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July 1827.

January 1828

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Court of Appeals.

Saturday 21st July 1827.

Pres.t

Ch. J. Reid - Presd
Mr Richardson
Mr Hall
Mr Smith
Mr Stewart

Bethune ex. appt
vs
Hoyle & wife. Respts

The Attr. Genl on behalf of the appellts moved for a Stay of proceedings in the Court until a bill of Indictment found for the forgery of the note of hand on which the Judgt was given
1 Tod. 437. 1. Pigeau. 217

Mr Gregg for Respts. moved for an order on Judges to complete the record -

Mr Attr Genl - it is necessary accords to 25th rule of practice to have an affidavit - the mo. is irregular - there is no allegation that there is any diminution of record - no order can be made

made to the Proths of K B — but a Certiorari must issue to the Judge to complete the record

Channell vs Denichan

Mr Gregg's mo. for Rule that the writ be set aside, the security given having been given by Mr Valliers the att3 —

Mr Valliers — says, there is no such rule in this Court — Hunter v Cowan 3 years ago —

Fernie vs Lambert

action in Court below for work & labor done —

Duval & McCallum for Appellt — the plea of defences en droit was not contested by Defendt in Court below, yet after hearing on the merits the Court dismissed the plea as insufficient answer to the action — The evidence besides given on the part of the Pltff in the Court below is insuffte to support the demand — The testimony on their cross-exam[n] contradicts themselves see 1st writ — for Pltff — see also testimony on the part of the Defendt touching facts subsequent to what have been stated by Pltffs Wn

2dly as to the temporary except. qt has been over-ruled by the Court as not being an answer to the action — because the Pltff was bound to render an acct — wch was a part of the duty he had to perform to entitle him to his reward — The Pltff refused to deliver up the books

books of acct of the Defendt when demanded
Mandat 5156 It was material to ascertain the balance due to Plff
pt could be done by the books only — or by acct
rendered — then Defendt is condemned without such
2 Camp. Rep. 63. account rendered — This plea necessary, to prevent
Defendt from being precluded of his demand agt
Plff — Mls 2 Camps. 63 —

a remittatur has been filed by the Respdt at
the offer after Judgt — This was irregular — be
shows the case had not been well examined —

Mr Power for Respt refers to the testimony
adduced on the part of the Respondt — which states
the acct to be proved & denied Respdt to call a
witness the amount of his acct — There is proof
of the Respdts services — There is no proof of the
payt of monies by appellt to Respdt — he merely
proc. Civ. 284. rec. money to pay himself & his fellow labourers
pt he did, but never kept any acct of such monies
as not being rec. by him as an agent — on
the contrary it appears by appellts own witness
(Robertson) that the appellt kept the books of
acct & of the monies received

As to the remittatur it could be made at any
time —

Monday 23d July 1827.

Prest

Ch. Just. Montreal. P.

M. Richardson —

M. Hale

M. Smith

M. Stewart

Bethune dal
Hoyle sup } rule for 28th —

Jourdain
vs
Donaldson dal } M. Stuart for Appellt — appeal from
Just condemning Appellt to pay for a
chattel of the they ordered to be delivered up to another
person —

By act of 28th June 1815 a bill of Sale made
to proper of a Schooner — no register of vessel
nor any indorsement of sale — 17 Geo. 3. ch
25. & 34 Geo. 3. ch. 68 — sec. 14 2. Evans Stats. p. 106
Viner Condition (V) sec. 7. — the Contract is invalid
without compliance w. Statute —

But if the deed had contained the Certificate
of registry this not enough — the indorsement
was also requisite — cites Gillespie v. Beaton dal

when

where the rule was strictly held, even in the case of fraud at the bona fide purchaser — 13 Vezey's Rep. 621. —

On 26 March 1825 — the respondts assigned over to the appellt the purchase money of the vessel they had sold to Pozer, wt warranty as to the existence of debt. Obl. N° 559 —

When the vessel was seized the vessel as the property of Pozer, the Respondts claimed the vessel as their property, but was granted to them —

13 Vez Rep. 588 — the circumstance of Pozer being a part owner of the vessel makes no difference as to the formality of the certificate of Registry and indorsement thereon —

—

Tuesday 24th July 1827.

Prest —

Ch. J. Montreal, Presidt
Mr Richardson
Mr Hale
Mr Percival
Mr Smith —

Closet vs Crysnan } mo. to declare the right of appeal to King & Council expired as the party has not done the necessary diligence in obtaining a certificate

Wednesday 25 July 1827

Present
As Before

Mr Stewart sat in lieu of Mr Percival

Deaves
Jones Jun

Mr Vallieres moved for an appeal from an Interlocy Judt — in the K.B. — in abbaut. for want of a sufficient amount —

Mr Stuart for Defendt — This not a case in wh an appeal can be granted — the rights of the parties not bound thereby —

Vallieres, the Cs have S. the act rendered is insuffe. & have liberated the Defendt — & in so far have decided on the rights of the parties —

Leave
Jones Jr —

a similar motion — on mo. to have the act rendered set aside as insuffe — wh the Court overruled —

Thursday 26th July 1827.

Prest

Ch. Justice of Montreal
Mr Richardson
Mr Smith
Mr Pyke
Mr Stewart Hole absent

Burnside
vs
Taylor
&
Cuvillier T.S

Mo. to ~~discharge~~ vacate the dismissal of the writ of appeal and quash this Cause & return of the Judges as the writ was not presented within the year & day

Mr Vallieres for appellt — the writ was returnable in April Term last — writ not being presented within the year is no cause to refuse the granting it, if all other things are regular It is not pretended that it was not served within the year —

Mr Stuart — there is nothing to shew that the writ was sued out within the year & day — the years day must be accounted upto the time of allowing the writ — see 25 Geo. 3 ch 2. sec. 29. see import of word allowed sec. 24

Mr Vallieres – the return is made but by one Judge, & it is irregular & there is only one ground stated for not allowing the writ – this is the only one the Court here can look at – The Judge of the Court below is not the person to judge of the allowance of the writ –

Attorney v Chapman

Two rules for ~~two~~ appeals ~~one~~ from an Judt of 20 Feby 1829 by the Attorney in the Cause by Mr Gugy –

Masterson v Powell & Grant Ld Interv

Mr Sewell for the appellt

Action by Powell agt appellt for rent of a lot of ground, as the proprietor thereof and not as the Lessee of another – the right of property was therefore necessary to be established the Defendt pleaded, that no rents was due to plff as proprietor – & Defendt then set up a title of possessor – on this an Intervention was made by Grant & Greenshields, who complained that the plea of Defendt was a trouble to their possessn – The parties then went to proof, when it appeared that the Plff was the Lessee of Grant & Greenshields – The proof of Plff therefore failing, the Defendt ought to have been discharged – But this is public property & neither party can set up any right to it –

cets

cites Chitty. p. — & other authorities referred to in the printed Case — The King is vested in this property & no action can be maintained by any subject in respect of it — The Intervention here is an Complainte, & complains of the plea of Defend^r as a trouble, but the plea cannot be held such. cites Poth. poss^n. N° 103 — The Intervening parties are without Interest in this Case, as their right could not be affected by any dispt. given between Plff & Defd^r — The Incid^l demand must be connected with the demand in Chief to be entertained — The evidence in the Cause shews that Defd^r was in poss^n animo domini, under a purchase — There can be no complaint in regard of the Kings rights —

Mr Gregy for Powell, the Respond^t — states the proceedings had in the Case —

Mr Stuart for the Interv^g party — the action for rent, on a Contract express or implied — the right of Interv^g party came in question — they came in, — no objection made, but only the title of Interv^g party was denied — The plea of Defd^t was here a disturbance de droit — The plea to the Intervention is a trouble — 1 Pigeau 334 — Poth. Louage. N° 54. a party hears an interest may intervene & in this respect a case of Trouble or Cause to the cause — Grant & Greenshields were bound to intervene in the Cause — Louage. N° 81-83 & 5. 6. 7. 8. & 2 Pigeau. 8. 9. 10. — The former cannot

Resp^ts no Intervention to shew the regularity of A. Pers.

being

bring the action for trouble — Poth. poss.ⁿ N° 100 — as applicable to the case before us —

The next question is whether the Intervening party has made out their title — no question but as to the property being in the State, but that the Defendⁿ is the proprietor — this is the only issue before the Court & the only one to be adjudged upon

The evidence on the part of the Intervening parties consists of Documentary & verbal testimony of the fullest kind — all sufficient to maintain the action on the part of the Defendⁿ no evidence of title —

Dengr ⁿ Conclusion. Repⁿ ⁿ Conclusion, 1 Pigeau 399 — no conclusion can be granted beyond what is demanded — There are no conclusions in the reasons of appeal praying the reversal of the Judgt —

v° appell 8.9 86. p. 191 v° Dengr. —

Repⁿ ⁿ possession p. 205. col. 1 — whose party condemned to pay rent although no title produced —

Mr Sewell in reply — no reasons of appeal are required, except by rules of practice of this Court — but this Court bound to give that Judgt of the Court below ought to have been given —

The original action not being brot by Pltff as Lessee of Grant to Greenfields, they could not have been called in as Garants, as their right was not in question — a Garant cannot intervene — The Plea of Defend is not setting up a title in the property, as a want of right in the Pltff to maintain the action —

Friday 27th July 1827

Prest

Ch. J. Montreal

Mr Richardson

Mr Percival

Mr Smith

Mr Hale

Chapman vs Atkins & Grigg —

On Mr Grigg's mo. to withdraw his rule for mo. for an appeal on the Plff's paying the costs in consideration of his consenting to abandon the costs

Mr Willan, The necessary papers not filed in support of the motion in this cause — they are filed in another cause but not here — The Plff has no interest in the question, as they never demanded the costs — the costs are only 40/ & not appealable here —

Mr Grigg — This is a part of affair & comes in content — the papers filed have reference to both motions in the Cause — as to the interest of the party in the Costs — they have been adjudged to the Plff who claims his right to claim them —

Bethune & Hoyle

on mo. for dismt of Lieutenant to complete the record —

Submitted. —

On mo. of Attn Genl. in the same Cause to suspend the proceedings in the Cause entitled an Indictment for a forgery of the note in question be tried. —

Mr Gugy for the Respondt — the application too late after the reasons of appeal filed —

—

Saturday 28th July

Pres.

Ch. Just. Montreal
Mr Richardson
Mr Hale
Mr Smith
Mr Stewart —

Moffat & Robertson

Cause re-heard. —

Monday 30th July 1827.—

Prest.—

Ch. Just. of Montreal. Pt.
Mr Richardson—
Mr Perceval—
Mr Smith
Mr Hale
Mr Stewart

Jourdain ap.
v
Mivelle Resp.

The Judgt of K. B. affirmed
The Court being of opinion that the privileges of the appellt in this case being on an open account of several years standing, without any authentic document to ascertain when & to what extent the work done might be, this could not extend the privilege of the appellt beyond the year and day so as to exclude a more diligent Creditor.—

see Notebook. p— & authorities cited

Moffat
v
Robertson

Judgt reversed—
The Court considered, that the Condition of the contract having been, by the Debtor absenting himself from the Province, the security from that moment became liable—

see Note book. p.

Fernie & vs Lambert.

Judgt. affirmed — The case rested wholly on the evidence adduced, which the Court considered sufficient to maintain the action.

—

Sourdain vs Dorion & ux.

Judgt. reversed — The Court were of opinion that the transfer of the sum of £400 — made by the Respds. to the appellt. was here without consideration, as it appeared to be the price of a Vessel sold by the Respds to one Pozer, which sale was wholly null and void as the Deed contained no certificate of registry of the vessel, and inasmuchas the vessel had been restored to the Respondts on this very ground, on their opposition to the Sale thereof on a seizure of the property of the said Pozer — The Court of K.B. had indeed reserved to the Appellt. his right to bring an action to have the transaction between him & the Respdts set aside, but this Court did not think that necessary, in a case where the nullity of the Sale on which it was grounded was absolute & declared by law — "

Chauvette vs Derochaud

The Court granted the Respds motion, on the principle that an advocate cannot become Security for his client in appeal — see 2 Jousse on subject of Procureurs.

Mr Valliers moved for an appeal to the Kings Council, but this was refused, being only an Interlocutory Judgt —

Chapman vs Atkins — The Interlocutory Judgt. in this Case from which an appeal was moved being the dismall of a plea of exceptn en droit, or demurrer, the Court held it was not a Judgment of that description from which an appeal could be granted — see cases of Gingras. v. Blacklock — and Demchaud vs Boisvert Jr in July 1826. —

Chapman vs Atkins — & Grigy. apt } The Court discharged the rule obd by Appellt with Costs — being of opinion that the Original motion for an appeal could not have been granted in this case by the Advocate — as the Judgt rendered ag[inst] him was made merely for the maintainance of order and regularity in the proceedings of the Court below, and this being merely a matter of discipline interna govt in that Court, no appeal could lie therefrom. —

Burnside vs Aylwin. & Cuvillier J.S } The Court were of opinion that a writ of appeal must be presented for allowance by the Judge within the year & Day from the date of the Judgt appealed from, and therefore discharged rule obd by Mr Cuvillier. —

Bethune et al vs Hoyle et al } The attz General's motion for a stay of proceedings granted. —

Deaves vs Jones — } Motion for an appeal granted — The Court considered, that here the Judge rendered although Interlocutory, had determined what could not be remedied by a final Judt — as the Defendt had been liberated from his arrest & confinement on the principle that the amount rendered by him was sufficient —

Lawe vs Jones — } Similar Case —

Burnside vs Aylwin — Cuvillier. J.S } In this case Mr Valliers moved for an Appeal to the King in Council, which was opposed by Mr Stuart, as this was merely a decision on a motion on which no such appeal ought to be granted —

Valliers said, if the appeal were not granted the party was without remedy and the Judt of this Court final as him, as both this Court & the Judges of K B. were of opinion that he was too late to have any appeal —

Mr Stuart admitted that the Judt in this respect appeared final. —

Tuesday 15th ~~Monday 14th~~. January 1828.—

Pres.t—:

Ch. Justice of Montreal.—
Right Rev.d The Bishop of Dunbar.—
Mr Hale—
Mr Smith.—
Mr Delery.—

Percevals
v.
Price — } Mo. for rule nisi ——

Merkle John
Attn Genl } Mr Vallieres for appellt.

claims that the seizure made of the Seigniory of Lauzon, by reason of the substitution thereon, and not being the property of the Defendt— The appellt being appointed Curator to the substitution.—
It is contended that the substitution is null not having been registered— It is alledged that the will is not signed, nor dated— Whether not authorizes The strictness of the laws of France in regard of wills has been taken away by the laws of this Country— & the Jurisprudence in England & in this Colony— 1 Mornac. p. 435— applicable to the laws of France— By laws of France the word signé not not necessarily imply Souscription.— the signature on envelope enough: Old Dumpt vs Testament No 35.— although not signed.— Id. No. 36.—

2. Mornac. p. 71.— { Recueil d'arrets at end of 4 Vol. Mornac 365. Will ~~not signed~~.— not dated.— The

The Stat. 29 Ch. 2d – the party devising must sign the writ – but it is to be settled, what shall be understood by signed – the
1 Levinz. p. 5. – 2 Vez. 454 – 1 Vez. 11 – 18 Vez. 175 –
3 Swinburne. p. 74 – 7 Bac. Abr. 317. paper writ by testator altho' not signed, is yet good – Id. 328 –
The Stat. 41 Geo. 3 does not require the signature of 3 Wit. to a writ of lands, it only requires the forms of England – If it is a writ – it must have its effect as under the laws of this Country – it distinguishes not between lands & goods. –

Before Stat. 29 Chas. 2d. lands were devisable by the Stat. of writ 32 Hen. 8 or by particular customs – & by the Stat. frauds 3 wits. are required – but the law regards particular & local customs as to lands. which does not extend here – see 1 Swinb. on Wills – 205 – as to the signature, cites agan. Prake Ev. 413. ed. 1813. if party writes his name at the head. this is a sufft signature – Ev. Poth. 2 vol. 197. –

Now the writ is begun by the name of the Testator in a solemn manner –

The Custom of Paris does not require a date to a holograph writ – refers to citation from Old Denizt. № 35 – v° Testament – Id. № 30 26 –
also. № 30 – the date not necessary –

But this writ has a certain date from the circumstance of a legacy to Mr Bowers Att'y Genl which was the case only in 1808 – & therefore revoked the prior writ. –
Even a false date has been rectified by circumstances –
Denizt № 33 – which is a stronger case than the present – where there is no false date. –
4 Maynac. 365 – in his Renewal d'arrets. writ good altho' not signed. –

