Evidence

See. 3 Camps. 283. Currie. v. Child.

Selwyn's N. P. 4th. edit. 516. n. – Gough. v. Cecil.

In an action on a promissory Note, the subscribing witness being dead, proof of his hand writing, and that the Defendant was present when the note was prepared – is sufficient without proving the hand writing of the Defendant.

A quere is put – if proof of subscribing witness's hand writing alone would have been sufficient? –

L^d. Ellenborough says, it has been the constant practice to admit such testimony as prima facie evidence of the instrument – but that the question may admit of some doubt. –

Bayley. J. – I have always felt this difficulty, that proof of the hand writing of the attesting witness alone, does not connect the Defendant with the Note. –

Abbot. J. I am by no means prepared to say, that proof of the handwriting of an attesting witness, is not sufficient. – 1. Barn. & Ald. 21. Nelson. v. Whittall. –

Kings Proclamation – see. under that head

7 Taunt. Rep. 246, Simpson. v. Bloss

The test, whether a demand, connected with an illegal transaction is capable of being enforced at law, is, whether the plaintiff requires any aid from the illegal transaction to establish his case. –

Evidence.

7. Taunt: Reps. 251.
Talbot. v. Hodson.

If an attesting witness to a deed, deny having seen the deed executed, other evidence of the execution is admissible.

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1. Holt. Reps. 420
Burr. v. Harper.

Although comparison of hand writing is not admissible evidence, when the fact to be proved is the hand writing of a particular person, whose supposed signature is upon a paper put into the witness's hand, Yet if such Witness has a document to which is affixed the hand writing of that person, as to whose signature the question arises, and which document he knows to have his genuine subscription, he has a right to recur to it for the purpose of refreshing his memory — a basis being first laid in his having once seen the Defendant sign his name, though he had forgotten the character of his handwriting.

Id — 1B. 593-
Rex. v. Meade.

In an Indictment under L. Ellenborough's act for cutting and maiming a Sheriff's Officer, it is incumbent on the prosecutor, not only to produce the warrant made out by the Sheriff to the officer, but likewise the writ.

Evidence.

1 Holt. Rep. 614.
Rex. v. Smith.

In a trial for murder, the deposition of the deceased, should be taken in the presence of the prisoner — but if such deposition be taken in the absence of the prisoner, and be afterwards read over to the deceased in the presence of the prisoner and the deceased assents to the truth of it, this will make the deposition evidence against the prisoner.

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admission by a Partner

1 Taunt. Rep. 104
Woodal. v. Braddick

An admission made by one of two Partners after the dissolution of the partnership, concerning Joint Contracts that took place during the partnership, is competent evidence to charge the other partner.

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3. Taunt. 262.
Mayor of Doncaster
Day.

What a dead Witness has sworn on a former trial between the same parties, is evidence in the Cause, and may either be read from the Judges notes, or proved upon oath by the notes or recollection of any person who heard it.

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3 Wilson. 275.
Meres & al. v. Ansell & al
C. B. 1771

Parol - not admitted.

Parol evidence shall not be admitted to contradict an agreement in writing —
see 3. T. Rep. Sittler. v. Holland. 590.

4. Burr. p. 2268.
Dickson. v Fisher
and
Gray. v Smithys. p. 2273

Evidence to support a Declaration for Bribery in the Election of a member of Parliament. —

A man is not to be permitted to give in evidence a Secret intrusted to him in confidence —
1 Raym. 733. Aaron. Sed qud:

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2. Starkie. 23.
Graham & al. v Dyster

It is not regular for a Defendant in the Cross-ex. of the Pltffs witnesses, to go into the evidence of facts constituting his defence, such evidence is admissible only in its regular course

Id. — p. 49

Nor can the defendant in the course of the plaintiff's evidence, cross-examine the plaintiff's witnesses as to the contents of written documents although notice has been given to the plaintiff to produce them and he refuses to produce them, in that stage of the Cause. —

Id. — p. 183.
Cooke. v. Maxwell

A record of a Conviction of felony without a caption, is not admissible in evidence to incapacitate a witness. —

Bayley. J. It purports to be an Indictment & conviction but it does not shew by what authority the Indictment was found; it is imperfect as a Record without the Caption

caption, since it does not appear to have been found by any persons who were competent to find an Indictment —

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2. Starkie. 455.
Shaw. v Roberts & al

The Court will reject evidence in itself illegal notwithstanding the admissions or omissions of the litigants. "

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4. Barn: & Ald. 595
Saunders. v. Wakefield

By the 4: Sec. of the Stat. of frauds, an agreement to pay the debt of another, must, in order to give a Cause of action, be in writing, and must contain the consideration for the promise as well as the promise itself, and parol evidence of the consideration is inadmissible. —

Id — p. 697.
Burt. v. Walker

The Clerk of the Defendant was the subscribing Witness to the bond, and when he was subponad said, that he would not attend, and the trial had been put off twice in consequence of his absence — Search had also been made at the Defendants house and in the neighbourhood; and upon receiving information at the Defendants that the Witness was gone to Margate, enquiry was there made without success Held, that under these circumstances, evidence of his hand writing was admissible. —

Evidence. Verbal Contract.—

5. Barn: & Ald. 613
Garbutt val. Watson

Where there was a verbal contract by the plaintiffs who were millars, for the sale of a quantity of flour, which at the time was not prepared and in a state capable of immediate delivery: Held, that this was a contract for the sale of goods within 29. Ch. 2. c. 3. s. 17. a

The following cases were cited for the Plffs Towers. v. Osborne. 1 Str. 506. — Clayton v. Andrews 4 Bur. 2101. — Groves. v. Buck. 3. M & S. 179.

Abbott. Ch. J. In Towers. v. Osborne, the Chariot which was ordered to be made, would never, but for that order have had existence — But here the plaintiffs were proceeding to grind the flour for the purposes of general sale, and sold this quantity to the defendant as part of their general stock — The distinction is indeed somewhat nice, but the case of Towers v Osborne is an extreme case, and ought not to be carried further.—

Bayley, J. The nearest case to this is Clayton. v. Andrews — but that decision was, as it seems to me, corrected by Rondeau v. Wyatt. 2. H. Bl. 63. — This was substantially a Contract for the sale of flour, and it seems to me immaterial whether the flour was at the time ground or not — The question is, whether this was a contract for goods, or for work & labor and materials found. — I think it was the

the former, and if so, it falls within the Statute of frauds. –

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6 Moore Rep. 86.
Jenkins val. v. Reynolds

To pay the debt of another.

The Defendant addressed the following letter to the plaintiffs, which he dated and signed. – "To the amount of £100, consider "me as security on I. C.'s account." Held, that it was not a sufficient memorandum to bind the Defendant under the Stat. 29 Ch. 2 c. 3. S. 4. the consideration or promise for the undertaking not having been expressed in such letter. –

The principles laid down in this Case deserve to be considered

Examination of a Prisoner — Confession &c

2 Starkie. 483.
Rex. v. Telicote.

After the examination of a prisoner before a Magistrate upon a charge of felony, has been taken down by the magistrate's Clerk, it is read over to him, and he is told that he may sign it or not as he chuses. — having declined to sign it, the examination cannot be read in evidence. —

Here Lambe's case. Leach's Ca. 625. was cited. where it was held. that the examination was evidence although the Prisoner had refused to sign it. —

But Wood. B. was of opinion that here the document could not be read — that in Lambe's case, the Prisoner, when the examination was read to him, said, that it was true — here the Prisoner had not said so. otherwise the Case would be the same. —

Excise Officer..

2. Bl. Reps. p. 913.
Bostock. v. Saunders
& al'.

According to the decision in this Case, Trespass was held to lie against an Officer of Excise, for an unsuccessful search after run goods, under the usual warrant of two Commissioners, procured by himself. and this on the principle that the Defendant, at whose instance the warrant was obtained, did not produce or shew the information stated in the warrant to have been made on oath before the Commissioners, - to prove that he had a reasonable and probable Cause for making the search.-

But this decision has been expressly overruled on great deliberation in K. B. on a writ of Error from C. P. and it was there determined, that in an action of Trespass against Excise officers for entering the - Plaintiffs house under a Warrant from two Commiss^rs - founded on the St. 10. Geo. 1. ch. 10 Sec. 13. they were not trespassers, even though they found nothing therein, the act itself being legal, but that the only remedy, was by an action on the Case for obtaining or executing the warrant from bad motives -
Cooper. v. Booth. 3. Esp. 135.- S. C. cited. 1 T. Rep. 535.
see also Price. v. Messenger. 2. Bos. & Pul. 158.
see also. Cooper. v Booth. 4. Doug. Rep. 339.-

Executeur Testamentaire

1. Point saisis d' Immeubles. — see 297th. art. Coutme.

Les Executeurs Testamentaires ne sont point saisis des Immeubles, quoique le Testateur l'ait ordonné par son testament. Ainsi arreté au Chatelet en une Enquête par turbes qui y fut faite au mois de Fevrier 1575.

Graude Com. de Ferriere — Remarks on the above article. And Glose 1re. No. 37. p. 278. L'Executeur est saisi des meubles et non des Immeubles, quoique même le Testateur l'eut ordonné. —

See also. Pothier. Donn. Tests. ch. 5. §. 3. p. 362.

Nouv. Denizt. Vo. Execution Testamentaire §. 2. No. 4. — says —

Les auteurs ont eté partagés sur la question de savoir si un Testateur peut éteindre la saisine de son Executeur Testamentaire, de même qu'il peut la restreindre: Si par example, dans la Coutume de Paris, il peut — ordonner valablement que l'Executeur Testamentaire sera saisi des Immeubles. — On doit se ranger de l'avis de ceux qui ont decidé cette question pour la negative. En effet un Executeur Testamentaire ne peut pas plus avoir la saisine qu'un Legataire en vertu de la seule disposition

disposition de l'homme. — Ce n'est que la loi qui differencie l'un de l'autre, qui accorde à l'un ce qu'elle refuse à l'autre. Or, comme l'observe Mr Pothier, un testateur peut bien deroger à un droit qui n'est etabli qu'en sa faveur, le restreindre comme il le juge à propos; mais il ne peut point l'etendre au dela des termes de la loi. — Tr. des Don. Test. Ch. 5. Sa. 1. art. 2. § 3. — above cites —

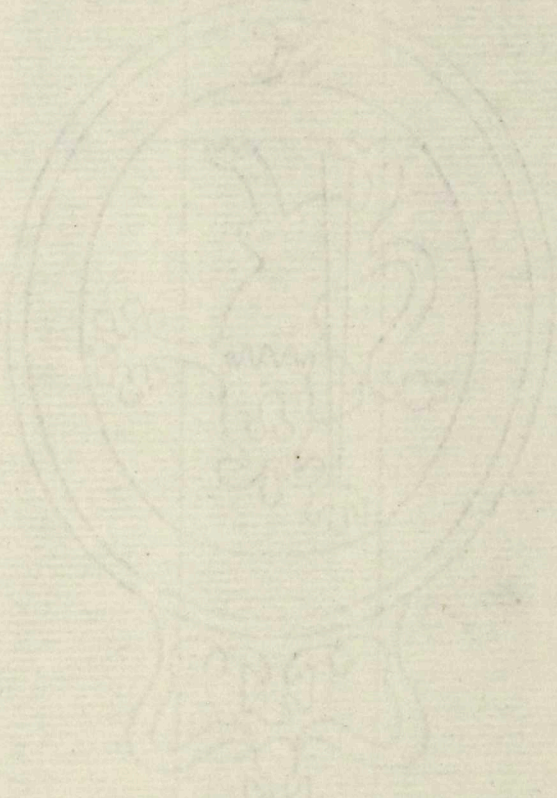
Un Testateur peut proroger la durée ordinaire de l'execution testamentaire. — Il a eté jugé que cette execution pouvoit etre prorogée valablement pour toute la vie de l'Executeur Testamentaire; qu'on pouvoit même charger cet Executeur de se nommer un Successeur et ainsi de suite, tant qu'une disposition particuliere du Testateur auroit quelque effet. Nouv. Denizt. Vo Execution Testamentaire. § 3. No. 5. — see also ~~3 A~~ No. 10.

