Opinions of Scientific Men, when rec^d in evidence.

3 Doug. Rep^ts 157.
Folkes. v^r Chadd. col.

S.C. cited. 4 T. Rep. 498.
1 Ph. Ev. 276. 6^e edit.

In this case the Court received the opinion of Mr Smeaton as to the effect of an embankment on a harbour, made to prevent the overflowing of the Sea.—

The opinion held in this case has been followed and confirmed by a variety of similar decisions — In Thornton. v^r The Royal Exchange Assurance Co — Peake's N.P. Ca. 25. L^d Kenyon admitted the evidence of a Ship builder, on a question of Sea-worthiness, — though he had not been present at the survey. — And in a subsequent case his L^d Ship received the evidence of underwriters in explanation of the terms of a policy. — Chaurand. v^r Angerstein Id. p. 43. — See also — Berthon. v^s — Loughman. 2 Stark. N.P.C. 258. — But see Durrell. v^s — Bedderley. Holt. N.P.C. 286.

So a person versed in the laws of a foreign Country may give evidence as to what in his opinion, would, according to the law of that Country, be the effect of certain facts. — Chaurand v. Angerstein. Peake's. N.P. Ca. 44. —

So in prosecutions for murder, medical men are allowed to state their opinions, whether the wounds described by the witnesses, are likely to have occasioned death. —

In the Case of Rex. v^r Wright, who was tried for murder, the defence being, Insanity, the twelve Judges were unanimous in opinion, that a witness of medical skill might be asked, whether in his judgment, such and such appearances were symptoms of insanity; and whether a long fast, followed by a draft of strong liquor was likely to produce a paroxysm of that disorder in a person subject to it. — But several of the Judges doubted, whether the witness could be asked his opinion on the very point on which the Jury were to decide, viz^t. whether from the other testimony given in the Case, the act with which the prisoner was charged, was in his opinion,

an

an act of insanity – Rex. v. Wright. Russ. & Ry. Cr. Ca Res. 456.– 2 Russell on Crimes. 623. 2. edit.–

The Scotch law is the same as that of England on this subject – "Professional men, when examined on the
" subject of their art or science, are of necessity allowed to
" state their opinions, and to speak to the best of their skill
" and Judgment.– In homicides, the corpus delicti,
" is in many cases established by no other evidence. – see
" Burnet on Cr. Law of Scotland. p. 458.–

Parol Evidence

1 Moore Rep. 45.
Wilson & al. v. Hart

Parol evidence of a broker may be admitted to shew that a sale of goods was made to a third person, for whom the buyer acted as Agent, although the bought note and Invoice were made out in the name of the buyer. a

Parol evidence to vary a contract cannot be received; but that the parties contracted in the Capacities of principals or agents may be explained.

Partnerships

2 Bingh: Rep. 133.
Evans. v. Yeathered

In an action against Y. for the price of goods sold, Held, that F. was not a competent Witness to prove that the goods had been sold to Y and F. jointly, and that they had been paid for by remitting a debt due from the Vendor to the firm of Y & F.—

The ground of this decision is, that by the establishing a debt against Yeathered, he became entitled to contribution from his Partner Follett, who thereby was interested to shew a discharge of the debt.—

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3. Camp. Rep. 239.
Ord & al. v Portal

1 Stark. Rep. 446.

Evidence

Where several plaintiffs sue as Indorsees of a bill of Exchange, if the bill appears indorsed in blank, there is no necessity for their proving that they were in partnership together, or that the bill was indorsed and delivered to them jointly.— Ld. Ellenborough. Ch. J. "The indorsment "in blank conveys a joint right of action to as many "as agree on suing on the bill."

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2. Moore. Rep. 9.
Mant & another
v.
Mainwaring & al.

In an action of assumpsit on a bill of Exchange against several Defendts as Partners, one of them who had suffered Judgt by default, and to whom the Plffs had severally given a release, is not admissible as a witness to prove that himself and his Codefendants were partners at the time the bill was drawn, without the Consent of such Codefendants, as his testimony might tend to inculpate them.—

Ch. J. Dallas also said + It has been established as an universal Rule, that a party to the Record cannot be examined as a Witness without the Consent of all parties. +

6 Moore Rep. 579.

Attwood & al. —
v.
Rattenbury —

— Where the pltffs as indorsees of a bill of Exchange sued the drawer in their own right, and it appeared that the bill had been indorsed to them in blank before the death of one of the firm who was a partner with the plaintiffs as bankers — Held, that the action was well brought without describing themselves as surviving partners in the declaration, as they were not bound to prove the partnership or that the bill was indorsed or delivered to them jointly with their deceased partner. — Secus — if the bill had been specially indorsed. —

Partnership — Partners &c.

Where a Contract was made by one of Several partners in his individual capacity, who at the time declared that the subject matter of the Contract was his property alone. — Held, that his Declaration was evidence against all the partners, and therefore they could not sue jointly on such a Contract. — 1 M. & Selw. 249. Lucas & al. v. De la Cour. —

Where the Executors of a deceased partner continued his share of the partnership property in trade for the benefit of his infant daughter — Held — that they were liable upon a bill drawn for the — accommodation of the partnership, and paid in discharge of a partnership debt; although their names were not added to the firm, but the trade carried on by the other partners under the firm as before, and the Executors when they divided the profit and loss of the trade, carried the same to the account of the infant, and took no part of the profits themselves Id. 412. Wightman. vs. Townroe & al. —

In proving a Partnership — it is not sufficient to prove the Several Sur-names, without proving also the Christian names of the members of a firm, as Stated in the declaration. 1 Starkie's N. P. Reps. 100. —

Partnership.— Partners.— &c.

1 Barn. & Ald. p. 29. — Richards & al. vs. Heather. —

see Tit. Joinder in action.

Under a declaration containing only one sett of Counts, charging the defendant in his own right — the plaintiff may recover one demand due from the Defendt individually, and another due from him as surviving partner. — See also. 3 Brod. & B. 302. — & 4 Barn. & Ald. 374. —

In assumpsit against one of several Partners for not delivering goods sold by him to the Pltffs, with a count for money had and received — To which the Defendant pleaded, that the promises were made jointly with A & B, his partners. — It appeared that the Defendt being partner with A & B, made the contract individually, though in the name of the Partnership, and for the sale of partnership — property, and that in fraud of his partners, he received the money to his own use, though the bill drawn by him for the money was in the Partnerships name. — Held, that the Plaintiff might recover the money so received, under the Common Count — And A. was held a — competent witness for the plaintiff to prove that the Defendt was never authorised or employed by the Partners to make the Contract, and that he received the money to his own use. —

4 Maule & Sel. 475. Hudson & al. v. Robinson

Partnerships.

1. Taunt. Rep. 104. Wood & al. v. Braddick. admission.

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. —

see also. 4. Dow & Ry. Rep. p. 7. —

1 Stark. Rep. 100..

It is not sufficient to prove the several surnames, without proving also the christian names of the several members of a Partnership as stated in the declaration. —

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d° — d° p 486.

Two Plaintiffs who sue as the Indorsees of a bill of Exchange, indorsed in blank, are not bound to prove any partnership. —

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admission. —

In an action of assumpsit against one partner, evidence may be given of the admission of another Peake's Ca. 16. 17. —

A similar admission was received in evidence by L. Ellenborough in Nichols. v. Dowding. 1 Stark. 81. And in Wood. v. Braddick. 1 Taunt. 104. The Court of Com. P. hold, that an admission made by one of two Partners after the dissolution of the partnership, — concerning Joint Contracts that took place during the partnership, was competent evidence to charge the other partner. — So in an action against one of several members of a Copartnership Society, the entries in a book containing a record of the proceedings of the Society, produced at the meetings and open to the inspection of all the members are admissible in evidence agt. the Deft., after he has been proved to be a member of the Society. — Alderson. v. Clay. 1 Stark. 405.

But

Partnerships.—

But where A & B. were partners, and also part owners of a vessel, L. Ellenborough held, that an admission by A. concerning the part ownership merely, was not admissible against B.— Jaggers. v. Binnings. 1 Stark. 64 See also. Grant. v. Jackson. Peake. 203.—

In an action brought by one Partner, another may be called to prove the debt paid to him. Peake 22.— Evans. v. Silverlock.—

But in Case of Goodacre v. Breame. Peake. 175 L. Kenyon held, that a man who is proved to be a Partner with the defendant cannot be examined as a witness to prove that he only is liable. L. K.— he is not a witness to prove this, for he comes to defeat the action of the plaintiff, against a man who is proved to be his partner, and by discharging the present Defendant, he benefits himself, as he will be liable to pay a share of the Costs to be recovered by the Plaintiff in this Cause.—

In this Case the witness might have been rendered competent by a release. 1 Esp. Ca. 103.— And in a stile later Case the Court determined that when it appears the witness is interested both ways, they could not nicely weigh on which side his interest preponderated; and therefore the Indorsee of a promissory note, to whom the drawer had given money to take it up, was held to be a competent witness for the defend.t to prove it paid, being either liable to the Plaintiff on the note, or to the Defend.t for

money

Partnerships.

money had and received.— His being also liable in the later case to the Costs of the action, was considered as making no difference. Birt. v. Kershaw. 2 East. 458.

But see. Jones. v Brook. 4 Taunt. 464. —

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1. Hen. Bl. 37.
Coope & al. v. Eye & al.

A. B. & C enter into an agreement to purchase goods in the name of A. only, and to take aliquot shares of the purchase, but it does not appear, that they are jointly to resell the goods.— On failure of A. the ostensible buyer, B & C are not answerable to the Seller as partners with A. —

In order to constitute a partnership, a Communion of profit and loss is essential; and this is the true criterion to judge by — see Seville v Robertson & al. 4 T. Rep. 720. Waugh. v. Carver & al. 2. Hen. Bl. 235–247. — that where one takes a moiety of the profits indefinitely, he shall by operation of law be made liable to losses. —

Partnership — bankruptcy.

Brillon. Dic. des Arrets. v° Societé. N° 7. (Societé Dettes) p. 208. & p. 209.