That the Defendr alone was intended to invoke the nullity of this will — he has acknowledged it to be valid in 1810 — at that time the Defdr was not the debtor of the Crown, & his Creditors — subsequent to that acknowledt cannot come aft that act. — Repre vo Legs - p. 403. —

The heir cannot come aft his own act, nor can his subsequent Creditors do it — cite Connoissances des Notres also 3 Henrys. 26 — 27. — an acknowledgt of a fedei-commis, in a will, altho' revoked by a subsequent will, cannot be set aside. —

In 1810 Defendr presented & approved the will & obtained a regular proof of it. — This confirmed the will & transferred the property to his son —

The defect of publication of the substitution is of no avail in this case — The ordre of Moulins of 1556. 1590 — and also that of 1712 — the last never in force in Canada — The ordre de Moulins was differently interpreted — but it was enough that the will was published in a Jurisdiction Royal, un jour de plaids which was sufficiently complied with by the probate granted by the Judge under the Stat. of 1801 — see opk. No 25. in proceedings — This was a Judicial act in a Cour Royal —

But minors are not included in the want of publication or the nullity arising therefrom — Brodeau sur Loret S. tom. 3. No 6 — The ordre of 1690 is not force here — Id. No 8. — applies only to majors — Mikié ch. 14. No 45 —

The substitution here is not subject to insinuation & publication here required — The substitution

Simple

simple is not subject to this formality—
Old Denis. vo Substitn. N° 15— simple when there
is only one degree, as here— 6 Lou. des Not. 272—
Rep.re vo Substitutions— 2 Louis. 592.—

Considers that the order of Moulins has been
revoked by implication by the Stat. of 41 of Geo. 3
as removing all restrictions from the power of
making a will.—

Mr Prevost for Henry John Caldwell
the appt

The will rejected no date, Rep.re vo Testament
138 p. 138— a will made at St Domingo after the
order— the signature not requisite, nor can
the directions of the laws of France in this respect
prevail over the decisions in England as to what
is a signature under a Stat. 29. Ch.s 2; after
the laws of E. have been introduced here— the
writing the name at the beginning of the will
has always been held a sufft signing
under the law.— The will here is in the form
of a Solemn act shews the intention of the Testator
and containing a disposition of all his property—
this signature sufft. even under law of France
refers to a signature on an envelope— cited by
first counsel— here the signature must be the first
thing seen—

The Stat. 41. Geo. 3. makes no distinction as
to the will of lands & goods, as in England, but
authorises every form of a will which are

Hanson

known in England or in France ~~or in Jersey~~ —
The ~~devise~~ injunction is to Henry Caldwell which conveys the
real Estate, 7 East. 97 — it vested in him subject to
the enjoyment of the father — Rep^r — v^r Substitution
p. 491. — also case where the right of appointment
of another was exercised Morgan v Dorman 1 Zeuch. 284.
2 Bouv. 153. 4 — ch 2. Sec. 2 tit. 5. which is strongly
applicable — a will of usufruit to the father &
the realty to the Son. —

Mr. And^w Stuart with the last Counsel —
took a view of the general outlines of the law —
the Roman law had many restrictions on wills —
so had the Canon Law which led to the restrictions
on the French laws — so also certain feudal
Customs — In England the Civil law did not
obtain, nor did the Canon Law; the only restrictions
then were those y^t owed their origin to the feudal
Law — The Stat. of 14 Gw. the 3^d had in contemplation
the different kinds of Inhabitants in the Colony
and give an easy means to every description of
them to will according to the respective forms of
their own Country & as they please — it is the
form alone which is required, the effect of the will
under the form is not touched by that Statute —
Forms are arbitrary & what ~~is~~ signature is, has been
settled by legal decision — but form must be separated
from Substance — the English form has here been
adopted & must be recognized as sufficient —
That Def^t being the heir at law of the Testator
the property vested in him at his father's death
subject to the will under the rule le mort saisit hors

being such heir, he confirms this will, tho it was to his disadvantage, he alone was interested in this respect, tho there was any nullity in the will he alone could avail himself of it, but no subsequent creditor of the Defendr could have any right or greater right to set up this nullity —

This will vested the real Estate in the Appellt subject to the usufruct of his father, & subject also to another appointment by the father —

This was not a substitution graduelle where enregistration is necessary, or of publication, that creditors may have an interest to be notified — here the legacy is immediately vested in the Appellt

There is no evidence that there was any debt due to the Crown at the time this will was made and subsequently proved by the Defendr —

Contd till to morrow

Masterson vs Powell. & Grant sal Intervs

On re-hearing —

Mr Sewell for Appellant — Action for rent of certain premises — to this action a plea was put in of general issue & plea of possession for year & day — here the Intervening parties came in & claimed the property as theirs tho they had leased to Plff & alledging that the Defendr plea was a trouble droit to their possession & claimed Just thereon —

Dft

Defts pleaded the same plea to Intervention, and an enquete was held — a Jugt rendered —
But there is no mention of the right of possession of the Bluff Powell —
Poth. on possn to shew what possession is —
Domat. p. 267, an usurper may obtain a just possession of another —
1 Gr. Cout. 1514 — when an usurper is allowed to possess for one year after trouble, he acquires the just possession. — Id. 1508. 1530. —
Dunod. p. 80. Gen's analyse du Droit Fr. 504
1 Argou 242. —
Dic. Droit. vo Complainte. —
Cout. d'orleans 594 —
Ordre 1667. 18 tit. ordre art. 1.
These principles applied to the facts —
The lease of Grant & Greenshields to Powell — is filed & destroys his action — Poth. possn N 87 100. by his joining in the plea has rested the issue, & have called his witnesses
Dic. Droit. Vo Complainte
Cout. d'orleans 572. —
1 Gr Com. 1520. —
Dig. liv. 43. tit. 16. art. 1.
Serres Instit. au Droit Cout: — can be seen Proctor —
The Intervening parties have called wits to prove their possession — but nothing to shew they ever possessed the part occupied by Masterson — who has built a house on heir of a Chantier. & 9th Interv parties were bound to take notice — it was such a trouble to

to the possession of the Interv. parties that they were bound to bring their action so as to prevent the Defr. from acquiring a right of possn Poth. possn 102 — The Interv. parties could not set up a trouble de fait, but a trouble de droit, in the plea set up by appellt — but this not a trouble de droit —
1. Gp. Coub. 1524. 1 Pigeau 107.

The Interv. were bound to prove a possn of year & day
2 Pigeau 131 to maintain their right, but have not done so —
2 Pigeau 131. Id. p. 10. note (a)

At all events no damages were due to the Interv. parties on the contrary compensation was due to them for improvements. Rep. vo Complaints. 2 Fr. Instit. p 72

Mr Gregg for the Respondt Powell — who states that he derives his title from Grant & Greens heirs — and has been supported by them — There is in this case fact to shew that appellt promised to pay a compensation for the use & occupation of the premises & as the case was consolidated with another will shew this —

Mr Blake for the Interv. parties — the parties had a right to come in on Powell's joining issue as to the possession — That possn of appellt was a vicious one as he recognized he had not right to acquire a right of possn as Interv. parties — Poth. possn No 100 —
The plea of Defendt was a trouble de droit —
There is no conclusion praying reversal of the appeal — & the Court cannot grant it. — 1 Pigeau 399 — N. Denizt vo Conclusion Repn vo Conclure — 1 Pg. 576. 17. N. Denizt vo appel. Sec. 8. § 9

Mr Stuart of counsel for Interv. parties —

Mr Sewell for the appellts — In this Country no conclusions necessary to demand reversal of the Judt — as this Court sits as a Court of revisal — no new proceedings no evidence heard, — this Court is bound to revise and correct if necessary the Judt. rendered. —

The action here implies a better right to the premises than the Defendt — It has no affirmative to a loan from Grant and Greenshields — but as his own property — but Pluff has failed in his proof. for he shews by his evidence that other persons are the Proprietors — In the issue raised, the Interv. parties had no interest. — Martineau's possession gave no right of action to Powell — he was in possn before Powell — The Intervention was unconnected with the principal action. —

Poth. poss. Nº 33. — no party can change the nature of his possn — but Nº 34 — there may be a possessor a titre singulier — & independant of all vice —

It is a question here whether Pluff can have an action, touching this property qt belongs to the Crown —

The Judt. is inconsistent with the nature of the action. —

Wednesday 16th Jany 1828

Prest
As above

Mickle John
Attv Genl } The attz General in answer —

Questions made

1. Do oppts in court below shew a legal title to set aside seizure of the property
2. Have oppts proved that a will was ever made or is in existance
3 Can this writing be considered as a hol: will? —
4 Can it be considd as last will of Hy L—
5. Can it be considered as a bar to the right of Crown w/ out publication —

In the Court below there were 3 several issues raised by Crown 1 Demurrer. 2d General issue & 3. Plea in bar, admitting all facts that the will not being published could not avail oppts

1. That is not stated here in the oppn anything to shew from whom the Inheritance was to take place, whether from the testator, or from any other person. & it was necessary to allege from whom this Inheritance was to take place — all the oppositions are equally deficient in this respect — There is a variance in the argument, between Mickelgohn & Hoy Caldwell in this respect — the first claims as an inheritance from John Caldwell, the 2d from the Testator —

2. After the first enquete and on the hearing the Court below admitted the opposte to amend their oppositions and to adduce new evidence — this he contends was irregular and wrong, and he will now argue the Case as on the evidence first given.

A holograph will can be of no avail until proved. 4 Fr. Cout. p. 83. — Poth. Don. Tests p. 300. Old Denizt. vo Testament. p. 519. — The only proof made was that as if the will had been made in the English form before Witnesses — Stat. 41. Geo 3. C. 4 refers to wills only executed according to the laws of England — The holograph will does not come within this Statute. — and consequently there was no proof of this will legally made. —

Under the amendment allowed, new proof was made, and even now the proof is not complete as the evidence refers to a paper marked B, — without ascertaining that this was the original holograph will of H Caldwell —

— But the will such as proved is insufficient. In this Country we have two systems of law in regard of making will — the Stat. 14. Geo. 3. — the English & french forms are given for the benefit of the old & new Subjects — The will here is a will under the form of the French law, being a holograph will — But this will is not made according to 289 art — not being signed by the Testator —

It is to be considered what constitutes a Signature

in this respect the legal acceptation & the ordinary acceptation, is the signing a subscription of a name to some writing as approving of it —
Dic. de l'academie. V° Signature. —
Dic. de Droit. V° Signature. — V° Signer. —
Riccard Tr. des Don. 1 Vol. p. 329. N° 1531 —
2 Bouy. p. 303. 304. — refers to Bardet —
1 Bardet. liv. 4. ch 41. p. 585. —
Poth. Tr. Don. Test. 298. 299. —
The authorities cited by the counsel on the other side on this head do not apply as they intend — Old D. V° Testament. N° 35. — the envelope here expresses an absolute declaration of the will, sealed and signed — and confirms the contents as being her will. — refers to the testimony of Mr Peter to shew that testatrix had an intention to make a will in april 1809, & to give instructions to him for that purpose — This paper may be considered only as instructions. —

The name Henry Caldwell at the beginning of the paper can be considered only as description of the person making it. — this is the common sense of mankind, if the old English decisions were again to take place, there is great reason to believe they would change the principle of a name of the testator found in any part of the will, by a signature —

By the English Stat. 29 Chr 2 this kind of Signature is admitted, but besides this. there must be the attestation of 3 Witss — to confirm the will — the Statute only says signed, but not subscribed

subscribed, which is very material & on this decision the Surr of the Court on this point was founded — but signature & signer in French is different it means subscription. —

That in regard of a holograph will this is most essential, so as to mark the perfect intention of a testator — as without it there must be the greatest uncertainty —

Roberts on Wills. p. 121. — to shew that Courts in England now begin to retrocede from the doctrine laid down in former decisions as to signature cites also Wright. v. Price — where more strictness was observed. —

The argument that the form in England by of chattels only may be bequeathed may be followed here to convey real Estate is ideal & suggestions for a nuncupative will is known in England, but it would be a misapplication of the meaning of the Stat. of 1774 to say, that a real Estate in this Country could be devised by a nuncupative will. — the form of the Country must be followed by which the Real Estate in that Country can be conveyed. —

As to the will having been approved by the legal heir, as contended by Appt wh must render it valid, however informal, so as to bind subsequent Creditors — there is no statement to this effect in the proceedings, nothing set up to call the opinion of the Court upon it — The issue between the parties raises no such question — and in

none

sion of the oppositions is there any mention made of such a fact — this argument not used in the Court below — the Crown were entitled to evidence on this point & a proper issue ought to have been raised — but there is neither allegation nor proof of this fact before the Court — the evidence of the probate made before the Lords at the instance of John Caldwell, the only thing produced — but this probate can be of no avail, as it is made in a matter over wh the Lords has no jurisdiction, & this Clerk could give no certificate touching that fact wh can afford legal evidence — the papers produced authenticated by Perrault & Ross in this respect can prove nothing, they merely certify that the paper produced is the copy of a paper in their possession, but it does not prove the paper to be the original will in their possession; — But allowing all this proof to be regular, it is evident here the intention of the Defendt was not such as contended for, as with this holograph will he adjoined a real will executed in 1799 by the Testator, & prays that both these wills be received for all legal purposes, but without renouncing to any of his rights — Refers to the authority cited by Appellt from Repe va Legg — as to the confirming a will in wh there may be any nullity — will not go to the extent to apply here — that he who takes a benefit under a will cannot afterwards be allowed to allege that nullity — but this not applicable here —

4. Suppose the will legal & proved — can it be considered to be the last Will & Testament of Testator we have here 2 wills — one legal & sufft — with a certain date — but we have nothing to say that the holograph will was made subsequent to the other — The fact of Mr Bowen's appointment as Attr Genl to prove the date of holograph will, has not been regularly proved — the evidence of Mr Montizambert who produces the copy of a copy instead of Mr Bowen's own Commission — by the additional evidence allowed this defect was cured —

5. It is to be ascertained what the nature of this devise is — one claims as Legatee of his Grandfather the other claims as Curator to a substitution which must arise by the appointment of John Caldwell under the will — this is a conflicting claim — That the devise here is evidently a conditional one in favor of such persons as Defendr — may select — That oppost Caldwell can have no present interest, as the will does not say, that the oppost is to inherit from him, the Testator, on the contrary the oppost was to inherit from his own father, if he made no other choice — this is the construction to give effect to the whole will — as in the first instance the Testator gives the whole of his property to his Son John Caldwell and afterwards to the oppost — The Defendr had therefore a life estate in the property, & would

not

nor be the case of the oppos. took immediately from the Testator — — The Defend. is also charged with the payt of all his debts, & shews this to be the intention of the Testator, to give him the means of doing so —

But this is evidently a fidei commissary Substn There are 2 kinds of Sub. in this Country, the Vulgar & fidei comty — John Caldwell takes an estate for life, & the sons be opponents, takes the fidei comy. Estate. Poth. Substn. p. 487. — as to the nature of such devises. see p. 497. — The fidei-commis is here conditional, until the contingency happens, the oppt has no interest — cites Riccard. 2d. Vol. p. 101. — to shew the person claiming has no interest till the contingency happens. Id. p 385 — 440. — 454. 461. — 2 Bouvr. 361. — 362. — Repn vo Substn. p. 497 —

This being a fidei commissary Substitution, the registration & publication thereof became — 1566 necessary — cites. Edits. Neron. p. 66 — Ordce de Moulins — . The enregistration & publication must be made within the Jurisdiction where the Testator died & in open Court. — & by a subsequt ordce 1590 — this enregistration was to be made where the property was situated — Repn p. 483. vo Substn, see the history of this law —

Poth. Substn. p. 491 — as to the extrinsic formalities of these acts —

2 Riccard. p. 506. — Repn vo Subn. 483. —

J1

2. 511

It was contended that Minors were not bound by these Laws — but this is a mistake in Brodeau the author cited, as has been well shewn by Ricard 2d Vol. p. 511. — and the other authors are of this opinion. Poth. Substs 496. —

Another ground insisted on &c cannot be maintained is. That the Ordce of Moulins applies not to a Substn of one degree, but a graudual Substn — but there is no such distinction in the Law.

2. Riccard. p. 513 —
Poth. Substs 492. —

2 vol. p. 549.