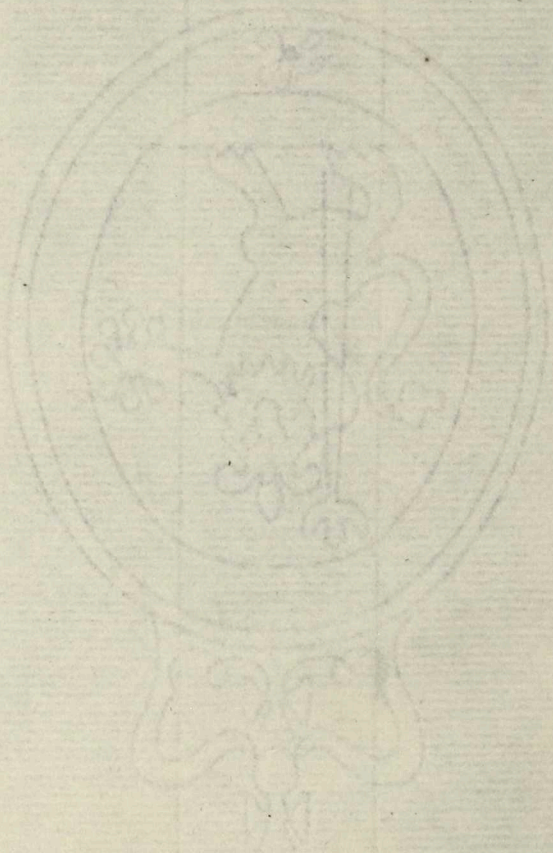
Ses fonctions sont gratuites. Nouv. Denizt. Ib. §. 1. No. 1. Rep. de Jurisp. Vo

Mais quand l'Executeur Testamentaire est en quelque sorte de necessité, que son execution a eté penible, et que le Testateur ne lui a rien laissé, il peut demander Salaire. — Lacombe Vo Execution Testamentaire. No 13. —

The heir of an Executor, or the Executor of an Executor may compleat what such Executor as such, may have begun, but he can do nothing more; nor can he act at all if such Exer had not entered on the duties of his trust before his death. 2. Vol. Delaurière. sur la Cout. Paris. p. 434. ~

L'Executeur ne peut reclamer les fruits des Immeubles pour l'execution du Testament. A. Fer. Gr. Com. p. 277. 278. N°33.34





Execution

Bac. Abr. Tit. Execution Letter. H. —

If a Plaintiff is prevented, within the year from the Judgment by writ of Error from suing out execution, the year is accounted only from final Judgment given. — So where there is a stay of execution, the year is to be reckoned from the expiration of the delay. —

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1 Cowp. Rep. 1. Lee. v. Gansel

A bailiff in execution of mesne process may break open the door of a lodger's apartment, having first gained peaceable entrance at the outer door of the house. —

Experts Serment.—

Regularly, experts ought to be sworn before they proceed to make any visit or examination under any reference made to them.—

Fer. Gp. Comv. vol 2. p. 1485. No. 3. Ces Experts doivent faire le serment devant le Juge avant toutes choses, a ce voir faire, les parties appellées.

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

L'Ordonnance de 1667 Oblige indistinctement tous Experts nommés de preter le serment avant que de faire la visitation et leur rapport— ainsi tous experts quoiqu' officiers &c—

1 Pigeau. 301. points out a similar course, which is still further elucidated by the form of the oath to be taken by the Experts, which is — "de faire et preter serment de bien "et fidelement proceder a la visite ordonnée &c"

Ravaut. Proc: Civ: du Palais. p. 108. Same course directed—

1 Prad: Lange. 230 Les Experts doivent prêter le serment devant le Commissaire ensuite voir et visiter les lieux ou batimens &c—

Desmarquets Nouv Stile du Chatelet p. 76. Il faut que les Experts prêtent serment devant le Juge de bien et fidelement proceder à la visite et estimation &c—

N. Denizt.

Experts. Serment

N. Denizt. Vo Expert. §. 2. No. 10. —

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

Boutaric. on Ordre 1667. Tit. 21. art. 8. 9. 10. p. 211. —

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

2. Bouj: Tit. 2. Des Rapports d'Experts §. 3. p. 30. — —

Says down same principle. —

Denizt. Vo Experts No 17.

Mais quand ce sont d'autres Experts sans titre, ils ne peuvent faire leur rapport qu'apres avoir prêté serment devant le Juge de bien et fidelement y proceder &c — C'est un usage invariablement observé au Chatelet, et il est de droit Commun dans tout le Royaume. —

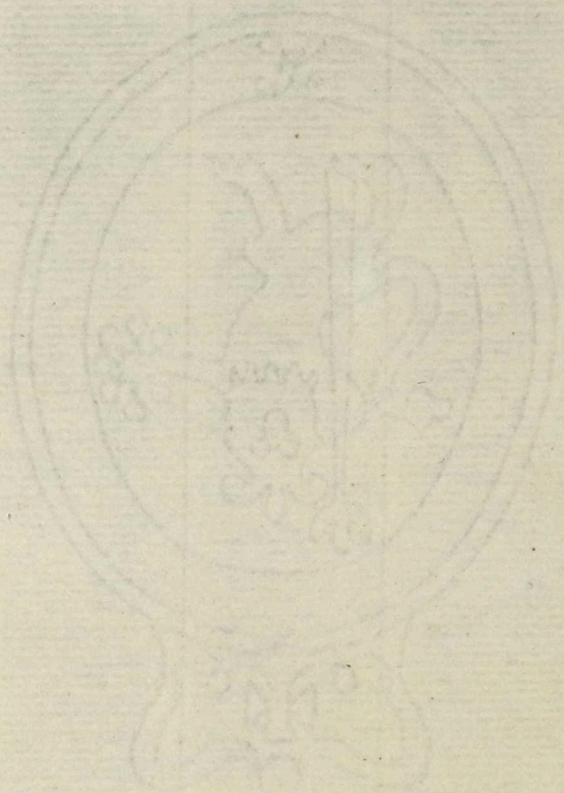
Factor.

A Factor cannot pledge the goods of his principal; therefore where goods were consigned from abroad to a Factor, to be sold on account of the Consignor, and a bill of lading was sent to deliver the goods to the Factor or his assigns, and the Factor afterwards indorsed and delivered the bill of lading together with the goods to the Defendants as brokers, with instructions to do the needful, and the Defendants made advances to him on the credit of those and other goods without knowing that he was not the owner of them — Held, that the Defendants could not retain the goods against the Consignor until payment of the debt due to them from the Factor on account of these advances. 1. M. & Selw. 140. Martini, v. Coles & al'.

Per L. Ellenborough. A Factor represents his principal until the principal is disclosed, but when that is done, his character of factor is at an end, and the principal becomes the person to be dealt with — until that time payments may be made to the factor, and be the subject of sett-off by him with the principal — the moment however the principal appears, provided it be before pay^t — he comes into his full rights to receive it — This rule is for the protection of the principal — Id. 576. Morris & al'. v. Cleasby. —

Femme. — Marchande publique. —

Une femme, marchande publique, quoique pouvant s'obliger, pour fait de son Commerce, ne peut cependant ester en Jugement sans l'assistance de son mari. Repse de Jur: Vo Jugement. p. 632. —



On Faits & Articles — divisibility of answers.

Extr. from Mr. Just Bowen's. MS. Notes

In Chancery it is uniformly held, that where the Defdt admits a fact, and insists upon a distinct fact by way of avoidance, he must prove the matter of his defence — as where the Defdt. admitted the receipt of £1100. and added that afterwards, he gave a bond of £1000. and that the pltff. gave him the other £100. —

But if he states one fact only, as that the pltff gave him originally the whole £1100, it must be taken altogether and allowed, if not disproved. —

The representation of one and the same fact, must not be garbled and distorted; but the admission of one fact cannot by any means be allowed as proof of another fact distinct and independant of the first. —

See. Ev. Pothier. 2. Vol. p. 157. —
Gilbert —— 51. —
Wood's Inst. Civ. Law. 305. — to same effect —

When a confession is regular and admitted by the other party, he ought to admit the whole as it is qualified, and when it is extended to other matters done at the same time, unless there is a presumption against that part. — To illustrate all by example, where there is no presumption of law agt. that part of the Confession. — The libel charges, that —

you

you received £100 of me. — You answer — That you did receive £100. of me which I owed you, and no other sum — This is but one sentence, and cannot be divided, and part accepted and part rejected — as if you had answered — that you did borrow the £100, but that you have since repaid it, or, that I have promised not to demand it till seven years were past — The latter part of this answer must be proved, else you will be condemned. — see. Woods Civ. law. above cited. —

In point with these authorities, see the following from the Recueil d'arrets du Parlement de Paris. par Pre. Bardet. p. 617. vol. 1. —

On distingue trois sortes de preuves — 1. La preuve littéral. qui se tire des ecrits — 2°. La preuve vocale, qui se forme de la deposition de temoins, et 3°. la preuve qui se tire de l'aveu de celui de l'obligation du quel il s'agit. —

L'aveu de la partie contre qui une demande est formée, est la preuve la plus forte qu'on puisse rapporter de son Obligation — pour se la prouver l'ordonnance présente un moyen aux parties, c'est l'Interrogatoire sur faits & articles, celui qui le subit, ne peut en tirer avantage en sa faveur, mais on peut faire valoir contre lui toutes les reconnoissances

qu'il

qu'il peut avoir faits. —

L'Interrogatoire sur Faits & articles vient au secours des autres preuves, et n'est point un obstacle à la preuve testimoniale dans les cas ou elle peut être admise — On peut rapporter ici la preuve que les loix ont attachée au Serment decisoire, c'est à dire, au Serment qu'une des parties à déféré à l'autre. —

Cette maxime, qu'en matiere Civile la Confession doit être prise integralement, et ne peut être divisée merite quelque examen. — On l'a tirée de la Loi l. 39. ff. de oper. libertor. ou le Jurisconsulte Paul propose l'espece d'un patron qui a stipulé, que si son affranchi, ne lui donne pas vingt journées, il sera tenu de lui donner vingt écus — Il demande, si l'affranchi a droit d'offrir vingt écus pour se liberer des vingt journées, et il repond, qu'il ne faut pas avoir cette indulgence pour l'affranchi, parcequ'il ne doit point approuver son obligation pour la derniere partie, & se plaindre de la premiere, comme si elle etoit injuste. —

Les Commentateurs du droit ont pris occasion pour former une regle sur cette loi, que l'on ne peut point diviser son Obligation, en reconnoitre une partie, et rejetter l'autre. —

Dans la Suite quelques Auteurs moins eclairés, ont voulu faire une maxime plus generale, et sous prétexte que — l'obligation contient une reconnoissance ou Confession de

celui

celui qui s'oblige, et qu'en justice l'on forme tous les jours une espece de Contrat par des Confessions, ils se sont — ingérés de dire qu'en matiere Civile l'on ne peut diviser la Confession, soit judiciaire ou Contractuelle de l'une des parties. —

Les simples praticiens qui font volontiers application a toutes sortes de Causes, d'un principe qu'ils ont ouï dire pour une espece particuliere, sans en connoitre la — difference, ont enfin rendu ce brocard si familier, qu'il ne faut pas s'etonner des preventions que l'on peut trouver ladessus —

Mais en remontant à la Source l'on trouvera que la decision du Jurisconsulte est limitée dans son cas singulier, et ne peut être appliquée à d'autres qui n'y ont aucune conformité. —

La Confession de l'affranchi, etoit contre lui dans les deux parties, et toute entiere au profit du Patron, qui avoit seul le choix de demander les vingt journées ou les vingt écus pour la peine — L'affranchi qui n'avoit point la même option, ne pouvoit point dire qu'il ne se fut obligé qu'à payer vingtécus, puisqu'il s'etoit d'abord engagé à donner vingt — journées, et il ne lui etoit plus libre de diviser son

Obligation

Obligation, ni sa Confession. —

Dans l'espece de celui qui confesse devoir, ou être depositaire, et ajoute, que le maitre de la chose deposée lui est pareillement debiteur — C'est pour lors que la confession peut etre divisée, et qu'elle ne produit d'un coté aucune preuve ni obligation active au depositaire, pour ce qu'il pretend lui être dû ; et d'autre part celui qui a fait le depot en a la preuve par la Confession, et il a la liberté de l'achever, si les Juges ne la trouvent point parfaite. —

C'est la reponse du même Jurisconsulte Paul, dans le texte précis de la loi 26. §. ult. ff. Depositi, ou il propose l'espece d'un homme qui confesse par une lettre qu'il est depositaire de dix livres d'or, plus ou moins, deux plats, & un sac cacheté appartenants à deux particuliers, & il ajoute incontinent, que leur pere lui devoit dix écus — Le Jurisconsulte reduit uniquement le doute aux dix écus, et repond que la lettre ne peut produire aucune obligation au profit du depositaire, qu'elle ne contient que la preuve du depôt, qui peut être achevée ; et pour savoir si le depositaire a la preuve des dix écus par la lettre — le Juge connoitra que non. —

Upon

Upon these authorities it has been held that the Confession of a party upon faits & articles can be divided in all Cases, where any matter is set up which can avoid or destroy the effect of the Confession — This has been doubted, and it therefore is proper that the question should be further examined.