Par arret rendu à la quatrieme chambre des Enquêtes, le 6. Juin 1692. jugé, una voce, qu'un Créancier de la Societé, est preferé sur les effets de la Societé, au Créancier de l'associé quoique le Créancier fut anterieur à celui de la Societé. Les effets n'etoient que des marchandises. —

De la preference d'obligation sur le fond d'une societé — Jugé au Parlement de Grenoble, le 22 Aout 1637. que les dettes faites pour la Societé sont preferables aux etrangeres, que l'un de la Societé a contractées en son propre et privé nom quoiqu'anterieures à la Societé — refers to Arrets of Basset. tom. 2. liv. 5. tit. 2. ch. 11. —

Deux associés achetent à credit des marchandises, un créancier de l'un deux, fait saisir la part de son debiteur; telle saisie n'est valable, et l'autre associé peut s'y opposer, et empecher l'effet de cette Saisie, jusqu'à ce que le prix des marchandises soit payé. — refers to Bouvot. v° Societé. Com^te — quest. 20. —

Par dessus — Cours du Droit Commercial 3. Vol. p. 17. —

Une autre consequence de ce principe est, que le créancier ne pourroit venir faire saisir les effets et autres choses formant l'actif de la Societé sous pretexte qu'une partie indivise appartient à son debiteur. — Il doit attendre la liquidation, se borner aux oppositions capables de conserver ses droits, et exercer seulement ceux de ce debiteur dans le

le partage des profits annuels. — De même celui qui seroit Créancier d'un de ses associés, et débiteur de la Société, ne pourroit ni invoquer ~~en~~ dans son interet la compensation pour se liberer — ni être repoussé dans les poursuites qu'il exerceroit contre son — debiteur, par l'exception de compensation que feroit valoir celui-ci. —

Pardessus. 3. Vol p. 193. Nº 1088.

Toutes les dettes qui ont été contractées par la Société doivent être acquittées avec les effets qui en composent l'actif, à l'exclusion des — Créanciers particuliers des associés, puisque la Société etoit un etre moral qui avoit son individualité et ses droits distincts de ceux de chacun de ses membres. La raison s'en fait sentir facilement. — Les Créanciers particuliers d'un associé ne peuvent pretendre plus de droits qu'il n'en auroit lui-même — Or il n'a de part que dans ce qui restera, quand les dettes seront payées. —

Mais lorsque l'actif de la Société etant insuffisant les creanciers exercent leurs droits sur les biens — personnels des associés, ils ne viennent qu'en concurrence avec les créanciers particuliers qu'il peut avoir — On rentre dans le droit Commun, l'exception que nous venons d'indiquer ne pouvant plus avoir son effet. —

1 Arrets d'Augeard p. 736.

Lorsqu'un marchand a fait banqueroute, apres la dissolution de la Société, les Créanciers de la

la Societé n'ont un privilege sur les effets qui la composoient à l'exclusion des Créanciers particuliers du marchand posterieurs à cette dissolution. —

The maxim according to the Law of England is conformable to the above principles, that in bankruptcy, the joint estate is applicable to the payment of the joint debts, and the separate estate to the payment of the separate debts, and the surplus of either Estate must be added to the other efficient Estate. —

see. 1. Montagu on Partnership. p. 131. —
Gow —— " —— p. 342. —

Principes du Droit Franç. par Du Parc Poullain. 7. Vol. p 222.

Le créancier, meme chirographaire d'une Societé est preferable sur les effets et credits de la Société aux Créanciers personnels de chaque associé, quoique ceux ci ayent des Créances hypothecaires et même preferables. — Arret du Parlement de Paris du 14 Juillet 1762. - contre une femme dans l'espece de l'hypotheque de sa dot, dont les deniers avoient été employés à faire les fonds de la Societé contractée par son mari avant le mariage. — cités Denis. v° Dot. N° 46. —

Independamment de la faveur du Commerce, qui est un puissant motif, la rigeur de droit autorise ce principe. Les biens particuliers de l'associé sont parfaitement distingués de ceux de la Societé. Quoique les associés soient solidairement obligés vers les Créanciers de la Societé, cependant ces Créanciers n'ont sur les biens de chacun d'eux que les mêmes hypotheques ou préferences qu'ils

qu'ils auroient s'il n'y avoit pas de Societé; au contraire les fonds de la Societé composent une masse separée, qui appartient à la Societé, et dans laquelle chacun d'eux n'a de part que comme associé, c'est-à dire, à la charge d'en acquitter les dettes; et cette part ne consiste que dans le residù apres les dettes payées. —

2. Bell's Comm. Law Scot p. 612. 613. —

By the preference which the creditors of the Company have over the Company funds, none of the partners, nor any one in their right, as individual creditors, or otherwise, are entitled to more than the reversion, after the payment of the debts of the partnership. —

Partnership — Partners.

1 Chitty's Rep. 707.
Bretton v Burton & Mills

A Warrant of attorney under seal executed by one person for himself and his partner, in the absence of the latter, but with his consent, is a sufficient authority for signing Judgment against both

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Ryan & Moodie's. N.P. Cases. p. 29.
Simons. v. Smith.

In an action against one of several partners, the Defendant cannot by a release make his partner a competent witness for him.

Vid. Young. v Bairner. 1 Esp. 103.
Cheyne v Koops — 4 Esp. 112.

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6. Barn. & Cres. Rep. 149.
Boville val. v. Hammond

Where two persons jointly undertook to procure a Cargo for a vessel for certain Commission which they agreed to divide equally between themselves, and one of them received on account of such Commission a certain sum of money — Held, that the other could not maintain an action for money had and received for a moiety, the demand arising out of a partnership transaction, and no account having been settled between them. —

Partnership — Partners &c.

9. Moore's Rep. 272
Evans v. Yeatherd

Witness.

In an action against B. to recover the price of goods sold to him, A. is not a competent Witness to prove that he was in partnership with B, and that the goods were delivered on the partnership account and in part liquidation of a debt previously due to the firm from the Seller — on the ground that if the Seller had recovered a verdict against B. which he might have done without the testimony of A. the latter would be liable to contribution. —

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3. Bingh: Rep. 101.
Stead val. v. Salt

power to bind.

10. Moore's Rep. 389.
S. C.

One of several partners cannot bind the others by a submission to arbitration, even of matters arising out of the business of the firm. —

Gow's N. P. C. p. 132.
Raba v. Robles.
Ryland v. another

Pledge by one Partner

A pledge by one partner of partnership property, will bind his Copartners, although the pledge is made without their privity and consent, provided the pledgee had no notice, that the property was joint property, and there be no fraud in the transaction. —

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3. Moore & Payne's Rep. 220. —
Ellis. v. Schmock & Thomas

liability as a Partner

In an action of assumpsit for goods furnished to a mining Company — It appeared that the Defendts had paid their deposits on Shares. and obtained scrip receipts which they transferred previously to the commencement of the action — they attended two meetings of the Company, but did not sign the partnership deed. — The Jury found that the Company originated in fraud, but neither the pleffs nor the Defendts were cognizant of it. — Held — That the Defendants were liable, by having attended the meetings of the Company. —

Partnership — Partners &c.

9 Barn: & Cress. 532.

Jones & al, assignees vs. John Yates, & Jno. Young

A. B & C. carried on trade in partnership, and A. was also in partnership with D. — A, being indebted to the firm of A. B. & C. before the dissolution of that partnership unknown to D. indorsed a bill and paid over money (belonging to A & D) in discharge of the private debt due from A. to A. B & C., and immediately afterwards indorsed the same bill to a Creditor of the firm of A. B. & C. — The partnership between A. B & C having been dissolved Held — that A & D could not maintain trover agt B & C. for the bill, nor assumpsit for the money paid by A. out of the funds of A & D. to A. B & C. in discharge of his private debt. —

Said in argument — One partnership cannot sue another, where any one person is a member of both — Bosanquet v. Wray. 6 Taunt. 597. — Mainwaring v. Newman. 2 Bos. & Pull. 120. —

538 Per L. Tenterden. — We are not aware of any instance in which a person has been allowed as plaintiff in a Court of law, to rescind his own act, on the ground that such act was a fraud on some other person, whether the party seeking to do this, has sued in his own name only, or jointly with such other person. —

539 The party to a fraud, who profits by it shall not be allowed to create an obligation in another by his own misconduct, and thereupon to ground an action —

1 H. Bl. Reps. p. 37.
Coope & al. v. Eyre & al

A. B. C. & D. enter into an agreement to purchase goods in the name of A. only, and to take aliquot shares of the purchase, but it did not appear that they were jointly to resell the goods — On failure of A. the ostensible buyer, B. C. & D are not answerable to the seller as partners with A. —

See. Waugh. v. Carver. 2d Vol. p. 235. —

But see what is said by Ld Ellenborough in Gowthwaite v. Duckworth. 12 East. 426. — "If all agree to share in "goods to be purchased, and in consequence of that "agreement, one of them go into the market and make the "purchase, it is the same for this purpose as if all the "names had been anounced to the Seller, and therefore "all are liable for the value of them". —

2 Wm. Black. 235.
Waugh. & Carver & al'

Case above referred to —

A & B. Ships-agents at different ports, enter into an agreement to share in certain proportions the profits of their respective commissions, and the discount on tradesmen's bills employed by them in repairing the Ships consigned to them &c — By this agreement they become liable as partners to all persons with whom either of them contracts as such agent, though the agreement provides, that neither of them shall be answerable for the acts or losses of the other, but each for his own. —

The distinction taken in this case as to agreements constituting a partnership with regard to third persons and yet not operating so to render the parties themselves

partners

partners as between themselves, has been recognized in many subsequent decisions.—

See. Hesketh. v. Blanchard. 4 East. 144.—
Bolton v Puller. 1 Bos. & Pul. 546.—

Lending the name makes a partner — For although in point of fact, parties are not partners in trade, yet if one so represents himself, and by that means gets credit for goods for the other, both are liable.— L. C. Kenyon. De Berkom. v. Smitth. 1. Esp. N.P.C. 29.—