The opposte cited Brodeau sur Loust, on this point but the authority does not for this length, but on the contrary confirms the general doctrin. — The author here uses a pleonastique expression of more terms than were necessary, for obliqua substitutio are fideicomis as before stated — see 2 Riccard. 241. —

As to the observations of the Counsel for the Appt Henry Caldwell, that by the will a life Estate was given to Defendt and the realty to the Opposte. so as to shew that both took immediately from the Testator, different kinds of property & cited 2 Bourjon 153-154 — In the case here the Defendt gets the whole Estate & he is charged to give over the Estate to another — & here the Ordce de Moulins apply — for if the Appt had died, the Estate belonged in fee to Defendt 2 Riccard. 442. Rispe v. Substs 522. —

522

Mr Walkers for Micklejohn in reply—

It has been objected that there are not sufficient allegations contained in the oppn— the will has been rested according to the words— The Defdt took as Legatee & so did Henry Caldwell as legatee from the Testator, & the words are of little consequence if the intentions of the Testator are fulfilled— There can be no inheritance by will —

2. There was no appeal from the Judt. to amend in the Inferr Court & must have its effect & this Court cannot set aside, the Enquete as made after the amendment must now be considered — This Enquete is complete, & the original will has been proved

3 As to the form of wills we have two laws, but as to the effect of them, only one law, that is of the Country — A greater favor is now given in the Courts here under Stat. of 1774 & 1801 than before, and therefore the old french writers ought to be consulted w. much caution— the word signer, taken in its strict sense by those authors ought not to be admitted, but the signification as settled by the Courts in England — it is not merely subscription, but the writing by the hand of the party —

The first auth. from Ricard not applicable to holographic will, as it is P. he must declare the reason why he does not sign— Bourj.e seems of same opinion, but he takes up the strict law on this subject— The arrêt he cites does not conform his

Dodrue

doctrine, but is like the case of Wright v Price where a testator signs the first page & not the others shews that the testator had an intention to do something which he had not completed — This is conformable to what is said ~~by~~ Evans's Poth. - cited yesterday — where the signature is at the head of the instrument this applies to the whole of it —

The answer to the cases from Old Dendy does not invalidate the kind of signature here contended for — for signature is not to be considered as ~~subscription~~ subscription

As to Mr Letts's testimony, it is of no avail how he was called 13 months before testators death he was notified of the intentions of the Testator but from the lapse of time it is evident the testator had changed his mind to make a holograph Will — This cannot be taken as the notes he meant to give to the Notary they have not that appearance — the act is in a solemn form —

It has been said that the decision in the case of Lemayne v Stanley has been reproved by subsequent decisions, but this is not the case Roberts in his treatise is obliged to admit that it is the law followed at the present day — The authority from Evans' Pothier is applicable here as well as in other acts — the case also of memorandums under Stat. frauds not signed in case of Stokes v Moore, admits the signature to be good. wherever made & this without reference

reference to the additional circumstance of the 3 witnesses — But all the difficulties in writing have been removed under our laws — Our laws make no distinction as to the will of goods & of lands in this country — A will of goods to any amount in England is good if the signature be at the head of the will. — but the distinction is unknown in our Country we have the forms of have been introduced but not this distinction — if the instrument is good in form, it extends to all property — it is the form & not the effect we have received the nuncupative form never excluded to lands in England —

That if the will were even insufficient the approbation of the heir has confirmed it — it has been proved by the heir — who alone was intended to obtain the property — the production of this proof was a sufficient notice to the party of the use to be made of it — The admission of the heir is sufft for the Opp.t here — and Lordship Wms had authority to receive the admission & the proof offered by the heir, even in France the proof of the will must be made before the Judge — & when the heir admits it, this is sufficient proof —

The Petition of Defend.t praying to be allowed to make proof and deposit of the will — admits the will, — The former will cannot be considered

as

as destroying the Olograph will, although accompanying it deposited with it — to have all legal effect — this legal effect is, that the last will must have effect — In this there is no fraud or concealment, and the effect is to give to the appt the right now claimed, for Deft — not being then a Debtor could dispose of his property as he might think fit. — The evidence of the will before Judge Williams, is sufft and the certificate of it in this cause is also good evidence, as the Clerk is the legal depositary of the original —

It is said that simple acknowledgt of the will is not enough, that something more should be done, but this acknowt cannot be retracted, once made it is enough see 4 Henrys cases —

5. As to the Substitution in the will — admits the doctrine as laid down by the Attr General But on behalf of Appt Caldwell he must regard the legacy as not being a substitution for if John Caldwell die without a choice the Estate will belong to Henry — his appointment is certain, to be destroyed only in case of another choice made by John — the legacy to John is with limitation not clear of all condition,

the words of the will are remarkable, the legacy is absolute in favor of Henry unless the father alters the choice —

But as to Mackleyshan he must admit it is a substitution, a fidei commis conditionnel only if the condition do not happen, the heirs will have nothing. & Henry will have the whole Estate —

As to the order requiring publication and enregistration affect the will in question these laws requires that the publication be made en Jugement, not audience tenante, as required by Ordr of 1712, which is a very material distinction — the publication was sufficiently made before the Judge en Jugement when the will was proved before him — it was also enregistered, and these laws require no Registration in a Register kept in purpose, this is demanded only by Ordr of 1712 which is not in force here — Before the Ordr of Substitutions the Ordr of Moulins was very differently interpreted by different authot Parliaments —

As to the right of Minors, not being bound by the want of publication of

the

the Substitution — we must look at the opinion of the old Writers, for the latter are founded on the latter ordre where this was requisite — the arrêt cited from Merlé is in point, about 30 years before the Establishment of the Superior Council at Quebec — and this ought to be the jurisprudence — it is true the tiers acquereur de bonne foi was upheld as the Minor —

The Substitution must be oblique, grevée de fidei-commis as cited by Brodeau that the order of Moulins affects, but not the Subn vulgaire —

Riccard says, that all Substitutions are subject to publication, as the ordre makes no distinction — now Pothier makes a distinction as to the Subn vulgaire, & is a great object — now the distinction made by Brodeau is the true one, when the Subn does not pass the first degree & is not the Case here & therefore not subject to publication — The Legacy of the jouissance to one & the property to another is not a substitution —

That the Substitution <u>publiciana</u> and <u>exemplaire</u>, are also two instances in which the formality is not requisite, & that there is a distinction to be made of the kinds of Substitution subject to publication—

Argument continued till to morrow

Thursday 17th Jany 1828.—
Prest.—
as <u>before</u>.—

Percival
vs
Price— & Rule Nisi—

Ryan
vs
Grant dal
&
Fraser Intervs

On motion for an appeal from an Interlocutory Interl— dismissing a motion to intervene in a Cause as interested in the object in contest—

Mr Power for Pltff— the Case in the Court below will be suspended & the cause lost—as the Law under which the Defendt are to be called in will expire in May next.

Maitland del
Mc Donnel
Mc Donnel
} over till to morrow —

The King
v.
Caldwell
&
Caldwell opt
} Mr A. Stuart on reply for the Appt —
The averments in the opposition are suffe —
but if they were not, these averments are
not put in issue, then being no special
demurrer there's nor room for it. —
The evidence on the amended opposition is quite
sufficient, and that is the only opposition before
the Court — But the evidence on the first
opposition was good — by St. 3 & 4 Ed. 6. ch. 4
& by 13 Eliz. ch. 6. the exemplification of the Bowes
commission is good evidence — here the Crown
is a party, & is the party making the enrolment.
But there was no appeal taken from the Judgt
allowing the amendment
— The only end of the verification of the will, is to
establish it as the heir, —
— As to the will, recourse can be had either to the
English & French law as to the form of the will
under our present System in Canada —
The end of all proof, is to ascertain the truth of
a fact — now it is in evidence that this will was
admitted by the heir — the only person at the
time interested — Was the best evidence. —

and according to the English forms the Signature may be at the head as at the foot of it —
The acquiescence of Defendt. was a matter of evidence not requiring to be pleaded —
The Certificate of the proof of the will is regular and entitled to credit. —

As to the opposant inheriting the property as stated in the will, it must be certain that the Testator was making a will for himself and not for his son the Defendt. so as to direct that the Oppost should inherit from the Defendt —

The question has been fully treated in 6 Louisiana Ann. p. 290 — grant. 2. of shews that the Individual holds from the Testator — & this corresponds with the English authority cited by Mr Primrose — The exception in the will as to Lawson, shews that Defendt never had this property devised to him at all. for it is true gets all the rest with this exception and therefore the fee simple of this Estate never was in the Defendt but passed immediately to the Oppost — subject to the condition of another appointment by Defdt —

If the fee passed to Defendt it was at least in trust for the Oppost — or such other as he might name —

Fideicommissary Substitutions — explained —

But the fee simple did not pass, nor even a life interest did not pass to Defendt— If Defendt had entered into holy orders so as to make it certain that he could have no other legal issue the appt becomes immediately entitled to the Estate— like a Corporation who had a right to make a choice refusing to make any— But on making the election the Estate would have passed immediately on the person chosen— This merely to shew the quantum of Estate given to the Defdt by the will— it was less than an Estate for life— On this act there was no room to require an enregistration of the will under the arde de Moulins.—

Friday 18th Janry 1828

Present.

As above.—

Ryan.—
v
Grant & al.
&
Trust Interv.

Maitland dal
vs
Mc Donnel
&
Mc Donnel

On mo. for an appeal from a Judt in ~~Appeal~~ motion to intervene.—

Mr. A. Stuart for the Respts— that the course to be adopted ought to have been by opposition, the course by Intervention is irregular, as it tends to prolong the cause & create unnecessary expence—

Powell's adm. of the

Hayes
vs
Wilson—

Mr Sewell for the Defts— agrees

The Atty Genl
vs
Black

Mr Atty Genl— the question here is whether interest is due to the Crown on its claim for monies paid for the Defend in the Superior Court—

Interest under the Law as in England is considered as a compensation to the Creditor for having been wrongfully kept out of his just debt—

The French Laws have several determinations

1 when conventional interest
2 when nature of obligation
3 when law specially allows
4 when Courts allowed

O. Denizart vo Interets p. 12 & 13—
Lapeirere p. 454. 2 Centuria 461.—

3. The claim here is from the nature of the obligation as having paid the money as the security of the Defend.t Lepretre. 461 — Interest is due to the fidejusseur for what he paid to the Creditor. — Lecamus.
Id. 747. — Lacombe. v Interest. p. 382. — co-obligés solidaires qui a payés — as indemnity — so in the case of a Sequestre
2 Journal des Pal. 350. — same principle —
Rep.re v.o Interets. p. 462. —

4. as to Judicial Interest. —
60 art. Ord.e Orleans — Serpillon. 490 —
Rep. v.o Interets p. 466. —
1 Despeisses. 214 —
Lecamus. p. 125. —
Dic. du Domaine, Laplanche — 3 Vol. p. 319. 331.
in Dubio Fiscus jure privato utitur. —
Dic. des arrets. 3 Vol. p. 842.
Gail ob. 1 Vol. ob. 20. — as to the ordinary course of proceeding. — same rule as in private Causes. —
Chitty on P. of Crown. 245. — King may maintain the same remedy as His Subjects. —
Hammond's Dig. Index. tit. Interest. 604 —
Ellice on Law of D.r & C.r p. 346. 8vo
Evans Coll. Stat. v. 4. p. 230. —
King v Mainwaring. 2 Price Rep. 67. — 74. — 76 —
N. Denizt. v.s Compstable — when King gave up interest.
Manning's Exch. 12mo

Mr. A. Stuart for Respond.t —
We cannot look to 2 different laws on this Subject
The only rule to be followed as regarding public rights
is the Common law of England —

Taylors civil law p 58 & seq. has been cited, as that jus fisci is a part of public law — all cases from French law do not apply. — the public law of England alone must be followed — when the rights of Crown are demanded the course of the Courts of the Country must be followed — so says Gail — so as to recovery of Lods & Ventes — Cujacius. obs. referred to by Taylor. p 65 —

States facts of the Case —

The declar contains no count for interest — but concludes as an action of assumpsit — Ham. Dig. tit. Interest. due on all liquidated sums — where the sum was not liquidated. the amount of debt not certain. — not known to the Defend. in the Cause — By the law of England the debt must be a liquidated debt from the law of England gives interest —

Stat. 33 Hen 8. ch 54 — regards obligations & specialties — a Specialty — is a bond &c — This not such a debt the contract here is under a Notarial Instrument — ment is uncertain — this is therefore a case of a particular Kind, suis generis. —

The Attys Genl in reply — The jus fisci, strictly understood applies to the prerogative right of the Crown this is a question merely of Common right — such as is due to the Subject — the law of Country applies — The demand here is liquidated by the ~~demand~~ contract itself — the debt was ascertained before the action brought, & admitted by Gourdie's agent —

Jl

It was not necessary that the declr should have contained any Count for Interest, — the interest must apply to the Debt of[f] was proved to exist at the time of the action —

Pothier Ob. tot Interest. — p. 457. & 458 — where demands on Covenant, even where there is no liquidation —

Saturday 19th Jany. 1828

Pres[t]

The Chief Justice of Montreal
The Lord Bishop of Quebec
Mr Hale
Mr Smith
Mr Delery. —

Masterson appell[t]
v
Powell — Respt
& Grant & al[t] Intervs

} Judgt — reversing the Judgt of the Court of Kings Bench, dismissing the Intervention of Grant & al[t] — & maintaining the appellant in the possession of the property in question on the principle that the possession proved by the appellant was fully sufficient to maintain him in his possession on the present action. —

July Session. 1828.—

Monday 21st. July.—

Pres.t

Ch. Justice of Montreal
Mr Richardson—
Mr Hale—
Mr Delery
Mr Stewart—

M.r Donnel and Maitland & al } Appell.ts / Resp.ds } Mr Gugy's motion for payt. of costs on the acquiescence of the Respond.ts to an order of this Court admitting an appeal from an Interlocutory Judgt. Stuart for Resp.ds— case not before the Court

N. Bethune & al and Hoyle & ano } Appell.ts / Resp.ds } Mr Attr Gen.l for the Appell.ts reads the declaration to shew its regularity, as not of any explicit nature upon a sufficient defence, & the appell.ts have thereby been precluded from shewing that the note was a forgery— To this decln the Defend.ts demurred— but demurrer was over-ruled— the Defd.ts were afterwards condemned— The action being an action of Debt, on which the authenticity of the note did not come into consideration— but the Case was eventually adjudged on the note.—

The Statement in Dec. might have given room for 3 diff. actions — 1. as withholding the note. as in detinue — 2. on a special promise to pay, in consequence of the delivery up of the note to Defdt — 3. on Indeb. Assumpt. on note — but equally bad in all —

1. As to the demand as being an action of detinue — the action could not be maintained — the delivery was to one individual — pf. could give no cause of action as to other Defdts — this action could lie of Bethune alone — besides the conclusions of the declaration are in debt not in detinue — the debt in this kind of action ought to be alternative, either to deliver up the note or to pay the money — vide 2. Chitty. 284 — 1 Do. 117. & 122. The remedy here also was claimed as there —

2 Action on a special promise to pay on receiving the particular security — This undertaking was however personal with Bethune alone — not maintainable

3 Action of debt on note — action brot. without being in the possn of the note — This not regular — 2 Camp. Refs. 212 — because party liable to another action — the delivery here made to an individual Bethune who may have handed it over to other persons —

That if this action could lie, it would be as the defendt only as Exctr — whereas this action is as them personally —

That on the merits the Plffs could not recover under any one of these kinds of action — 1 as an action of detinue — the evidence is that the note came only into the hands of Bethune — & no evidence as to the other Defdts — & the production by Bethune of the note was an action for the note — 2. as an action of special assumpt — there is no evidence whatever —

At the Enquete, the Defend^r considering the action in detinue, were not prepared with evidence to shew that the note was a forgery—

As an action of Debt—it was necessary to shew there was a debt due by the testator—but there is a variance between the note produced & that stated in the declaration—in Debt it is stated as payable to the Pltff^s whereas the note itself is to Sarah Hoyle alone—Right v Bois Law 2. Doug. Rep. 664—
3 T. Rp. 645. 646—4 T. Rp. 580—do 611. 612—687—
2 Chitty Rep. p. 333.—
This was a note made to a married woman without the intervention of her husband—this is contrary to the 223. art. of the Custom—Rep^re v^e autorisation p. 816—even where the contract is advantageous to the wife—N. Denz^t. p. 787. 788. v^o autorization
Le Jannes 2 vol. p. 15.—
If the note was made by the Testator the Defend^r. would be liable only as his Exec^r, not personally—but the Engt. is as Defend^r personally—and the conclusions of the declaration are as the Defend^r personally—the words "is qualités" are here improperly used, and can imply nothing—& if they refer to qualité of Exec^r it is contrary to the conclusions of the declaration.—

