Pltff contract with him — nor did he give any authority to contract for him, nor did he ever ratify what had been done in his name — Poth. Ob. No 75 —

A thing may be in common among many without their being in partnership. —

That had it even been the Case that a third person was interested as a partner, he might be put into the Cause on motion, but the action cannot be dismissed — either by laws of England or of this Country — on authorities cited in Case —

Mr Stuart of Counsel for the appellant — the declr states an action pro socio & for an account, no partition of the township is demanded, only that Pltff be put in possn of 1/3 of the township lands

There is no law of this Country by which an action of this kind can be dismissed even if one of the parties to the Contract is left out —

It was not necessary that Mom. should have been made a party to this Suit — the Defendr says there is a third person — but he does not shew it, nor prove it & if the Pltff shd bring an action vs. three, it may happen that Mom. has no interest in the action —

But if Mom. were a partner & left out — when is the law that the action is to be dismissed on that account? In the Civil law Courts in England, the writ abates — but in the Court of Chancery, the party left out is put in on motion.

Mr Plamondon for the Respondt — In examining the contract as set out in the declaration, it is evident there were three persons who were to be partners, three different interests, & three different portions & shares of division — how can the property of Mom. be divided if he is not in the Cause —

When the pltff here declares himself not only the partner but the procureur of the two other partners, he admits the partnership & shews he knew who the parties were & states them here himself, and chuses to leave out one of them. —

Besides in one of the pleadings the Defend^r pointed out Mr Montmolin as one of the partners & called on the pltff to call him into the Cause —

That it is not stated in the decl^n that the object of the declaration was ever attained in suing out the Patent of the Townships — The Pltff does not allege that he had himself obtained or taken steps to obtain any such Patents —

N° 135

161. 2. 3

There is only one case where a single partner can be sued, & it is where he holds the whole gains of the partnership — Poth. Soc. N° 135. — This action can be instituted only after the partnership has been dissolved — Id N° 161. 2. 3 — here it is not so that it is dissolved — indeed it is not yet begun, as it was to begin w^th the obtaining the Patents. —

It is not said that Montmolin is dead or insolvent the cannot be called on to pay 2/3^rs of the loss, as demanded —

Mr Stuart in reply — The Repn has acknowledged the principle that where all the partners are not in the suit, the absent partner may be called in —

Monday 15th Janv. 1827

Pust
Ch. J. Monreal
Mr Richardson
Mr Perrault
Mr Delery
Mr Stewart

Masters appt
v
Millar Respt } On

Hunter appt
v
Bishopdal Respt } Mr Pemrose for appellt

action of assumpsit in the Inferr Court for goods sold by the ~~Defendt~~ Respt to appellt a bill of particulars was filed with respts letters in support of their demand — with the act there were affidavits taken before the Lt Mayor — Parties agreed to submit the matters in dispute to arbitration under special conditions — 1st That arbitrators should decide upon evidence only on oath — 2d That the arbitrators should determine specifically upon every one of the objections submitted to their consideration. —

It appears here that Arbitrators heard no wit. on oath of either party — the only evidence for Plff was the affidavits taken before the Lt Mayor of London

and papers therein referred to — it appears that the goods in question R. & B. had been seized on suspicion in the Port of London, & Appellt is charged with the whole value of those goods which never arrived in Quebec — That the affidavits before the Deputy is not evidence taken on oath — by 5 Geo. 2. ch. 7. there is a condition in the stat. that the addition & place of residence of the party examined shall be added in the affidavit taken — here the place of abode of the wits is not stated — and he has sworn to facts he could not know, and to what he was not true — The objection was taken before the arbitrators that they ought not to be received as being inadmissible —

The arbitrators disallow the amt. of the goods seized in the port of London from Respts demand but they do not say, what the amount of the goods was — Now it is said by Respts themselves that the whole of the goods in R. & B. were forfeited but the arbitrators in another part limit them goods to be coppers only — which makes a very serious difference in the sum awarded —

The Defendt objected before the arbitrators —
1st. That the Defendt is charged with goods he has not ordered — The arbitrators say, they were not ordered but had been received by Defdt — This will not bind the Defdt — and the words in the award of certain goods, is too indefinite —
3d. The Defdt charged with goods never shipped — the arbitrators say, no — But by the Wits examd on

part

part of Defts. shew the goods were not shipped nor the fees paid,

The bill of lading of the Copper, is unto order, not to the order of the Defendt—

Custom House fees are not payable by law, & yet are here allowed, to a great extent—

4. The Plffs say they have allowed so much to Defts on the goods consigned — but this is not binding on Defts—

8. The Defendt charged with Insurance — this Plffs had no right to do as to Defts goods without his order — as is a proof that the goods so insured were the Plffs. own, then own consignments — but there is no proof of any insurance have been made —

The arbitrators are in contradiction in what they say in regard of the coppers in the 9 & 18 objections —

12. obj. has not been decided upon at all by the arbitrators they only say, they do not admit the objection, but they have not decided upon it —

18. Is material — the arbitrators here say, they disallow it but this is not deciding upon it, but they here let out what the goods forfeited were —

The Attys Genl of counsel for the appellt—

The whole grounds of appeal arise on the award of the Arbitrators —

1. Award void, as made before exp. of time allowed for the investigation of the case —

2. Arbitrators have not pursued the terms of reference

3. Have not decided on all points submitted.

4. Award unfair & unreasonable & unjust

5 Uncertain

6. Part of sum awarded arose from smuggling

transactions & in part of illegal fees —

1568 The French law admits an appeal from the award of arbitrators under an ordre of 1560 & Rep^re v^o arbitrage. 552. & v^o Compromis. p. 314. 315 —

2 Jousse Ad. Ord. 715 — Domat. p. 2. on arbitration & their jurisdiction — That this Court therefore possesses the power of trying the validity of an award of arbitrators, whereas the Court of K. B. has not that power according to Law —

The award here is void on the face of it — The arbitrators were to admit all evidence & hears of the parties ~~to~~ on or before the 1st June last — The parties therefore had a day on all the 1st June to offer anything to the arbitrators — The award was made & filed on 1st June, before that time expired — Rep^re v^o Arbitrage p. 545 — 2. Jousse. 698 —

No time fixed for making the award by the reference — cites Domat — N. Denis. v^o Compromis

2 Arbitrators have not pursued the terms of the reference Domat — p471. Ph. on evidence — sealing alone not sufficient where the submission was that signing & sealing required — Here the whole writs were to be sworn before one of the Judges of this Court that could be heard by the Arbitrators — & no other parole evidence could be admitted by them — & thereby the affidavits taken before the D^r Mayor were excluded — & even without this condition the affidavit before the D^r Mayor was not legal & could not have been received as testimony, as not being made conformable to the requirements of the Statute —

Palmer's Rep

3 The arbitrators have not decided on all the points referred to them —

Edit. 1777

cits. Domat. p. 150. 152. & 2d part. p. 186 — 708. p. 2 Louis — Kidd on awards. p. 91 — The 12th Objn made by Defdt has not been decided upon by the Arbitrs where they say, that they do not admit the objection, but do not decide upon it —

4 The award on the face of it is unreasonable & unjust — refers to the 10th Objn — The charge of goods to Defendt for goods which were seized and forfeited — Here the award of the Arbitrators is not clear nor specific unless we refer to the bill of particulars contd in Plffs act. R. N. what the amount of the goods seized and forfeited which they allow to Defendt and the words used here by the arbitrators in strict language is that they make allowance to the Defendt by condemning him in another sum. — Under the Plffs could have no action for any part of the forfeited goods, whether they Defendt. owned them or not, & it became necessary for Defdt to have a distinct & clear decision & statement on this objection