So if the name of a clerk is introduced into a firm he is liable as a partner, though he has no share of the profits. Guidon. v. Robson. 2 Camp. N.P.C. 302.— (but see Teed. v. Ellworthy 14 East 210)—

But if a person holds himself out as a partner of another in one transaction only, he will not thereby render himself liable as a partner in other transactions De Berkom. v Smitth. 1 Esp. N.P.C. 29.—

Nor will a person be chargeable as a partner merely by his name appearing in a firm, unless it appears that it was used with his Consent. Newcome v. Coles. 2 Camp. N.P.C. 617.— and see as to withdrawing the name. Goode. v Harrison. 5. B. & A. 17.—

So where A. suffers his name to appear in a firm, but has no participation in the profits and losses, he is not a partner as to persons who have notice of that fact. Alderson. v Pope. 1 Camp. N.P.C. 404.(n)— and see Heard v Bigg. Mannings Index. 220.—

A participation in profits will render the person participating a partner, and it is immaterial whether he receives the profits for his own benefit, or as a Trustee for others.— Wightman v Townroe. 1 M & S. 412.— and

whether

whether he takes a larger or a smaller share of the profits. Rex. v Dodd. 9 East. 527.—

It is also immaterial whether or not the party dealing with the Concern knew, at the time of such dealing, that the party he charges as a partner participated in the profits. Ex parte Geller, 1 Rose. 297.—

In order to render a person liable as a partner by participating in the profits, it must appear that he was to receive a portion of the profits as such.— Therefore a remuneration made to a traveller or other Clerk or agent, by a portion of the sums received by or for his master or principal in lieu of a fixed Salary, which is only a mode of payment adopted to encrease or secure exertion, will not constitute a partnership. Cheap. v. Cramond. 4. B. & A. 670.—

So an agreement between A. & B. the owner of a lighter, that A. in consideration of working the lighter should receive half the gross earnings — Ld Ellenborough held that this was only a mode of paying the Defend wages for his labor and was different from a participation of profits and loss. Dry. v Boswell. 1 Camp. N. P. C. 329.—

So the agreements entered into by the Crews of Ships employed in the Whale Fishery that they shall receive a certain proportion of the produce of the Cargo in lieu of wages, do not render the Crew partners with the owners of the Cargo— Wilkenson. v Frasier. 4 Esp. N. P. C. 18.— Mair. v Glennie. 4 M. & S. 244— See also Rex. v Hartley. R & R. Crown Cases. 139. Evans. v Bennett 1 Camp. N. P. C. 300.—

So where a person receives from a trader an agreed sum in respect of goods sold by his recommendation, such receipt is not a receipt of a portion of the profits, so as to create a partnership Cheap. v. Cramond. 4. B & A. 670.— See vide. Young. v Axtell cited in the above case & Waugh. v Carver ed.—

But

But if a broker agrees, that in lieu of brokerage, he shall have a share in the profits arising out of the sales such an agreement will make him a partner as to third persons — Smith. v Watson. 2. B. & C. 409. —

If however the party is to be paid only by a salary or sum of money in proportion to the profits and relies only on the profits as a fund for payment, he is not a partner, for he is not to receive a portion of the profits as such — Ex parte Hamper 17 Ves. 404 Ex parte. Rowlandson 19 Ves. 461. — Grace v. Smith 2. Bl. 998. —

Although the grant of an annuity of a certain sum to a retiring partner will not render him liable as a partner, yet if the annuity is subject to abatement or increase, as the profits of the business may fluctuate he will still continue liable to the Creditors of the Concern — Re Cathcart. Buck. 48. —

7 Barn. Rep. 709.
Helme. v. Smith. —

A part owner of a ship is not necessarily a partner — therefore a part owner, who as ship's husband, incurs the expence of the outfit, may sue the other part owners separately for their respective shares of the expence. —

1 Barn. & Adolp. Rep. 11
Carter. v. Whalley & al

T. & others carried on business under the name of the Plas Madoc Colliery Company. — T. — withdrew from the firm, which afterwards became indebted to C. — No notice having been given to C. or the public, of T.'s withdrawing — Held, that

T

S. was not liable for the debt, there being no suffiaent evidence, that he had ever, while a partner, represented himself as such to C. or appeared so publicly in that character, that C. must have been presumed to know of it. —

Payment. plea of.

In an action of debt on Bond by Pltff as assignee of a Bankrupt — by the Defendants pleading, "payment." the Pltff is not bound to prove himself to be assignee. —

1 Starkie. N. P. Rep. 76. Crosbie. v. Oliver.

Ld L^d Ellenborough. in last Case — The general principle is, that a party who puts himself upon one issue, admits all the rest. —

Perishable article. — Sale of. —

4 Bing: Rep. 728.
Maclean. v. Dunnval

Ch. J. Best. — It is difficult to say, what may be — esteemed perishable articles, and what not — but if articles are not perishable, price is, and may alter in a few days, or a few hours — In that respect there is no difference between one Commodity and another. — It is a practice therefore founded on good sense, to make a re-sale of a disputed article, and to hold the original Contractor responsible for the difference — The practice itself affords some evidence of the law, and we ought not to oppose it, except on the authority of decided Cases. — Those which have been cited do not apply — Where a man in an action for goods sold and delivered insists upon having from the Vendee the price at — which he contracted to dispose of his goods, he cannot perhaps consistently with such a demand, dispose of them to another: But if he sues for damages in consequence of the Vendee's refusal to complete his Contract, it is not necessary that he should retain dominion over the goods; he merely alledges that a Contract was entered into for the purchase of certain articles, that it has not been — fulfilled, and that he has sustained damage in — consequence. — There is nothing in this which requires that the property should be in his hands when he commences the suit — and it is required neither by justice, nor by the practice of the Commercial world —

In actions on the warranty of a horse, it is the constant practice to sell the horse, and to sue to recover the difference. — The usage in every branch of trade is equally against the objection which has been — raised on the part of the Defendants — It is urged indeed that in Contracts entered into by the East India Company, the power of re-sale is expressly provided for

for, in case the vendee should refuse to perform his Contract. That is only ex abundanti cautela, and it has never been decided, that a resale of the goods is a bar to an action for damages for the non-performance of a Contract to purchase them — the Contrary has been held at Nisi prius — But without referring to a Nisi prius Case, as authority, we are anxious to confirm a rule consistent with convenience and law. — It is most convenient that when a party refuses to take goods he has purchased they should be resold, and that he should be liable to the loss if any upon the resale — The goods may become worse the longer they are kept, and at all events, there is the risk of the price becoming lower. —

Perjury.—

1 Raym. 256.
Rex. v. Griepe.

False evidence if immaterial, is not perjury.

Held— That though a man swear falsely, yet if it be in a matter immaterial to the issue, it will not amount to corrupt perjury; for the reason that perjury is so high a Crime, is, in respect of the injury that it does to a man; but if it is not material to the issue, it cannot by any means induce the Jury to give their verdict one way or another, and consequently — cannot injure the other party against whom the verdict is given.—

Whatever is perjury at Common law is perjury under the Statute— The Statute does not alter the offence but merely encreases the punishment.—

The Kings pardon will remove a disability which is the consequence of a Judgt— but not a disability which is part of the Judgt— On a conviction for perjury upon the Statute, the disability of giving evidence is part of the Judgment— on conviction at Common law, a consequence only.—

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6. Barn: & Cress. Rep 102.
King. v. Callanan

In an Indictment for making a false affidavit it is sufficient to state, that the Defendant came before A.B. and took his corporal oath, (A.B. having power to administer an oath) without setting out the nature of A.B's authority.—

When perjury is assigned upon several parts of an affidavit, those parts may be set out in the Indictment as if continuous, although they are in fact separated by the introduction of other matter.—

Plea.

Payment. The Plea of Payment, admits the right, or capacity in which the Plaintiffs sue. —

P L. Ellenborough. — The general principle is, that a party who puts himself upon one issue, admits all the rest. — 1 Starkie. N. P. Rep. 77. —

Cases temp. Hard. 233. — Bush. v. Gower

Matter that might have been pleaded in the original action, cannot be pleaded to a Scire facias upon the Judgment —

Possession — given under writ

1 Taunt. 55.

Doe, on demise of Pate
Roe. v

After possession once given under a writ the plaintiff cannot sue out another writ of possession, though he be disturbed by the same Defendant — and though the Sheriff have not yet returned the former writ.

Post-Master.

Delivery of Letters.

A postmaster is bound to deliver all letters to the several Inhabitants, within a post-Town or place, at their respective places of abode, at the rate of postage only, as established by act of Parliament — 1 Cowp. 182. Smith v. Powditch. —

See also Cases, Jones. v. Walker. 2 Cowp. 624. —
Rowning. v. Goodchild. 2. Bl. Rep. 906. —
S. C. 3. Wils. 443. — 5 Bur. 2716. —

Practice.

1 Starkie's Rep. 71. 2. Paterson. vs Zachariah & Arnold.

A plaintiff who fails in proving the case stated to the Jury, cannot afterwards go into a new case which has not been stated.

One of several Defendants against whom on the close of the plaintiff's case, no evidence has been offered, is not entitled to an acquittal till the whole case is ready for the Jury. But in adducing evidence in contradiction to that offered by the other Defendants, the plaintiff cannot go into fresh evidence to implicate such Defendant. 1 Starkie Rep. 98.

Ryan v Moody's N. P. C. 254. Browne v. Murray

In an action for a libel, where the general issue is pleaded and also special pleas in justification, the plaintiff may in the outset give all the evidence he intends to offer to rebut such justification, or he may do so in reply to evidence produced by the Defendant, but he is not entitled to give part of such evidence in the first instance, and to reserve the remainder for reply to the Defendant's case.