Mr Gregg for Respond^ts

The action here, is to recover the amount of a promy Note. &c. had been delivered up to Defend^t—and not an action of Detinue—
There are 3 Counts in Declar—1st for the amt. of note.
2^d for money had and
3 Amt stated—
1 Pigeau. 45. shews an action of this kind will lie for the note—The Pltff was not bound to submit to the alternative in his demand—

Chitty on bills 152. when Defend. withholds the note. this action lies — case cited from 2 Camp. 312 does not apply — there the note was lost — cites 5 East. 477 — Smith v. M'Clure — where action brot. ag. the acceptor who refused to deliver up the bill —
The demurrer not maintainable. 1 Chitty 658 — the demurrer must be to the whole or to a part — for if a part is good, a general demurrer will be bad there are 2 counts independant of the first, to wh. the demurrer could not attach —

The action is ag. the Defend. personally — but less has been given by the Court — and if the Inf. in this respect should be wrong it would be the duty of this Court to correct, by giving that Inst. wh. the Court ought below ought to have given — The action is founded on the promise exp. press & implied of Defdt to pay — Poth
546 Obl. N. 546 — a new debt was here contracted by the Defend. 0. Dunn. v. Solidate — where parties are solidaires — the admission of one affects the whole — a Rule was given for the note by one of the Defdts wh. is admitted — when this was given there was a promise to pay the note, as a letter to Pltff referring to a promise Bethune had made to remit money on acct. of the note —

The doctrine of demurrer & variance, is purely English & not reasonable here — 1 Pigeau 126. & 127 wh. is our law shews a different principle — and if there be enough in the declaration to shew a right of the Pltff — the Court is bound to maintain it —

The Plffs. declare here on a note not in their possession & all they can state is the substance of the note — It is cited as matter of inducement to the claim of the Plffs — 1 Chitty 291. 2 — a description has not so necessary, as not intended to be set out verbatim — nor is a verbal description attempted. but the legal effect of it is sufficient Chitty 302 — The consideration here is sufficient — 1 Taunt. 523. Poth. obl. N°550 — this a novation, by substituting a new debt in lieu of the old. —

The husband here is entitled to maintain the action the article of the Custom (223) does not apply — this is no contract on the part of the wife — Poth. puiss.a mar. N°80 — — old. Dunz. v° autorization 2 Anyon 206. —

The Attys. Genl — in reply — The admission of the Counsel that this action is founded on the undertaking of Bethune to pay the note on its being delivered up to him, limits case to a small point — now there is no evidence of this promise — but it would have been nudum pactum on the part of Bethune, as some consideration was necessary to support the undertaking — The undertaking if any, was not personal, it was on act. of the Estate of he represented 7 Ire Rep. p. 350 — and there could be no personal obligation on the part of the Defd. Bethune — Comp. 289 — 7 Taunt. 530 — to show the liability of parties sued as Execs, neither liable out of their own property Here the Defendts are not sued as Exctrs, not as representing the Estate of the Testator — but on their own personal responsibility —

Averill Val. Appellt
and
Patk O'Connor Respondt

Mr Shiart for the appellants — contends that in pursuance of the previous agreement a delivery took place at Quebec on 2 July anterior to seizure by O'Connor —

Lien, is an extension of the pledge — is favorably considered in law — There is a general & special lien — the special lien attaches to some particular thing only — The appellts have been dispossessed of their pledge, which they claim to be restored to them —

The 181 art. Coust. excludes all contributions on the pledge Bourg. Dr Exc. tit. 8. Duplessis 620 — Gp. Coust on 181 art. Coust. — Bell. Com. Law of Scotland. p. 476 —

Mr Gregy for Respondt.

There is no evidence that the Appellts were in possn of the raft at the time of the seizure by the Plff O'Connor — who pd part of the wages to the men — The evidence of appellts is given on a Com. Rogy which is irregularly executed, there are forms of the oaths to be taken by the Commissioners, which a form of the return — but none of these things appear to have been attended to — They do not give the words of the witnesses, but only a statement or abbreviation of what the witnesses said —

There is a variance between the date of the agreement produced & that proved by Appellts — & not proved to have been executed the day they bear date — It is in proof that the sale of Blanchard was made 3 weeks after the Raft set out to come to Quebec, instead of

being

being made before and the groundwork of the whole
There was a 2d delivery at Quebec, & was done with
a view to prevent the right of other Creditors —
only a part of the raft was delivered in Up. Canada
a small part was marked by Appellts — A. H — &
might be about 1/3 of the whole —

On the part of O Connor, it appears that some
of the labourers were paid for wages due to them on
that raft — at a time when Blanchard was in the
public possession of the Raft. —

If the appellts had any knowledge it was for a
much smaller sum than the value of the
raft — & the agreement that the surplus should be
paid to 3d persons not parties to the Contract
cannot be admitted, as it is a stipulation to the
prejudice of other Creditors —

Mr Sewell for Respondts — The reasons of appeal of
appellts shew a ground for setting aside this appeal,
as they say that Blanchard was not before the
Court below, & shews they could not be declared
the proprietors of a thing which belonged to Blanchard
if he was no parties to the Suit. —

B.R. Avertissement. 22 & 25

The delivery, if any to appellts in U. C. was delivered
back to ~~Blanchard~~ as they say there was a re-delivery
at Quebec — now before this re-delivery the Plff
right accrued —

The Jugt of the Court is calculated to do justice
to all, as the claim of appellts may still be secured
to them —

The condition of the assignment to appellts was
that they should pay the Raftsmen, which it appears

they

they did not pay the assessment, but on the contrary O Connor appears to have paid several of them and therefore entitled to their privileges before appellts

Stuart in reply — The Com. Reg. was opened and published by consent of all parties — and there is no motion made by Respondts to set aside the Commission as irregular —

There is no fraud here — the note is dated & proved as stated — The debtor had the possn to bring the suit to market as most interested — as this there is no fraud — this is the practice in case of this kind — & when arrested then a re-delivery or actual possn to the pledgee —

Wrightsal
v
Patton — } Mr Stuart for appellants —

The decision on both was remitted back to the Respondt & the question here is whether the answer of Respts is sufficient —

The demand here consisted of a variety of things, notes, monies advanced, goods sold — the bill of particulars limits the demand to the consideration for of the notes were given — the answer is deficient in many things — the question is restricted to the promissory notes, the answer is general & embraces all the objects of the demand there is also a question as to the interest — no answer to this — also touching costs & charges of protest — nothing of this in the answer —

nothing answered - to question whether appellant admitted the debt - This is an inland bill - no notice of protest or of non-payt to drawer of note -
Mr Gaggs for Respondt -

Tuesday 22 July 1828

Prest
As above

Henry Vilet Wright - Appellt
and
Jos. Piccard & Lapointe Respts

Mr Stuart for appellant - a balce being due by appellt to Respts & appellt gave his note for it, wh remained in the hands of Respondts for some days, & he rec'd several sums on acct of this note - in consideration of this note the Respondts gave a receipt for the balce due him & accepted the note as satisfaction. The Respondts notwithstanding this note sued the appellt & obt'd Judt against him - The Respts pretended that he was unacquainted with the contents of the note & the delay of 90 days thereby granted for the payt of the above balance

That the Respondt by signing the receipt & taking the note ought to be bound by his act and not allowed to allege any mistake, which cannot be ascertained, & the allowing such change of intention would render all transactions insecure

The Judge of the Court below is for £123.10 the amt agreed on in May was £130 — whereas it appears that a small payment was made reducing the amount to £107.10 — as appears by evidence adduced

Mr Vallieres for Respondt — There was no question of delay, when the act was settled yet in drawing up the note unknown to Respondt — inserted 3 months delay — When the Respondt found out this error he returned the note to appellt — who accepted it, & thereby acceded to the imposition he had put on Respondt —

There is no proof of the payts alleged to have been made by appellt — the book produced cannot be credited, the general manner in which payts made do not apply to payts made by the appellt to the Respondt — The book is in contradiction with the admission made by the appellt in his exception where he admits owing £130 — to the Respondt — & there is no proof of any payt subsequent to the date of this admission —

Stuart in reply — The taking back the note could not alter the delay of pay[t]

Jos: Dorions appellt
Jn B[te] Dorions dat Respts

Mr Walliers for the appellts the action here was to obtain an account of administration of the property of the late Jos. Dorion — the Defendt denied his responsibility — the Plffs submitted facts & articles to him — the Defendt made default — & thereupon the Plffs closed their enquete — the day after the Defdt appeared and prayed to be allowed to answer which was refused to him, & he was thereupon condemned — The authorities on this are Jousse art. 5 tit. 20. ordre 1667 — refers to the other authorities cited in his factum — as containing most express authority on the subject — The rule of practice refers to the law of the Country on this subject —

The Plffs prosecuted as heirs — now in England the ~~next of kin~~ heirs can claim only the realty — the residue of the moveables goes to the next of kin. The succession claimed lies in the United States.

There are also errors in the Exhibits baptismaux as to the genealogy of the Plffs

Mr Blake for the Respondt. It was not pleaded by the Defendt in the Court below that the Plffs were not heirs of the deceased Donors — there was no defaut de qualité alledged, which is a preliminary objection and must be alledged by the party who wishes to avail himself of it — 1 Pigeau 161 — But the possession d'état of the parties appears sufficiently by the Interrogatories not answered by the Defendt —

The art. 25. of 10th. title of Code Civil on which is entitling party to appear & answer if he comes in before Judgt — but then it must be sans retardation de procès — The Defendt made default — there was no application on his behalf for a delay to come in and answer — his default constituted a proof of the Plffs demand — & the enquête was thereupon closed — after this Defdr. came in & prayed to be permitted to answer — but had this been allowed it would be delaying the proceedings as the enquête must have been gone into anew —

The Prov. Stat. 41 Geo. 3. authorizes Courts to make rules of practice — & by the rules made in this respect according to the constant practice the party was too late —

3 Bro. 1726 — 2 Atk. 754 —

Mr Valliere in reply — The day after the default of the Defendr he appeared to answer, which was refused to him contrary to the express authority of the law. The rule of practice in question refers to the law of the Country — which is that relied on by the Defendr —

The 5e art. is very diffe from 1er art. of 10e title of the Code civil & more extensive —

The quality assumed by the Pltffs of heirs, of the deceased could not give them the right they claim to moveable property in the United States — and to such as might be readily admitted by the Defendr — as it gave them nothing —

Robert Laws Appellt
John and Jones — Respdts

Mr Valliere for Appellant — action was at the Respondr — en rédition de compte as Curator to one Deaves — he was condemned to render an account — not having complied with this Judgt the appellt obtained an order of contrainte a corps — on this he filed a paper in which he states that he owed nothing — that he expended nothing, & that he remains nothing —

Mr Stewart for Respondts has stated all he knows, as Curator, not acting in his own right. and he cannot be compelled to answer those, nor to account for what he does not know

Ravot. p. 130

Valliere in reply — the Curator stands in the place of the deceased & is bound to account for what the Succession received —

Reuben Deaves appellt
John Jones and Curr. Respt

Similar Case with this difference that an attachment had been sued out but set aside —

Mr Stuart for Respondt — The Judt. condemns Respondt. to account establishes nothing as him beyond his accountability —

In this Case the proceeding goes further than the other, as the process for Contempt had been sued out — this is in the nature of a Criminal proceeding, for not performing what the Court ordered — but this Court cannot judge of the Contempt committed of the Inferior Court — The party here cannot be held liable for what he does not know, and cannot admit — without injury to others & to himself —

Elvr: Astor et al appellts
Benjn and Corriveau. Respdt

Mr Dewey for the appellants — The Respdt was called in as Tres Saisi & made his declaration & it appears thereby that on the purchase made he was first to pay the Mortgage debts, and the balance to the Defendr in annual payments of £50— but he avails himself of a delay being given by the Benevolent Society of Quebec for the payt of a mortgage debt of £200— he refuses to pay the £50— annually to Appellts as Creditors of the Defendr— On the contestation raised by the appellts to his declaration, & on it the Court condemn the Respdt to pay the Costs, but by some unaccountable Cause, he is condemned to pay the annual instalment only in January 1828— The debt was due to the Benivolent Society in Octr 1823

Mr Vallieres of counsel for the appellants

Mr Hamel for Respondt— the stipulation in the Contract between the Respondt and Voyer ought to be favorably construed for the purchaser

Mr Stuart of counsel for Respondt— The Respondt could not be considered en demeure till proceedings had against him— the Respondt might avail himself of delay until called on to pay the hypothecary debts

Mr Duval in reply — By the deed of Sale to the Respondt the Mortgage debts were to be first paid — & the £50 annually to be paid afterwards —

From the moment the term of payt expired the interest became due de droit — Poth. Obl. 283. 4

—

Roger Lelievre Appellt
and
De Lanaudiere Respt

Mr Debarats for Appellant — the Respondt prosecuted by virtue of the will of her late husband. Mr Baby, & also as widow & Commune en biens with him — in support of her claim she produced only the will of the late Mr Baby, but made no other proof —

Mr Vallieres for Respondt the Respt prosecuted as widow & Legatee; & no objection was made to the qualité of the Plff — but it was even admitted, as appears by the plea to the merits made by the Appellt — in which he states the Respondt the widow of the late Jr Baby

1. Pryor 161
161

Mr Debarats in reply — There is no admission by Appellt of the title in qr Mrs Baby even by taking the title of the Cause —

in case of Donnelly v Smith — in L. R. 1824 — the 2 other cases, where the party sued as Executor & not having filed the acte de Curatelle, the action was dismissed — cites also 1 Pigeau 65. —

Pemberton's appellts
and
Evans & al. Respdts

On the Respondts motion to strike the case from the Role as having been inscribed before it was at issue and before the cases were filed —

Mr Grigs for the appellts — The Inscription was made on 19 April 1828 — at which time the answers to the reasons of appeal were filed — There is no instance of an Inscription being discharged from want of the case being filed, as it is a matter in which the adversary has no interest in it —

Mr Vallieres for the Respondts —

The parties consented to a hearing

Grigs for the appellts — The action was in assumpsit, on a promissory Note — & on other money Counts — on a particular filed, the demand was limited to the Promy Note —

The matter now to be considered demurred specially to the first Count in the declaration and on this demurrer the whole action was dismissed —

This Judg^t is null as it dismisses the whole action, whereas the demurrer goes only to one of the Counts — Both. Obl. N° 24 — The Judg^t is null when it pronounces upon what is not demanded — 1. Pothier. 399. & 400 —

Chitty Plea. p. 99. to 104 — The action here is for a damage for non compliance with his obligation — it was that the Indorser was to pay the Indorsee if the Maker does not — and the action is founded on the promise of the Defend^t to pay a debt formerly contracted —

Newland on Contracts. p.

It was contended that there was no protest nor allegation of protest of non-payt of the note — 3 Bl. Com. 295 — proof may be made on any Count — Party thereby entitled to go to proof of the loan of money here — the protest not here necessary — see doctrine of protests. Chitty on bills 216 — That the appell^t was entitled to prove that party waived the laches — Chitty. 248 — cites. 2 Camp. 188 — 1 East. 55 — Farr + Price — & on note in case — 7 Ter Rep. 243 — 6 East. 16 —

Mr Vallieres for Respond^t — The subsequent promise to pay is a question of evidence, this is a question of law & of allegation, which must be regularly

regularly made, the authorities cited do not go to shew that the declaration did not allege the necessary diligence having been done — it is this want of allegation which the Respondt has availed himself of —

There is but one Count in the declaration, although many things united in it — The the Defendt demanded a bill of particulars, & on this occasion the Plff limited his demand to the sole object of the note — The Indorser may promise to pay, but he must be regularly called upon by a legal diligence & obligation — a want on the part of the drawer to pay — The Prov. Stat. 34 Geo. 3. ch 2. directs that the Indorser shall not in any instance be liable without necessary diligence —

Mr Gugy in reply — the demurrer admits the facts as stated, which evidently shew a debt contracted and promised to be paid —

That the bill of particulars does not extend the consideration of the other Counts — if the other Counts can be supported on the facts stated in the bill of particulars

Mr Smith retired & Mr Stuart took his place —

Franc Blanchet appellt
Pre E. Dibarrats - Respt

Mr Vallieres for the appellt — The action contained 2 Counts — 1 Count is regularly stated the 2d Count is irregular, neither breach assigned nor damages laid —

The action of assumpsit is in damages and a default must be ~~made~~ shewn — a breach & damages —

The Appellt. made default — the Entry is on the 2d Count. / Impeys Mod. Pleadn. p. 9 —

The Costs of protest are allowed tho' was wrong as it operates no benefit — the note bore interest & there could be no necessity for it on this account — nor was it necessary to give notice of the Indorsr as no indorsement appears —

Mr Debarrats for the Respondt — The action lies was regular —

Wednesday 23.d July 1828.—

Prest.