442 — 218 —

5 The award is uncertain & this has been shewn —

6 Demand founded on smuggling transactions & this shewn & founded on the principles of right under the authorities cited

Mr Stuart for Respondt

The power of the arbitrators, as arbitrateurs, was to decide finally — they are charged with partiality & misconduct, but of this there is no proof — What is the power of these men — they are not arbitres, but arbitrateurs or amiables compositeurs — Judges chosen by the parties, bound by no other rules than those of good conscience —

1 As to the objection that the award was made too soon, viz on 1st June — no objection of this kind was taken before the Arbitrators but the arbitrators were to adjudge within the term of 2 June

according to the rule of presumes – so that after the 1st June, the arbitrators had no power + the parties were heard before that day no further demand made for other hearg – That is no law to render null the proceedings of the arbitrators altho' no day fixed for the report –

ob. 2 The evidence taken before Dr Mayor not legal – If this the Defts. had communication – as to what to be ex. this could not apply to the documentary evidence in the cause – The writ ex. before the Dr Mayor is stated to be the Clerk of the Plff. which is suffe compliance w[ith] the Statute –

The objections drawn up by the Defendr are so general, that no specific decision could be given upon them – such as a charge that the Plffs had made for goods not shipped, not received, sent without orders & the like, but no specific amount, no specific time – nor any certainty whatever –

The findings of the arbitrators on all the points are as full & precise as to meet the objections – As to the 10th & 12th objections – necessary to correct an error of statement by the appellts counsel that all the goods in the acct R. & B. were disputed – the fact is, that only a part was disputed, & there is no admission to the contrary + the difference allowed between the sum allowed to Plffs & that demanded on acct. of these goods is about £107. 11. 11, which shews the justice done to Defdr in this respect –

The answer of the arbitrators to the 12th obj[n] must considered as sufficient and as adjudging

on

on it.—

As to the objection that the award is unreasonable unjust— this Court cannot enquire into this, nor exercise any Jurisdiction beyond what was exercised by the Superior Court — otherwise a reference to arbitration would be of no avail — How can this Court enquire into the various statements, facts and circumstances which were before the Arbitrators — There is no proof of partiality before this Court in the arbitrators, and because this award does not please the Defdt can this be taken as a ground of such partiality—

There is no evidence before the Court of any smuggling transaction or shipment of goods prohibited by law this court cannot entertain the enquiry now —

Mr Primrose in reply— The rule of reference cannot be so construed that the award was to be made on the first June, as the Defendt had all that day to be heard before the arbitrators—

It is admitted by the statement laid before the arbitrators by the Plffs that the whole of the goods in the Invoices A & B. were forfeited and the loss to be supported by the Plffs— and the arbitrators allow by their award only a part of the goods as forfeited,— The Plffs. however contend the part not to be as stated by the appellants —

—

Morin & Fraser + Fraser appe

Mr Plamondon for the appellant—

The action in the Court below was en retrait conventionnel, on a deed of cession of the right of Alexr Fraser the Seigneur on the

the land sold by Deant to the Appellant.—
The Court ought to have dismissed this action on the
defenses au fond en droit, & the Court reserved
to determine upon what the final Judgment—
It is said that the right of retrait belonged to
Alex^r Fraser under a deed of Concession, but not
said that it was before a Notary, now the ordre
of Fr^e I. de 1535. ch. 19. art. 5— 1 Vol. ord. de Neron.
reserves this— 2^d It is not d^t that the Droit de
Retrait was not granted to the d^t Fraser & his Successors
on this head cites Loys. in case of Lauvix. v. Turgeon
3^d Not said, that the act was destroyed by force
majeure. Poth. Ob. N^o 815—
4. Not alleged when this Concession was made—
2 Carpen 252. 2. Dumesse. 227. no prescription could be alleged
5. The Concession cannot maintain this action
it belongs to the Ceddant alone—

The words of the Lease do not bear the interpretation
of conferring to the Plff a pouvoir this right ought to have
demanded in the name of the Seigneur—
Bourt. ~~230~~ 231. 2 — Henrion de Pansey — 414 —
Poquet 467—

The intention here was to grant by Lease only what
were the inherent rights of the Seigniory & not the personal
rights of the Seignior—

But in all the demands of retrait that the Retrayant
make sufficient tender— here none is made— Poth.
Obl. N^o 578 — Rap^t v^o offres. 368— This is an acte
Judiciaire, & can be made by a huissier— It is true
it has here been made by a Notary, but this is not

a

a person who has authority to make it — but even were this sufficient. there has been no Consignation
1 Pigeau 435 — Laroche. vo Consignation. Dens. eo vo

Here the pltff did not prove that there had ever existed a deed of Concession with droit de retrait

The Interrogatories on Com. Rog. not allowed by the Judges according to rules of practice —

The admission of the Defendant cannot make proof of the appellant — there is no proof that the deed of Concession was destroyed —

The Deed of the Sheriff to the appellt. is produced but this is not a legal proof, his certificate as to the acts done by him cannot be admitted in evidence

But were this admitted, it does not prove the fact of a sale subject to the retrait, it refers to a paper not before the Court —

Mr Valliers for the Respondt — The appellant purchased the land in question subject to the retrait — The Pltff in the Court below had no need of any other deed to maintain his demand — the objections raised by the Defts. on this
1 Vol. N. Dig. p. 185 exception in droit are of no avail, and acts are enforced in regard of realty, as may be seen by A. Denis. vo Acte Notarié. 1 Vol. p. 185; although not made before a notary so also the many Deffts given in this Country upon billets de Concession — No presumptions can be allowed of the acknowledgments of the party, of Defdt here makes by the deed given him by the Sheriff —

The Pltff has a right to maintain this action in his own name for the retrait — Repse vt 536. vo Droits Seigneuriaux to shew this is a Seigneurial right — as an accidentelle
ed. p. 545 — Argentré. 774. of this right the Seigr

can

can make a lease. 2 Poth. p. 196 – the rebate is a part of fruits Civils – 1 Poth. No ~~894~~ 568 Rebate. – appendix. p. 894 –

N. Denz. vo Droit Seig^r. § 2. No 4 – every stip^n in favor of a Seig^r. is reputed Seigniorial –

Rep^re vo Faculté de Rachat. p. 267–8 this is a right qt. passes to the heirs. the faculté de rachat, & he who acquires for himself is presumed to acquire for his heirs also –

as to offres – Poth. Ret. No 273. offres not necessary for the right to institute the action.