In Rees. v. Smith. 2 Stark, N. P. C. 31. which was an action of trespass for breaking & entering a dwelling house and seizing goods, with the general issue, and pleas in justification, Ld. Ellenborough states, that the general rule was, that, "when by pleading or by means of notice " the defence was known, the Counsel for the Plff " was bound to open the whole case in Chief, and could

" could not proceed in parts; that when it is
" known, what the question in issue is, it must be
" met at once."— And the practice before His Lordship
in cases of bills of Exchange, where notice of the
intention to dispute the consideration had been
given, accorded with this rule.—

see. Delauney. v. Mitchell. 1 Starkie N. P. C. 439.—

But a different practice in actions of this
nature, has prevailed under the present L^d Ch.
Justice, (Abbott) who has always allowed evidence
to be given in reply to that of the Defendant
impeaching the consideration, provided no
suspicion has been cast upon the pl^ffs title, by
cross-examination of his witnesses

Chitty on Bills. 6^th Edit. 401.—
Ph: on Evid: 6 edit. 2^d Vol. 17.
Starkie on Ev. p^t 3^d. p. 383. n. (a).—

And the present practice in the Common
Pleas agrees with that of the Kings Bench
though it was otherwise ruled in Spooner. v^s
Gardiner. Ry: & Moodie. 86. — It would seem
that the option given in the principal case,
would only apply where the plaintiff's case
consisted of one transaction, and the Dep^ts
justification of another distinct one, as in
libel — but where there is only one transaction
in question between the parties, as in assault
& battery, with plea of Son assault de mesne,
it would not be allowed a plaintiff to give in
reply any evidence applicable to that transaction,

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Practice

Ryan & Moody's N.P.C. p. 293.
Bedell vs Russell

In an action of assault & battery, and a plea of justification only, and issue thereon, the Defendants counsel has a right to begin, the affirmative of the issue being on him. The onus of proving damages, does not give the plaintiff's counsel a right to begin. —

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8. Dowl: & Ryl. Rep. 114
Bane vs Jones.

Where an affidavit answered a Rule Nisi, for setting aside proceedings for irregularity with Costs, but was written in a cramped & slovenly hand, the Court on that ground refused to grant the Costs of the application. —

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4 Barn: & Adolph. 193.
Friedlander vs The London assurance Co

If a witness on a trial gives evidence against the interest of the party calling him, such party may bring other witnesses, not to discredit him generally, but to contradict him on the fact to which has deposed, if it be material to the issue — not if it be merely collateral. —
See. 2. Camp. 556 — 3. B. & C. 746 — 8 Bing. 57. 2 Starkie. N.P.C. 334

Préference — Privilege &c.

St Vast. Comm.ve
4 Vol. p. 450. 451.

M. de Parence dit, que le 16 Janvier 1715, on decida deux questions par Sentence presidiale de Mans au premier Chef. La premiere, que quoiqu'un marchand ait pris un billet pour marchandises, il ne laisse pas de conserver son privilege, à moins qu'il n'y ait renoncé, ou qu'il ait pris un billet pour & loyal prêt. — La Seconde, que quoique par la Declaration du Roi du 16 Août 1707, le marchand n'ait de privilege que sur les marchandises par lui vendues, qui se trouvent encore en nature, sous balle, et sous Corde, il peut encore demander la distraction des marchandises qui ne sont pas sous balle et sous Corde, quand elles ne sont pas de qualités à être emballées; qu'ayant vendu dix chevaux, ou dix pipes de vin, il en peut revendiquer cinq qui restent, parceque chaque Cheval, ou chaque pipe de vin, a son existence particuliere, et son integrité à part. — Dans la Cause il s'agissoit de draps qui avoient été vendus. —

Les boulangers et les bouchers ont un privilege sur les meubles de leur debiteur — Mais si ils ont fourni aux Cabaretiers, ils n'ont de privilege que pour ce qui a servi aux maitres, et non pour ce qui a été depensé en l'auberge. —

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1. Brod. sur Loüet
C. Som.ve 29. N.o 4.

Par arrets du 28 Fev. 1604, et du 12 Mars 1611, il a été jugé que le droit de préference pour les apoticaires a lieu non seulement sur les meubles mais aussi sur les deniers procedans de la vente et adjudication par decret des Immeubles, contre les Creanciers hypothecaires. —

Préférence.

Arrets de Jovet v°. Preference de Créanciers. p. 85. N°1. —

Pour avoir par le Créancier privilege de preference ce n'est assez, qu'il ait prêté son denier pour — acheter une terre, mais faut qu'il montre, qu'elle ait eté acquise de ses deniers, et que le Contrat — d'acquisition en fasse foi. — Jugé ainsi en 1592. — autre du 19 Juillet 1606. autre du 2 Avril 1577. — autre du 14 Mai 1608. — autre du 26e. Août 1621.. Louet. Lettre H. N°. 21. —

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Les Apothicaires et Chirurgiens sont préférés à tous créanciers — même à la Veuve pour ses Conventions, d'autant que les Apothicaires sont Créanciers necessaires, etant contraints, d'avancer leur drogues. Ce privilege a lieu non seulement sur les meubles du defunt, mais — aussi sur les deniers procedans de la vente et adjudication par decret des Immeubles — entre les Créanciers hypothecaires — Arrest du 8 Fevrier 1586. — autre du 12 Mars 1611. autre du 15 Janvier 1610. — autre du 29 Aout 1615. Louet. let. C. N°. 29. — et Brod. ibid, en rapporte un du 7 Septbre 1613. Et ce privilege a eté jugé avoir lieu non seulement sur les meubles, mais sur le prix des Immeubles, par arret des Enquêtes du 12 Mars 1611. & 28 Fevrier 1604. —

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Des dits arrets, il en faut excepter le maçon pour ce qui lui est du des reparations qu'il a faites à une maison, pour lesquelles il est preferable à l'Apothicaire, parceque l'Apothicaire n'a privilege que sur la personne, et le maçon sur la chose, sur la maison, et prix provenant

d'icelle

Preference

d'icelle ; il a une hypotheque privilegiée sur la maison pour ce qui lui est dû par le Proprietaire contre toute sorte de Créanciers, etiam, qu'ils soient précedens en datte et hypotheque — Et il n'y a que le Seigneur direct qui est preferable au macon, pour les droits Seigneuriaux, et les frais de Justice — Jugé ainsi par arret du 12 Juillet 1592. Tronçon. art. 128. in v° apothicaires

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Le vendeur est preféré pour le prix de la chose, a toute sorte de Créanciers, en la Coutume de Paris, — suivant les art. 176. & 177.— encore qu'il ne soit — premier Saisissant, pourvû toutesfois que les marchandises se trouvent entre les mains du — debiteur, et non entre les mains d'un tiers.— arret du 10 Mars 1587. Troncon. art. 177.—

Par arret du 12 Avril 1588, rapporté par Tronçon art. 176. in v° Sans terme, a été jugé, que la chose se trouvant saisi sur le debiteur par autre Créancier, en ce cas celui qui l'a vendû, nonobstant qu'il eut donné terme de payer, ne laisse d'être fondé à empêcher la vente, jusqu'à ce qu'il soit payé, et qu'il est preferable sur la chose à autres créanciers, autrement si la chose etoit saisie sur un tiers acquereur en ce cas le vendeur n'auroit aucun droit de preference sur le premier Saisissant — ainsi jugé par arret du 10 Mars 1587. Tronçon. art. 177.—

Preference.—

2. Louet. Lettr. P.— p. 351. N° 12.—

Ce privilege, ou pour mieux dire, ce droit réel de celui qui a vendu sans terme, ne reçoit pas de concurrence, et de là vient, que le privilege du proprietaire super invectis et illatis, n'a point lieu pour les meubles et marchandises venduës sans terme et portées en sa maison par l'acheteur locataire parce que le droit du Vendeur qui demeure vrai— proprietaire de la chose, est plus ancien, et plus— puissant que celui du Créancier du loyer, quelque privilege qu'il se rencontre en sa dette ; et le droit de proprieté et directe, qui est une chose réelle precede perpetuellement celui de l'hypotheque soit conventionnelle et expresse, ou tacite et legale ; aussi en concurrence de deux privileges, le plus puissant l'emporte, comme il a été jugé par arrêt du 15 Mars 1605.— here he gives the Case referred to.—

D°— D°— N°. 14

Les marchandises, et autres choses de cette qualité dont le prix n'est point payé, ne peuvent pas être comprises entre les meubles exploitables, sur lesquels la Loi et la Coutume donne le privilege et l'hypotheque tacite au proprietaire.—

Et la preference a lieu contre le proprietaire quoique le premier saisissant pour les loyers, non seulement au cas de la vente faite sans jour et sans terme, qui est l'espece de l'arrêt ci-dessus cité, mais aussi, comme j'ai deja dit ci-devant, quand il y a terme donné, et promesse ou obligation passée pour le prix de la chose venduë qui est saisie sur l'acheteur à la requête du même proprietaire, comme il a été jugé par d'autres arrêts rapportés sur l'art. 177 de la Coutume de Paris.

D°— D°— N°15.

Il a été pareillement jugé sur l'interpretation de l'art. 176 de la Coutume de Paris que sa decision a lieu même au cas de vente faite par le debiteur de la marchandise ou autre chose, qu'il avoit acheté sans jour

et

et sans terme, nonobstant la bonne foi de l'acheteur en la maison duquel elle auroit été transportée, et que le premier vendeur la peut suivre et la vendiquer comme sienne, si mieux le dernier acheteur n'aime lui payer le prix de la vente. — C'est la decision remarquable d'un arrêt du 24 Juillet 1587 donné au rapport de Mr Myron, qui a été depuis Lieutenant Civil en la Troisieme Chambre des Enquêtes, les autres consultées, par lequel, en infirmant la Sentence du Prevot des Marchands et Echevins de Paris du 18 Nov. 1586, la Cour declara la saisie faite à la requête de Claude Roussel, Guillaume Marie et Guillaume Bertrand, marchands de vin, sur la quantité de 32 demi queües de vin d'Orleans, par eux vendus sans Jour et sans terme à un nommé Prevot et par lui revendues à Marie Guillart, en la Cave de laquelle elles avoient été trouvées marquées à leur marque, bonne et valable — qu'elle leur rendroit les dites 32 demi-queües de vin si mieux elle n'aimoit leur payer la somme pour laquelle la vente avoit été faite par eux au dit Prevôt; ce qu'elle seroit tenüe declarer sous quinzaine, autrement l'option riferée, sauf son recours contre ledit Prevot son vendeur. — Lequel arrêt est rapporté tout au long par Carondas entre les arrêts qu'il a mis ensuite de son Commentaire sur la Coutume de Paris Arrêt. 2. —

En l'espece de cet arrêt, il n'y avoit eu qu'une seule vente faite par Prevot, premier acheteur. —

Le même auroit lieu par identité de raison, s'il y avoit eu plusieurs ventes, si par pleures personnes emptas ambulavit, comme il est dit aux loix préallegüées; parceque la Coutume donne au proprietaire le privilege de suivre sa chose en quelque lieu qu'elle soit transportée, qui est un droit réel de revendication, et par la regle et maxime generale de droit remarquée ci-dessus — res transit cum sua causa et onere. —

1e de Nº. 16. Arrêt au Grand Conseil, le 12 Juillet 1672. qui a jugé, que dans la Coutume de Paris, ce qui est porté en l'article 126 d'icelle, n'a pas lieu de Marchand à Marchand. —

Prescription.—

Poth. Ob. N.° 684.