Ch. Justice of Montreal
Mr Richardson
Mr Smith
Mr Hale
Mr Stewart

Ryan
"
Grant— } on rule Nisi.—
Grant
Gregg for ~~Ryan~~ — writ of appeal not signed by advocate suing it out — rule 12.th moves that it be rejected —

Mr Powell for Ryan — admits the fact — but contends that rule ought not to be so strictly enforced.

Ross dat
and
Nord— appellt
Respondt

Mr Stuart for the appellt — The action claiming a tract of land under a Grant from the Crown — The pleas are several — Defends claim the property under a deduction of title from the former King of France — & alledging fraud in the appellts in obtaining their Grant — Contends that Letters Patent, as matter of record are conclusive 2 Bl. Com. 346 — 17 Vener. tit. Prerogative 68. 2 U.C. dec. 2. Chitty. 330.1 — answers

to

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to the policy of France no large grants of land were made without the Concurrence of the Crown in this Colony, and until ratified, not binding — this principle must be looked to at the present day as a rule regulating the nature of the titles of parties — The nullity law is a nullité d'ordonnance — Resp^ts no Nullité — The Grant referred to by Defend^ts is in 1695 Subsequent to the arret of 1676 & liable to its provisions — therefore if the original grantee had no title, he could give none — There never was any Settlement made under this Grant —

1 Vol. arrets Edits p. 74 —

Decisions given by the French King to Messrs de Frontenac & Duchesneau Dated 20 Mai 1676 —

The next arret or Ordre is that of 1741, which refers to grants ratified, but where the conditions of Settlement had not been made — such grants were voidable —

2 arrets p. 326 —

The Defend^ts have set up a possession under the grant of these lands, but this is a possession adverse to the right of the Crown — But the lands in question, claimed are not identified to be the same granted to appell^ts — The variety of names given to the property, shews the improbability of any grant being given under such names — & there is evidence to shew that some of the lands carrying these names are situated in a different place —

As to the question of an adverse possession of the Defend^ts as the Crown, the maxim is nullum

tempus

tempus occurrit regi — The Lands ungranted & waste in this Colony fell to the Crown by Conquest cite Grotius & Vattel. diff^{t} parts — Cowper 208 L^{d} Mansfields Jud^{t} — The lands here in question are imprescriptible — 7 D'aguesseau 489 — Lepine de Laplanche liv. 12. ch. 7. — Poth. Prescrip. N^{o} 14 — The authors who hold that prescription holds — are Bacquet. ch. 7. N^{o} 6. 7. 8 – 27. 28. 29. Droit de Desherence Loisel liv. 5. tit. 3. — Poth. Prescrip. N^{o} 288 — LeBrt tom. 1. p. 93 — Lebrun in 1 Vol. p. 27. 31 — divides the Domaine public & privé — & places conquered lands in the Domaine privé — & liable to prescription according to Bacquet & Loisel — refers to a state of Society q^{t} has long disappeared — the King was Lord of his particular manors & the head of the State, and his feudal superiority only was acknowledged — but in other respects the Great Barons acknowledged no superiority — accordingly in the Kings particular Estates it was of moment that economy should be observed as the public was obliged to make the deficiency — and accordingly when the King & his Barons conquered any particular country, it belonged to him in the same manner as the particular Barons claimed any Estate they conquered from another — This principle now inapplicable, as the System has changed & the Crown is now supported by public expence — So far back as James Ist a great question arose whether the Colonies of America belonged to the King or to the public —

the

the question arose in respect of the State of New York — This was finally settled at restoration of Chas. 2d — that they belonged to realm of England Upon this principle all waste lands of the Crown in the Colonies are imprescriptable —

Dic. Domaine. 1re Domaine — sec. 1. No. 5 — But Lebrt admits that conjuncted lands ceded by the Crown vest in the nation —

But there is no proof of any possession of the Defendr before 1823 — by the Letters de Terrier. Mr Valliers for Respondts. In 1790 ~~1862~~, the late Mr Drapeau acquired the whole extent of land between the Seigniories of Mile & Lussard — on the River Sl. — This is the identical lot grant by the Govr & Intendant of Canada in 1695 to Lepage, between the Seigniory of St Pachot, qch is Mile — it is agreed that this grant covers the land granted by the Crown to the appellts in 1824 — There were 2 grants one in 1695 & a second in 1697 — of a confirmation which was in effect a confirmation of the first grant. — From these grants there is a chain of titles down to Mr Drapeau — the different names here do not apply — but the Seigniory was subsequently known under the name of the L'anse au Coq — but no name was given by the King, it was left to the families to whom the grant

was

was made to attach such names thereto as they chose —

The Court below decided upon the principle that as these lands had gone out of the hands of the King of France, they would presume all the rest to be right, without deciding upon the question of presumption of the Crown — & that the Confirmation must also be presumed. — That many hold their lands by long possession without being able to shew their titles —

N. Denoz. v° Devolut — The King in his grants always reserves his own rights & that of others —

The Grant by the Gov.r & Intendant had a right to concede, & their grants although liable to be declared a peine de nullité, yet a reunion was necessary before a D° con. could be granted. 1 Vol. Edits & Ords p. 534 — art. 3.

Observe Reunion

That after the purchase of Drapeau in 1790 he paid the Quint to the King as appears by the receipt filed — & for the land in question — this was equivalent to an act of possession admitted & acknowledged by the King —

Observe Quint

That in 1773 there were 2 concessions made by one Lepage their proprietor of this property

That there has been agent acting for this Seigniory one Frechet, for 29 years for the family Drapeau & that in 1805, Drapeau had the Seigniory surveyed and the Procès Verbal of one Honoré Roi, is filed

Survey —

Lettres de Terrier

In 1823 the family obtained Letters of Terrier from the present Governor, Lt Dalhousie — There was an error in the Grant made to the appellts in consequence of the form of the Certificates granted on such occasions — This appears by the testimony of Mr Montezambert — In virtue of the Lettres de Terrier, 5 of the appellts acknowledged the right of the respondents and accepted titles from them —

There are besides 33 other Concessions to tenants who have acknowledged the right of the Respondts —

The fraud alledged by the appellts is made out in several points — their concealment that the Respondts were in possession —

In 1789. when W. Ross, the father of the appellts when he made application for these lands. he represented them as Steriles, whereas the appellts state the contrary —

In 1807. there is an order in Council stating that the grant should not be granted to Ross — this was also concealed, when the present Grant in 1824 was obtained —

The Govr after signing. put a note that the grant should not pass the Audt — but this was overlooked by his Successor Sir Franl Burton —

Protest of Drapeau

The appellts had a knowledge of the possession of the Respdts as appears by the protest No 15 — in 1803. contre the answer of Drapeau on a demand to draw boundary lines —

That all the Concessionaires are not in the Cause nor is it shewn what has become of them —

That the Appell^ts are without interest having made over their rights to one Campbell — they admit this on oath — cf. Deniz^t V^o action p. 194. 197 —

Poth. Prescrip: N^o 16 — what is inalienable is imprescriptible
Rep^re p. 83. N^o 6. Vol. 6. V^o Domaine —
But where property is alienable it is prescriptible
D'Argentré — p. 1043 — but the waste lands of the Crown are alienable, and consequently prescriptible
Dunod. p. 273. 275 —

The King of France established a Domaine in this Colony, yt is become inalienable —
1 Edits & Ord^ces p. 43 — reserve of Kings Posts —
2 d^o — p. 87 — fixing the limits of the Domaine
N Deniz^t V^o Domaine de la Couronne — p. 719 —
terres incultes may be alienated — p. 620 — § 8 — & 621
says, where the inalienability ceases the prescription holds — refers also to Papon — 1 Bouy. p. 1093. gives the same rule — Bacquet Droit d'Aubaine — p. 116 —

Howard on old laws as stated by Britton — and Fleta allow same rule that what the King can alienate may be prescribed —

That the party here had acquired prescription before the Conquest — and even under 9 Geo. 3. they had acquired a possession of 60 years —

9 Geo. 3

N Deniz^t Domaine de la Couronne § 6. N^o 5.

as

as to the rule to be observed as to the right under which a Conqueror of a Colony must claim his rights —

Mr Stuart in reply —

In 1785. the appellts settled on this land — there was then no possession in the Drapeau's or any of their predecessors — the petition & order of Council upon it shew the right of the appellt so far back as 1785 — and long after this that Drapeau purchased & we hear of no possession, until the Lettres de Terrier in 1823 —

Not one of the titles produced by Respondts shew that they regard this grant — The Grant to the Respondts and the Continuation or augmentation are both void, not having been confirmed —

When the title vested in the party — then a Reunion was necessary, but not when the title was null —

Supposing the original Grant valid — are the Respondts the representatives of the original grantee? then being no possession proved on the Respdts to correspond with this title, the Respts can now claim nothing — None of the titles produced convey the right in the land in question — the persons who sold to Drapeau, appear to have had no title, & could not sell to him — this title also is set up against the Crown, nearly a Century after the original Grant — The pay. of Quint

applies

applies only to the title produced — but this cannot go to divest the Crown of its right — unless title of the Crown is produced — the sole effect of such poss.n is only a proof of possession —

That even if the Crown were divested by the original grant, still the persons claiming must shew they represent the original grantee, or the right of the Crown was divested only in regard of such original grantee or his representatives —

Although the appellt may have sold to Campbell yet the vendors must deliver, & till delivery the alone can bring this action — Poth. Prop. N° 286 —

286

In 1st a L. Vol. of the inalienability of the lands of the Crown is well treated by M Laurier —

The waste lands of the Crown are of equal importance with the antient domains of the Crown as it serves to make new settlements for Emigrants from Parent State — The waste lands of Canada are the property of the Public, and as such cannot be prescribed — this right of prescription is different in France — where what only is the Domains of the Crown is property imprescriptible —

2 Dic. Domain p. 109 —

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John Gow Smith appellt
Bernard & Peltier — Respts

M Guay for appellant — The late Lancelin Smith

Smith had children by Several marriages the question here agitated arises from the rights of Mary Smith only child of the 2d marriage the appellant here was the son of the 4th marriage born in 1803 — In 1823 Lauchlin Smith died, & by his will appoints the appellt his Universal Legatee — In virtue of wh the Legatee took possession of the Est in question which was in the possession of the Testator at the time of his decease —

In 1807. Mary Smith married one Jean Fr Fournel, & by the Contract of marriage dated in 1807 it was provided, that all the rights of Mary Smith were £300 — in the Succession of her father Lauchlin Smith — this sum was afterwards paid to her & in consideration of her renonciation to all other claims —

On 4 Feby 1826. B. Pelletier obt a Jugt. agt Mary Smith, for £1100 — Upon wch out — and at the suggestion of the Pelletier one fourth of the Lots in question was seized in the possn of the appellt as being the property of Mary Smith, being her Dotal Community thereon On this Seizure the present opposition was made — and contended to be null — & it was alledged that Mary Smith had renounced to all claim of Dower by her Marriage Contract

To this Opposition an Exception was put in by the Respondt — It is admitted on all hands that by this marriage Contract Mary Smith renounced to the Succession of her father — & this she could validly do — C Dimz. Vo Contract de mariage — Poth. Succ. p. 31 — C. Dimz. Vo Renonciation a Succession future. p. ~~300~~ 232 — Lacombe. p. 11. art d'heritier — No 352. 293. No 297. 354. 356. Poth. Douaire — a debt of the Succession of the father as a maintainence for the Children — 1 Repert 362 363 365 — the kind of renonciation of the child to entitle her to the dower must be gratuitous here it was not gratuitous — but was a sale by the ~~father~~ her to her father. 1 Bourg. 905 — renonciation for a sum of money does an act d'heritier — & cannot afterwards claim Dower — Lacombe Vo Renonciation No 29. — 1 Bourg 905

That the seizure here is irregular — that the party here ought not to have the benefit of £300 ~~of the~~ Dower, without bringing back the money — but here the seizure is made of property claimed by the apptt — the proceeding should have been by an action de partage — That there might have been an action de Compte & partage & thereupon a mass would have been prepared Poth. Douaire 397-79 — That by this course of proceeding the Oppot is cut out of his claim to have the sum of £300 refunded, in case the Dower be allowed — Mr Vanfelson of counsel for apptt — The Oppot claims, that by virtue of his father's will this Estate passed to him, & that there is no right of Dower —

1 Mary Smith has renounced to her father's
succession & cannot claim the Dower—
That by a marriage contract a female may
renounce her right to future claims for a consideration
1 Bourg. 2 part. ch. 3. N° 36. 37. 38— p. 909—
Poth. Suc. p. 32. part. 1.— Rep^ns 15 Vol. V°—
Renonciation. 136. 137.— The acquittance is a further
confirmation of the renonciation. Le Brun. To.
de Suc. liv. 3. ch. 8. sec. 1.— (he liv. 3 ch. 8. sec.)

The Respond^t by his answer a Exception to the oppos^n
admits that by the Mar. Contract Mary Smith
did renounce to the succession of her father—
Such renonciation excludes all claim for Dower
because it is an acte d'heritier & bound to warrant
the oppos^t from such claim— Dic. de Arrets
V° acte— p. 68— Domat. liv. 1. tit. 1. sec. 1. N° 18.
p. 348. 349— 4 Poth. Domain sec 2. p. 164. N° 320

The Att^s Gen^l on same side— The title by Decret
must be made ~~upon~~ by seizure on the person
of the Debtor— without which there could be
no security— The only notice of seizure is by
notice in a public Gazette— The french law
makes it requisite that the seizure should
be made on the Debtor in possession— Sale
thereon void— N. Denis V° Decret— p 47.—
Rep^ns V° Decret—

M^r Vallieis for the Respond^t— There is no
proof that M^r Smith is in possession, the

admission

admission of the Respondt. that the late Mr Smith was in possn at the time of his death but this does not follow that oppt came to the possession — the possn must be presumed to be in the Debtor, Mary Smith —

Renusson Douaire ch. 5 n. 31 — Douaire Conventionnel saisi, sans demander — art 256-257. — The party opposing must not only be in possession but he must be proprietor also — here oppt if in possession was not the proprietor —

There is no renunciation by Mary Smith in her Marriage Contract, that is no express renunciation as alledged — but Respt admits a renn to the succession of her father — but this was no renunciation to the Dower — because Dower cannot be demanded without renunciation — as to the money rec'd — this does not apply as an act d'heritier — because there can be no renunciation to a succession not open —

Renusson ch. 6 du Douaire — en subpt de support — art 252 — restitution to be made by the Childn of what he has rec'd from the succession of her father

O Denizt vo Douaire n° 65 — n° 68 —

The Dower is inalienable by the Children — here Mary Smith was a Minor & could not sell her Dower Pothier Coutumes tit. 1. p. 389.

The Attr Genl — possession is a presumption of property in every person — before a Sale this possession in a third person is sufficient to set aside the Seizure if the Sale had been made the Tiers must in that case also show that he was not only in possn but as proprietor.

It is sufficiently apparent from the State of the pleadings as fact admitted that the Oppt was in possn at the time of the seizure —

The Renonciation of Mary Smith, was of a nature to be a sale of the Succession to her father, & is very different from a sale without taking any thing so as to entitle her to claim the dower — The Respondt confirms the allegation in the opposition that M. Smith renounced in consideration of a sum of money —

That the s^d Mary Smith has not done what was requisite to entitle her to claim dower — Pothr. Douair. p. 429. 436. 438. 452. 472 in 12° — 1st that thing is a Renonciation to the Succession of the father, and 2d a rapport of what the party had received —

Rep^se v^o Douaire. p. 341 — The pre-requisite on a claim of Dower —

Here there is in fact no renonciation on the part of Mary Smith to the Succession of her father — it has been admitted to be expressed in the marriage Contract —, but it is in truth no renonciation, nor does the subsequent receipt given for the £300, confirm it, or consider it as such — Neither is there any offer or tender to rapporter what Mary Smith had so received, so as to entitle her to Dower —

Valleres — The Renonciation stands admitted by both parties — And the Respondt finding M. Smith in possn of her property subject to Dower, seized it, he had no occasion to enquire whether any Rapport had been made or offered —

Thursday 24th July. 1828.

Prest

Ch. Justice of Montreal
Mr Richardson
Mr Hale
Mr Stewart
Mr Delery.