Poth. des Ret. p. 887. 8 – lays down the same doctrine – in No 550 – excepts one case – but even then it is transmissible – see also No 546. – 7 Rep^re p. 268. & Old Denz^t. Ret. Conv. No. 4 – ~~Nouv. Denz^t~~ Old Den. Faculté de Rachat. No. 20 –

The certificate of Sheriff is valid – vide Stat. 41 Geo. 3. ch. 7. sec. 15 – the Sheriff authorised to pass Deeds & as such made a public officer, N. Denz^t. vo Expedition. No 1. § 1. the Sheriff is here the depositaire & passed the acte – Id. vo Acte autentique. §1. No. 1 –

The aveu makes proof agt the vassal Denz^t vo Aveu & Denombrement. § 9. No 2. – Argentré – Papon. 599. art. 1819 –

The Decret is equivalent to a Judg^t –

cont^d. to hear Mr Plamondon in reply to morrow

Tuesday 16' Jan'y

Present
As before —

Richardson, Perceval, De Lery & Stewart

~~Morin~~
~~Jones~~
v
~~Waight~~ } On appell's mo. that record be remitted as no diligence has been to obtain an appeal to the King in Council —
White
v
White }

Mr Stuart for Respond't says, that there has been diligence done —

Morin
v
Fraser & al } Mr Plamondon in reply. —

Deniz. v° acte Notarié § 6 N° 2 — says there must be a minute of every such acte

2 arrets d'Augeard p. 659 — un Contract de vente en brevet was not valid — It was in this case necessary that there should appear an act of Concession passed before a Notary —

The action de Retrait ought to be instituted in the name of the Seignior — this is a Seig'l right. N. 569. Poth. du retrait lays it so down —

The offers cannot be dispensed with. —

The certificate of the Sheriff is no proof here — the Sheriff is merely a Seller & ought to go before a Notary & execute a deed in the usual manner —

The acknowledgment of the Censitaire not founded on a sufficient title is null — the Debtor cannot consent any burthen he chuses on his property — This acknowledg't —

acknowledgt. would not be binding as a titre nouvel cites. Demurt. vs. Titre Nouvel.—

That even if the Pltff were founded it is impossible that the Judgt. can subsist — as there is a condemn. from to pay the fruits & revenues from the day of the offers, although it is contended that none were necessary.—

Mr Hale, here took Mr Perceval's place who retired.—

Moffat.— vs Robertson }

Mr Black for Appellt.—

One Seguin was confined in Gaol. His creditors agreed to take his obligation payable in 10 years provided he gave security not to leave the Province — The Security was given — the property of the Security was sold, & the Pltff put in his oppon. altho' before the expiration of the ten years, & on the principle that the Debtor had left the Province & gone to France, but had returned before the expiration of the Ten years.—

The Court must consider the intention of the parties — here the undertaking was absolute and the fugitive or departure of the debtor

The Security may become bound for the personal act of Debtor. 395. 6. Poth. Obl— also No. 204.—

Mr Primrose for the Respondt.—

The Caution here was not caution for the debt but only that the debtor could not leave the Province now the Caution cannot be bound for more than the principal — the Creditor ~~had~~ held the Debtor in Gaol

Gaol under a Ca. Sa — & the Cr having let him out he could not replace him there — The construction of the contract here was, if at the time the debt becomes due the debtor was found in the Province — The opposition here is not made en ordre to preserve the right of the Creditor, but absolute as if he had a right to receive the money —

The contract here is null — as the Caution binds — himself for what the original debtor was not bound it was greater than the original debtor had contracted — The debtor never did agree to this — it is a caution for the fact d' caution — for if the principal was not bound

Rep^t. 765. 6. V° Caution.

The cautionnement must be of the same nature as the original obligation —

Dom^t. T. 1 N° 8. V° cautionnement

According to the rules of construction of contracts, the party must have an interest appreciable a Jurs d' argent en it to render it binding —

This case has been to assimilated to the Sheriff having the body under mesne process — he may let him go. provided he can produce him at return of writ — or per Sp. Bail on a Ca. Sa — if previous to an act. of the Sheriff for an escape the debtor be retaken, it is a good defence to the action —

Bac. Ab: V° Escape.

Mr Blake in reply — The contract here was founded on the right of the Creditor to detain the debtor in Gaol — & the obligation of the Security was to give liberty to the debtor and a Security for the Creditor —

The Caution here could bind himself for the personal act of the Debtor & can be performed by the Debtor alone —

Poth. Ob. 1. 396

Wednesday 17th Jany 1827.

Prest.

Ch. J. Montreal
Mr Richardson
Mr Hale.
Mr. Delery
Mr Stewart

Masters
vs
Millar

On motion that the writ of appeal be dismissed not having been returned in time —

Mr Thompson the intention of the party is to proceed — the proths is the person agt. whom the party ought to proceed. —

Perceval
vs
Patterson et al

The Attr Genl. for the appellant
The action for the recovery of a small sum, the excess of duty pd. to appellt on importation of goods at the Port of Quebec — By an act of 1813. 53 Geo. 3. ch. 11. a duty on all goods imported £2-10. on every £100 worth of goods — This act was amended by another Stat. 55. Geo. 3. ch. 2. which abolished the distinction between resident & non-resident Importers, & settled a mode of estimate of goods where there

ch. 2. 55.

was

was no Invoice — In the Invoices in this case, the Defendt insisted upon the duty upon the long price that is not deducting the discount on the Invoice — & insisted on the entry being made accordingly — this mode of estimating the duty was resisted by the Respts and a protest made by them of the Collector — & thereupon the duty was paid as required by the appellt —

This action was instituted on a wrong principle — & damages granted without proof

1. The action below was not for a ~~wrongful~~ malicious non-feasance of duty but an action on the Case to recover back money alledged to have been pd under compulsion to a public Officer —

2. The action was not sustainable under the demurrer filed in K. B —

3. Not on the general issue —

4 — If at all sustainable, it could be for the £2. 11. 3 the excess pd beyond the amt of legal duty — & in regard of the excess awarded the Judgt must be reversed —

1st Actions on case, see 1 Chitty. 122 — are principally confined to actions arising ex delicto — p. 133. — a more minute distinction is taken — 1 Comyns Dig. p. 167. Tit. Action — refers to case of Hall & Campbell. 1 Cowpers Rep. 204 where a similar action to this was brot of the Custom House officer This was an action for money had & received — so ought the present action to have been — 1 Salkeyns N. P. Leak. v. D. Pigot — action to recover back monies overpaid to Defendt — Dissertation sur l'Erreur de Droit par D'agueseau. 5. Vol. p. 497. 8 — 9th. shews the condictio indebiti is the proper action for monies over paid in a case like this —

allows the Respts. must to bring their action in the shape they did, but the question brot before the Court regarded merely the over payt. of the sum for duty, and the statement in the Declaration was not warranted by the fact — and the Court ought to have adjudged only to the Respts. the excess of duty paid — The declaration shews that the refusal of the Collector was not absolute but conditional, to make the entry of the goods, upt the payt of £20 instead of £17. 17. 0 — The party might have refused to have paid the excess of duty and thereupon to have brot. an action for non-pleasance — but when the Respondts. pd the extra-duty & got the entry made it is then merely a question of excess of duty pd for which the action lies, but not for a non-pleasance of duty, because the duty has been done. 1 Salk 330. Hurkett's Case — distinction laid down between the action for not doing the duty, and for the excess of money paid —

Had the party meant to sustain his action for non pleasance duty, there are requisites wants in the declaration — to maintain it — there must appear a specific damage to have accrued to the party. 1 Comyns Dig. 168. there must be an injury, & damage to maintain this action. see also. 170 — refers to case of Ashby & White ~~Hoth~~. 2. Ray. Rep. 942. 948 — to shew general principle that damages with injury must concur to maintain this action — 1. Chitty. p. 389. same doctrine in a modern shape — the special damage must be set

out

out or it ought to be dismissed on demurrer—

There is a distinction between general & special damage — the conclusion in the declaration generally to the damage of the party so much, is so general, & are supposed to arise as a legal consequence of the action as an action for debt to the damage of Plff so much, goes to give a right to a damage at least equal to value of the debt — but the complaint of a public officer for not making an entry of goods unless so much money were paid to the damage of the party so much, is not a special, but of general damage, because the damage does not as a necessary consequence arise from the refusal of the officer — 1. Chitty. 385. & 387. — where the special damage is the gist of the action it must be alledged and proved —