In settling a point of Jurisprudence which has been considered as uncertain or doubtful, regard should be had to the general sense and opinion of law writers to ascertain, if difference exists among them, upon what ground such difference rests, that we may be the better able to chuse what may be considered as the soundest opinion — On the subject of the divisibility of the Confession of a party in his answers to Faits & articles, we shall find, that the general sense of those writers is so uniform, that little difficulty or doubt ought to be entertained thereon —

As to the authorities cited from the Chancery practice in England, it is to be observed, that what is there said as to dividing the answer of a party, is

more

more applicable to pleading, than to Evidence; for in Chancery, the answer made by the party on oath is his plea to the ~~bbbb~~ Bill, and what he therein alledges in avoidance, must be proved. — Observe on this the Editor's note from the authority cited. 2 Ev. Poth. 157. "Mr Peake having cited the preceding case
" at length, observes, that no other better shews the —
" distinction between the rules of evidence in the Common
" law Courts, and those possessing an equitable —
" Jurisdiction — In a Court of law, it would have
" been said, that if a man was so honest as to —
" charge himself when he might roundly have denied
" it, and no testimony could have appeared, he ought
" to obtain credit when he swears in his own discharge,
" — he adds — that his habits of thinking and legal
" notions having been formed in Courts of law, might
" perhaps have given him an unfair prejudice in favor
" of their rules — but that to him they appear in this
" particular at least, most consonant to reason and
" Justice" — upon this Mr Evans observes — If
" my ideas upon the subject be correct, the distinction
" in this matter is not between Courts of law

"and

" and of Equity, but between pleadings and evidence; and
" that if an answer in Chancery was introduced incidentally
" and merely by way of evidence in a Court of Equity,
" it ought to be treated precisely in the same manner
" as in a Court of law — On the other hand, it is clear,
" that if in a Court of law, a plea confesses the matter
" in demand, but avoids it by other Circumstances, the
" proof of the avoidance is incumbent on the Defend.t."

But whatever may be the practice in the Court of Chancery in England as to the confession of a party made either by pleading, or in evidence, yet if a different rule be established by the laws of this Country, the Chancery practice cannot be upheld as precedent, however desirable in other respects it might be —

The writers on French Law are nearly unanimous in saying, that the Confession of a party en matiere civile, ought not to be divided — this they consider as a general principle — there are exceptions to it, but they come under particular Circumstances not applicable to the point in consideration — the establishing a

general

2e Faits d'Arts

general principle — The following authorities are submitted for consideration. —

Nouv: Denis. V° Confession. §. 2. N° 9.

" C'est une autre regle forte importante en matiere de Confession, qu'elle ne peut pas être divisée, et qu'il faut la prendre ou la rejetter toute entiere. —

Supposons, par example, que je vous ai assigné au paiement d'une somme que je soutiens vous avoir prêtée; Si sur cette demande, vous êtes convenu du prêt, mais en ajoutant, que vous m'avez rendu la somme, je ne pourrai pas diviser votre Confession, c'est à dire, me servir de votre aveu pour prouver la dette, et rejetter sur vous la preuve du paiement — Il faut que je prenne votre declaration telle qu'elle est, ou que je renonce à m'en servir, sauf a moi à justifier ma créance par d'autres preuves". —

La raison de cette maxime est evidente — On n'a aucun motif pour s'attacher à une partie de votre confession exclusivement à l'autre, dés que l'on suppose que sur tous les points il n'existe d'autre preuve que celle qui resulte de votre aveu. — Au contraire on doit presumer,

suivant

suivant que l'observe judicieusement Böerius, que vous avez dit la verité en tout precisement, parceque vous auriez pû ne convenir de rien — Sicut potuisset negare totum, et non negerit, ita presumitur in omnibus dixisse veritatem. — Böer: decis. 343. Nº. 5."

Repᵉ. de Jurisp.ᵉ v.º Confession p. 424. —

C'est un principe certain, qu'on ne peut diviser la Confession en matière Civile — c'est-à-dire, que celui qui veut se servir de la Confession de son adversaire, ne peut pas employer ce qui est à son avantage, et rejetter ce qui lui est contraire — Il faut ou prendre droit pour toute la declaration, ou ne point s'en servir —

See also Note (1) on Subseqt. paragraph

Ferr. Dict: Droit v.º Confession

Une autre remarque importante à faire sur ce sujet, c'est qu'en matière Civile la Confession ne se peut diviser — c'est-à dire, qu'on ne peut en admettre un Chef pour en tirer avantage et servir de Conviction contre celui qui a fait la Confession en Justice, et la rejetter pour les autres chefs qui servent à sa decharge. —

Par

Par example, j'avoue et confesse en Justice que je vous devois une somme que vous me demandiez, sans que vous ayez aucune preuve que je vous la doive; et je declare en meme tems que je l'ai totalement payée, ou en partie — vous ne pouvez pas diviser ma Confession, il n'y a que mon serment qui decide — Ainsi vous ne pouvez pas admettre ma Confession en tant qu'elle me constitue votre debiteur, et la rejetter pour ce qui regarde le paiement que j'ai declaré vous avoir fait. —

La raison est, qu'en matière civile on presume que la Confession du debiteur n'est point accompagnee du dol, et que celui qui a eté d'assez bonne foi pour convenir d'une dette, qu'il pouvoit nier, n'est pas d'assez mauvaise foi pour supposer un paiement sans — l'avoir fait — Cites, Chorier. Juris p. de Guy Pape. p. 311. — Boyer en Sa decision. 239. — & Belordeau. Tit. 3. art. 11. —

Potth. Obl. № 832.

Observez que lorsque je n'ai d'autre preuve que votre Confession, je ne puis la diviser —

Scaccia № 920

Supposons,

supposons par example que j'aie donné une demande contre vous pour une Somme de 200 livres, que je soutiens vous avoir prêtée, et dont je vous demande le paiement.— Si sur cette demande vous etes convenu en Justice du prêt, en ajoutant que vous m'avez rendu cette Somme, je ne puis tirer de votre confession une preuve du prêt qu'elle ne fasse en même tems foi du paiement; Car je ne puis m'en Servir contre vous qu'en la prenant telle qu'elle est, et en Son entier.— Si quis confessionem — adversarii allegat, vel depositionem testis, dictum cum sua quantitate approbare tenetur. Brunneman. ad L. 28. ff. de Pact.

According to Brunneman, here cited, the same rule of construction is made to apply to the declaration or confession of a party, as to the deposition of a Witness in a Cause — which upon considering both as evidence, is correctly true — the deposition of a Witness must be taken to be equally true in every part, unless there be other evidence to gainsay it — and the same rule ought to extend to every kind of evidence in the Cause.—

Id. Proc: Civ: p. 70. 71. §. 5.—

L'effet de ces Interrogatoires est de tirer une preuve

contre

contre la partie à qui on la fait subir, qui peut resulter des aveux et confessions contenus dans ses reponses.— On peut aussi tirer des arguments contr'elle des contradictions qui se trouveroient dans ses reponses.— Au surplus celui qui fait subir à sa partie cette Interrogatoire, n'entend pas s'en rapporter à ce qu'elle repondra; en quoi cet Interrogatoire est trés different du Serment decisoire— C'est pourquoi cet Interrogatoire ne peut faire de preuve que contre la partie qui le subit, et non point en sa faveur.— On ne peut pas neanmoins sincoper ou diviser ses reponses— la partie qui veut en tirer avantage, doit prendre ses reponses en entier, et elle ne peut tirer avantage d'une partie de la reponse, si elle rejette l'autre.—

2. Argou. Droit Fran.s p. 516.

On tient communement qu'en matiere Civile, la Confession d'une partie ne peut être divisée, et qu'il faut la recevoir toute entiere ou la rejeter.— Par examp: si un hom. avoue que je lui ai prêté la somme que je lui demande, mais ajoute, qu'il me l'a payée— je ne puis pas me servir de cet aveu pour prouver la dette, et rejetter sur la partie adverse la preuve du paiement.—

Dict.re de Brillon, Vo Confession, passim.

Confession du debiteur ne peut être divisée. Mornac sur la loi 1. C. de edendo. — Böer. Decis. 243. n. 9. 13 — Papon. lis. 8. tit. 15. —

Jugé au Parlemt. de Dijon le 9 Janv. 1572. — Que la Servante d'une hôte, ayant confessée qu'elle avoit reçüe deux pistoles, mais qu'elle les avoit rendües, ne pouvoit être divisée — ainsi le maitre ne fut tenü de les payer. Bouvot. tom. 1. part. 3. Vo Confession. quest. 1. —

Mais aussi telles confessions ne peuvent être divisées quelque raison qu'on en eut — Comme il a eté jugé, de l'avis des Chambres consultées, par arret de l'an 1672 — C'est une maxime que Confessio in civilibus scindi non potest, Ce qui avoit eté deja jugé au mois de Juillet 1642, pour le Sieur de la Marcousse contre la Dame de St. Pol. — Voy. Chorrier. Jurisp. de Guy Pape. p. 311. —

Arrets de Bardet. 1. Vol. Ch. 109. p. 465.

The arret here referred to is of 31 May 1630, by which it was determined — Que le depositaire disant qu'il a prêté sous gage à lui deposé, sa Confession n'est divisée — et celui qui a fait le depot, n'en ayant point d'autre preuve que cette Confession,

ne

ne peut denier le prêt ni reduire la Somme, et n'a que — l'affirmation du depositaire". —

It is upon this arret, that the Annotator on Bardet takes occasion to set up his opinion contrary to the decision of the arret above referred to; he appears however to be alone among the French law writers in the opinion he adopts, which ought to make it be received with caution, were he a man of more note than he appears to be. — The Commentator on Loüet, does not fail to remark this singularity of opinion in the annotator on Bardet, without seeming to treat it with much respect — After stating the opinions of some of the Civil Law writers and the distinctions they take on the question, he goes on to say —

Arrets de Loüet par Lacombe 1 vol. p. 305. 6.