Ross appt
and
Ferguson Respt } Rule absolute by consent

Hayes appellt
and
Nelson Respt }

Mr Gugy for the Appellt The question now touches the interpretation of one of the rules of practice of the Court of K. B. — The action was on a bill of exchange emptied by appellt on assumpsit — a bill of particulars was demanded and according to rules of practice there is a stay of proceedings till such particulars be furnished — on the day of return of the rule for particulars, it was given in — this was on the 4th Octo — & according to rules, the Defdt had delay to plead from 4th Octo — The Defdt also moved for security for Costs from Pltff which is another stay of proceedings — On the 8th the Pltff gave security — so that the delay to plead began

began to run from 8 Oct. — by the rules of practice, a plea is due on 6th. day after entry of the Cause — On the 11th the Pltff moved to proceed ex parte as Defendt — for want of a plea, on a wrong certificate of the Proth'y — set down his Cause for Enquiry & wit were heard & cause set down on the Dob de droit — The Defendt — then moved for setting aside the Pltffs. proceedings as irregular — the parties were heard, on this rule, and the Pltff on the merits ex parte — and Judt was given as Defendt — who was thus not heard on the Merits —

Mr Sewell for Respondt. — The action was in assumpsit — & pt. included the money Counts — when exh. an plea, the rule to plead commenced from the return day — Pltff filed his exhibits, on 1st day with his particulars, & had none other — the Defts mo. was unnecessary & irregular, and when the rule was returned, the Pltff declared he had no other particulars to file — & consequently the rule was discharged — On the 6th security moved for, & on 8th was given — The demand for security suspends the proceedings, but cannot affect the time for pleading already elapsed — and the suspension could affect only the 2 days from the 6 to the 8th — so that on the 11th the Pltff was in time to proceed on the 11th for want of a plea —

The

The application of the Defend- on moving that the proceedings should be set aside, shewed he was too late to pyle a plea, as he moved to be permitted to pyle a plea without giving any ground to the Court for granting

—

Smith — appellt
and
Fraser — Respt

Mr Grigg for the appellt

The ~~Appellt~~ Lauchlan Smith having married without contract Customary Dower, which attached in favor of the Children of his wife — the Respond. was Ann Smith

In June 1823 Lauchlan Smith died & the appellt was appointed by his will his universal legatee and the respond. in right of his mother now claims of the appellant — Two Suits were commenced by the Respondt for those rights, & submitted to an arbitration — an award was made & both parties agreed to it — But afterwards the Respondt brot another action claiming all that the award gave him and also a further sum which the award had not given him, & pross the Insf. on the demand the appeal is now made —

The late Lauchlan Smith gave his daughter Ann. Smith at her marriage £600 —

In the deeds the compromis is set out & the award upon it — The arbitrators omitted to decide

the last point submitted to them.— The parties agreed to the award by them naming Experts to ascertain certain fruits or revenus of the Fief St Denis.—

In the declaration it is stated that the ¼ of the fruits or revenus of the Fief Laporcaterie & St Denis are omitted by the arbitrators in their award, & is now demanded by the declaration.— There can no conclusions to this declaration on wh a Libel can be founded there being an omission of the Defendrs name as the person to be condemned.— This condemnation being prayed of the Pltff himself.— the only part that can be maintained is that whereby Pltff demands to be declared proprietor of a certain part of the Fief & Seigniory of St Ann &c.—

There is no proof that the action referred to in the award has been discontd.—

In claiming the Dower the Dame ought to return what she had from her father's succession now the Award gives the dower & also the value of the £600 stipulated in the Mar. Contract.— in this respect the Award is wrong.

There is no conclusion here to homologate the award.— but Pltff having conformed to the award cannot be allowed to depart from any part of it without paying the stipulated penalty.—

Mr Advocate Genl.— The declaration is not for the homologation of the award, but contains a conjunction of demands of a real & personal

nature

nature, it begins by stating the nature of Submission and award of the arbitrators, & then proceeds to state that Defendt. refused to pay, not that he refused to abide by the award of the arbitrators — and the conclusion, is merely that Pltff be declared proprietor of the parts of the 2 Seigs & certain monies paid him The general demurrer pleaded will here apply, & the action ought to have been dismissed —

The action here ought to have been either to confirm the award, or not — If to affirm it — his conclusions are at variance with it — as he complains of certain defects in the award — In referring to the Submission to the arbitrators, it will be found that there was an option given to them to award either the £600 or the Share of the Seigs as Owner but not both whereas they have awarded both. —

If the action be considered as a demand for an object not included in the award — it must be considered as a Cumulation of actions — this appears by the conclusions — 1st that he be declared proprietor of 1/4 Fief St Denis, this being a real action — & 2d conclusion — that a sum of money be pd Pltff for the Domain Contumier on 2 Houses — this is also of a real nature — 3d — also a sum of £ for the bala. of the £600 — &c is of a personal nature. — & 4th that a sum of £100 — be allowed as fruits & revenues on the Fief St An. — this also real & the 5th for £50 — for expenses of award which is a personal object —

action ought therefore to have been dismissed
1 Py. p. 37.

3d The parties have acquiesced in the award, & they are to be considered as rejecting it — if they have acquiesced in it — the action is irregular. Rep. v. Arbuth. p. 108. the award if acquiesced in is like a transaction — Nos 8. 9. 10 on record shew that the parties acquiesced in the award — and the allegations in the pltffs declaration —

4 The final decision is irregular — no Court seems to have considered the action as an action to homologat the sentence arbitrale, & on declare — whereas there is no such demand in the declar — Repse Vse conclure

Me Valliers for Respde — The Court below has not been granted the object demanded &c — was not awarded by the arbitrators — But the Defendt by his confirmed the award of the arbitrators &c objected — That there are no conclusions in the declaration — This is a mistake — the conclusions refer to the award, as far as that goes the condemnation is right, as to the object not comprehended in the award it has not been granted —

Me Advocate General in reply — The rights demanded accrue partly from the rights of the mother & partly from those of the father —
In the conclusions no reference is had to the Award

Rogerson & al. Appellts
Isaac Reid — Respt

Mr Stuart for appellts — The action was for running rigging of ship claimed by appellts in the Court below as his property — plea General issue — The action is brot by the Shipper in England — shipped by the order of Reid & Henry in Ireland, to the order of the Shipper, & the order delivered over to one Maxwell the ~~agent~~ Servant of Henry & Reid. — They had given order to appellts to build a ship for them at Quebec — The usage in this trade is — The European Merchts employs the Can. Merchts — who contracts w the builder here & advances the money to build & draws on the Europn Merchts for such advances — when the bills are honord the Can. Merchts (as in name of Europn Merchts. if he has doubt) has the ship registered in his own name & sends the ship to Europe w his agent & authority to make over the vessel, on getting his advances paid — The Europn Merchts generally sends out a Capt to superintend the building & to navigate the vessel — but in all other things the Capt is a Stranger & has nothing to do — But in respect of the rigging this sent out from Europe until about the time it was wanted — Thus the European Merchts must pay, & not the Canadian Merchts — The rigging arrived in Canada — and were placed in the hands of the appellts as the proper persons to make the entries at the Custom House & have the charge

of

of what belonged to the Ship — The appellts com advanced money to Maxwell for his wages — The appellts became dissatisfied with Maxwell and substituted another Captain in his place, and pd him his wages in full —

An action is brot by Isaac C. Reid for the restitution of this rigging & Maxwell appears as a Witness — Now Maxwell only & his principals could have brot the action — The Consignor never can have any action after he has parted with the goods, as they are at the risk of the Consignee — The Consignee Maxwell alone or his principals could maintain the action —

8. J. Rep. 330

The testimony of Maxwell is the only evidence to support the Respts claim — objections

1. The facts he states are immaterial — taking em to be true he says, that Respts — delivd the goods to him to be kept by him till paid for — Now Maxwell on receiving them goods their property vested in his principals —

2. There is no evidence relative to the Case — as he says that he recd his instructions in a letter from Respondt — but letter not produced — of course was the best evidence —

3. There are apparent falsehoods in Maxwells testimony — he says that those goods got into the hands of the appellts without his consent — does not produce on this point — shews no instructions to the contrary — but is perfectly silent —

It is in the ordinary course of the trade that the

then

then goods should have gone into the possession of the appellts who under had pd the duties on them —

4. Evidence is offered of the acquiescence of the Maxwell to the possession of the goods in the appellts — a more might have been offered had not the Court refused to give appellts an opportunity to adduce one Freer who was at the time absent — see Munn's evidence —

But who was to pay for these goods in Canada there was no person who could be called on to do it according to the course of the trade —

1. Stark: Ev: 524.

Mr Greggs for the Respt — The plff a merchant in Liverpool sent goods and effects on the building a ship — There is no proof of that fact — The Plff was not the agent of Twomly & Rees in Ireland, but merely their correspondent. There is nothing to connect this voyage with this particular ship Ocean — The Irish firm became insolvent & upon this the Respondt stopt the goods, as he had a right — this was contemplated from the nature of the order to deliver the goods to Maxwell the Consignee — the bill of lading is of record — The goods were laid on the wharf at Quebec by the Capt of the vessel, as delivered to Maxwell — The shipper on suspicion of insolvency of his Debtor can follow the goods & lay hold of them —

While the goods were on the wharf, a part of them was taken possessn of by the appellts without the consent of the Consignee Maxwell & refused to be delivered up — That there is proof of the insolvency

of

of Reid Townley & Lyon —

Under the general issue the Appellt could not claim as for a lien. 1 Chitty. 124.

There was no delivery of the goods ever made to the appellts. & they can establish no legal lien by taking them —

~~The~~ proof of sale to Reid & Co either on credit or for money — & in either case on their insolvency the shipper was entitled to attach the goods —

Refers to case of McNider v McGillivrai decided at Montreal —

This is the right action en Revendication which ought to lie here — there was no sale here even — Old Denis. vo Revendication — art. 177 Coutu. Repse vo Revendication —

The appellts as holders of the property should have shewn from whom & under what right they held them —

Poth. Prop. pt 245. There never was a delivery by the Respondts to any one but his own Agent

Nos 219. 221. 228. 231. 233. 277. & 229. 242. 235 — Poth. Obl. — necessity of delivery en order to transfer the right of property —

2 Argou. 239. — 1 Pigeau 619 —
Repse vo Vente. p. 480 —

1 H. Blacks
6 East p. 17. —
3. East. 93 —

That the Appellts can claim only under the right of the Merchts in Ireland — how the Insolvent Merchts in Ireland could claim no right to detain these goods —

3e East. 93 — case in point —

Was objected to the cross-exam^{n} of Maxwell as relating to facts not in issue—

The evidence of Freer was rightly rejected, as it did not appear that he could prove any fact pertinent to the issue, as appears by Mr D. Burnet's affidavit —

The appellt had purchased the Vessel Ocean before the goods arrived. —

Mr Stuart in reply — There is no evidence of any restriction given by the Respond^{t} to Maxwell — There can be stoppage in transitu here, after the goods came to the hands of the appellt as the agents of Henry & Reid —

3 East. 93 — case cited by Resp^{t} — but has no connection to present case — there ~~was~~ goods never came to the hands of the Consignee — since the goods were delivered —

Friday 25th July 1828. —

Pres^{t} —

The Ch. Justice of Montreal
Mr Richardson
~~Mr Smith.~~ —
Mr Dale
~~Mr Stuart~~
Mr Delery. —

Levi Patton } ~~Disall^{d}~~ — Mo. to obtain an appeal from an interlocutory Judg^{t} of this Court below dismissing an ex. of Sett^{s} about to leave the District —

Mo. not made within time prescribed by 80 Rule of Practice —

Mr Gayo in support of the motion, states that there are reasons to show why the motion could not be made as stated in affidavits filed. —

Perron & al
vs
Simard

Mr Vanfelson for appellts

Emarencienne Charlotte Gagnon by contract of marriage wt. Francis Boivin her first husband all propres fell into the Community — Boivin then had a lot of land belonging to him — The Children of this marriage are the Respts. The widow Boivin married Paschal Perron — on her death she willed all she had to her second husband Perron — after Perron's death, the two daughters of the first marriage bring their action against the 3 Children of the second marriage for a partage of the Estate of the Joint mother —

The declaration of the plffs is limited to demand a partage of the property of the mother and not beyond it. To this action the Defts pleaded the will of their mother — to this it was ~~answered that they~~ answered by a general denegation of all the facts pleaded — The Court however did not attach itself to the issue, but directed the appointment of

a

a Notary to make an Inventory and to ascertain what property the deceased possessed, & what she was entitled to at the time of her death —
As the parties did not agree in naming a Notary, the Pltff presented a petition to one of the Judges on vacation who named ex officio — The Judge had no such power in vacation without authority given by the Court —

The Notary thus named, made a kind of partage from papers, not from the actual state of the property — he was directed to make an Inventory — but no Inventory is made — It does not ascertain what the property was which the mother brought to the 2d Community —

The Court homologated the report & ordered a partage to be made —

This report is vague & uncertain & no Judgt could be founded on it — the Court has directed a division of the property according to the rights of the parties, without determining what that right was —

The next question, is whether the Stat. of 14 Geo. 3 & 41 Geo. in regard of Wills, has not set aside all the inabilities of Legatees taking under a will &c. held under the French law — The appellee contends that under the will the property of the widow Boivin passed to her second husband — It has been contended that the Edit de Secondes Noces prevented the widow from

from making such will, as to take the acquest by the liberality of the first ~~marriage~~ husband must go share & share alike to the children of both marriages — but this restriction is done away with under the above Statutes — 3 Poth. Dr. de mariage N° 423. N° 614 — the rights of the children under the Edit of Secondes noces, is limited to their share in the propres patrimels

Mr Valliere for the Respondt

Remon Comte 267. N° 20 Ch. 4. 2e partie

The ameublissement by the husband of his propre by marriage contract is an advantage in favor of the wife — Remusson Comte p. 267. ch. 4. N° 20 — and by the Edit of Secondes noces. the wife is bound to reserve to the children of the husband the property she rec'd from his liberality — The property here was a Conquet of the first Comté and the 279e art. declares expressly that this property cannot be disposed to the prejudice of the Children of first marriage. The only law we have in regards of solemn wills is the 289e art. of the Custom — the will here produced is null & void — The will here is not alleged to be dicté au notaire & temoins this is a nullity in the face of the Instrument — That it is ~~not~~ said that the will was read but not in the presence of the Testr —

But supposing the existence of the will

22

it cannot have the effect of enabling the alienation of the property in question —

That the 2 Stat. made in pari materia, ought to be taken together — Now it can never be said that what a person cannot dispose of by act inter vivos, he cannot devise by will — the wife cannot acquire such right — now the property here could not be alienated by the woman by any act inter vivos — The Statutes have not affected the right of property, but the faculty of disposing by will what they had a power to dispose of in his life time — a property affected by Substitution cannot be disposed of by will — See Rep^z v^o Droits — p. 144 as to the words of Ord^ce 1560 2 Bourg. 198 & seq. — D. Denizp. v^o Noces —

The rule applies as well to moveable as to real property — see Commentary on 279^th art. Coutume —

The appointment of a Notary in the vacation was necessarily implied by the Judge of the Court who was rendered on the last day of Term — That by the Judicature act, the Judge out of Court

Stat 1793. Sec. 8. as regarding Equity or dispatch

could do this, — and in France all petitions were answered by the Judge at Chambers —

As to the moveables, there does not appear that the Notary allows any part of what was of the first Community +

Mr

Mr. Vanfelson in reply — Objects that the Interlocut. Judgt — was irregularly executed — the Notary d'office, could not be named by the Judge in Vacation — the powers given by the Indication act to the Judges in vacation are expressly stated but no words in that act can imply that a Judge in vacation can interfere with any part of the proceedings in a suit before the Court —

There is no Inventory made by the Notary as required — that Inventory must have been made according to the actual state of the property, and of the mov. property as it stood by an inventory made some years before — Yet the report of the Notary has been homologated — which comprehends the personal property of the first Community, or at least the value of it — which value may have been expended in the maintenance of the Children of the first marriage —

As to the will, it is formal & in conformity to the 298 art. of the Custom —

The parties may make what limitations they please on the property by marriage Contract but here no restriction being imposed by the act of the parties, the act of law is done away by the Prov. Stat. 41 Geo. 3. which has removed the prior desirability of the Edit de Secondes Noces —

Peter Paterson & al - }
Allan Ban McDonell }

Mr Stuart for the appellt

The facts are, the appellt agree to pay to Respt a certain sum of money when the same should be appreciated by certain men to be appointed for this purpose - question here is, has this been ascertained. -