1 Chitty. 129 — the language here stated in the declaration is incorrect & cannot be imputed to the act complained of — a bad intent is never to be imputed, unless where the action cannot be maintained without it — the intent of the wrong doer is immaterial, so motive of Collector in taking the greater duty not to be consd. p. 377. 8. 9 — Malice must be combined with non-feasance to warrant a Lnf. agt. a public officer —

In this Case the principles of English law must be adverted to, as the only one which can apply —

2. The Cause was not sustainable in the Court of K. B. in consequence of the demurrer pleaded by the Defendt — this demurrer was not argued, in order to let the parties in to the consideration of the question in what manner the duty in question was to be paid — it now becomes necessary to insist upon that demurrer — The declaration is not sufficient, the criterion upon which the Collector was or was not entitled to ask the extra-duty, is not apparent

on

in the declaration, as to the amount of the Sterling Cost on the Invoice is not set out to shew how much was due — 5 Comyns. Dig. ~~373~~ 590 — states what is necessary to be stated in an action of a public officer that he had acted contrary to his duty — here it is not shewn what was the duty of the public officer and to perform 1 Chitty 376. the circumstances of the injury must be set out — 8 Went. Sypt. pleadr. p. 463 — where the form of a declr for an officer for non-feasance of duty is set out — can be cited much in point — the non-feasance is stated, and also the special damage

3 Action not sustainable on the general issue — There ought to have been a months notice of the action as the Collector. as a public officer — There was no evidence of such notice — the duplicate produced before the Court not proved — no depn of Pagot & Mr Alsopp — the signature of Stuart & Black to the notice is not proved — Ph. on Ev. 462. 3. 4 — also 474 — the proof of execution where there are no subscribing wits — the saying that the paper was signed by Messrs Stuart & Black, without proving the Specific signature is insufficient. — Nor is there evidence to shew that the duplicate Served on the Collector was a correct copy of that filed. —

The material facts to maintain the action are not proved, it was necessary to have proved that an entry in the form of the entry under of the Respts paid ~~the money should have been made~~ of over duty — the wits Bruce states an original entry in his possn of the duty to be paid the receipt of the duty by Prendergrass — but the original entry itself has not been produced or proved — Ph. Ev. ~~438 439~~ 218. 219. 221 — the best evidence to be taken — 442 2,3. 48. 45. Id. 438. 439 — Shews how a written document must be got at in order to produce & prove it where in other hands than that of the party himself — — the

The course is a Subp. duces tecum to bring up the document if in the hands of a third person, if in the hand of the adverse party to give a notice to produce it & on default of so doing to prove its contents — but parole evidence of a written document cannot be admitted until the fact is ascertained that the document itself cannot be obtained. — The best testimony even is not given as to the facts done by Prendergast in receiving the money, he was the best wit. of that fact — see Ph. Ev. 221 — That even if this proof be good, it shews that Young got the money as the Consignee, and therefore the action belonged to the s^d Young — as the Stat. of 1813 requires the entry to be made in the name of the Owner or Consignee & the affidavit must be made by him — The Stat. of 1815 alters the Stat. of 1813 only as to the mode of proof where there is no Invoice.

The Pltffs set out in saying that an entry had been tendered conformable to law by them to the Collect^r — see doc. N^o. 17 & 19. on fyles — the affidavit included in the entry tendered is different in several particulars from what the law requires — "and that it contains the exact quantity of goods imported" which is not stated in this affidavit, requisite — It is not said, that the "prices are just and true" as req^d by the Stat — the Collector was therefore warranted to refuse making any entry on it. —

That admitting the Pltffs below to be right in all the above points, all that the s^d Court could give in shape of damages ag^t Defend^t was the sum overpaid, viz^t £2 11. 3 & interest thereon from the day of pay^t — There was no demand for any special damage beyond this — there is no proof either of malice or of damage — The only evidence is that stated by some merchants who say they had made entries & paid duties at the short prices — but no malice can be inferred in this case by the Collector or the Resp^t — nor will it apply, as the action alledges no malicious intent in the Collector — It is not said that in any one of these cases were such entries made by the Collector or with his knowledge — but from the

the multiplicity of business errors may have arisen, and the Collector may have adopted the entries offered by the parties without examining the Invoices — There can be no presumption of the Collector here, for he drew no personal benefit from the account thus paid. — The protest files no evidence — it cannot be considered as proved by the evidence of W. Lindsay — who speaks generally as to the truth of all the contents of the paper — But if there had been malice in the Collector — there is no title of proof as to any damage done to the ~~Appellt~~ Respt —

Mr Stuart for the Respondt

The Court must have in view the legal principle upon which this action is brought — The Att. Genl seems to regard this action neither on the case, nor for money had & rec^d — but this is an action on the Case as a Custom House for monies unlawfully exacted — No action lies at the public office for monies had and received, as he does not receive the sums on his own acct — nor does not account it for himself — it is public money, belongs to the Crown — In case of Campbell & Hall cited, it was agreed by the Att. Genl that the action should be tried in that way — Cooper's Rep. p. 69 — action at Revenue office does not lie to recover an over payt —

1. Chitty Com. Law. 614. where laid down that Custom House officer is liable to an action for not doing what his duty requires — Bull. N. P. 64. a. — 1 East Rep. 561 — Drew v. Coulter — it is necessary to allege malice at the office 6 Durnf & East. 649.

1st As to notice of the action — It is not essentially necessary that the notice should be signed by any of the parties — 1. Chitty on Com. Law. 866. — It is no evidence that the

notice

notice was delivered to the party, and was handed by the Atts to the officer to serve, this delivery is suffe evidence. And it is in evidence that it was signed by the Atts for the Respts No 20. exp. of Pageot & Labatt

In point of evidence in support of the action, there appears no probable cause for the demand made by the Collector under the Provl Statt. The Collector does not account by his counsel for the interpretation he put on the Statt nor give any colour for his exaction — The price of Goods must always be understood to be by deducting the discount — for this constitutes the real original value — The Collector cannot pretend ignorance in this case, — there can be no palliation for such an opinion — it can be accounted for only from malicious motives — He had no advice of the Crown officer, to warrant him, & he must have known such opinion to be adverse to his own. —

The part of the duties being paid by other individuals on a different footing, although not proved to have been made to the Collr himself, yet he must have known it from being at the head of the office, & the length of time from of these payts were made —

The answer of the Coll: to the protest of Respts — this protest & answer have been objected to as not evidence — but it is evidence it is evidence of the fact it contains — but it is besides proved by the person who made it — here it is said, that the notice & the protest & answer should be embodied in the testimony of the Clerk — but this is unnecessary — the proof of documents is not made in this way, but the fact of the thing done as stated in the paper is all that is requisite. — The Respts were entitled to an answer from the appellt as a public officer he was bound to answer to the Kings subjects as such —

The Collector was acting merely ministerially, and had no right to determine upon this matter, and assuming the right to determine at all events, he cannot be protected. —