"Mais toutes ces distinctions et autres que fait Böerius, avec les Auteurs ultramontains, sont plus Subtiles que Solides — A l'egard de nos Auteurs François, Legrand sur Troyes. art. 21. glos. 4. N°. 29. dit, qu'en matiere Civile, c'est chose certaine qu'une partie ne peut pas diviser la Confession, ou offres de sa partie, d'autant que ce seroit les approuver en —

partie

partie, et les improuver pour l'autre partie. — L'auteur des notes sur Bardet, et le Seul de nos auteurs — François, qui ait combattu cette maxime qu'il — appelle brocard — Il dit, sur ledit arret du 31 May 1630, que dans l'espece &c — (and goes on to cite the — opinion held by the author of the said Notes on Bardet and the authorities he refers to, which he considers as "fondée sur une pure subtilité de droit". — Mais pour revenir au point d'equité et à l'usage, il faut tenir sans entrer dans toutes ces distinctions, que quand celui a qui la Confession est faite, soit en Justice ou extrajudiciairt. n'a aucuns moyens pour prouver son action, il faut suivre la maxime, que la Confession en matiere Civile ne peut point être divisée — ce qui est l'espece de l'arret ci-dessus du 31 Mai 1630. —

See also the follows authorities

Encyclopedie de Jurisprudence. V.° Confession. —
Practicien Universel par Couchot. 1 Vol. liv. 9. p. 335.
+ 1. Pigeau. Proc. Civ. p. 244. —
Ravaut. Proc. Civ. p. 63 —
1. Jousse Com.r sur l'Ord.ce 1667. tit. 10. art. 8. p. 101. —
+ Serpillon. Proc. Civ. p. 104. 5. —

Upon

3 Faits & arts

Upon these authorities therefore it may be safely considered as a general principle of law, that the Confession of a party on faits & articles, cannot be divided. — There are however certain exceptions to this rule, founded upon particular circumstances, which cannot be considered as affecting the general principle, but subject to be regulated according to their particular nature and extent — such as the following. —

1st. Where there is improbability or absurdity in the answer of the party. —

See. N. Denizt. Vo Confession. §. 2. N. 10. — Le principe de l'indivisibilité de la Confession ne souffre aucune difficulté lorsque les deux parties de la Confession sont egalement vraisemblables, ou du moins egalement possibles — mais si l'une des deux etoit absurde, ou prouvée fausse, ou infectée de quelque mensonge qui donnera lieu d'en suspecter la verité — alors la Confession se diviseroit, et le Juge suivant les Circonstances, pourroit ou deferer le serment au demandeur, ou même lui adjuger ses conclusions — See cases cited in the two arrets referred to — See also

1 Pigeau Proc. Civ. 244. 267. —
Dic. de Droit. Vo Confession. —
Serpillon. p. 105. —

23

24. Where there exists a proof of the falsity of the answer.

See arrets de Louet. p336. above cited — mais au contraire quand celui à qui la confession est faite — avoit d'ailleurs des moyens pour etablir son action, en ce cas il est juste de diviser la Confession. —

Henrys. tom. 4. p. 18. dans sa sixieme question posthume, rapporte le cas ou la Confession se divise en matiere Civile. 1°. Lorsqu'il y a une forte presomption qui combat le fait qu'on ne veut pas diviser dans la Confession — 2°. Lorsqu'outre la Confession on a une preuve testimoniale du fait principal qu'on veut diviser. —

(f) "Preuve testimoniale". — this must be understood of such Cases where this kind of proof would be admissible without faits & articles, unless there appear that improbability or absurdity in the answer, as above mentioned, wh might give room to the admission of Verbal testimony owing to the mauvaise foi of the party exam.d on faits & articles, or something upon which to

rest

rest a presumption that the party has not told the truth — For if all the facts charged should be denied by the Examinant, without any thing to impeach his veracity, verbal testimony ought not to be admitted to contradict the answers of the party, unless verbal testimony were in other respects admissible — so held in the Case of Labbaye. v. Pelle. 19 June 1815. —

Vid. 1 Pigeau Proc. Civ. 214. —
Poth. Obl. N° 920. latter part — "à moins &c"
Serpillon. p. 104. a. 8. 12.

3ly. In matters of account where sums are acknowledged by the Comptable to have been received by him, but afterwards charged en depense. —

"A quoi il faut ajouter en matiere de Compte, que quand un regisseur ou Administrateur se charge d'une somme en recette, et la porte en depense, il faut indistinctement diviser la Confession, c'est-a-dire, admettre la recette, et rejetter la depense, si elle n'est justifiée; parceque d'un coté tout Comptable est obligé de justifier de sa depense, et qu'il

n'est

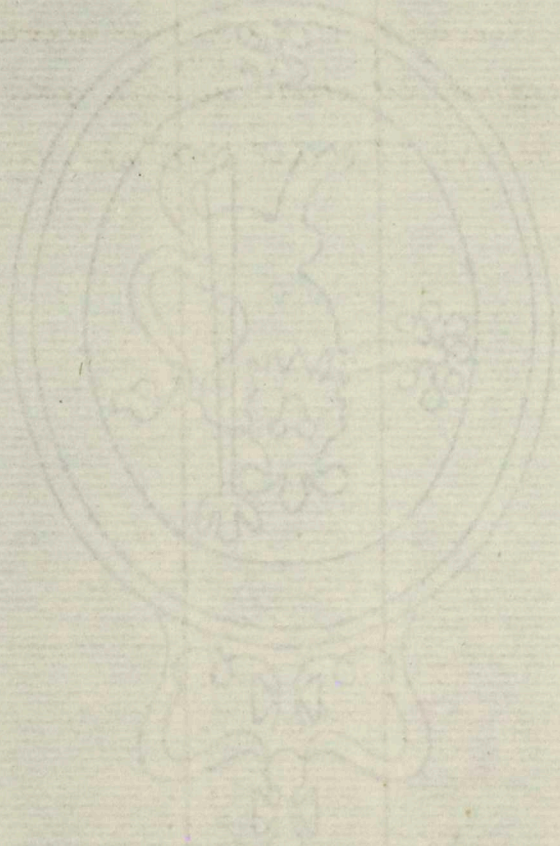
n'est pas vraisemblable qu'il se seroit chargé d'une somme sans l'avoir seçüe. 1. Arrets de Louet. 306. —

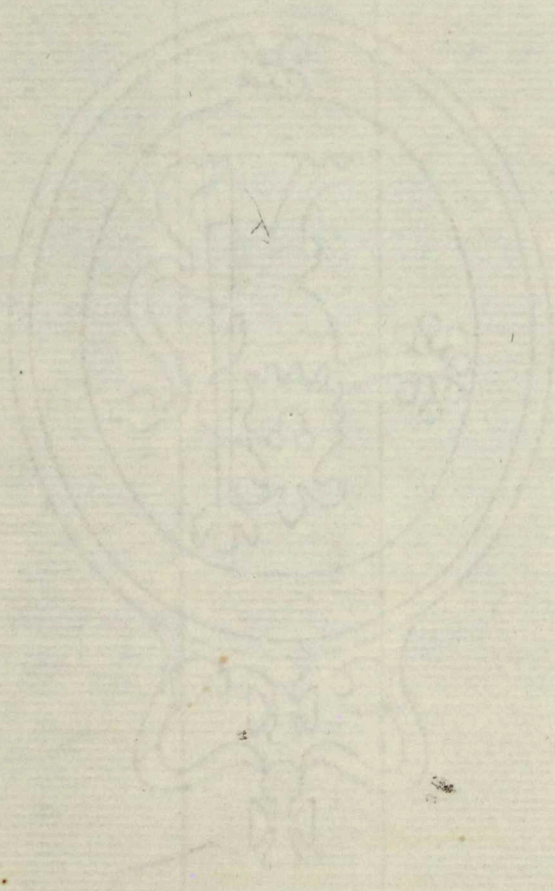
There may be other instances in which the Confession of a party may be divided, but this must depend on the opinion of a Court of Justice and the peculiar circumstances of the Case —

Faits & art. Calomnieux

Articles Pertinens. — Car si les faits sont impertinens ne concernent point la cause et la matiere dont est question, calomnieux, ou captieux et prejudiciables, ou qu'ils concernent le dol ou la Conscience des parties — qu'ils aillent à decouvrir leur turpitude; alors elles ne sont pas tenuës de repondre, et la partie peut demander la rejection. Bornier. Tit. 10. Ordre 1667. art. 1. —

Ainsi la partie n'est point obligée de repondre à des faits & articles vagues, non concluans ou calomnieux et prejudiciables à sa reputation. — Positioni per quam quis detegeret delictum suum, quis non cogitur respondere. Lacombe. V° Interrogatoire sur faits & art. —





Felony – in a Foreign Country. –

If a person, having committed a felony in a foreign Country comes into England, he may be arrested there and conveyed and given up to the Magistrates of the Country against the laws of which the Offence was committed – Per. Heath. J. – Mure v. Kaye 4 Taunt. 34 He states – It has generally been understood, that wheresoever a Crime has been committed the Criminal is punishable according to the lex loci of the Country agt. the law of which the Crime was committed, and by the comity of nations, the Country in which the Criminal has been found, has aided the police of the Country against which the Crime was committed in bringing the Criminal to punishment. – In Ld. Loughborough's time, the Crew of a Dutch Ship mastered the vessel and ran away with her and brought her into Deal and it was a question whether we could seize them and send them to Holland – and it was held we might. –

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1 Taunt. 26. King v. Depardo

A Manslaughter, committed in China by an alien Enemy, who had been a prisoner of war, and was then acting as a Mariner on board an English merchant ship, on an English man, cannot be tried in England

under a Commission issued in pursuance of the Stat. 33. Hen. 8. ch. 23.— and 43. Geo. 3. ch. 113. s. 6.— — The Court considered that foreigners were not comprehended within this law.

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N. Denvz.t Vo. "Etrangers" §. 2. No. 1.—

En general on ne doit pas refuser d'admettre les etrangers qui se refugient en France, ou ceux que leurs affaires y amenent — C'est un devoir du droit naturel.— Mais il est de l'interet de — l'Etat de mettre des bornes à cette admission qui peut être quelques fois dangereuse — Ainsi — quelques sacrés que soient les droits de l'hospitalité ils ne peuvent obliger à donner retraite à un etranger qui ne s'est refugié dans le Royaume que pour se soustraire à la juste punition d'un delit grave commis dans son Païs.— Un tel homme peut être rendu au Souverain qui le reclame.—

Id. Vo. "Delit." §. 4. No. 4.

Si le refugié est accusé d'un crime de Lez-Majesté, ou de fausse monoie, le Souverain du Païs ou il a commis son Crime fait demander au Souverain du Païs ou il s'est retiré, ou aux Juges des lieux, la permission d'arreter l'accusé, et on le ramene dans le païs dont il — s'est echappé pour lui faire son Proces — Pareille permission ne se refuse pas ordinairement

On

On demande aussi la même permission pour d'autres crimes dont l'atrocité est telle qu'il importe a tout le genre humain que le criminel soit puni : Les Juges des lieux ou il s'est retiré l'accordent ou la refusent suivant les circonstances, et selon qu'ils le jugent à propos d'apres l'enormité et les presomptions deja subsistente du Crime dont est question. —

see also N. Denz^t. V^o Droit des Gens. §. 5. N^o 1. —

False representation.