Le tems de la prescription court contre une succession quoique vacante abandonnée & destituée de Curateur; Car les Créanciers de cette Succession, qui sont ceux qui ont interet à la conservation des droits de cette Succession etoient à portée de faire nommer un Curateur à cette Succession — c'est pourquoi ils ne peuvent se servir de la regle Contra non valentem agere non currit prescriptio.—

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2 Burr. 1099
Yea. v Fouraker

A debt acknowledged after an action brought takes it out of the Stat. of limitations.—

Preuve.

A. Journal des Audiences de Bretagne. par Tullain Duparc. p. 35.

Apres un marché fait par ecrit (entre un proprietaire et un entrepreneur pour une construction d'edifice) portant le detail de tous les ouvrages qui font l'objet du marché, l'entrepreneur ne doit pas etre admis à la preuve par temoins, que le proprietaire a depuis exigé des changemens, qu'il s'est departi de quelques articles du marché, et qu'il a accepté le renable des ouvrages. —

But this does not deprive the party of his right to examine his adversary upon oath. —

—

Le Debiteur est recevable à prouver par temoins le paiement d'interets usuraires qu'il a fait au Créancier quoique chaque paiement excedat 100 francs. —

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Principal & Agent.

1 Moore's Rep. 25.
Wilson & al. v. Hart

Parol evidence of a broker may be admitted to shew that a Sale of goods was made to a third person, for whom the buyer acted as agent, although the bought note and invoice were made out in the name of the buyer. —

Parol evidence to vary a Contract cannot be received; but that the parties contracted in the Capacities of principals or Agents, may be explained. —

Prisoner — his examination. &c

1 Holt. Rep. 597
Rex. v. Wilson

The examination of a prisoner before a magistrate, who examines such prisoner as a witness, although he holds out no threat or inducement, cannot be used against him. a

The examination of the Pris.r ought to be without oath. — Bull. N.P. 242. a

And the whole of the Confession must be taken together when it is offered in evidence. —

Prisoners. — punished by the Court for misbehaviour in the prison. — see. 2. Barn: & Cress. Rep. 344. —

Priviledge

1. Dowl^{s} Rep. Prac. 9.
Phillips v Wellesley

An unpriviledged person in custody in execution elected a member of Parliament, is entitled to his discharge on motion, and therefore bail may have an exoneratur entered on the bail piece, if the priviledged person be elected between perfecting bail, and final — Judgment.—

If a Defendant is a member of parliament at the time of his arrest, the Court will at once discharge him.. Exēs of Skewys. v. Chamond. 1 Dyer. 60. (a) Holiday. v Pitt. 2. Str. 985. Com. 444.— But in case of Chester. v. Upsdale. 1 Wils. 278. this was held to be discretionary with the Court.—

Bail is discharged, if the Defendant succeed to a peerage 1 Doug. 45.— (F) So in Merrick v Vaucher. 6. T. Rep. 50. where Defendant was sent out of the kingdom under the alien Bill. and in Wood. v Mitchell. 16. 247, where Defendant was under Sentence of transportation — and in Langridge v Flood, 1 Tidd. ~~102~~ 290. † where Defendant became member of Parliament. But the rule is confined to cases, where the render has become impossible by act or law of the State, and will not be — extended to a detention by a foreign potentate — See also — Robertson v Patterson. 7 East. 407.—

† cited in 4 East. 190.

Priviledge.-

1. Dowl3. Prac. Rep. 157.
Anonymous.

A Defendant when discharged from legal custody, has no priviledge from arrest in returning home.-

The Defendant in this case had been accused of a felony, had been tried and acquitted, and on his way from Court was arrested for the money which formed the ground of proceeding criminally against him.-

Priviledged Communication. — see. Attorney &c. witness. —

Ryan v Moodie's N. P. C. p. 165.

Foote. v. Hayne

The retainer of a Counsel for a Cause is in the nature of a priviledged communication, and cannot be disclosed. —

Id. — p. 198

Docker. v. Hasler.

A Widow cannot be asked to disclose conversations between her and her late husband. —

Probable Cause.

8. Taunt. 182.
Hull & ux. v. Yates et al

In actions of Trespass and false imprisonmt the question of reasonable and probable cause for the apprehension of the plaintiff, cannot be left to the Jury. —

Borgia. appellt
Prior. vs Respdt.
January 1826.

Held in appeal, that a declaration stating that the plaintiff had been falsely and maliciously arrested and confined in Gaol by the Defendant, was sufficient to maintain an action for a malicious prosecution under the Laws of Canada, although not alledged, that such arrest was made without reasonable or probable cause. —

4. Dowl: & Ryl: 187.
Ravenga. v McIntosh

Where A. arrested B. upon the advice of his special pleader, that he had a good cause of action, but afterwards upon being ruled to declare, discontinued proceedings, and B. brought an action for a malicious arrest without any reasonable or probable Cause. — Held that the reasonableness or probability of the Cause, was a mixed question of law and fact for the Jury to decide; and that they were rightly told by the Judge at Nisi Prius, that if they believed the Defendant to have acted bona fide upon the advice he had received he was entitled to a verdict, otherwise, they ought to find for the plaintiff. —

Mr Justice Bayley observed — I accede to this proposition, that if a party lays his facts fairly before Counsel, and he acts bona fide upon the opinion he receives, however erroneous the opinion may be, he is not liable for the consequences. —

Probable Cause

5 Bing: Rep. 357
Davis v Russel

The definition of probable cause is, such conduct in an individual accused, as will warrant a legal and reasonable suspicion of offence against the law in the mind of the person accusing, so as that a Court can infer a prosecution against the accused to have been taken upon public motives.— It is a mixed question of fact and law — What circumstances existed and what knowledge the prosecutor had of them, is a question of fact — but when the facts are known and the mind of the prosecutor is laid open to the Jury by evidence, then, whether it were a reasonable or an unreasonable Cause of proceeding, is a question of law.—

3. Moore & Payne's Rep. 354. & seq.—

The principles upon which an action for a malicious prosecution are founded are clearly laid down in the Case of Johnstone v. Sutton, (1 T. Rep. 544.5) the essential ground being that a legal prosecution has been carried on without a probable Cause; and although from the want, malice maybe, and most commonly is, implied, yet from the most express malice, the want of probable cause cannot be implied, and both are essential to support the action; and it is for the Jury to find the facts which are evidence of probable Cause, and the Judge afterwards determines, whether those facts so found amount to a probable Cause or not.—

Some evidence (although slight evidence would be sufficient) must be given on the part of the Plaintiff, on an action for a malicious prosecution, of want of probable Cause before the Defendant can be called upon his defence. 1 Camp. Rep. 203. n. Incledon v. Berry — Ld Mr Justice Le Blanc.—

An

An omission to prefer an Indictment, after a charge on oath for an assault, held not sufficient to excuse the plaintiff from proving the want of probable Cause by the Defendant — by Ld Ellenborough in Wallis. v. Alpine. 1 Camp. 204. (n). —

In Purcell. v. Macnamara (9 East. 361 — & 1 Camp. 199) it was decided, that the plaintiff must give evidence of malice in the defendt. shewing — plainly the want of probable Cause; and that malice is not to be implied from the mere proof of the plaintiff's acquittal, for want of the — prosecutor's appearing when called on at the trial of the Indictment

In Smith. v. Macdonald (3 Esp. Rep. 7) where the Defendant indicted the plaintiff for felony, and the Jury paused sometime before they — acquitted him, Ld Kenyon deemed it to be evidence of probable Cause, and said, that a person might be acquitted, though the prosecutor had the best grounds for the prosecution he had instituted.

In Savil. v. Roberts, (1 Salk. 15. — S. C. 1 Ld Raym. 387) it was decided that if an Indictment be found by the Grand Jury, the Defendt shall not be held to shew a probable Cause, but the plaintiff must prove express malice. —

In Byne. v. Moore. (5 Taunt. 190) the Court said that that case had been often cited, and they refused to set aside a nonsuit in an action for maliciously indicting the plaintiff for an assault on his proving that the Bill of Indictment was not found. —

In Arbuckle. v. Taylor (3 Dow's Parlts Cases 180) Ld Ellenborough said — "I conceive that by the law of England, an action for a malicious prosecution cannot be supported, unless it is proved to the satisfaction of the Jury — that it was malicious, and that it was without — probable Cause. —

The want of probable Cause is the gist of the action, and in Freeman. v. Arkell. (1 Car. & Payne 138) Mr Justice Park said, that the question of probable Cause, was a question for the — Judge, and that the fact of a bill of Indictm.t being thrown out, was no proof of a want of probable Cause, and directed a Non-Suit.