It

It has been sd. that the affidavit req^d by the Stat. had not been tendered & therefore no sworn to the action — but it is evident that Coll^r did not refuse to receive the duties on any alledged defficiency of the affidavit — the form used, is suffic^t & that used at the Custom House — there are sworn to have been offered by the Clerk, but the reason why refused is given, that it was the duties being calculated on the short price — at all events the tender made afterwards to the Coll^r puts the matter beyond a doubt and in the very terms of the law —

Is 2^d the action ought to be in name of Mr Young, but see his evidence, & explains how the business was done by him as the Clerk of Resp^dt

Is 3^d no evidence of the payt. of the duties — or the memdm of the payt. has not been produced & was made at the time by Mr Prendergast the Cashier of the Appellt — it may be proved by any other means besides this memdm this memdm was not under oath — the clerk who paid the money or who saw it paid is better evidence

As to the declaration, it is suffic^t not necessary to have the same strictness of pleading here as in England the Jury in England try the facts, the decl^n should contain substantially the grounds of action — which here is done — It is only to read the declaration to be satisfied of its sufficiency —

It is contended that the damages are excessive — the Resp^dt contend that this is a malicious act on part of Appt — the amount of damages here is of no moment — the object is to settle by this, that the Appellt was in fault & condemned accordingly — the amount of damages given can be no compensation to the Resp^dt,

and

to give them merely what had been wrongfully taken from them, is no satisfaction — In all cases where the injury is wilful, the damages ought to be commensurate thereto —

Continued till to morrow to hear the Reply

Thursday 18th Jany. —

Prest.
Ch. Just. of Montreal. —
Mr Richardson
Mr Hale
Mr Delery
Mr Stewart

Stevenson
v.
Bryson

Mo. that the appeal be allowed, & the Judges ordered to transmit the record to this Court — Mr Willan for appellt

The Judges give several reasons why the appeal has not been granted —

The matters stated are matters of fact fit for the consideration of this Court — the Judges below act in this respect ministerially —

The security offered is now before the Court & he considers it sufficient —

Mr Gugy of counsel for the appellant —

Mr Farribault for the Respondt — It appears by the documents produced with the return that there is a great number of other persons interested besides the Plff & the appellt — The Security offered is from a Judgt of 20 July 1826 — no such Judgt. being given — the Security has not justified —

The parties interested were not notified to be present at the giving the security — The security given to Bryson cannot operate in favor of the others interested — The individuals collocated by the Judgment have an interest to support the Judgment —

Mr Gugy — By 27 Geo. 3. ch. this Court has all the necessary power given to determine respecting the sufficiency of the Security offered — The party offers security to the amount of the Judgt — as to the form of the security it is of no consideration to him —

—

Gouin — }
vs }
Rousseau dit. }

Mr Stuart for appellant. —

This is the Case of a Tutor who appeals from a Judgt rendered against him on grounds that an inquet — The Inventory ex. No 10 — shews the state of Rousseau's property at the decease of his first wife — it was then considerable — there were

Six

Sup children of 1st marriage in 1800 the 2d Comte
was dissolved by the death of Rousseau & the Inventory
then taken No 9 shews his property had greatly
diminished in value — he owed a great many debts —
The appellant was named Tutor to the minors of the
2d marriage — an assemblée de parens held to settle
what shd be done — a Rule to sue recommended —
this was confirmed by the Judge — the Tutor renounced
accordingly — the other heirs who were of age renounced
at the same time — the widow renounced also —
Gonin the appellt pd. all the debts — takes charge of the
Children — The act. No 65 - the monies in hand belonging
to Rousseau's Estate to be applied to payt of the debts —

The Respondt here institute an action of act. of the
appellt — he pleaded the above renonciation — but the
Court ordered an act to be rendered by him — this was
rendered. No 23 — Debats are filed to it — the grounds
of which state that the account is not correct — The
demand however of the Pltff — that the above Renonciation
made by Gonin should be set aside, without which
these heirs could have no right in the Estate — this point
is still undetermined upon — & the Court without
such consideration ordered a supplementary account
No 52. — this act. is the same in tenor as the first, except
as to the two lots, which he says he had greatly improved
& established an Oil mill upon it — & done other things to
an amount which rendered the Estate of the late Henry
Rousseau indebted to him — Debats were here again made
and a reference is here made to two Notaries to report
upon the account — They make their report — and
state in what respect Gonin was accountable to the
Estate of Rousseau & then award the rent of the

two

these lots from the time of Rousseau's death they allow certain improvements & they allow however no interest for the monies laid out by Garcin on these improvements or the money pd by him as advances — the report was confirmed and the Appellt condemned to pay to Respts their proportion of the monies, & also the proportion of the lots of ground — but they do not order the Respts to reimburse their proportion of the monies laid out in the improvements —

2 Merlin Tut. 14 ch. p. 29. 70 — An act done under the authority of the Judge by the Tutor, requires strong grounds to set aside — Restitution is granted to the Minor on the principle of lesion: — cits Domat — Bourjn — and wherever the Minor can shew such a case he is relieved —

The real Estate at the time of the Renunciation was comparatively of small value, and it will be for the parties who demand that this renunciation be set aside to shew the value of the property was so great as to operate a prejudice to them — To meet the debts then due of exceeded 8000 francs there was no other property but these lots — the improvements are 7767 francs — & at the present day the property is valued at £25 Sterl —

So long as the Renunciation subsists these parties cannot claim as heirs — & until the Just: has adjudged upon this Renunciation, there could be no further proceeding had — Their Rens would hold good as Creditors until set aside — This objection must be fatal as the Just rendered in this case — The

the Tutor here being a possessor of good faith made the fruits his own — 2. Boryon. 518 — The possessor de bonne foi, making improvements cannot be compelled to give it up until his improvements are reimbursed to him. —

Mr Bostwick for the Respds

The Defend. was never divested of his capacity of Tutor notwithstanding the Rend — he ought to have had a Curator appointed — but he remained in possession — the Interlocutory Judt. to account, must now stand, as it has never been appealed from, either as a final or Interlocutory Judgment. But the appellt. acquiesced in this Judt. by rendering the acte required — The Tutor by remaining in possession, held that possession for the benefit of the minors and made himself accountable accordingly — 1 Dup. 577. No 15 — the Tutor bound to keep in repair the real Estate of the Minor — Dup. p. 604 — The tutor owes interest but receives none — The Tutor ought to place out the monies annually he receives & get interest thereon —

The Report of the Experts Notaries was never objected to by the appellant — their report is favorable to the appellant they allow him all his improvements and estimate the annual value of the property only at £25, which the witnesses say was worth £50 & £60 p ann. —

Arg. contd till to morrow

—

Jones Jr
vs
White

The Court granted the motion for an appeal to the King in Council — being of opinion that although the appellant had not complied the terms of the first order by giving Security within the months, yet having made the second application within the year the Court considered him within the term limited by Laws for obtaining his appeal.

—

Friday 19th Janv. 1827. —

Prest.