4. Moore & Payne. 61.
Foster & al. v. Charles.

Where the Defendant recommended an Agent to the plaintiffs, with a knowledge that the representation of the character of the Agent was false— Held— in an action on the Case to recover damages for the misconduct of the Agent, that it was not necessary for the plaintiffs to prove a malicious or interested motive by the Defendant for the misrepresentations.— if what the Defendt said was false within his own knowledge and occasioned an injury to the plaintiffs, it is a sufficient ground of action.—

Femme mariée. Contrainte. —

1. Brod. sur Louet. F. 11. p. 722. —

Jour: du Palais 5. Juin 1671. part. 2. quest. 1. — 1re Tom. p 123. —

Arret de Paris du 5 Juin 1671. par lequel il a été jugé, qu'une femme peut etre contrainte par corps, quoi qu'en puissance de mari, pour dommages et interets adjugés contre elle pour excés par elle commis

But see art. 8. Tit. 34. Ordre 1667. which says, "Ne pourront les femmes et filles s'obliger "ni etre contraintes par Corps, si elles ne sont "marchandes publiques, ou pour cause de — "stellionat procedant de leur fait." —

Bornier observes upon this article — Il faut aussi observer qu'une femme peut être contrainte par Corps au paiement des dommages & interets pour raison d'excés par elle commis comme il a été jugé par arret recueilli dans le second tome du Journal du Palais, d'autant qu'ils tiennent lieu de reparation et de satisfaction

N. Denizart. Vo Contrainte par Corps. §. 3. No 1. p. 455. — —

Mais elles sont contraignables par corps en matiere criminelle pour dommages et interets — ce qui a été jugé par arret du 5 Juin 1671. Jour. Palais —

Jer. Dec. Droit. co: verb. —

Ce que nous avons dit qu'une femme ne peut être contrainte par Corps n'a lieu que pour les matieres Civiles; Car en matiere Criminelle, une femme, meme en puissance de mari, peut etre contrainte par Corps au paiement des dommages et interets adjugés contre elle pour raison d'excés par elle commis ainsi jugé par arret du 5 Juin 1671. —

Rep.re V.o Reparation Civile. p. 210 §. 3. —

Cette Contrainte par Corps resultante de la reparation Civile, ou des dommages interets qui s'ajugent par forme de reparation Civile, & meme des depens qui s'adjugent dans cette forme, est de droit contre toute personne, de tout sexe, et de tout âge, Les septuagenaires y sont soumis, et de même les femmes mariées. —

The Reparation Civile is to be distinguished from Dommages-Interets. —

Denis.t V.o "Reparation Civile". N.o 17. — makes this distinction — Il ne faut pas non plus confondre les Dommages-Intrets avec les Reparations civiles ces deux condamnations different beaucoup l'une de l'autre. — Les Dommages-interets sont regardés comme un dedommagement d'une perte, que celui qui les obtient, a soufferte dans sa fortune et qui, de la part du condamné, peut avoir une Cause innocente; mais la reparation Civile a toujours pour Cause, un delit, dont le condamné s'est rendu coupable, et pour objet, la reparation d'un tort souffert par l'offensé, non seulement dans sa fortune, mais encore dans sa personne et dans son honneur. —

2. Bourj.n Tit. 8. Des Exons. Ch. 5. Sec. 1.re N.o 22. — p. 702. —

Mais si la femme pour les depens ne peut être contraignable par corps, elle est sujette à cette Contrainte, pour les dommages et interets contre elle adjugés. — And on the note to this article refers to the above arret in the Journal du Palais and also cites another arret to shew where the wife

wife was held liable to the Contrainte for Costs,— contrary to the general principle laid down in the text— "Cependant par l'arrêt du 5 Octobre 1691, rapporté dans le cinquieme volume du Journal des audiences. p. 557. la femme pour dépens a été jugée contraignable par Corps: mais les dépens avoient été faits en matiere d'poursuite criminelle, et il y avoit eu 20 livres de dommages et interets joints à ces dépens, ce qui mettoit le tout dans la classe des dommages et interets les dépens n'etant dans ce cas qu'une suite des dedommagements au quel elle avoit été condamnée, — Juste exception à ce que dessus. »

Fiction of Law.

Every Country has its forms, which are invented for the furtherance of Justice, and it is a certain rule, that a fiction of Law shall never be contradicted so as to defeat the end for which it was invented – but for every other purpose it may be contradicted – 1 Coup. 177. Mostyn. v Fabrigas.

Foreign Judgment.

2. Barn: & Adolp. 951.
Becquet & al:
vs
Mac Carthy. Exect.x &c

To render a foreign Judgment void, on the ground that it is contrary to the law of the Country where it was given, it must be shewn clearly and unequivocally to be so.—

Where the law of a British Colony required that in a suit instituted against an absent party, the process should be served upon the Kings Attorney General in the Colony, but it was not expressly provided that the Attorney General should communicate with the absent party:— Held, that such law, was not so contrary to natural Justice as to render void a Judgment obtained against a party who had resided within the jurisdiction of the Court, at the time when the cause of action accrued, but had withdrawn himself before the proceedings were commenced.—

5. Moore & Payne. 407.
Dagleish and others
vs
Hodgson.—

The Sentence of a foreign Court of Admiralty condemning a vessel for attempting to violate a blockade, is not conclusive, unless the fact upon which the Condemnation proceeded appears upon the face of the Sentence, free from doubt and ambiguity: It cannot be collected from mere inference, nor can it be left in uncertainty whether the vessel was condemned upon one ground, which would be a just ground of condemnation by the law of Nations, or on another ground which would only amount to a breach of the municipal regulations of the Condemning Country.—

Foreign Laws —
How proved

The way of knowing Foreign Laws, is, by admitting them to be proved as facts — and the Court must assist the Jury in ascertaining what the law is — For instance, if there is a French Settlement, the Construction of which depends upon the Custom of Paris — witnesses must be received to explain what the Custom is. — So in the Supreme resort before The King in Council, the Privy Council determines all Cases that arise in the plantations, in Gibraltar or Minorca, in Jersey or Guernsey — and they inform themselves by having the law stated to them. — 1 Cowp. 174. Mostyn. v. Fabrigas. —

Whatever is a justification in the place where the thing is done, ought to be a justification where the cause is tried. Ib. 175. —

The English Courts do not take notice of any Judicial act done in a foreign Country, without evidence of the laws of such Country — And in the Case of Ganer. v. Lady Lanesborough. Peak. 17. 18. where an instrument under Seal of the Synagogue at Leghorn was produced to prove a divorce, L. Kenyon held it to be no evidence, as before he could take notice of any proceeding in a foreign Court, he must know the law of the Country which was matter of evidence, and and should be proved by Witnesses. —

Vid. 1. P.W. 431. accord. and such laws if in writing, must be proved by a copy properly authenticated Clegg. v. Levi. 3. Camp. 167. & L. Ellenborough. — Millar. v. Heinrick. 4 Camp. 155. & Gibbs. C. J. — In Boehtlinck v. Schneider. 1 Esp. 58. it is stated to have been held by

by L^d. Kenyon, and confirmed in K.B. that the unwritten law of a foreign Country can only be proved by documents properly authenticated. — But in Millar v Heinrick. Ch. J. Gibbs, says, foreign laws not written are to be proved by the parol examination of witnesses of competent skill. But where they are in writing, a copy, properly authenticated, must be produced. —

vide. Buchanan. v. Rucker. 1 Camp. 63. and Richardson v Anderson there cited. —

1. Barn: & Adol. 284.
De la Vega, v Vianna

In a suit between parties resident in England on a Contract made between them in a foreign Country, the Contract is to be interpreted according to the foreign law, but the remedy must be taken according to the law of England —

One foreigner may arrest another in England for a debt which accrued in portugal while both resided there, although the Portugese law does not allow of arrest for debt. —

Foreign Courts — Sentences of

(How far the Sentences of foreign Courts of Compitent Jurisdiction are taken notice of as conclusive evidence by the Courts in England
see note (b) 9 Mod. Rep. 66.67. cases cited —

N. Denizt. Vo Curatelle §.10.N.4.

Un Curateur à Succession vacante crée par une Jurisdiction etrangere, quand cette Succession est-celle d'un etranger, et qu'elle est ouverte dans son Païs n'est pas recevable à ester en Justice en cette qualité dans le Tribunaux de France. —

See the observations of M. D'ormesson, avocat General on this point, which may be applied to many questions of a similar nature arising in our Courts here. —

He says: Quoi qu'une personne puisse aller par tout pour exercer ses droits, il n'en est pas de même de celui qui la represente — Il faut distinguer, pour savoir jusqu'ou va ce droit de representer un defunt, entre les choses du droit naturel, et celles du droit Civil: Toutes les nations reconnoissent le premier, mais chacune a son droit Civil particulier. — Ainsi ce qui est du droit naturel peut être reconnu par tout, mais le reste n'a de force que dans l'interieur de l'Etat d'ou il procede. —

Les examples et l'application de ces regles sont sensibles. — Les enfans succedent à leur pere par le droit naturel, c'est le sang qui les y appelle, et par tout on le sent et on le reconnoit; ainsi un pere mort son fils va poursuivre ses droits par tout — Mais un Curateur ne represente le defunt qu'en vertu du droit Civil, qu'en vertu du pouvoir qui lui est conferé

conferé par un magistrat — Ce pouvoir ne s'etend pas plus que l'autorité du magistrat, ou celle du Prince qui l'en a fait depositaire, et l'autorité du Prince ne passe pas les bornes de son Etat —

Robinson v. Bland
2 Burr. 1079
on note (d)

A mans personal estate is distributable accoroing to the laws of that country where he dwelles, but to enable a person to sue for any part of the personal estate, he must qualify himself for that which is the proper Jurisdiction of the place where the personal estate lies; but that does not determine the right to the equitable property — ℔ L^d Chancellor in Pipon. v. Pipon. M. S. and S. C. cited ℔ L^d Harwicke 2 Ver. 37. —

Foreign Laws — Legitimacy — Right of Inheritance

5. Barn: & Cress. 538.
Doe. ex. dem. Birtwhistle
Vardill^Vr. — —

A child born in Scotland of unmarried parents, domiciled in that Country, and who afterwards intermarry there is not by such marriage rendered capable of inheriting land in England. —

Forfeiture

Parker's Rep:
p. 227.—
Rob^t. Mitchel. q. t.
Soren^v Torups.

A ship importing 221 pounds weight of tea, put on board in Norway by Mariners on their own account, without the privity of the master, mate, or owners, is forfeited by the Stat: 12. Cha^s 2. c. 4.—

Guarantie. — a Continuing, what.

3. Moore & Payne's Reps. p. 573. —
Hargrave. v. Smee. —

The defendant gave the plaintiff the following guarantie in writing. — "I do hereby agree to — "guaranty the payment of goods to be delivered in "umbrellas and parasols to I. & E. S. according to the — "custom of their trading with you, in the sum of £200" —

The custom of trading between the plaintiff and I. and E. S. was, to make up monthly accounts of goods delivered, and for I. & E. S. to give acceptances for the — amount of each monthly account — Held - to be a Continuing guarantie. —

Gaoler.

Impey's Sheriff p. 51.

A Gaoler is an officer of the Court and subject to its orders

The Sheriff and Gaoler are each of them so far under the regulation of the Court of Kings Bench that they will compell the Sheriff to assign prisoners &c, and the Gaolers to surrender up goods.

3. Bac. Ab. tit. Gaol & Gaoler. p. 350.

Gaolers are not only punishable by Attachment, as all other Officers are by the Courts to which they more immediately belong for any gross misbehaviour in their offices or contempts of the rules of such Courts; but they are also punishable by any other Courts for the disobeying writs of Habeas Corpus awarded by such Courts and not bringing up the prisoner at the day prefixed by such writs. 3 Hawk. Pl. C. bv. 2. ch. 22. sec. 31. p 288.

Id. — p. 349.

A Gaoler is considered as an Officer relating to the administration of Justice. — Also it seems that the Court of Kings Bench which has a general superintendency over all persons who are in any respect, Ministers of Justice, may award an attachment against any Gaoler using a prisoner barbarously or inhumanly. 3. Hawk. P. C. sec. 32. p. 289.

Goods sold &c — action for. —

An action lies for goods sold & delivered, where the goods have been sold abroad but which are prohibited here (England) if the delivery of them be complete abroad though the vendor knows they are to be run into England.