In Turner. v. Turner. Gows. N.P.Ca. 20) Ld Ch. Justice Dallas ruled, that malice. and a want of probable Cause must be proved — that on proof of a total want of probable Cause, malice might be implied, but that although express — malice be proved, some slight evidence of a want of probable Cause must be given by the plaintiff. —

In Willans. v Taylor. (3. Moore & Payne 360) Ch. Justice Tindal, said — As to what shall amount to a Combination of malice and a want of probable Cause, so much depends upon the circumstances of each particular Case, that it is difficult, if not impossible, to define it, nor can any general rule be laid down on the subject. — But such a state of facts ought to exist as to impress the mind of any reasonable man and satisfy him that the party accusing had

no

no motive for proceeding, but a malicious feeling, or desire to inflict an injury on the accused, and that he could not have honestly believed that there was any true or substantial ground for the accusation, or probable cause for the prosecution —

Process - service of

2. Barn: & Cress. Rep. 761.
Thomas v Pearce

Where a Defendant on being served with a copy of a writ, demands to see the original and it is not shewn to him, the service is irregular, and will be set aside with Costs. -

Promissory Note.

S.C. 13 Mull. 273.

A promissory note payable to an infant, when he shall come of age, specifying the day, is a good note — 1 Bur. Rep. 227. Held to be sufficient — if it be certainly and at all events payable at that time, whether he lives till then, or dies in the interim. — Goss. v. Nelson.

1st This is certainly and in all events payable.
2d The distance of time makes no difference.
3d Nor the adding, that it is the day of the Infants coming of age.
4th It is, debitum in presenti; though solvendum in futuro. —

1. T. Rep. 637. 6. Ves. 248. — and qu. 1 Atk. 486.

But a note in the name of two, but signed by one only, promising to pay on the death of G.H. "provided he leaves either of us sufficient to pay the said sum; or if we shall be otherwise able to pay it." —

5. T. Reps. 484

1st This is not a negotiable note within St. 3 & 4. An. being only eventual, not absolute. — &c

See. 1. Bur. Rep. 325. 6. Roberts. v. Peake.

The Indorsee is bound to apply to the maker of the note, and if he is guilty of a neglect, and the maker becomes insolvent, the Indorsee loses the money, and cannot come upon the Indorser at all. — And if the Indorsee of a note brings an action agt. the Indorser, the Plff must prove a demand of, or diligence used to have gotten the money from the maker of the note. — 2. Bur. Rep. 676. 7. 8.

1 Raym. 180. —
Nicholson. v. Sedgwick

The bearer of a note, payable to a particular person, or bearer, cannot maintain an action thereon in his own name against the maker. —

Bayley. 15. —

But again it is laid down — That a bill or note payable to I. S. or bearer, is payable to the bearer; and in the latter case I. S. is a mere cypher. — cite Grant. v. Vaughan. Bur. 1516. —

Chitty. 125. ch. A.

It is also stated to be a matter now well settled by usage and decisions, that bills whether payable to order, or to bearer, are equally negotiable from — hand to hand ad infinitum — and that the — transfer vests in the assignee a right of action on the instrument assigned, sustainable in his own name — See cases referred to in note (3)

See also Kyd on bills. p. 36. 37. —

According to the authorities of English law, in an action by the bearer, he was bound to shew that he came fairly by the note and gave consideration for it — see 13 Bayley. 222. Chitty 391 — Kyd. 38 — But the principle seems to be different in the French law —

Nouv. Denizart — v° Billets au Porteur N° A. —

On ne peut dans la regle generale forcer le Porteur d'un billet au porteur de declarer de qui il le tient, parceque ce seroit gêner le commerce et les negociations que cette espece de billet a pour objet de faciliter, et vouloir penetrer dans des negociations, que ceux qui les ont faites, sont bien aises de tenir secretes, quoiqu'elles n'ayent rien de reprehensible — On l'a ainsi jugé par deux arrets — le premier du 10 Dec. 1717 — le second du 7 Juillet 1730 — But any fraud illegality

or

or want of consideration may be proved by the Defendt

Declaration - that the Defendant and another, made their promissory note by which they "jointly or severally" promised to pay - is good. - 2 Cowp. 832. Rees. v. Abbot.

L. Mansfield. - If "or", is to be understood in this case as a disjunctive, who is to elect, whether the note shall be joint or Several? - Certainly the person to whom it is payable. - If so, the plaintiff has made his election. - But "or", in this case is synonimous to, "and". - They both promise that they, or one of them shall pay; then both and each is liable in solidum. - The nature of the transaction forces this construction. - It is said that Judges should be astute in furtherance of right, and the means of recovering it - and therefore one is ashamed to see either hitch or hang upon pins or particles, contrary to the true manifest meaning of the Contract.

Variance.

Where the Indorsee declared against the maker of a Promissory Note, - that he made the same payable at the house of Messrs B. & Co London; and upon production of the note at the trial it appeared, that the address at the House of Messrs B & Co, was not a part of the Note, but only a memorandum at the foot of it. - Held, that this was a variance. - 4 Maule & Sel. 505. Exon. v. Russell.

L. Ellenborough. - The Plff has taken upon himself to aver that such is the import of the note; he has therefore not truly stated the note, for he has stated that it is made payable at a particular place - Therefore he ought to have been non-suited upon the ground that he has misdescribed the note as payable at a particular

particular place, which it is not, the address being no part of the Contract, but a memorandum

Variance

The maker of a promissory note, payable at a specified time after sight, at the time of making it, writes on the margin, "accepted on myself, payable every where" — These words — constitute no part of the original instrument, and need not be noticed in the declaration. —
1 Starkie. N. P. Rep. 125. Splitgerber. v. Kohn.

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1 Holt. Rep. 474. Clerk. v. Blackstock

A Note, beginning, "I promise to pay" signed by two parties, is joint & Several —
see. March. v. Ward. N. P. 130

Handwriting

In an action against the payee of a promissory note, who was likewise the Indorser Held — That his indorsement was an — admission of the hand writing of the — maker. —

Notice.

The Payee is entitled to notice of the dishonor of the note, although there were no consideration between him & the maker.
1 Holt. 550. Free val. v. Hawkins. —

2. Barn. & Ald. 417. Blanckenhagen v Blundell. —

A note, whereby the maker promised to pay to A, or, to B & C. a sum of money therein specified, value received, is not a promissory note within the meaning of the Stat. of Anne. — Nor can an action be maintained at Common law upon such an instrument even by the payee agt. the maker although it is stated on the face of the note, to be given for value received. a

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2 Starkie. 29. Willis. v Barrett

A plaintiff suing upon a promissory note which purports to be payable to a person of a different name may shew by evidence that he was the person intended.

This was an action brought by the payee agt. the maker — In the body of the note the amount was made payable to Elizabeth Willison, the action was brought by Elizabeth Willis — The Plff was allowed to adduce evidence to shew that Willison was inserted by mistake for Willis, and that she was the person really intended

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8. Taunt: Rep. 92. Free v. Hawkins

1 Moore. Rep. 535 S. C. —

Evidence of a parole agreement, at the time of making and indorsing the note, that payment should not be demanded until after the sale of the estate of the maker, cannot be received, as a waiver of the right of the indorser to notice of non-payment by the maker. —

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1. Barn: & Cress. Rp. 407. Hall. v. Smith.

Where a promissory Note beginning, "I promise "to pay", was signed by one member of a firm for himself and his partners — Held that the party signing, was severally liable to be sued upon it.

2 Burgh: Reps. 306.
Perham. vs Raynal et al

acknowledgmt.

9. Moore. Rep. 566. S. C

An acknowledgment within Six years by one of the Joint Makers of a promy Note, will revive the debt against the others, although they have made no acknowledgment, and signed the Note as a Surety only. —

3. Moore Rep. 79.
Wells. v. Girling

Variance.

If in a joint and several note, payable by instalments, the day on which one of the instalments becomes payable be mistated in the declaration, it is a fatal variance, and if the Defendant sign such note as a Surety for the other maker, the plaintiff cannot resort to the Common money Counts. —

Ch. J. Dallas directed the Jury — That in order to entitle the plff to recover on the money Counts, there must have been a privity of Contract, or privity or mutual dealings between him and the Defendt. — As it appeared there had been no such dealings between them, and as the Defendant was a Surety only, there could be no consideration for which the note was given. —

5. Barn: & Cress: 234.
Geary vs Physic

Indorsement

An Indorsement upon a promissory note written with a pencil, is a valid indorsement, within the Custom of Merchants. —

6 Barn: & Cres. Rep. 373.
Camidge v. Allenby.

Laches

In an action for the price of goods, it appeared that the same were sold at York on Saturday the 10th Dec. 1825, and on the same day at 3. O'Clock in the afternoon, the Vendee delivered to the Vendor, as and for a payment of the price, certain promissory notes of the Bank of D & Co at Huddersfield, payable on demand to bearer. — D & Co stopped payment on the same day at eleven o'clock in the morning and never afterwards resumed their pays but neither of the parties knew of the stoppage or of the insolvency of D. & Co. The Vendor never circulated the notes or presented them to the Bankers for payt but on Saturday the 17th he required the Vendee to take back the notes and to pay him the amount which the latter refused — Held — under these circumstances that the Vendor of the goods was guilty of laches, and had thereby made the Notes his own, and consequently that they operated as a satisfaction of his debt. —

3. Carr: & Payne's N. P. Rep. 335. —

Booth. v. Grover

Variance.

If the declaration in an action against the maker of a promissory note, state, that the Defendant made it — his own proper hand being thereunto subscribed, and it appear that the note was drawn by his son in his name and by his authority, the variance will not prevent the reading

1 Barn: & Adolp. R p. 89. —

Beauchamp. v. Parry

evidence -

In an action by the Indorsee ag. the maker of a prom. Note, declarations of the payee (not uttered at the time of making the note) are not evidence to prove that the consideration for the note was money lost at play, — unless it be previously shewn that the indorsee is identified

in

in interest with the payee, as by having taken the note after it was due, or without any consideration. —

1. Moody & Malkins N. P. Ca, p. 182. Booth. v. Grove

In an action on a promissory note, alledged to have been made by the Defendt. "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, and the allegation of the Defendants handwriting may be rejected as surplusage. —

see Chitty on Bills. p. 357. 8. 7th edit. —

1 Tyrwhitts Rep. 84 Ridout Exer. v. Bristow dux. —

Where a promissory note expresses the consideration for which it is given, evidence cannot be admitted of a consideration inconsistent with its terms. —

Proof. —

1815.
1 Starkie. Rep. 76. — Corsbie. v. Oliver.