Nr 206. Ev. Poth. - Nr 207. - & Nr. 218. - when oblign is suspended 6 L. Rep. 710 - to shew the conditions precedent must be performed before action can be maintained on a Contract - Here three certain persons were to settle & ascertain the amount of the money in question - The evidence to ascertain this fact by other means is not legal - & if it were, they do not prove the fact sufficiently -

The evidence offered here, is copies of papers, without shewing when the Original - and copy of evidence in another Cause where Appellts were not parties - Ph. Ev. p. 346 - & 433. - but if legal yet is not the evidence to prove the Contract - particular persons in whom the appellts had confidence were the only persons whose opinions could bind him -

Mr Valliers for Respondt admits the law as stated - but if the Respdt has proved the arrival of the Condition, it is sufft - The Plff submits facts & acts to the Respdt & their answers are sufficient

proof

proof — The answer to the 8th Interrogy is sufficient proof of the fact — because it is not sufficiently answered and ought therefore to be taken off him The Defendr under an affidavit allowed him to amend his answer — but this was wrong, and the Court on the final hearing saw there was error in allowing the amendment and therefore held the Defendr to his first answer —

Rodier. p. 110 — written evidence of the contrary only can be admitted —

There is proof that the three Trustees had intimated to the Defendr the amount of the demand due to the Estate of Allan Taylor — The service by the Sheriff of an office copy of the declaration by the Trustees of the Estate of Allan Taylor, in which the amount of the appreciation of the intent of the Respondr here was made — is sufficient proof that the appellr had notice of Plffs. claim — This paper alone is suffl notice — so also is the Defendr's first answer to the 8th Interrogy — either, or both prove the Respondr demand —

Stuart in reply — it was necessary, first that there must be an appreciation — & 2dly a notice of such appreciation — There is merely an averment of a Plff — this cannot constitute proof — this is the averment in the declaration drawn by the advocate of the party — & not even by

by the party himself—

The Just. of the Court admitting the party to amend his answer is a substitute Just not appealed from— The error proceed from the Officer of the Court should be amended at any time — no affidavit—

Aubin dal
Bürgeon dal

Mr Stuart for appellt

This action touching a water course, wh has been carried out of its natural course— The great principle of law is, that water must always be allowed to take its own course—

Pand. tom. 17. tit. 43. tit. 12. whole law is laid down— additional authorities to be furnished—

Stat 4 Geo. 4. ch. 33. — Sec. 7. 8. 29. 10. 11. There is no power has given to alter an old drain and make a new one— But even on the merits of the Case in looking at Hamil's survey and report will be found to be well explained— There is much contradictory evidence— but Hamil's plan gives the true state of the Case—

1. It appears by this report there was a natural water course— wh could not be altered—

2. This was done to the prejudice of numerous individuals.—

3 The new course more onerous than the old one

If any change was necessary ought to have been done at least possible expense — It deprives other persons

persons of the benefit of the waters —
4- It contains an order to carry ditch down to the rock —
5- Did not mark out the drain from its inception to its termination —
6 The forms of calling together the meeting of the persons interested as required by the Statute have not been complied with —

Mr Hamel for Respondt The course I see him is not changed but improved, by putting it in a more direct and less expensive course —

—

The Queen V Bank
Geo: Vanfelson — }

Mr Stuart for appellant — question here is entirely of evidence - refers to case as stated in the Case stated —

Mr. Valliers also submits the Case in same manner —

Saturday 26th July 1828.

Prest.

Ch. J. of Montreal
Mr Richardson.—
Mr Smith
Mr Stewart
Mr Delery.—

Perceval vs Price— } on recusation of Mr Hale to sit as Judge in this Cause made by the appellant

The King.— vs Jos. Hunt }

The Atty Genl. for the appellt.— This is an action petitoire for a lot of ground— To this action it has been set up in defence ~~an immemorial~~ centenary possession The extent of the lot here claimed is not that part of gt. this possn. is claimed, but something beyond—

Sheriff's title 14 July 1815

2d. an adjudication by the Court 1761
3 Promise to sell by Chas. Stewart 1802
4 Deed of sale by Taché & wife to Morin 1792
5 Copy of a Petition by Taché wt. order on it of 25 Feby 1752—
6. an adjudication to Taché in 1749—
7. Deed of Gift from Allen to Hunt Ind 1815
To this evidence there is that of wits that for 30 or

40 years the premises have been possessed by the Respond^t^ —

So there is no proof of a Centenary prescription contends — 1 that the prescription pleaded has not been proved —

2^d^ That the Ground in question being part of the River St L. & of the beach, could not be prescribed

3. The Centenary prescription does not hold ag^t^ the Crown by Fr Law

4. The Kings Prerog. is that no prescription can be admitted ag^t^ him for lands he holds in right of his Crown

5 That Def^ds^ title was originally vicious & cannot be aided by prescription

6. Sheriffs Sale would give no title to this property —

7 Nor could Sheriffs' Sale bind the Crown

8. Does not convey the land in question —

The Crown is entitled to use the titles set up ag^t^ him. Rep^r^ v Roc. p. 20 — Recherches de Paquier. liv. 4. ch 11. Deloriere sur Loisel. liv. 5. tit. 4. Chopin de Domanio. liv. 3. tit. 29 No 22 — Tr Domaine 3 Vol. p. 305 —

2^d^ The ground in question could not be prescribed There are certain things not in commerce & cannot be sold. & Inst. Franc^re^ book 2. tit. 1. § 4 — also § 2 Instit. Loisel. liv. 2. tit. 2 § 5 — Loiseau des Seig^ies^

ch. 9. N. 17. — Basnage Justice. p. 441. ch. 30. N. 3 & 4
Fr. Hist. des Droits du Roi p. 529 — & 530 —
Fr. du Domaine by Laplanche 1 Vol. p. 15. & seq. —

3d The Centenary prescription cannot be set up as the Crown —

All land held by the King Jure Coronæ is imprescriptible & forms Domaine of the Crown, & is to be distinguished from what the King holds in his own private right By the law of France, what the King acquired, did not belong to the Domaine — but according to English law whatever is acquired by the King, as by Conquest, he holds Jure Coronæ — Com. Dig. 6. Vol. p. 60. Tit. Prerogative — Chitty on Prerog. 205 — The French law is diffr. N. Denizt. Vo Domaine. p. 593 — Fr. Hist. de la Domne 1 Vol. p. 93. 94 — shews distinction that what the King holds Jure coronæ cannot be prescribed but only what he holds in his private right — see also Laplanche. p. 516 — Libert. p. 96

516

Some authors seem to think that a Centenary prescription will avail as the King — as to lands he holds Jure Coronæ but the weight of authors is on the other side, as they found upon principles of Legislation — Ordr. 1539. Fs. 1st — 2 Guenois. p. 871 — The introductory part to this Statute shews the intention that prescription of any length of time whatever —

N. Denizt. 595. Vo Domaine — to shew that imprescriptibility attached to the Kings Domaine before its inalienability was called in question — Dupuis can be referred to. 7 Vol. p 489.

Cites, Campbell v Hall. Cowp. Rep. p 204 —
2. Hay. Constitl. Rep. 378
7 Coke Rep. p. 17 — Vaughan 281
Dyer. 224 — 2 Peer Wms 75 —

as to what constitutes Public Law — Taylors Civil Law. p. 58. 59. 60. 62 — Domat. p. 22 23 of Preface Preface to 1 Vol. of Domat. p. 30. & 35 — The object therefore here is a matter of public law, as regards the rights of the Crown.

The Stat. of 1774. introduces only the private Civil Law into the Country — but the Kings Prog^s which came in with the Conquest, was not affected by it — it is a principle that the rights of the Crown can not affected unless expressly named —

1 Vern Ab. tit Statute. C 10
Bac. Abr. Prerog. C. 5.
2 Hawk. P. C. ch. 42.
Chitty p. 382. 383 —
Targets opinion in regard of Lessees property

5th That the titles set up by the Respd — ~~are~~ being vicious that no prescription such as that claimed can avail — Poth. Prescrip. Nº 282, 283. 287 —

The title here gives no interest in the soil — it is a mere permission given to one Taché to erect a wharf "sur le devant de son emplacement" — the word, ~~dans~~ sur, shews the wharf was to be put upon the ground that had been granted, and not sur le devant, as is pretended — the title gives 7 toises 2 pied by 6 toises 3 pied in depth, this is given by Taché to his purchaser — The permission given to whatever extent, never gave a property in the soil — the soil was never granted — this is not a grant in the formal manner required to be

be exercised by the Gov. & Intendant of the Country in their official capacity of the property of the Crown 42 Dig. tit. 18. ler. 42. de superficiebus.—

That of this right, no one after Taché, ventures to convey it— Taché sold to Morin — Morin sold to Heywood & none of them make a sale of this right Taché sold all his rights, but without any warranty as to what he obtained by the permission, the right to erect a wharf in front of the lot— but Taché did not make use of this permission, and it was a thing he could not sell— it was personal to Taché alone— the subsequent titles mention the words. after the specific grant, & plus & ici y trouve— even by the Sheriff's title in 1815— the property is stated to be limited by the beach— on the terms of the original grant—

C. 7. 8 But the Sheriff could not sell the public property in this way— refers to authorities cited in support of 2 propn

The King's property cannot be disposed of by the Sheriff nor can the King be bound by act of Parliament unless named— or ordn of 1785 does not name the King —

Mr Valliers for Respondt—

Contends that the Crown ought to prove its property or shew some right arising from property which had never been granted— The King must shew that the soil belonged to the Domain of the Crown— it is merely alleged that the property belongs to the King— but the King might call upon every individual to defend his
2 Bacquet 116 possession in this way— Bought on terrier. It is a fiction to suppose that all private property belongs to the King— Rep. v. Roi— Wm Conquerr caused Doomsday book to

be

Barons at Antient Doman

be written in qt he caused the Domains of the Crown to be specifically described—

N. Deniz. vo Domaine—the subject was bound to prove their title only after the Atty Genl had proved the property to be within the Kings Domain—

The Defendt has pleaded immemorial prescription has been proved, he has not alledged the centenary prescription, as not necessary—

That it would be wrong to give the present King a retroactive power beyond the Conquest over the property of his Subjects—N. Deniz. Domaine de la Cour. § 6. No 5— and according to the French law what is acquired by Conquest may be prescribed—

The ordce of 1539—says, that all alienations shall be revoked, qt shews that the principle of imprescription was not in existence before the principle of inalienability—N. Deniz. Domaine p. 621—

That the title of the Crown must have accrued within 60 years before the action brot. accordg to Stat. 21 Jac. 1. ch. 2 and 9. Geo. 3. ch. 16 which shews that there must be a title in the Crown here the same as if this suit were brot. in England. The Information here does not alledge that the lot in question makes any part of the bed or beach of the River, as being public property—according to the English public law the beach of public Rivers belongs to Individuals—

see

2 Bl. Com. – That according to the Fr. Law the rivages of nav. Rivers do not belong to the King N. Denz, Dom. de la Couronne. p. 609 – The Ord.ce 1669 in establishing a public road on the grève shews that this was private property otherwise this Ord.ce became unnecessary –

The Respond.t here is proprietor by good title, it has been produced by the Advs Gen.l it consists of 2 parts – in q.t it is represented by Tachè represents himself to be proprietor to the basse marée – now by the plan the basse mer is much beyond the Key built – ~~by~~ under Fr. Gov.t it was necessary to obtain the permission of the Crown to build a wharf – This act made 1752 made before the conquest, in q.t the party calls himself proprietor to low water mark – ~~and that for being without~~

The word sur, must mean upon the property & the word must be applied to the meaning of the title produced – it would appear even that a wharf was already made, or the permission is demanded to raise eleven sous par pieds –

The granting the permission here in question was merely a matter of police, and there was no particular form required to grant this leave –

Demand as to immoral prescr.n

The title, as filed by the Advs Gen.l goes to low water mark, on q.t the party asked leave to build a wharf, as between the lot of Tachè, as described, & the river there could be no land belonging to the Crown – & asking leave to build a wharf on his own property must have arisen from the existence of some regulations

opr

Coursp. Rep. p 110. Horner v. Mayor of Hull

Attys Genl the authority cannot apply, as it shews no title to the exercise of ground —

on the subject of Wharves, as on the subject of building on Streets. — This appears more strongly as he could not build his wharf after getting permission until he had obtained an alignment from the Grand Voyer — The P. V. of alignment bounds the property of Taché — by a line running South, whereas the Attys Genl pretends this line to lie in front of the Wharf, which is contrary to the locality of the place — the alignment refers to the State —

That altho' this Quay has been raised at different times, it has never encroached more upon the Culde Sac, more than the other wharfs which are bounded by the Cul de Sac —

That Taché sold all his rights although he did not chuse to warrant the full extent — he sells the permission to build &c he had obtained — this permission was equivalent to a Concession — this right has always passed from one Propr to another down to the Respds with possession —

Mr Attys Genl in reply — The subject is bound to shew title whenever the ~~the~~ Crown claims — and the Crown cannot be bound to shew title — Vo Rot. p. 21. Repse Chopin. liv. 3. tit. 29. — N. 22 of 19e title — Laplanche Vol. 3. p. 305 —

That the term of immemorial possession constitutes no title of prescription, it is unknown & cannot apply here — But no prescription can apply in this Case —

The Stat. 21 James 1. ch 2. was a Stat. which could operate only for the part, but not in the future — The Stat 9. Geo 3. cannot apply to this Colony as not mentioned & having been passed since the Conquest —

The King of England entered into all the rights of the King of France in Canada in regard of Rivers & beaches of Rivers, upon which the Crown of France had a beneficial interest — the authorities cited from the Parliament de Toulouse, qt was a Part. of Droit Ecrit, where the Roman principle was that the Rivers & beaches did belong to individuals —

That the permission granted to Mr Taché to build a wharf did not convey to him any right in the Soil — he shews no prior title, and he cannot argue that this permission was intended by the Intend. & Governor to approve the statement of Taché in his petition as to the extent of his property to basse marée — because this was not a question on which they were called to give any opinion — the only question before them, was granting a permission to erect a quay — Petit. No 739. Obt. —

Then ~~he can~~ is evidence to shew, that by the title. No 27. that is the adjudication to Taché himself, he never was proprietor of this extent of land — the description given in this adjudication and the limits defined the party ~~to~~ this has not filed the saisie nulle of the lot, qt might have contravened this extent — this is further apparent by the terms of sale by Taché to Morin & wife. No 25 — or the description of the property is limited to the just extent of what he had purchased by the adjudication, the pretended transfer of the permission he had received, he only granted his right thereto, not an absolute conveyance of the soil —

Louis Nadeau
v.
Fabrique St Henri

Mr Hamel for the appellt. The action in the Inferior Court was en Complaint, for trouble occasioned in the possn. of a servitude — Quest. then whether such action lies — and whether it will lie in this case — & whether the title ongt. this action is bot. has or has not been discharged in toto In 1825 Valliers & Durocut purchased the right of one Vernon in a pont de passage, they purchased a lot of land from Fabrique St Henri — the condition ogt. was a right of passage on this bridge free — Soon after Laurent and Valliers, & on indgt. this bridge was seized — but before sale — Valliers pd the debt — but required that the Devt should be made of the bridge — it was sold to the appellt & Hebert who purchased the 3/4s & sold — That Nadeau afterwards allowed the Fabrique to pass them by politesse — this was afterwards refused, and the Fabrique instituted the action afterwards complaining of being troubled in the enjoyment of their reserve — concluding that they be maintained in the possn of this servitude, & defens made — & the bridge declared subject to this right of servitude in future with damages & Costs —

This was not an action en Complaint — properly so speaking — Pothier admits the action founded no doubt on the principle cond en the

Code

Code Civile – but the Court de Paris having said
there is no servitude without title necessarily excepts
the case of complainte in case possession of a servitude
2 Bonjon p. 512. many real rights may be acquired
and held without title – but the case of servitude
is not entitled to any species of right without title.
1 Duplessis – 598 – holds so –
Dunod. p. 288. 9. 10 –
1 Lange. 218 –

This at all events, this is not an action en Complainte
Pothier will shew this – poss.ⁿ N° 85. The
conclusions taken here that the bridge be declared
subject to the said servitude en future, is an petitoire
& inconsistent with this action – The action de complainte
is merely provisoire, to preserve la partie his situation
until the petitoire be determined – the possessoire and
petitoire cannot be cumulated – Bourg. N° 28. cum pap
when simple maintenue en la possessoire is the only
thing that can be demanded, more than this would
destroy the right – Poth – loco citato –

The appellt pleaded en Court below that Fabregue
had lost its right not having filed any opposition
to this it was answered that this was not a
decret forcé, as the Jugt on pt. it was founded
having been satisfied before the sale the decret was
null – That as only 3/4 of bridge was sold
the servitude cannot be destroyed
as to the residue of the decret – N. Denz. Decret Sec.
§ 5. N° 2. – Here the Fabregue could not complain

of

this nullity — The deed purges the servitude
caches — The Fabrique ought therefore to have
made its opposition — as Nadeau was a purchaser
de bonne foi —

That the Servitude is indivisible and cannot
be longer exercised — Rep^re. vo Servitude. see p. 367.
col. 1 —

M Valliers for the Respond^t — The action en
complainte lies in this case — 2 Pothier 13 ht. Code
Civ. even admits it — Rodier on this article, says
that under this article the droit de servitude
is admitted — Poth. Poss^n. N° 90 — N. Denisart
v^o Complainte §. 2^e. N° 1 — when a title is
produced, the action can be maintained —
That after the Deed, Nadeau acknowledged
the right of the Fabrique N° 33. & 34 — of Record —
Borden the proprietor of the other 3/4 sold to Hebert
on condition of the servitude — & on 11^e Nov^r
of same year — 1823 — which sale was afterwards
transferred to Nadeau the appell^t — That
Hebert & Nadeau were joint proprietors of
the bridge — they were joint adjudicataires of
3/4^ths sold by Deed —

If the action was irregular the Defend^t
ought to have excepted to it, but he goes to
the merit —

M Hamel in reply — The Fabrique cannot
take advantage of acts to which it was not a
party

party, nor was the action instituted upon those acts by which it is alledged that the appellt acknowledged the right of the Fabrique — That the situation of Nadeau will be altered, from the time he made the purchase by adjudication, and his knowledge he might acquire afterwards — he purchased clear of servitude, and no title between him & third person can establish the right in favor of the Fabrique — besides if the Fabrique had any right on those acts they should have been bred on it — The servitude was destroyed by the Incendie at the time of the Sale by Bowen & Hebert —

Monday 28th July 1828.