This is not an immoral Contract — for the revenue laws, as well as the offences agt them are all positivi juris — and no Country ever takes notice of the revenue laws of another. — And the Contract was complete where no offence at law was committed. —

1 Coops. 341. Holman val'. v. Johnson. —

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7 Taunt. Reps. 312
Hicklin & another
v.
Hardey. —

If a buyer pays for goods by a bill which the drawee refuses to accept, but afterwards desires it may be again presented and it will be honoured, the holder is not bound again to — present it — nor to return the bill. —

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see. 4 East. 147
Musson. v. Price

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7. Taunt. 397
Fry. v. Hill

The vendor of goods being paid for them by a bill at one month after sight, given by the purchaser's banker for a larger sum than the price, the vendor paying the difference, is not, upon the bill's being dishonoured, precluded from recovering against the buyer the price of the goods

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Goods Sold &c

2 Starkie. 39. —
Lyons & al. v. Barnes

A. Sells beer to B. in Casks, giving him notice that unless he returns the Casks in a fortnight he will be considered the purchaser — B does not return them in a fortnight — A cannot maintain an action for goods sold and delivered qua the Casks, as they were left on a special agreement between the parties, and that agreement ought to be specially declared upon. —

Id. — 539
Delauney. v. Barker

If goods are delivered to a bailee on a Contract of Sale and return, but with this stipulation that the bailee might retain the goods on his own account if he chose. — Such bailee cannot pledge the goods. —

Abbot. Ch. J. — Cases of this kind come before the Court very frequently; the party taking goods upon such Conditions did not purchase the goods out & out in the first instance, if he did so, then he would become liable to pay for the whole amount and could not afterwards return them, which would be contrary to the nature of the Contract — he had an option either to return the goods or to keep them, if he elected to keep them, he was to announce that intention to the proprietor and then and not till then, he would become the purchaser.

Goods Sold &c. &c.

1 Moore's Rep. 61.
Hickling & al. v. Hardey

Where a bill of exchange is given in payment for goods sold, which upon presentment to the drawee is refused acceptance. — Held — That the holder having declared against the drawer on the bill, and joined Counts for goods sold, may treat such bill as a nullity, and recover his demand on the latter Counts, although the credit on the bill be not expired. — It is sufficient in such an action to prove a presentment to the drawee for acceptance, without shewing that the bill was protested for non-acceptance, or that the drawer had notice of its dishonour. &c.

see. Milford v. Major. 1 Doug. 55. —
Ballingalls. v. Glostr. 4 Esp. 268. —

1. Car: & Paynes N.P. Rep. p. 15. —
Milner & al. v. Tucker

If goods are supplied, not conformably to the order for them, the buyer is bound to return them within a reasonable time, or he will be bound to pay for them. —

10. Moore's Rep. 477
Hadwen. v. Mendizabel

The defendant having given the plaintiff in payment for goods certain bills of exchange which were afterwards dishonoured, the latter sued him for the price of the goods Held — that the pltff was not bound to produce the bills at the trial, and the fact of their being in the possession of his agent at the time did not bar his right of recovery. —

Goods sold &c.

7. Barn: & Cress. Rep. 19.
Smith & al. v Ferrand.

Where the seller of goods received from the purchaser an order upon his banker for the price, and the latter (with whom money had been deposited to meet that and certain other demands) offered to pay in Cash, deducting discount for the period of credit, or by a bill upon a third person, which the seller elected to take. — Held — that although the bill was afterwards dishonoured, he could not sue the purchaser for the price of the goods. —

3. Car: & Payne Rep. 457.
Ferguson. vs. Carrington.

If goods be sold on a credit, the Vendor cannot before the credit has expired, maintain assumpsit for goods sold, even though he can prove that the goods were not bought in the fair way of trade, but for the fraudulent purpose of being immediately resold at an under-price. — Semble — that trover is his proper remedy

Goods Sold and Delivered — Delivery how made.

2 Hy Black. 316.
Goodall. v Skelton

A. agrees to sell goods to B. who pays a certain sum of money as earnest — the goods are packed in cloths furnished by B. and deposited in a building — belonging to A, till B shall send for them — but A — declares at the same time, that they shall not be carried away till he is paid. — This is not a delivery to B. —

The question as to the delivery of goods arises in many different ways. —

1st — What delivery is sufficient to complete the Contract so as to pass the property to the purchaser. —

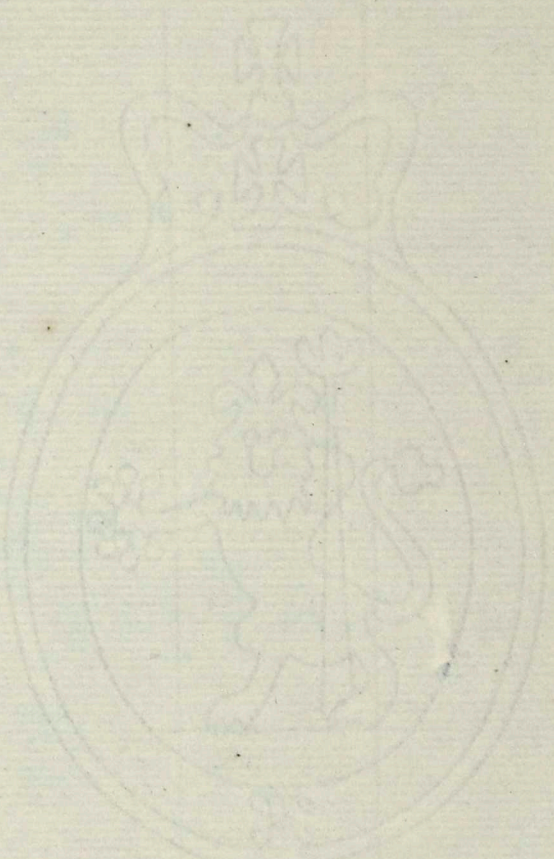
Hanson. v. Meyer. 6 East. 614
Rugg — v. Minett. 11 East 210.
Wallace v Breeds — 13 East 522
Busk — v Davis 2 M. & S. 397
Zagury v. Furnell — 2 Camp. N. P. C. 240 —
Austen v Craven 4 Taunt. 644
White — v Wiles — 5 Taunt, 176. —

2 What delivery is sufficient to constitute an acceptance of goods under the Statute of frauds. —

Chaplin v Rogers. 1. East — 192
Elmore — v Stone — 1 Taunt. 458.
How — v Palmer — 3. B. & A. 321.
Tempest v Fitzgerald do — 680
Hanson — v Armitage. 5. B. & A. 557
Carter — v Toussaint. do — 855.
Baldey — v Parker — 2 B. & C. 37.
Bentall v Burn — 3. B. & C. 423.
Phillips v Bistolli 2 B & C. 511. —

Guarantie.

A paper writing was given by the Defendt. to A. (to whose house the plffs had declined to furnish goods on their credit alone) to this effect— "I understand "A & Co. have given you an order for rigging &c— I can "assure you from what I know of A's honor and probity "you will be perfectly safe in crediting them to that amount, "indeed I have no objection to guaranty you against any "loss from giving them this credit"— which paper was handed over by A. to the plffs together with a guarantie from another House which they required in addition, and the goods were thereupon furnished— Held, that the paper did not amount to a guarantie, there being no notice given by the plffs to the Defendt. that they accepted it as such, or any consent of the Defendant that it should be a conclusive Guarantie.— 1. M. & Selw. 557. M^c. Iver pl. v. Richardson.



Habeas Corpus.

——— Issued in vacation, returnable immediate before the Judge at his Chambers, does not expire by the Term's coming on (so as to require a new writ) but the defendant may be brought into Court upon the old writ. — 1 Bur. R. 460. Rex. v. Shebbeare. — 1 Feb. 1758.—

And being then committed to prison from want of bail (for the Court cannot commit him to a King's Messenger, in whose custody he was when brought into Court) he may be afterwards brought up by rule from the prison, without being obliged to sue out a new Habeas Corpus. — Ibid. —

——— Issued in vacation, the person was brought into Court in Term time. 1 Bur. 542. Rex & Mary Mead. 1758. —

——— For a young lady who had been decoyed away from her father, but now desired to continue with him. 1 Bur. 606. Rex. v. James Clarke. May 1758. This writ also issued in vacation and was returned in Court. —

——— No Peer or Lord of Parliament hath — priviledge against being compelled to process of the — Courts in Westminster Hall to pay obedience to a writ of Habeas Corpus directed to him. — 1 Bur. 632. Rex. v. Earl Ferrers. 10 June 1758. —

Habeas Corpus.—

1. Bur. 636. 7. 8. —— In the Cases of Dawes & Kessel, two impressed men, who had sued out Writs of H. Corpus in order to be discharged out of the Regiments in which they then were, upon the foot of injustice done to them in being compelled to submit to the will of the Commissioners — it is stated in a note —

In both these Cases, neither of the parties could have brought a H. Corpus, as neither of them was in Custody — Dawes had deserted and absconded — Kessel was made a Corporal. Both prayed to be discharged from the Condition of Soldiers upon the ground of the Commissioners having misbehaved in the exercise of a Parliamentary authority; (for which misbehaviour they might be liable to an Information) — In neither Case did the Counsel object to the propriety of this method — and the benefit to the Subject is manifest. — see 6 T. Rep. 498.

—— For a Prisoner of War taken on board of an Enemy's privateer Ship, and alledging and proving by affidavit — "that he was a foreigner, subject of a "neutral power, taken by a French privateer in an — "English Ship as he was coming to England to enter into "our English Merchants service, and detained by force and "against his will to serve on board the French privateer" This Court will not take upon themselves to set him at liberty, the application must be to the Crown. — 2. Bur. 765. 766. — Rex. v. Barnard Schiever, a Swede. — 1759. —

The

Habeas Corpus.—

The note on this Case makes the following qu:

For as he was the subject of a Neutral prince, and was in the French Service by compulsion against his own Will?—

Qu: Whether when he was taken the last time by the English, he was to be considered, not as an Enemy, but as the subject of a Neutral prince, and therefore not as a lawful prisoner of war.—

——— To the Keeper of a private Mad-house — where it appeared that the person confined was a lunatic, and not fit to be produced in Court; and that the Relations were applying for a Commission of Lunacy —

1st The Court therefore enlarged the time for making the return.—

2d They refused liberty of access and inspection to a person who could not make out any pretension to demand it.— 3 Bur. 1362. King v. William Clarke. 1762.—

——— To produce an Infant— (directed to private persons.

1st The court are, ex debito justitiæ, to set the infant free from an improper restraint

2d But they are not bound to deliver over the infant to any body.—

3d Nor to give the infant any priviledge; though the infant has a priviledge redeundo, unless the Court should see ground to declare the Contrary

4ly.

Habeas Corpus.

4ly The true rule is, that the Court are to judge upon the circumstances of the particular Case, and to give their directions accordingly.

5ly L. Mansfield approved of what was actually done in the three Cases of Mrs. Turberville[1] Frances Howland[2] and James Smith[3] though he did not agree with all that was said in them.

see 3. Bur. Rep. 1435. vseq. Rex. v. Delaval & al. 1763.

(1) 1 Str. R. 444.
(2) Id. 579.
(3) 2 d. 982.

Ad Testificandum.

1st. Will lie to remove a prisoner in execution to be a witness.

2ly. Was refused where the application for it seemed to be a mere contrivance.

3. Bur. 1440. Rex. v. Burraze. 1763.

Sued out by a husband against his wife's friends to obtain his wife. It appeared that he had used her ill, and she swore the peace agt. him.

The Court would not deliver her to him, but left her at her own liberty, and even ordered a tipstaf to protect her. 4. Bur. 1991. Anne Gregory's Case. 1766.

Habeas Corpus.

3. Barn. & Ald. Rep. 420. – Hobhouse's Case

The writ of Habeas Corpus at Common law, although a writ of right, is not grantable of course, but only on motion in term time, stating a probable cause for the application, and verified by affidavit: Quere, whether under the Stat. 31. Ch. 2. Ch. 2. and our Provincial Ordce of 24. Geo. 3. Ch. 1. Sec. 1. & subsequent St, 34. Geo-3. Ch. 6. S. 37— and 52. Geo. 3. Ch. 8. where the application is made to a Judge in vacation, the writ be grantable of Course.—

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2 Burr. 765. Rex. v Schiever

A Hab. Corpus, for a Prisoner of War taken on board an enemy's prize ship, denied.