Ch. Justice of Montreal
Mr Richardson
Mr Pyke
Mr Vallières
Mr Delery

Gouin — } Mr A Stuart in reply,
v
Rousseau }

A Renunciation was made in due form of law by the heirs, and it is only in equity, that they can come in & ask it to be set aside — The Minors were not certainly entitled to interest on the property, on the face of their Renunciation the parties must at least be considered as standing on the same ground as to right in this respect —

From the moment of the Renunciation of these heirs the Estate vested in the other heirs of the deceased — at the time of the Renunciation there were debts to the amt of 12,000^{tv} & funds to the amount of about 4000^{tv} — a small real estate worth about £9 P ann. in a dilapidated state, & to be made valuable only by laying out money, & by industry & attention, the Renunciation therefore was well made — This is apparent from the circumstances & from the concurrence of the Widow & Heirs who

were

were of age the fact is further strongly corroborated The widow was entitled to 2300$ for her rights & opted to take bon in lieu thereof - & transfer all her surplus right to the appellt — all the Children having renounced, the Estate vested in the Collateral heirs of Roussan — and even the Collateral heirs have abstained from making any claim. — The Children had no right to expect that Gouin would pay all the debts of the Estate — and finding this done the Appellt now wish to take the benefit of all that the Tutor has done without even allowing him interest on the money he has so laid out — This is not consistant with Equity — The minors may be entitled to interest on the annual sum of £25. for rent when paid or due, but Gouin is entitled to interest on the gross amount of what he has advanced for improvements —

The Renunciation made by the Minors came in question only on the account rendered — the Appellt was liable to act even had he had nothing in his hands — The validity of the Renn comes in question only on the account rendered — and there is no lesion alledged agt. it — Restitution can be granted only on this ground & must be specifically alledged — and there is no Judgt awarding restitution. —

The Notaries in the act they made use ought to have allowed the appellt the whole of the sums transferred to him, which were due by the Estate — & not merely what he paid —

—

Perceval & Patterson et al

Mr Attv Genl in reply —

The Respondts have confounded all the grounds alledged by the appellt in their answer, so as to prevent

if possible a right view of the objections as taken

The first point stated, was "to the nature of this action — The answer to this objection was that the action was generally for a misbehaviour in office — depend to Bull. N.P. p. 64 — but here evidently the words kind of action, of non-feasance — mis-feasance & mal-feasance are all included, without making those distinctions which the authors treating the subject usually establish — The Respt. varies his argumt. from an action of non-feasance, to an action of mis-feasance according as circumstances suited — It is said this is an action of non-feasance — & mis-feasance — this is impossible, it cannot be both at the same time the same circumstances cannot prove both — the non-feasance, is the refusal to do any act req. by law, but the mere delay to do the act does not amount to non-feasance, as the act is done — Malice in an action of non-feasance is necessary to be alledged, but it must be proved — but the mere taking more money than the appellt. was entitled to is not a malicious act — at least does not imply malice — The case of Whitbread v. Brookbank has been referred to — but that action was correctly brot. for money had & received — this is a case in point being for an over-payt — the Court held that this kind of action would not lie, had the party availed himself of the objection, after the money was paid away by the officer — This doctrine is more clearly laid down in Leake v. Ld Pigot — & can 4 T. Rep. 553 is referred to — where the remedy by action for money had & received is admitted as the regular course in a case like the present — The

Cowper Rep. 66. 8-9.

The whole detail of fact in the declaration amount only to an action of an ind. debt. Ass^{t} — for monies over paid — If this kind of action here, lies, the Offic would be without protection, as he ought to have the same protection here had he pd over the money, as if the action had been in indeb. ass^{t} — & he had pd over the money — but the Appt. is disposed to admit the principle of the present action as far as the recovery of the overplus of money pd — but not as an action for non-feasance for the recovery of Special damages —

2° Point. action not maintainable under the demurrer filed in the Inferior Court — The appellt. is entitled to the benefit of that demurrer at this time — The Invoice Cost of the goods not being mentd. in the declr — is of itself a nice suffic. to dismiss the action — The Engsh form can be adopted here known other & this must go as well to what protects the Officer as to what is of heir. —

3 Upon General issue, the action is not maintainable there being no sufficient notice given to the Officer — there is no signature proved to the notice — yet it is said that the signature were not requisite — this is inconsistant, as without a signature, it is no notice — The fact as proved wd. have been sufficient on the part of Defendt as an admission of his adversary — but the Plff cannot say that proof of his own admission, is proof of the fact so admitted — the Defendt had a right to proof of the fact

It was the duty of the Respts. to have proved they tendered a sufficient entry to be made at the Custom House — but is said, that a regular entry was tendered by the Notary — but the protest of the notary is not proved — the mere proof of the signature, is not proof of the facts stated in it,

accordg

to french rules of evidence, this paper carries it evidence along wt. it, but according to the English rule of Evidence this paper is a mere certificate, of no value, and the signature although proved, does not prove those facts — but had the Clerk spoke to all the facts in the protest it would not be sufft — the fact is, that it is the importer must exhibit the correct entry, — it is not enough to say, that he is willing to swear to this or that entry — but he must tender that entry wch the law requires —

The written document establishing the regular evidence of the payt of the money & of the entry ~~produced~~ mainly ought to have been produced — & not secondary evidence — the receipt by Prendergast, is the best evidence — it was a public document, although in the possn of the appellt was yet in the power of the Respts

Upon the supposition that this could be called an action of non-feasance — yet it must fail from want of proof of malice — then it is inferred because the public Officer deviated from a regular line of duty, it is proof of malice — but here the duty was to be estimated on the production of an Invoice now an Invoice, shews two things the long & short price and if on putting a Construction on this invoice the public Officer errs this is not proof of malice — But there was even reasonable ground for the Collector to adopt the one price or the other — the Statute says — a sum is to be paid by the importer on every £100 pounds worth of goods imported — not of what then goods are to be estimated —

Culpability cannot attach upon the appellt unless it be brought home to him personally, this is necessary in all actions of tort — the rules are different in cases of

of Contract. when, qui agit per alium, agit per se but not so in tortious acts, such as attempts to be set up here —

The answer of the appellt. to protest — no presumption up him as to malicious intent or want of duty as a public officer

The want of proof of damage to any amount — here the Respts were obliged to say substantially this was an action of non-feasance — but here no special damage alledged. nor any proof of it — The only damage apparent on the declaration is the difference between the duty tendered and that paid — the general words to the damage of the Plff. £19 — is admissible as a damage arising from the payt. of the extra duty of £2.11.3. which at most this could be admitted only as to the interest on that money

1 East 564

The Report of the Judge shews the opinion of the Court is erroneous, and is founded on a case totally inapplicable to the case before the Court — the action reputed to lie for a nonfeasance where malice must be made out —

Hart
Grieve

On hearing ex parte. —

Mr Solr. General for appellt — action in the Inferior Court on an obligation transfered by one Anderson to appellt — on certain conditions of the appellt using diligence to recover the money so transfered of Boutte the Debtor — the appellt did use diligence & did discuss his estate personal & real, & thereupon brought his action of the Respondt as Curator to the Estate of Anderson The Court below on the evidence adduced dismissed the action from this Judgt. the appeal is made. and it is contended

that

that he is entitled to his Injn. as the Respondt as Curator — If the appellt has done the necessary diligence the Injn was wrong — The plea of Defe. in the Court below was that the appellt had not proceeded to the sale of the goods & chattels of the Debtor — But it appears by the evidence adduced by the Defendt in the Cause that the goods & chattels were seized, and were afterwards sold —

Mr Bostwick for the appellant —

The first ground in the Court below in defence, was, that the Plff had not made out his Case, by the documents produced by him — but only a part of proceedings produced — In ~~Septr~~ Octr 1821. the Sheriff says. he did not seize the Defts goods — but only the real Estate, — the writ of Fend. Expo. on wh the goods were sold, refers to another & subsequent writ not produced —

The condition in the deed of transfer, has not been complied with by the appellt — the appellt. shd have taken steps to recover the amount from Pratt by the month of Septr when recd —

No notice given by Hart to Anderson of the insolvency of Pratt — or any transfer made back to Anderson —

Saturday 20th Jan.y 1827.