Pres.t

Ch. Just. Monteal

Mr Richardson —

Mr. Smith

Mr Hale

Mr Stewart

Bell and Nouet al

The atts Genl. for the appellant —

The right of the appellant is in this case in most apparent — on Drapeau about 1803 obt.d a vente & concession from the Nuns on

the river St Lawrence, or portion de grave - & this without any legal power to convey such a portion de grave - Drapeau made a lease to the appellt of the property in 1810 - and subsequently the lease was renewed in 1817 for 2 years - the heirs of Drapeau afterwards sold the whole to Bell - with a droit de patte. in all for £1050 - Bell purchased a triangular piece of ground from the King adjoining the lot he had so purchased & made considerable improvements thereon -

The action in the K. B. is an action en bornage the irregularity in the declaration has led the Court into error, as the specific lot & boundaries are not sufficiently described - Wm Bell called in the King as his Garant - who by the Att Genl - his Curiae, filed a plea to Drapeau's action This course of proceeding was set aside by the Court and Bell was ordered to plead to the action &c he did, denying that he was bounded by any property belonging to the Plffs - such as the purchase made of the triangular piece of ground from the Crown by &c he was bounded. On this state of proceedings an Enquête was had but no testimony was produced by the Plffs the testimony of the Defend - shews his possession under his grant - There was no proof

of

of the letter from the Nuns to Drapeau — no
any evidence to establish the right of the Plff —
Here the action ought to have been dismissed, but
instead of this the Court made an Interlocutory
Judgt. directing a Survey to be made — M Lap
made a P. Verbal of Survey, and the Plffs. moved
for the homologation of it — and as Bell was not
represented by any person — the Court homologated
the P. V and gave Judgt en banque — This Judgt
is without foundation —

1 According to Plffs own showing by his declaration
the action ought to have been dismissed — the
matter in dispute ought to have been clearly designated
in an action of this kind — the Plffs property ought
to have been well described by tenans & abouttissans
as being a real action — Dict. de Droit. vo Designation
Id. vo Tenans & abouttissans — Rep. vo co. &c
Here the designation of the lots to Drapeau by the
Nuns is so confused, that it is impossible to
comprehend the true boundary or extent of it — &
the action refers to what Drapeau did not sell to
Bell, which is still more confused & incomprehensible
as the situation when the reserved part lies is not
alledged nor known — This enough to dismiss the action —

2 But on the plea of Bell, the Drapeaus could not
maintain their action without producing any
title from the Nuns to show the property he held from
them — But it has been artfully introduced into the
declr that Bell admitted that what Drapeau

held

sold him was only a part of what he Drapeau had acquired from the Nicks — N° 4. of Rand — and by this means compelling the appellt indirectly to admit that he was the neighbour of Drapeau & supercede the necessity of Drapeau from producing his title from the Nuns — But this admission was not binding on Bell — as he at the time had no interest in this point, and this constituted merely terms enonciatifs, and could make no difference who was his neighbour, provided he obtained the quantum of land sold to him — There is a diff^{ce} between terms enonciatifs & dispositifs Poth. Ob. N°735. — 1. Pigeau. 223. But the property & limits of what Drapeau reserved, was matter of no concern to Bell, whose attention to this part of the enonciation was not called, nor concerned — The authority from Pigeau is very applicable —

Therefore on the general issue there was a total absence of proof on the part of Drapeau & then also the action ought to have been dismissed

3 But an extraordinary Interlocutory Jugt of survey was made by the Court, directing a survey according to the titles of the parties respectively But this has not been complied with by the Surveyor — he ought to have taken notice of the Defendrs title from the Crown as well as the titles of the Pltff — but he takes no notice of the Grant from the Crown to Bell —

The

The report of Sayre does not even settle the point referred to him by the Court — but states three different hypothesises without determining either — the Court could not assume any one in preference to another without further evidence — See P. Verbal of Sayre. No 40 How the extent of the conveyance from the Nuns to Drapeau became absolutely necessary, but still is not produced, which became absolutely necessary — but he refers to a plan drawn by Dubergé made in consequence of this Conveyance — and on examining this plan it will appear that Drapeau had no land remaining after the sale to Bell — That Sayre says he was unable to determine what was the limits of the property of the heirs Drapeau, which they reserved in their sale to Bell — The plan of Dubergé shews what the Nuns sold to Drapeau and Sayre refers to it on several points on the hypothesises he lays down

When this report was made, the Plffs moved for the homologation of the plan & report — & adds, that a certain line be declared the line of boundary between the parties, and boundaries planted accordingly. Now this report determined nothing, and the Court could not adopt any hypothesis without further proof

The plan filed by Drapeau, shews, that all the property sold by the Nuns to Drapeau according to Dubergé is comprehended in figure I F. G. H. leaving as a part of the property of the Crown a triangular piece, qt would comprehend the piece qh the Drapeaus say they reserved when they sold to Bell —

Mr Valliers for the Respondt –

The action is founded on pet titles – an action en bornage on a deed from right acknowledged by the appellt – The allegations in the declaration shew that when the sale was made to Bell there remained a portion belonging to the Draperies – & in this sale the appellt acknowledges to be in the possession of the whole under a lease to him by the Draperies – The want of description has been waived by the Defendt – not having pleaded it as being an exceptn dilatoire – but when the party acknowledges to know what is described this is suffte – & this is the case of Bell by the law is intended, that Defendt should know the property in question – & here it is evident –

Jousse – art: 3. 2d q. –
Born. en bam art. p. 56 – –

The attys. genl intervened, but instead of claiming on behalf of the Crown, he pleaded on the part of Bell a plea to Pltffs action – this was dismissed as irregular – and Bell afterwards defended the Cause himself, and amongother things stated that he is proprietor of all the property in question under a title from the Crown – Now all that was necessary for Pltffs was to prove their possession – qt is sufficient to maintain the action en bornage but beyond this the Pltffs have proved their property, under the acknowledgment of Mr Bell himself – as acknowledged the Pltffs to be proprietors of the surplus not sold – The sale to Bell by the Crown is here of no avail & is no sale of the land of the Crown – it is a sale by Ld Dalhousie

N. Denizo Bornage 8. 2 No 3

before

before Notaries on 8 Nov. 1820 — it requires matter of record to convey the property of the Crown — 2 Bl. Com. ch. 21 — The Crown cannot be bound by this cite. Bac. Ab. tit Prerogatives —

As to the possession the Plffs held it by their tenant, Bell, who was their permissive — & is enough and Bell could never change the nature of his possession to the prejudice of the Plffs. & ag. the title under which he possessed — That was no necessity to produce the title from the Nuns or Bell admowledge the right of Drapeau under it — That while in possession for Drapeau, Bell underhand went to purchase from the Crown, this was in bad faith, as no intimation was given to Drapeau —

The Interlocutory order of the Court, had no reference to the conveyance from de Calhoussa to Bell, but the titles between the parties —

The line of division between the properties of the parties as comprehending the part sold to Bell, & the extent beyond this of the property of ~~Bell~~ Drapeau is not material here as not affecting the question — The Court were of opinion there was no conveyance from the Crown to Bell — & did right not to admit any right beyond the line bounding the extent of land sold to him by the Plff —

According to Dewitt's plan the point E is the same as point O on Day's plan — & would still show that Bell has nothing beyond the line Day has drawn —

Mr. Att'y Genl in answer — That action en bornage is personal & real — personal as to points previous & real as to the soil, & is a kind of action petitoire. Rapr. de Bornage

but is given to adjoining proprietors — it is not necessary that title should be produced when the right of property is admitted — but when the right of property is denied, as in this case, the Pltff must in that case produce his titles —

The tenans & abuttissans here are so imperfectly stated that no Judgt can be given allowing any extent of property to the Pltff Drapeau — from the incorrect manner in wch the property is described

Here there is nothing to shew what was the extent of land which Drapeau reserved when he sold to Bell — without which no limit of division can be established between them —

That the renunciation terms in Bell's purchase cannot bind him as to extent of property which belonged to Drapeau, and wch was not sold, but reserved as belonging to Drapeau — Such admission is of no importance to bind Bell here —

Path Presump. 172. 1287

That knowledgment of Bell. can be considered only as a presumption against him, but does not exclude the necessity of a proof of title, where a better than that on wch Bell held from Drapeau is produced by him —

Port à usage. No 47.

That the title here given by L^d Dalhousie, is not in legal form — but according to Fr. law. this would be a good title to call in question the title of Drapeau although in England the property of the Crown cannot be alienated in this way, yet a subordinate functionary such as a Gov^r of the Province may operate a right of this kind, the same as any other public functionary But ground this argument this deed of sale from

L^d

Ld Dalhousie, and is an answer to the present action and must compel the Pltff to shew a title better than that of Bell — the possession of Bell was enough under this title to enable him to hold the property until Drapeau shewed a title translatif de propriété —

The line adopted by the Survey is one of the three suppositions laid down by the Surveyor, without having sufficient proof, and without noticing the titles of the Defend[t] — and he was ordered to notice the titles of the parties respectively — This might yet be corrected by a new order of Survey — when Bell may produce a regular title from the Crown — & the Att[y] General may intervene for the Crown —

Burnet
Charrey

Mr A. Stuart for appellt No man ought to be allowed to execute his own Judgt — The Court by its Judgt authorized the taking down appellts mill dam & as far as the Judt goes on the face of it, there is no objection to it — when the Judt is indefinite in its nature it is not a plea that is to judge of the nature or extent of what the execution ought to be — In this case the Pltff executed the Judt with armed force in his own way —

The first step towards the execution of this Judt was the nomination of Experts — it would not have been prudent for the Defend[t] himself to have taken down this dam but in the presence of the Experts, so as to ascertain the nature of the operation, so as to constitute a title in all future time — The parties could have no evidence to shew

shew in what manner the Judgt. has been executed

According to the principle of the Fr. Law whenever a party is in default, that default must be judicially established —

That although a period is fixed for the Defendr doing this yet it would have required some report & proof before the Court of a 2d order directing the thing to be done —

Mr. Arnoil for the Respondt — The Judgt directs Appellt to make the demolition à dire d'experts, for his default of his doing so — the Pilot Chanel is authorised to take down the Dam — The object of the Judgt. was to remove the injury to the Pilot by taking down sufficient of it to allow the waters to return to their natural channel —

Stuart in answer — the Judgt. ought not to have been signified till Experts were named — some of the officers of the Court ought to have been present —

—

Tuesday 29 July. 1828

Pry.

Ch. J. Monk
Mr Richardson
Mr Hale
Mr Stewart
Mr Dery —

No business before the Court —

Wednesday 30th July 1828.

Pres:
Ch. J. of Montreal.
Mr Richardson
Mr Perceval.
Mr Smith
Mr J Cale
Mr Stewart
Mr Delery.

The Atty Genl appt
and
Jane Black Respt

In this Case the Judgt of the Court of K. B. was reformed in regard of the interest, which was allowed from the day of the demand en Justice — The K.B. allows it only from day of Judgt.

John H. Caldwell.
Appt in the Court below. Apt
and
The Attr Genl pro. Regr Respt

The Judgt of K. B. affirmed

Bethune & al Exrs. appellts
and
J Coyle & uxor — Respts

Judgt of the Court of K. B. reversed

The Court were of opinion that the action here was for the personal act or neglect of the Executors, and not for a debt due by the Estate of the Testator Oldham — that is for not returning or paying a promissory note confided to them according to their undertaking — that as there was no proof of this — the action ought to have been dismissed — but as the Judgt of the K. B. appeared to be rendered as the Estate of Oldham — this was irregular, as there was no demand of this nature before them.

Averill & al — Appellts
and
O'Connor — Respt } Judgt of the Court of K. B. revesed — The Court were satisfied that there was sufficient evidence to shew that the timber in question had been delivered to the Appellts according to the agreement entered into between them and Blanchard the proprietor, before the attachment obtd by the Respondt — and as the parties appeared to have acted in good faith, this agreement must have its effect — ordered that the timber be delivered up to the Appellts

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Wright & al — Appls
and
Patton — Respt } Judgt confirmed —

Henry V. Wright — Apt
and
Piccard & al — Respts } Judgt of K. B. confirmed to the extent of £107. 10 — the excess is allowed as the Respondts had not allowed credit to appellt pr monies they had rd

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Jos: Dorions — Apt
and
J. Bte Dorions & al. — Respts } Judgt of K. B. confirmed

Robt Lawe — Appellt
and
John Jones — Respt } Judgt of K. B. reversed — The Court considered the paper filed by Respdt as no answer rendered. —

Reuben Deaves — Appe
and
John Jones — Respt } Similar Case — Judgt reversed —

Eliz: Astor & al' Appts
and
Corriveau — Respt } Judgt of K. B. reversed — The Court being of opinion, that on 1st Oct. 1823. when the Respondt was called upon to make his declaration in Court as a Tiers Saisi — all the mortgage debts of Vogler were due and payable, & from that day the Obligation on the Respondt to pay the £50 — annually to Vogler accrued — Judgt for 3 Instalments of the £50 — the first of wch became due on 1 Octr 1824 — & so to continue annually till the appellts debt was paid —

Roger Lelievre — apt
and
M. De Lanaudiere Respt } Judgt of K. B. reversed — The Court considering that the Respondt was bound to ~~shew~~ prove the death of M. Baby under whose will she claimed —

Pemberton — Appt
and
Evans & wife — Respts } Judgt of K. B. confirmed —

Blanchet — Appellt
and
Debarats — Respt } Judgt of K. B — confirmed, except in regard of the sum of 20/- charged for the protest, wch was disallowed — as in this case the protest was not necessary nor created any beneficial right to the Respt

Hayes — appellt
and
Wilson — Respt } Judgt. of K. B. confirmed

Smith — appellt
and
Fraser — Respt } Judgt of Court of K. B. confirmed.—

—

Rogerson & al — appellts
and
Isaac Reid Respt } Judgt of Court of K. B. confirmed

—

Levi — — — appellt
and
Patton — Respt } On rule to shew Cause why an appeal should not be granted from an Interlocutory Judgt of the Court of K. B. allowing the examination of witnesses about to leave the district.—

—

Peter Patterson & Co — apl
and
Allan B. M'Donell Respt. } Judgt of K. B. confirmed —

—

Aubin & al — appelt
and
Bergeron & al — Respt } Judgt of K. B. confirmed —

The Quebec Bank
and
Geo. Vanfelson — } Judgt confirmed —

Burnet — appellt
and
Charray — Respt } Judgt confirmed.—