Debt on bond by the plaintiffs as assignees of a Bankrupt — Plea. payment. — It is not incumbent on the plaintiffs to prove themselves to be assignees. —

L. Ellenborough. The general principle is, that a party who puts himself upon one issue, admits all the rest.

There are several exceptions admitted to the Ordinance of Moulins and that of 1667 in regard of proof to be received by witnesses in matters exceeding 100 livres. —

4 Henrys. 248. Plaid.r 14.

Il y a encore plusieurs autres exceptions faites par la jurisprudence des arrets suivant les differens Cas et les diverses circonstances; pour en donner une idée sommaire, il faut distinguer les personnes, les — Iurisdictions, et les choses.

A l'egard des Personnes, l'on peut dire 1o. Que l'ordonnance n'a pas lieu entre les marchands — Cela se juge ainsi tant toutes les Iurisdictions Consulaires. — 2o. Elle n'a pas lieu entre deux etrangers entre deux — Etrangers plaidans en France, ainsi qu'il a eté jugé par deux arrets rapportés par Brodeau let. C. ch. 42. N.o 3. 3o. Elle n'a pas lieu entre les gens de Guerre. — 4to. Elle ne devroit pas avoir lieu entre les habitans de la Campagne pour ce qui concerne le labourage, les denrées et les bestiaux; Car il est presqu'impossible qu'ils passent des actes par ecrit de toutes ces choses; D'ailleurs la bonne foi regne encore parmi eux. — En effet les Iuges des lieux ne voulant pas autoriser la mauvaise foi, et n'osant pas aller directement contre l'ordonnance, sont obligés de prendre un detours;

Ils

Proof

Ils reçoivent le demandeur à revendiquer, par exemple son cheval, ou son bouf, et condamnent le Defendeur à la restitution avec dommages, interets, et depens. —

A l'egard des Choses — l'ordonnance excepte le Depot necessaire — mais elle ne parle que de quatre Cas les plus ordinaires - Incendie, Ruine, Tumulte, et naufrage — mais il y en a encore d'autres, par exemple l'incursion des Enemis, ou des voleurs — incursus hostium et impetus prodonum. —

Ce même article excepte le Cas des Accidents imprevus ou on ne peut faire des actes. — Il faut excepter tous les Cas ou il est impossible de passer des actes, et qui ne dependent pas de la convention des parties — Comme tous les quasi-Contrats, les quasi-delits, et autres semblables

Le prêt à usage est aussi excepté de la regle etablie par cet article. — DuRousseau dans la Jurisprudence Civile au mot "Pret" N°. 5. dit, que dans presque tous les Cas, la preuve par temoins du prêt à usage, est reçue au dessus de 100 livres — parcequ'il n'est pas d'usage, ni possible d'en passer des actes dans tous les Cas. — Et effectivement celui qui prête un Cheval ou autres choses mobiliaires dont la valeur excede 100 livres, ne proposera pas à son ami, à son voisin, ou parent auquel il prête, de lui en passer un acte; ou n'auroit souvent pas même le tems de prendre cette precaution — Il seroit donc injuste de rejetter la preuve par temoins en pareil Cas. —

Serpillon. on tit. 20. art. 2. Ordre 1667. p. 319

Les tailles de boulangers et autres artisans pour fourniture de pain, vin, viande, et autres denrées

Id. —

4. Henrys. p. 249. Plaid. 14.

Proof

denrées, font encore une exception à la regle etablie par le présent article, qui n'a entendu parler que des Conventions, et des Cas ou il est d'usage de contracter par ecrit ; il seroit d'une trop grande incommodité pour pareilles denrées, dont on a besoin plusieurs fois par Jour, de faire autant de billets qu'il y auroit des fournitures reiterées ; chaque livraison ne merite pas une Convention ou arreté par ecrit.—

Poth. Ob. N° 764.—

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Id— N° 809.

L'Ordonnance de Moulins, confirmée par celle de 1667, en ordonnant qu'il seroit dressé des actes, n'a pas entendu exiger l'impossible, ni même exiger des choses trop difficiles, et qui genereroient ou empêcheroient le Commerce ; c'est pourquoi elle n'a interdit la preuve testimoniale qu'à ceux qui ont pu s'en procurer facilement une litterale.—

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Protet

De Commis. Consult.ᵒ 2. Vol. 1328. — Ch. 13.
Bornier ordᵉ 1673. Tit. 5. art. 8. —

Le protet faute d'acceptation de lettre de change bien qu'en pais etranger, porte hypothegue en France.

Et la faillite d'un marchand en un endroit ne fait pas sa faillite en autre païs, si non du Jour qu'elle s'ensuit. —

But see observations of Mr Soulatges. Tr. des Hyp. p. 51. 52. on this kind of mortgage. —

Quarter Sessions - Judgt. of.

8. Dowl. & Ry: Rep. 173.
The King v Ellis

Where a Court of Quarter Sessions have passed an erroneous Judgt. of transportation this Court (K. B) will not send it back to be amended, but will reverse it on Writ of Error.

Quittance.

St Vast. comm^n sur les Cout. d^e. Vol. 4 p. 315.

Il me paroit injuste que le créancier qui ne sait pas signer, fasse payer au debiteur, le coût de la quittance qu'il lui donne devant notaire: Le debiteur ne peut valablement s'en passer pour prouver sa liberation, et il est contre tout droit que le debiteur en souffre, parceque le créancier est hors d'etat de pouvoir lui donner une quittance: à la bonne heure que le debiteur paie le coût de la quittance pardevant Notaire, si le Créancier offre de lui en donner une de sa main, et qu'il ne veuille s'en contenter. a—

Recommendation

Arrets de Jovet v° Lettre de change p. 441. N° 7.

Par arret du Parlement de Dijon du 23 Dec^re 1661, rapporté par Bouvot. partie seconde, in verbo — "Lettre de recommendation", quest. 1^ere a été jugé, que les lettres de recommendation n'obligeoient pas neque ex contractu, neque ex quasi contractu, si non, qu'il y eut promesse de payer. —

see also. - Arrets de Jovel. v° Obligation. N° 24. p. 22. - part 2. —

6. Bing^s. Rep. 396. Fosterman^n v^s Charles.

Where a party recommends an agent, by making Statements which he knows to be false, he is responsible in damages for the — misconduct of the agent, although it be not shewn that the recommendation was given from malice or with a view to the pecuniary interest of the party recommending. —

Record - Judges of - who

1 Comyns Rep. 79
Groenwelt v Burwell 2 ab 3. —

They are Judges of Record who have — authority to impose fine and imprisonment; and when a new authority is constituted with power to fine and imprison, the persons invested with such authority are Judges of Record; for that very thing proves a Court to be a Court of Record, viz. the power of fining or imprisoning; for Courts which are not of record can neither set a fine nor commit any one to prison. — 3 Holt. Ch. J.

3. Bl. Com. 24 —
2 Mod. 218. —
1 Salk. 200. —

Riviere Seigneuriale.

Un Vassal Censitaire ne peut faire des Saignées à une Riviere Seigneuriale qui fait tourner le moulin banal de la Seigneurie — Gaz: des Trib. ~~Fol~~. Tom. 7. N°. 10. p. 144.—

Rules of Practice. —

1. Tidd's Prac. Pref: p. 9. 10. — The practice of the Court, by which the proceedings in an action are governed, is founded on antient and immemorial usage regulated from time to time by Rules & Orders acts of Parliament and Judicial decisions. —

The practice is the Law of the Court, and as such is a part of the Law of the Land; and it has been so strictly adhered to, that in the Case of 2 Str. 755. — Bewdley, a practice of seven years only, was 4. Bur. 1755. allowed to prevail against the express words of an 1 P. Wms 207. 223. act of Parliament. —

The Rules and orders of the Court, are either such as are made for the regulation of its general practice, or such as apply only to the proceedings in a particular Cause — The general rules are confined in their operation to the Court in which they are made, and for the most part respect the mode of conducting the proceedings. —

1 Wils. 162 Fogoo v Gale "And we cannot depart from the practice which "is the Law of the Court, and as such is the Law of "the Land". —

4. Bur: 2572. Rex. v. Wilkes. Mr Just. Aston — "But it is the practice, the "Custom of the Court, and therefore the Law of the "Land."

Id. — 1996 L^d Mansfield. — The Court ought never to lay down a Rule to be construed so rigidly as that it may put unreasonable difficulties upon the Suitors, and under

render them liable to inconveniencies worse than those which the rule was intended to prevent. —

4. Bur. 2271. — Dickson. v. Fisher.

L^d Mansfield. — This was a motion for liberty to move for a new trial, though the four days were elapsed, which are by the Rule and practice of the Court limited for making motions of that sort — It has been objected that no such motion can be made after that limited time as no leave was given for it — but if there appear under the particular circumstances of the Case sufficient grounds to us to excuse the delay, and that to attain Justice there ought to be a new Trial, we may make an exception to the general rule of practice —

1 Bur. 30. 1 Rex. v. Phillips

L^d Mansfield — General rules are wisely established for attaining Justice with ease, certainty and dispatch — but the great end of them being to do Justice, the Court are to see that it be really attained —

Saisie.—

et Saisie-arret.—

St. Vast. Comm.re sur les Coutumes &c 4e Vol. p. 370. 371.—

Le Créancier d'un mineur peut saisir chez le survivant de ses pere et mere avec qui il est en continuation de Communauté, les effets communs.