Pres.t

Ch. Justice Reid
M.r Richardson
M.r Perceval
M.r Gale
M.r Delery
M.r Stewart

M. Nider, Tutor appt
vs
Forestier & ux. Respts } Judgt of the Court below confirmed

The Court considered that the appellant had not been sufficiently attentive to the preservation of the minors rights in making an opposition to preserve the same even on the first notification of sale of the property of J. G. Hanna, but especially on the notification in the Quebec Gazette, that the same was to be sold subject to the Dower of Mrs Hanna, as this operated an entire exclusion of the minors right upon the property — this the Tutor was bound to take notice of — That in regard of the subsequent proceedings had by the appellant claiming to recover the rights of the minors, the Court could not here give any opinion on them, as they were not brought before it for discussion — if the appellt has submitted to these proceedings by acquiescing in their decision he must be bound by them — if on the contrary he has applied to the Superior Tribunal for relief, but without effect — he must be equally bound and therefore in either case the opinion of the Court of K. B. in regard of these proceedings must be binding — and they state that the Tutor was too late in applying for relief, and consequently that negligence was to be imputed to him.

Demoulin. appellt. —
vs
Laframbroise &ac. Respts

Judgt of the Inferior Court confirmed. in regard of the demand in Chief + But reversed as to the Incidental demand, there not being sufficient evidence before the Court, to substantiate any ground of relief to the Incidental plaintiffs in the court below against the acts and acknowledgments passed by them on the accounts which had been rendered to them by the appellant as Executor of the late Mr Crissé + The Incidental demand was very loosely drawn, containing merely general allegations of the appellt but no specific facts upon which the Court could ground relief, except as to the 3 Constituts upon which the appellt brot his action + in regard whereof the Court below had given no decision upon the conclusions taken by the Incidental demand - the Court has now determined on that part of the Incidt demand, but dismissed the rest. — Costs divided. —

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Maitland & Co.
vs
Delagorgendiere

Judgt of the Court below reversed —
see reasons at length stated in the Case which was drawn up on giving Judgt -

—

Gagnon. appellt
vs
Fabrique de St
Roch ——— Respd

Judgt of Court below reversed

Mater v. Fulford } Judg. of the Court below reversed. –

Gararndval v. Morin – } Judg. of Court below confirmed

The Court in this Case were unable to give
any decision upon the merits, as they
considered the variance in the Contract of marriage
stated in the declaration and that produced to be fatal
this Contract, being a Notarial act, was stated to have
been made and executed by and between the parties at
S François on the 30 June 1819. – the act produced
was made and executed at S Thomas on 30 June 1819

Stewart v. Stilson. } Judg. of the Court below confirmed.

Both parties held by deed from the Sheriff on a
sale made same day – 16 March 1808. – the Pltffs.
title was to lot No. 9. & was executed on 6 April 1808 – the Def
title was to lot No. 10 & was executed on 29 March 1808 – the Pltff's
title was for a specific quantity of land, the Defend for a certain
quantity of acres & perches or *thereabouts* – The Pltff's lot contained
the full extent at the one end, but by means of the division fence
between the lots of the parties inclining towards the Pltffs side, at
the other end there was a considerable defficiency – this fence however
had subsisted for 30 years and was in the same state at the time of
the Sheriffs sale – and according to the plan & survey of the land Surveyor
it appeared that neither party had the full complement of land their
titles expressed. – The Court therefore held that the line of division as
now existing being the same as when the parties purchased from the
Sheriff, it could not be disturbed by an action in *bornage*, unless the
party had shewn an encroachment since the Sheriff's title

Hart
v.
Debarrats.

Judgt of Court below confirmed

The Court considered that the Plaintiff by his action shewed a partnership in the transactions in question as well between him & Montmollin & between him & the Defendt and therefore from the nature of the conclusions in this case it was necessary that Montmolin should be a party + as to the suggestion that the Court would assist the party in his action by ordering the absent party to be put in suit, it was a matter which depended much upon the discretion of the Court, and although from the authorities cited by the Counsel for the appellt it would seem this was a course to be pursued, but these authorities apply chiefly to cases when a partnership is sued by a stranger who cannot always have the means of knowing the names of all the partners he may have dealt with, & in equity the Court has helped him in this way on his application for that purpose - but in a Contract between parties, this cannot be an excuse, the action must be consistent with the Contract + here it is joint, & so must the action, for if the Pltff can bring an action agt one partner, he can have as many actions as there are Partners or parties to the Contract, which is contrary to the very nature of it - Besides it was impossible the Pltff could expect that the Court should of its own proper motion interfere & order Mr Montmolin to be made a party in the suit, when no motion or application to this effect was made by the Pltff. -

Hunter...
v.
Bishop et al.

Judgt of Court below confirmed

The Court held, that although by the rule of reference the parties no doubt had a right to be heard by the arbitrators on the first day of June, yet as on that day they were also bound to make their award, the Court would require some strong ground to satisfy them that there was matter still for hearing, or application made for this purpose to the arbitrators on the first of June before they would set aside the award, inasmuchas they had not power to make it after that day — but there appeared nothing before the Court of this kind and the Court was bound to support the award in point of form — That under the authority vested in the arbitrators by the rule of reference, they were authorised to judge ex aequo & bono between the parties and the Court had no power to look or to enquire what kind of evidence they had received to ground their award — we must suppose it was legal and correct, as we see nothing to the contrary and in regard of the decisions given by the arbitrators on the 18 objections laid before them the Court considered these decisions sufficiently to meet the objections so made That on the whole the arbitrators seemed to have taken a great deal of pains, to have had a great deal of labor and certainly merited the acknowledgments of the parties for having done so. —

Morin v. Fraser — Judgt. of the Court below confirmed. —

The Court held the evidence of the appellt's title he took from the Sheriff under the sale of the lot of land in question, as alone sufficient to maintain the action en Retrait — That the Sheriff was a public officer, executing a great public duty in the execution of the Judgments of the Courts, and as such was authorised, may bound, to execute and grant deeds to purchasers of the Estate & property he adjudged to them in such public capacity — and being such public officer and the legal depositary of the deeds he so passed, the copies thereof certified by him were legal evidence in a Court of Justice

That it was not necessary that the action ought to have been in the name of the Seignior, as the Cessionaire was by law authorised under the general terms of the transfer made to him to institute every action, and was vested with every right of a profitable nature attached to the Seigniory, and as to the retrait it was even specially mentioned among the rights so transferred

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Hart v. Grieve — Judgt. of Court below confirmed

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Stevenson
vs
Bryson

Rule obtained by the appellant made absolute, on his giving good & sufficient security to pay and satisfy the amount of the Judgt rendered in the Cause, to the persons and in the manner mentioned in the said Judgt — in case the same should be confirmed on appeal, and also for the Costs on the appeal. — The Court considers the other reasons, excepting that in regard of the Security offered by the appellant, to be matter fit for the consideration of this Court, and on which the parties had a right to be heard before adjudging thereon. —

See Reasons of Judges in case filed by the appellant.