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1 Raym. 673. Archer's Case

A Habeas Corpus is grantable to bring up a daughter from her father on a letter from her, stating that her father used her severely.

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2 Raym. 1333. Rex. v. Johnson

A Child of ten years old shall on a Habeas Corpus be taken out of the Custody of a guardian appointed by the Spiritual Court, and deliver her to one appointed by her father's will. See also Str. 579.—

According to the report in Str. 579. the only reason why the Court delivered the Child to her testamentary Guardian was, because she was too young to judge for herself — and this is considered as the right ground of the decision. Vide. 1 Burr. 1436. and Str. 444. 982.—

Habeas Corpus

4. Moore Reps. 306

In re Pearson

The Court will grant a Habeas Corpus in the first instance, to bring up an infant who had absconded from his father, and was detained by a third person without his consent. —

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5. Dowl: & Ryl. 610

Ex parte. Grocot

Habeas Corpus refused to discharge an apprentice from a King's Ship, where the apprentice did not alledge that he was detained against his own Consent. — The Master however may have a warrant to the Commander of the vessel to have the apprentice discharged. —

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9 Moore's. Rep. 278

Ex parte, Skinner, an infant.

The Court of Chancery, representing the King as parens patriæ, has jurisdiction to controul the right of a father to the possession of his child, but the Court of Com. Pleas has not any of that delegated authority. —

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2. Smith's Reps. K.B.

The King v. Wiseman

ex parte. Newton.

A motion for a Hab: Corp: to a private person, on the application of a husband to bring up the body of his wife, the affidavit must state, that she is detained against her will. —

Ld Ellenborough-Ch. J. It does not appear that she is under any restraint — You do not state that the refusal to admit the husband to the house of Wiseman, was not upon her own suggestion. — Suppose she was brot. into Court, we should let her go at large — Unless it is suggested that there is a restraint upon her, we cannot issue the writ — If he seduced her from her husband, you may have your action. —

Habeas Corpus.

1 Dowl: Prac. Rep. 84
Ex parte McClellan.

The Court of K. B. will remove a child from the custody of the mother to that of the father, although there is no suggestion that the child is subjected to any improper confinement or restraint, nothing being shewn to prove that the custody of the father is improper. —

☞ But a Court of Chancery has a greater power in this Court, so also I presume the Courts of K. B. in Canada —

Handwriting, evidence.

Ryan v Moodie's N.P.C. p. 90.
Harrington v. Fry.

A Witness, who had never seen the Defend^{t} but had corresponded with a person of the Defendant's name, living at Plymouth Dock where the Defendant resided, and where — according to other evidence, there was no other person of that name, stated, that the handwriting of certain letters, was of the person with whom he corresponded. Held, that this evidence was sufficient to admit the letters to be read against the Defendant. —

Moody & Malkins N.P. Ca. p. 39.—
Lewis & al. v Sapio.

The signature of a party to a bill of exchange may be proved by a person who has seen him write his surname only.—

Id. p. 182.—
Booth. v. Grove.

In an action on a promissory note, alledged, to have been made by the Defendant "his own "proper handwriting being thereunto subscribed", if it appear that the Defendant's name was written by another person with his authority, it is sufficient, the allegation of the Defendants handwriting may be rejected as surplusage.—

See Chitty on bills. 357. 8. 7th edit.—

Hypotheque.

Actes de Notoriété 267 to 270. — An obligation passed before two notaries or a notary and two witnesses, carries a mortgage although passed en brevet.

Fe. Vast. Comm^tr. sur les Cout. de 4 Vol. p. 469. — La Tacite reconduction ne produit point d'hypotheque, quoique le premier bail fut passé devant notaire, le proprietaire a simplement un privilege, mais point d'hypotheque. —

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2. De Cormis Consult^o p. 1328. cls. 13. Borner Ord^ce 1673. Tit 5. art. 8. — Le protet faute d'acceptation de lettre de change bien qu'en pais etranger, porte hypotheque en France.

Identity of person — on charge of Perjury. &c

2 Burr. 1189.
Rex. v. I. Morris

Perjury upon an answer in Chancery — no need to prove the identity of the person, or the actual swearing.—

It was there held, that as the name subscribed to the answer was proved to be the Defend.ts handwriting and Bennet, (the Master) had proved that the Jurat was subscribed by him, as being sworn before him, this was sufficient proof, that Defend.t was the same person, and also that he actually swore it.—

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2 Starkie. 239.
Parkins. v. Hawkshaw.

On non est factum pleaded to a bond, it is not sufficient to prove the execution by a person who executed in the name of the Defendant, without proof of his identity.—

Ignorantia Juris non excusat.—

Where money is demanded as a matter of right and the person of whom it is demanded, with a full knowledge of the fact upon which the demand is founded, pays it, he can never recover it back again.—

Brisbane. v. Dacres. 5. Taunt. 143.—
Bilbie— v Lumley. 2. East. 469.—
Stevens. v Lynch— 12 East. 38.—
Gomery. v Bond. 3. Maule & Sel. 378.—

Incendie.

C'est un principe de Droit Commun, que dans le Cas d'un peril evident il est permis d'abbatre les maisons voisines pour arreter une Incendie.

Dans les villes ces sortes de domolition doivent se faire par ordre des magistrats de Police, qui ne manquent pas de se transporter au lieu de l'incendie.

2. Decormis Cons. p. 1809. ch. 17.

En cas d'abbatement de maison pour eviter la suite du feu, les maisons voisines doivent payer la demolition, et non la communauté. —

Repse Vo Voye de Fait. p. 606. —

C'est un principe de droit Commun que dans le Cas d'un peril evident, il est permis d'abbatre les maisons voisines pour arreter une incendie. —

Dans les villes ces sortes de demolitions doivent se faire par ordre des magistrats de police qui ne manquent point de se transporter au lieu de l'incendie — Alors il n'y a point de recherche à craindre pour ceux qui ont abbatu — ce n'est pas une voie de fait qu'ils commise, c'est un devoir qu'ils ont rempli

Information.

The Court will grant a Criminal Information for publishing in a Newspaper, a Statement of the evidence given before a Coroner's Jury, accompanied with comments, although the Statement be correct, and the party had no malicious motive in the publication. ~~1 Barn. & Alder. 379.~~ The King v. Fleet. 1 Barn. & Alder. 379.

Parker's Rep. 264
Attᵍ Genˡ v Buckley

Information for a penalty abates by the death of the Defendant, after trial and before Judgment, and this may be taken advantage of by suggestion of the death upon the Roll, confessed by the Attorney General, without a Writ of Error.

Price's Rep. 12 Vol. p. 61. —
Attᵍ Genˡ v. Tongue
In Exch.

In an Information for penalties, as in an Indictment, if there by any count on which the conviction may be sustained, it will be sufficient, and punishment must necessarily follow. — Baron Graham. — see also p. 63. same opinion held by Baron Hullock. —

Inn-keeper.

2 Barn: & Adolph. 803.
Kent v. Shuckard.

Inn-Keepers are responsible for money belonging to their guests — and in this respect are to be compared to Carriers.

Insolvency – what –

3. Dowl. & Ryl. Rep. 218.
Shone & al, assignees
Lucas & another

Insolvency within the meaning of the Bankrupt Laws, does not mean an inability to pay twenty shillings in the pound, when the affairs of a bankrupt shall be ultimately wound up; but a trader is in insolvent circumstances when he is not in a condition to pay his debts, in the usual and ordinary course of trade and business. –

1 Maule & Sel. 338
Bayley, v. Scofield

Insurance

1 Wils. Rep. 10.
Sadlers Company & Badcock, Trustee of the Hand, v Hand For Offie In Chancery. 1743

The party insured ought to have a property in the thing insured at the time of the Insurance made, and at the time of the loss, or he cannot be relieved.—

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1. Bing: Rep. 339
Thurtell v Beaumont

In an action against an Insurance Company to recover a loss by fire, the defence being, that the plaintiff himself had wilfully set fire to the premises, the Judge directed the Jury, that in order to their finding a verdict against the plaintiff, they ought to be satisfied that the Crime imputed to him, was as fully proved as would justify them in finding him guilty on a Criminal accusation for the same offence.— Held, that this direction was right.—

In the same Cause, the Court refused to grant a rule Nisi for a new trial, on the ground that subsequently to the verdict for the plaintiff, the Grand Jury had found a bill against him and others for a Conspiracy to defraud the Insurance Company in this very matter.—

But on affidavits disclosing the Conspiracy itself, and shewing that the Defendant did not attain a knowledge of it till after the trial, so that the plaintiff's case was in effect a surprise on him, the Court granted a rule Nisi for a new trial, on payment of Costs.—

Interest

1. Doug: Rep. 376. on Notes.

L^d Ellenborough, the present Ch. Justice of the Kings Bench in England, has laid it down as a general rule that Interest ought to be allowed only in the following Cases—

1. Where there is a Contract for the payment of money on a certain day, as on bills of exchange, promissory notes &c.

2. Where there has been an express promise to pay interest.

3. Where from the course of dealing between the parties it may be inferred that this was their intention—

4. Where it can be proved that the money has been used, and interest has been actually made. De Haviland. v. Bowerbank. 1 Camp. N.P.C. 51.

In the Case first above stated, the Contract for the payment of the money, must be a written Contract. See. Gordon. v. Swan. 2 Camp^s N.P.C. 429, note. & 12 East. 419. S. C.

So where goods are sold and delivered upon an agreement by the vendee, to pay for them by a bill at a certain date; as interest would have run upon such bill, if given, it may be recovered in an action for the price of the goods brought after the time when such bill would have become due; and it may be recovered as part of the estimated value of the goods, upon the Common Count for goods sold & delivered Marshall. v. Poole 13. East. 98.—

So where from the usage of a particular trade, the intention of the parties that a book debt shall bear interest, can be collected, Interest will be allowed.—

Eddowes. v. Hopkins. Doug: 376.—

Where debts carry interest, the Jury are now directed to give interest in damages up to the day on which Judgment may be signed Frith. v. Leroux. 2. T. R. 58.—

Interest.

In action to recover the interest upon monies advanced to the Defendant by a Banking House it is not sufficient to shew that it was the general Custom of the House to charge interest calculated upon half yearly rests, without also shewing, that the Defendant knew that such was the practice

1 Starkie's N. P. Rep. 487.

Repse Vo Interet
P. 467. 1st col.

On peut demander en Justice des interets des arrerages de Cens, de Rentes Seigneuriales de Rentes Foncieres, de Rentes Viageres, de Pensions Alimentaires, de Douaires, de Loyers de Maison, de Fermages - de fruits dont on poursuit la restitution, et même des Interets dus de plein droit, parceque tous ces differens arrerages ou Interets forment un Capital pour celui à qui ils sont dus et sont capables de produire des fruits, à la difference des Interets judiciaires qui ne sont que la peine du retard du Debiteur, et qui ne peuvent produire d'autres interets -

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1 Camp. N. P. Rep. 51. -
Dehaviland v Bowerbank. -

see also -
7. Bing. Rep. 254. -
Hare. v. Rickards -

cases there cited by the Counsel.