Pour empêcher qu'un debiteur mal-intentioné ne mette, par une vente simulée, ses meubles à couvert de la poursuite de ses Créanciers, on juge, qu'un Contrat de vente de meubles, quoiqu' autentique, non suivi de deplacement, est insuffisant pour fonder en faveur de l'acheteur, une demande en revendication, et que la Saisie etant faite sur le vendeur qui continue, ou qui est reputé avoir les meubles en sa possession, comme si le vendeur et l'acheteur demeurent ensemble, est bonne, encore que le Contrat soit anterieur à la Saisie.—

M. Auroux observe de meme, que la donation ou vente d'un meuble faite à un parent, qui le loue au donateur ou vendeur, n'empêche pas que le Créancier de celui-ci ne puisse le saisir.—

L'adjudicataire des meubles vendus publiquement n'est pas obligé de les rendre, la Saisie etant declarée nulle— le saisi n'a de recours que contre le Saisissant

Id. p. 444.—

Les paiemens faits d'avance par un fermier ou locataire, ne peuvent être opposés au saisissant à moins qu'il n'y ait une clause dans un bail autentique, qui autorise ces paiemens prématurés.—

Sale — what delivery necessary. —

S — possessed of 30 tons of hemp at his wharfinger's the cargo of a certain Ship, sold ten tons of it at £110 ℔ ton, payable by the purchaser's acceptance, and gave the wharfinger an order to weigh and deliver. — The order was entered and the goods transferred in the wharfinger's books — Before the hemp was weighed off, or bill accepted or drawn, the purchaser stopped payment. — Held that the weighing being a term precedent to the delivery, the sale was incomplete, and the vendor might recover back the hemps. — 5. Taunt. 617. — Shepley. v. Davis & another. —

See also case on note of Dusk. v. Davis. Id. p. 622 — where it was held — Upon a Sale of Ten Tons of flax at a specific price ℔ ton, out of a larger quantity, packed in mats of uncertain weight, though a note is given for the delivery on a certain day, and the warehouse room from that day is charged to the buyer, the Sale is not complete till the flax is weighed off, and may be rescinded in case of the purchasr's bankruptcy. —

1. Taunt. 458

Elmore. v. Stone

If a man bargains for the purchase of goods and desires the Vendor to keep them in his possession, for an especial purpose for the Vendee, and

Sale. — what delivery necessary &c.

and the vendor accepts the order, this is a sufficient delivery of the goods within the Statute of frauds. +

It is no objection to a constructive delivery of goods, that it is made by words, parcel of the parol Contract of Sale. +

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3. Barn. & Ald. Rep. 321, Howe. v. Palmer.

Where a vendee verbally agreed at a public market with the agent of the Vendor to purchase 12 bushels of tares (then in the vendors possession, constituting part of a larger quantity in bulk) to remain in the vendor's possession till called for, and the agent on his return home, measured the 12 bushels and set them apart for the vendee —— Held that this did not amount to an acceptance by the latter so as to take the Case out of the 17th Sec: of the St: of Frauds.

The price agreed on was 20/ p bushel — the vendee declines taking the sample, saying he had seen the tares on the Vendors premises, and that he had no immediate use for them, and therefore requested they might remain in Vendor's poss.n until the vendee wanted to sow them. —

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1. Barn: & Cress: p. 181 Crawshay & al'v. Eades

A. delivered a quantity of Iron to a Carrier to be conveyed by the latter to B. the Vendee in the Country. — The Carrier having reached B's premises, landed a part of the Iron on his wharf, and then findg that B. had stopped paym.t reloaded the same on board his barge, and took the whole of the iron to his own premises. — Held — that there was no delivery of any part of the iron so as to divest the

(see y.e opposite page)

H

Sale — payment

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 vendee paying the difference, is not, upon the bill's being dishonored, precluded from recovering against the buyer the price of the goods.

See also. 1. New Rep. 330. Brooke & al. v. White

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3. Barn. & Ald. 321.
Howe. v. Palmer.

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V the Consignor of his right to stop in transitu, the special property remaining in the Carrier until the freight for the whole Cargo was either tendered or paid, or until he had done some act shewing that he assented to part with the possession of the goods without receiving his freight.

Sale — by sample.—

1. Barn: & Cress. Rep. 1.
Lorymer. vs Smith

The buyer of a parcel of wheat by sample, has a right to inspect the whole in bulk at any proper and convenient time; and if the seller refuses to shew it, the buyer may rescind the Contract.—

Sale — Note or memorandum of.—

5. Barn: & Cress. 583
Elmore v. Kingscote

The note or memorandum in writing of the bargain in the case of the sale of goods, for the price of £10— or upwards required by the Stat. 29. Geo. 2. c 3. s. 17. must state the price for which the goods were sold

Sale by Auction.-

3. Brod: & Bing. Rep. 116.
Fuller. vs. Abrahams

Held that a purchaser did not acquire any property under a sale by auction, at which he and his friend were the only bidders, the rest of the company being deterred from bidding by the purchaser's stating to them, that he had a claim against, and had been ill-used by, the late owner of the article. -

Sale and Delivery.

3. Dowl: & Ryl. 220
Baldey & al v Parker

Where a person entered a tradesman's shop, and selected various articles, some of which he marked with a pencil, and others were cut from piece goods and laid aside for him, (the whole amounting to more than ten pounds) and desired them to be sent home – and when sent he refused to take them; Held – 1st That the contract was joint – and 2d that there was no acceptance, to take the Case out of the Statute of frauds. –

But see the cases, 1. Camp. Rep. 233. Hodgson v Lebret, where the purchaser wrote her name on an article; also the Case cited on the note, of – Anderson v Scott, where the cutting off the spills and the marking of the party's name on certain Casks, was considered as an incipient delivery which took the Case out of the Statute of Frauds.

A written order given by the Seller of goods to the buyer directing the person in whose care the goods are, to deliver them, has likewise been held sufficient evidence of a delivery within the meaning of this Statute. 2 Esp. Cas. 598. Searle v Keeves. –

So where a sample is delivered to and accepted by the purchaser, and such sample is to be accounted for as part of the Commodity sold. – 7 East. 558. Hinde v Whitehouse. –

Sale and Delivery.

5. Dowl: & Ryl. 284
Bentall & al. v. Burn

S.C. 3 Barn: & Cress: Rep. 423.

S.C. Ryan & Moodie's N.P.C. p. 107.

Where goods above the value of £10. lying in the London Docks were sold without any written Contract, and a delivery order given to the buyer, it was held that the buyers acceptance of the delivery order was not an actual acceptance of the goods so as to take the case out of the Statute of frauds.

Ryan & Moody's N.P.C. p. 414

Hawse & al. v. Crowe

If a vendee under terms to pay for goods on delivery, obtains possession of them by giving a check which is afterwards dishonoured he gains no property in the goods, if at the time of giving the check, he had no reasonable ground to expect that it would be paid. —

See Gladstone v. Hadwen 1 M & S. 517. —
Taylor — v. Plumer — 3. M & S. 562
Noble — v. Adams 7 Taunt. 59
Earl of Bristol v. Wilsmore 1 B. & C. 514
Kilby — v. Wilson — Ry & Moody. 178

6. Barn; & Ald. 388.
Rohde & al. v. Thwaites

A. having in his warehouse a quantity of sugar in bulk, more than sufficient to fill 20 Hhds. agreed to sell 20 Hhds to B. but there was no note in writing of the Contract sufficient to satisfy the St: of Frauds — Four hhds were delivered to and accepted by B. — A filled up and appropriated to B. sixteen other hogsheads, and informed him that they were ready, and desired him to take them away. — B said he would take them as soon as he could. — Held, that the appropriation having been made by A. and assented to by B. the property in the Sixteen hogsheads thereby passed to the latter, and that their value might be recovered by A under a Count for goods bargained and sold. —

Sale. of a perishable article. see. Vo Perishable article..

As to the effect of marking goods as a symbolical delivery. see

Ellis. vs Hunt. 3. T. Rep. 464
Stovold. Vs Hughes. 14. East. 316.
Hodgson v Lebrett 1 Camp. 234
Harman Vs Anderson 2 Camp. 243.

purchaser obtaining credit with fraudulent intention.

9 Barn. & Cress. 59. Ferguson & another Vs Carrington.

A. purchased goods upon credit, fraudulently intending at the time of the Contract, not to pay for them. B. the Vendor brought assumpsit for the goods sold before the time of the credit expired. Held that this action was not maintainable, though the Vendor might have treated the Contract as a nullity, and have brought trover immediately to recover the value of the goods.

The Court were of opinion that the plaintiffs had affirmed the Contract by bringing this action — The Contract proved was a sale on credit, of which there had been no breach, and where there is an express contract the law will not imply one.

With us an action on the case would have been the proper remedy.

Sale – proposition to sell & acceptance &c

3. Man: & Ryl. p. 97.
Head v Diggon. –

A. & B. being together & B. offers goods to A. at a certain price, and gives A. three days to make up his mind – Before the three days expire, B. offers the goods to C. – A. cannot declare against B. as upon an absolute bargain and sale of the goods – and semble that B had a right to retract. –

The declaration here was no doubt wrong, as founded on absolute bargain, as the contract had not been completed by the mutual consent of the parties, but a promise to sell of this description must be so far binding on the party making it as to render him liable in damages, on his refusal to complete the Contract – see case of Adams. v Lindsell 1 Barn: & Ald. 681. – The principle laid down in the case of Cooke v Oxley. 3. T. Reps. 653 – would not hold in our Courts in Canada – The principle laid down by Pothier. Tr. Vente. № 32, is more equitable and more consistent with good faith and morality – And here I cannot help remarking the high compliment paid to Pothier by the Reporter of this Case, note (c) p. 100 – where he says, – "After reading the Judgment in the case of "Kennedy. v Lee. (which is cited) it is refreshing to return to "this writer, whose luminous method in the investigation "of abstruse and complicated propositions appears almost "to justify the proverbial boast of his Countrymen with "respect to the redeeming excellence of their language – "Ce qui n'est pas claire, n'est pas Francais". –

Sale of goods.—

9. Barn: & Cress. 78.
Thomson. v Davenport

At the time of making a contract of Sale, the party buying the goods represented, that he was buying them on account of persons resident in Scotland, but did not mention their names, and the Seller did not enquire who they were, but afterwards debited the party who purchased the goods — Held that the Seller might afterwards sue the principals for the price. —