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Masterson
vs
Millar —

The Respondents motion for dismissing the appeal was granted, because the same had not been returned within the time limited by the writ. —

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Militia Laws

34 Geo. 3. ch. 4
36 —— ch. 11
43 —— ch. 1
48 —— ch 3
51 —— ch. 9
52 —— ch. 1
55 —— Ch. 1 Duties &c
52 —— ch. 2 Sept time of enrolment
53 —— Ch 2 Grant of money
55 —— ch. 10
57 —— ch. 32
59 —— ch. 2
1 Geo. 4 —— ch 4
3 Geo " —— ch 28
5 —— ch. 21.

The first of these Statute 34. Geo. 3. ch. 4 is entitled an act to provide for the greater security of the Province by the better regulation of the Militia thereof, & for repealing certain acts or Ordinances relating to the same"

The preamble declares, that the laws in force respects the Militia are inadequate to the purposes intended and then proceeds to enact, that all men from 18 to 60 shall be militia men &c

The 31st Sec. is as follows, — And be it further enacted, by the authority aforesd., that from and after the passing of this act (March 1793) an Ordinance of the late Province of Quebec, passed in the 27th year of His Majestys reign, entituled, "an ordce for better regulating the Militia of this Province, and rendering it of more general utility towards the preservation and security thereof — And also an ordce passed in the 29th year of His Majestys Reign entituled — an act or ordce to explain and amend an act, entituled (as above 27 Geo. 3. c 2.) shall be and they are hereby repealed"

And by the 35th Sec. it is enacted — That this act shall be and continue in force, from the passing thereof until the 1 July 1796, and no longer — provided always, that if at the term above fixed for the expiration of this act, the Province shall be in a State of war, Invasion or Insurrection, the said act shall continue and be in force until the end of such war, Invasion or Insurrection"

The intention of the Legislature, as it is to be collected from the foregoing Statute appears to have been, to repeal absolutely the Ordinances of 27 Geo. 3. ch. 2. and 29. Geo. 3 ch. 4) above mentioned, for such is the language of the Statute

Statute, and that it was not in contemplation of the Legislature that these Ordinances should revived upon the expiration of the Stat. 34. Geo. 3. c. 4 appears equally clear, since it provided for the possible contingency of the Province being in a State of war, Invasion or Insurrection, in which which events, the Statute was not to expire until the end of such War, Invasion or Insurrection.—

The 36. Geo. 3. ch. 11. passed 7 May 1796 amends this act, and continues its duration to 1st July 1802, and until the end of the then next Session of Parlt., and it expired accordingly.—

The 43. Geo. 3. ch. 1. (passed 18 April 1803) entitled An act for the better regulation of the Militia of this Province, and for repealing certain Acts or Ordinances therein mentioned, established a new Militia Law, adopting many of the provisions of the two preceding Statutes, and then by the 53d. clause, ex majore cautelâ, again repeals the two Ordinces above mentioned, as also the Stat. 34 Geo. 3. c. 4. and 36 Geo. 3. c. 11. which latter Statute expired at the end of the Session of 1813. not having been continued, and therefore needed no repeal—

This last Stat. 43. Geo. 3. ch. 1, is declared to be in force till 1 July 1807, with a similar clause to that of the 34th of the late King, respecting War—Invasion and Insurrection—

This Stat. by the 48. Geo. 3. ch. 3. is continued in force to 1 July 1810. with a like clause respecting War &c

And

and again by 51 Geo. 3. c. 9. it is continued, with the like clause to 1 March 1813 —

The following year on the 19th May 1812, parts of the 43. of the late King were repealed and sundry new provisions enacted under Stat. 52. Geo. 3. c. 1, which then continued the Stat. of 43. with these amendments to 1 July 1814, with a provisoe, that if the Province at the time limited for the expiration of the Stat. be in a state of Insurrection or Invasion or imminent danger thereof it should continue in force until the end of the War &c

Now this and the previous act. 43. Geo. 3. c. 1, with its several amendments, expired on the 1 May 1816 — and was afterwards revived on the 22d March 1817. by the Stat. 57. Geo. 3. c. 32. and continued in force till 1 May 1819 —

The 59. Geo. 3. c. 2. continues it till 1 May 1821 —
The 1 Geo. 4. c. 4. continues it till 1 May 1823 —
The 3. Geo. 4. c. 28 continues it till 1 May 1825 —
The 5 Geo. 4. c. 21. continues it till 1 May 1827 —

On which day the several Statutes in question, not having been previously continued, expired. — And the question now is, whether upon the expiration of the said temporary acts, particularly the 43. of the late King, which repeals the Ordinances of the 27. & the 29. of the late King, these Ordinances did, or did not revive? —

It is contended that a perpetual law cannot be repealed by a temporary one, and under this view of the subject, the Executive Govert. of the Province has caused the two Ordinances in question to be reprinted and circulated, with directions to enforce the provisions thereof, but the legality of this proceeding may be well questioned

for

for it is an undoubted principle in law, that a Statute, though temporary in some of its provisions may yet have a permanent operation in other respects and it becomes in all such cases a question of construction as to what the Legislature really intended.—

3 East. p. 206. The like point came under discussion in the K. B. in England in 1803, in the Case of Warren q. t. v. Windle, where the question was, whether the Stat. 26 Geo. 3. c. 108. sec. 27. which repealed the Stat. 19. Geo. 2. c. 35. having itself expired at the end of the Session of Parliament after June 1795 — the Stat. 19 Geo. 2. ch. 35. did not revive.— And L. Ellenborough Ch. J. expresses himself thus — "That would not " necessarily follow, for a law though temporary in " some of its provisions, may have a permanent " operation in other respects — The Stat. 26. Geo. 3. " c. 108, professes to repeal the Stat. 19. Geo. 2. ch. 35. " absolutely, though its own provisions which is " substituted in the place of it, were to be only temporary."—

10. East. 569. Again in the same Court in the year 1807, in the Case of the King v Rodgers, wherein Harris moved to quash the Conviction, returned by Certiorari, on the ground that the Stat. 46 Geo. 3. c — having repealed the provisions of the Stat. 42. Geo. 3. c. which constituted the offence of which the Defendt. had been convicted, and having substituted another provision in its place, though this latter was only temporary; the prior provision did not revive upon the expiration of the temporary one — for which he cited Warren q. t.

vs

v. Windle, in which the rule was laid down, that the prior law could not revive after the repealing temporary Statute was spent, unless the intention of the Legislature to that effect were expressed, which he said did not appear in this Case —

Dampier, Contra — relied on the 14th Sec of the temporary repealing Stat. of 46 Geo. 3. as evincing the intention of the Legislature not to repeal the 42d of the King absolutely but only from 1 Augt. 1806 to 25th March 1807. He said he did not differ from the principle laid down by the Defendants Counsel, but only on the application of it to this Case —

It was a clear rule, that by the repeal of a repealing Statute the original Statute is revived, (a) and it must be the same thing if the repealing Law itself provide that the repeal shall be only temporary —

(a) 6. Bac. Abr. Statute D. 372.

L. Ellenborough. Ch. J. It is a question of construction on every act, professing to repeal or interfere with the provision of a former Law, whether it operate as a total or a partial and temporary repeal — Here the question is, whether the provision of the Statute. 42 Geo. 3. which was originally perpetual be entirely repealed by the 46th of the King, or only repealed for a limited time — The last act recites indeed, that certain provisions of the former one should be repealed — but this word is not to be taken in an absolute sense, if it appear upon the whole act, to be used in a limited sense, and the 14th Sec. of that Statute shews it was used in a limited sense only? —