In this case Ld Ellenborough laid down the rule - that interest ought to be allowed only in cases where there is a contract for the payment of money on a certain day, as on bills of exchange, promissory notes &c. or where there has been an express promise to pay interest, or where from the course of dealing between the parties, it may be inferred that this was their intention, or where it can be proved that the money has been used, and interest has been actually made. -

Interest.—

3. Wilson. 205.
Blaney. v Hendrick & al
C. B. 1771.—

In an assumpsit upon an account stated between Merchant and Merchant, the Jury may give interest from the day the account was stated.— see also. 2 Bl. Reps. 761.—

1 Moody & Malkin N. P. Ca. p. 449.—
Newall & al. v. Jones

A Contract on a loan of money, to add the interest to the principal at the end of each year, and pay interest on the whole sum as principal, is valid in law, and may be inferred from accounts stated by the debtor on that footing.—

Note— See 4 Madd. 64. n. as to the cases in which compound interest is allowable— and Dawes. v. Pinner 2 Camps. 486. n. Moore. v. Voughton 1 Stark. 487.—

4. Moore & Payne, 589.
Foster & al'. v. Weston

Interest is only allowed by law upon mercantile Securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade (as in the Case of bills of exchange &c.) or other circumstances.—

see also Cases cited where by Law interest is recoverable— 5. Moore & Payne. 43.—

Inventaire — cloture d'

Il suffit, que le Curateur (ou legitime Contradicteur) signe en la preface de l'Inventaire sans qu'il soit requis de necessité qu'il signe à la fin, ou qu'il soit present lors de la cloture. —

1 Arrets de Louet. lettre C. somm. 30. N° 13. p. 274
Id. — — — lettre. I. somm. 11. N° 5 & 6. p. 895.

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1 Arrets d'Auzeard arrêt. 15. p. 32.

La prestation de Serment de la part du Subrogé Tuteur, est tellement necessaire, que l'omission de cette formalité rend un Inventaire nul, à l'effet de faire continuer la Communauté.

Joinder of action

2. Chitty's Rep. 436.
Golding. v. Vaughans

A demand against a Surviving partner, as Survivor, may be joined with a demand due from him as if he were solely liable. —

1 Barn. & Ald. Rp. p. 29. —
Richards v. Hewther

see cases referred to on the note (a) in this case

See tit. Partnerships &c.

10 Moore's Rep. 446
Barratt & Hodsoll.
Collins." —

An action cannot be maintained jointly by two plaintiffs where the wrong done to one is no wrong done to the other. — Where therefore an action was brought and a verdict obtained by two plaintiffs against the Defendant for a malicious arrest the declaration alledging by way of special damage, the false imprisonment of both, as well as the expences incurred by them. — The Court ordered the Judgment to be arrested. But the Jury having by their verdict confined the damages to the expences which the plaintiffs had been jointly put to in procuring their liberty, the Court ordered the postea to be amended. —

10. Barn: & Cress. 671.
Cothay & al'. v. Fennel & al

Where three parties agreed to be jointly interested in certain goods, but that they should be bought by one of them in his own name only, and he made a Contract for the purchase accordingly: Held — that all might join in suing the Vendor for a breach of that Contract. —

Per. Curiam — If an agent makes a Contract in his own name, the principal may sue and be sued upon it, for it is a general rule, that whenever an express contract is made an action is maintainable upon it, either in the name of the person with whom it was actually made, or in the name of the person with whom in point of law it was made. —

Irregularity - in proceedings.

6. Taunt. 191.
Fletcher. v. Wells.

A party who would set aside proceedings for irregularity, must apply instantly after the irregular party has taken the first further step: If he lets him take a second further step, he waves the irregularity.

1 Chitty's Reps. 129 on note (a)

The rule is, that if there has been any irregularity, the party suffering is not bound to move to set it aside within any specific time, for he may reasonably suppose that the opposite party will discover his mistake and abandon his defective proceedings; but if the party guilty of the irregularity takes one step more, which shews that he does not mean to abandon his process, then it is incumbent on the party complains to apply instantly to set it aside, for if he takes a step himself, or permits the other party to take a further step, it is a Waver of the irregularity.

3. Brod: & Bing: 1.
Griffith.
vs
Crockford & al!

Omission to add the Similiter, is an irregularity for which the Court will set aside the verdict.

1, c Moore Reps. 317.
Kingston
vs
Llewellyn & Belcher

By a writ of Ca. ad respondendum the Sheriff was directed to take Messrs C. & D. without mentioning their christian names — They afterwards signed a bail-bond in their christian and Surnames, which was duly executed — Held a waiver of the irregularity in the writ.

Issue.

3 Brod: & Bing. Rep. 1.
Griffith.
Crockford vol. —

An omission to add the similiter is an irregularity for which the Court will set aside the verdict. —

Judgment — Corporal punishm^t

1 Raym. 267.
Rex. v. Harris & Duke

Judgment for Corporal punishment cannot be pronounced against a man in his absence Salk. 56. —

1. Chitty's Reps. 322.
Harris. v. Wade & al

Judgment cannot be entered up against two Defendants on a warrant of Attorney purporting to be an authority to confess a Judgment against three persons, one of whom afterwards refused to execute — And the Judgment against the two was set aside on motion, but without costs, and on terms of no action being brought. —

Judge.

6. Barn & Ald. 611
Garnett. v. Ferrandval

No action will lie against the Judge of a Court of record, for an act done by him in his judicial capacity, and therefore trespass cannot be maintained against a Coroner for turning a person out of a room where he is about to take an inquisition. —

Juror. — illness on trial.

If after Indictment, arraignment, the Jury charged and evidence given on a Capital offence, one of the Jurymen become incapable, through illness, of proceeding to verdict — the Court of Oyer and Terminer may discharge the Jury, and charge a fresh Jury with the prisoner and convict him. — But semble, that the prisoner shall be again allowed his challenge to each of the eleven former Jurymen upon their being sworn anew to try the Pris^r. — 4. Taunt. 309. — Rex. v. Edwards. — See also. Ann Scalbert's case 1 Leach. 706. —

_____ Decem Tales — & Fines. —

1 Bur. Reps. 273. 4. Denn. v. Cadogan. —

Decem Tales granted upon a Saturday returnable the Monday following — and is the first instance. —

The Court, on the application of the Gentlemen of the Jury, took off the fines (of £20. a piece,) which had been set on Saturday last upon the defaulters. —

Jury-trial, proceedings &c.

A Plaintiff, who fails in proving the Case stated to the Jury — cannot afterwards go into a new Case, which has not been stated
1 Starkie N. P. Rep. 71. Paterson. v. Zachariah & al
see Id. p. 483 — & Cur.

2. Barn. & Ald. R. p. 462.
King. v. Kinnear & al.

Upon the trial of an Indictment for a misdemeanor, which continued more than one day, the Jury without the knowledge or consent of the Defendants, separated at night — Held — that the verdict was not therefore void, and that it formed no ground for granting a new trial, it not appearing that there was any suspicion of any improper communications having taken place. —

Id. — p. 606.
The King, on the prosn of Mills v. Brice. — —

A prosecutor of an Indictment has no right to address the Jury, and state the Case for the prosecution. —

But this does not hold in regard of Counsel employed for the prosecution. —

4 Barn. & Ald. p. 471
The King. v. Edmonds & al. —

Held, that it is not competent to ask Jurymen, (whether Special Jurymen or Talesmen) if they have not previously to the trial, expressed opinions hostile to the Defendants and their Cause, in order to found a challenge to the polls on that ground, but such expressions must be proved by extrinsic evidence.

Jury. Trial by do

1 Chitty's Reps. 401.
Rex. v. Mozely Woolfe et al'. —

The dispersion of the Jury with the permission of the Judge during the interval of an adjournment in case of a misdemeanor, does not vitiate their verdict, where there is no suggestion of their having been improperly practised upon in the interim. —

Whether the Jury shall, or shall not be permitted to separate before verdict in cases of misdemeanor, is matter of discretion with the Judge. —

Juryman — affidavit by. —

4 Barn: & Adolp. 681.
Everett. v Youells

Affidavits of Jurymen are admissible as to — matters which pass openly in Court, but where there is a Judge's report on the same point, that is conclusive.

Justice of Peace — action ag.t a

In an action against a Justice of the Peace for a malicious conviction, it is not sufficient for the plaintiff to prove his innocence, and to call on the Defendant to shew probable Cause for the Conviction; The plaintiff must give such evidence of what passed on the hearing by calling the Witnesses for the prosecution or otherwise that it may appear there was no probable Cause for the Conviction. — 5. Taunt. 580. Burley. v. Bethune. a

2. Barn. & Ald. Rep. 278. Willes. v. Bridger

A Justice of the Peace is authorised to require Surety of the Peace for a limited time, according to his discretion, and need not bind the party over to the next Sessions only. a

3. Barn. & Ald. 432. The King. v. Borron

In the investigation of a charge of felony before a magistrate, an Attorney is only as a matter of Courtesy permitted, but has no right to be present; nor can he comment on the evidence so as to apply the law to it, unless he be requested by the magistrate to give his opinion and advice upon the case. a

2 Bur. 720. Rex. v. Fielding

A Justice of the Peace cannot be criminally proceeded against for a mere irregularity. a

Justice of the Peace.—

2 Raym. 978.
Elderton's Case.—

A Justice need not mention in a warrant of commitment that he is a Justice.—
But it must appear that he is one on the return to a Hab. Corpus.—

Every act a Justice does which he could not properly do otherwise than as Justice, shall be presumed to have been done by him as Justice —

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3 Wilson. 12.
Basset. v. Godschall & al' Justices
C B. 1770.—

No action lies against Justices of the Peace for refusing to one a licence to keep an Inn or ale house.—
see 1 T. Reps. 692. R. v. Holland.—

Wilmot. Ch. J. Every Pltff in an action must have an antecedent right to bring it — The Pltff here has no right to ~~keep~~ have a licence unless the Justices think proper to grant it, therefore he can have no right of action against the Justices for refusing it —

The same thing was decided in K. B. Montreal in an action by a Parishoner ag. the marguillier for refusing a certificate to entitle the parishoner to obtain a licence.— see. Desbiens v Laurin 19 June 1816.—

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1 Brod: & Bing: Reps. 432.
Brittain v. Kennaird & al'
4th Moore Rep. 50.
S. C.

In an action against a Magistrate, a Conviction by him, if no defect appear on the face of it, is conclusive evidence of the facts contained in it.—

Justice of the Peace.

4 Moore Rep. 195
Butt. v. Sir Nathl Conant. Knt.

A Justice of the Peace out of Sessions, before Information filed, or Indictment found, has Jurisdiction in the first instance to issue his warrant to apprehend a party charged on oath with publishing a libel, and require him to find bail, and on default of Sureties to commit him to prison to abide his trial.

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8 Dowl: & Ryl: Rep. 166.
Cropper. v. Horton

Quere — whether a Justice of the Peace has jurisdiction to commit a person for contemptuously refusing to take an oath, and give evidence touching a charge of riot, alledged to have been committed by a person then under examination?

Where the plff was committed by a Justice for refusing to give evidence before him, touching a certain riot and disturbance, without shewing that there had been a person charged before the Justices, and that the plff was apprized of the existence of such charge, with respect to which he was required to be examined as a Witness — Held, that the Warrant of Commitment was no justification of the magistrate in an action of trespass. —

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9 Moore Rep. 161
Bane. v. Methuen & al

If an act of Parliament give a Justice of the Peace jurisdiction over an offence, it impliedly impowers him to make out a warrant to bring before him any person charged with such offence. — Where therefore a party neglected to attend a Summons granted by a Magistrate, charged with an offence under the malicious Trespass act. 1 Geo. 4. ch. 56. — Held,

that

he might issue his warrant to apprehend and bring such party before him to answer the charge, although it was insisted, that he had no power to do so until after conviction. —

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6. Bing. Rep. 85.
Mills. v. A. Collett.

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Defendant as a magistrate, committed to prison as a felon, the plaintiff against whom a charge had been made of maliciously cutting down a tree on premises in the occupation of the plaintiff, the property of A.B. — Held that Defend was not liable to an action. —

This a strong case in favor of Justices

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Justices — in Sessions. —

The Justices at Sessions may alter their Judgt during the continuance of the Sessions. 1. M. & Selw. 442. The King v Justices of Leicestershire. —