THE CASE

OF

GEORGE ARNOLD

Plaintiff.

VS.

JOHN BOYLE and others,

Defendants.

ARGUED AND DETERMINED

IN THE

Court of King's Bench,

FOR THE

DISTRICT OF QUEBEC,

IN THE

TERM OF APRIL

1822.

QUEBEC:

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THIS was an Action upon a Note of hand made by the Defendants in favor of the Plaintiff, for the Sum of Three hundred and twenty six pounds fifteen shillings and two pence, to which the Defendants pleaded the general issue, and also a Plea of Temporary Exception, and a Plea of Perpetual Exception.

By the Plea of Temporary Exception, the Defendants pleaded "that the promissory Note and "supposed promises and undertakings in the said "Declaration, mentioned if any such were at any "time made, were jointly made with one Richard "Annett a Co-partner in Trade with the above "named Defendants, who was still living to wit, at "Gaspé, in the Inferior District of Gaspé, and "not by them the said John Boyle, George "Boyle, Felix Boyle and James Boyle alone."

By their Plea of Perpetual Exception, the Defendants pleaded that " heretofore, to wit on the " seventeenth day of November one thousand " eight hundred and nineteen, at the City of " Quebec aforesaid, they, the said John Boyle, " George Boyle and Felix Boyle acting as well " for themselves as for the said James Boyle and " one Richard Annett, their Copartners in Trade, " carrying on business under the firm of John " Boyle & Brothers, by a certain Notarial Act " or Instrument in writing, (an authentic Copy " whereof was therewith fyled, bearing date the " day and year aforesaid at Quebec aforesaid, du- " ly made and executed before M'Pherson and " Confrère, Notaries Public, for the causes and " considerations therein mentioned, did acknow- " ledge themselves to owe and be indebted to the " said George Arnold, and did also then and " there by reason thereof, undertake and promise " and did thereby, then and there bind and oblige " themselves and their said Copartners, the said " James Boyle and Richard Annett, their res- " pective Heirs and Assigns jointly and several- " ly *(Solidairement)* to pay to him the said Geor- " ge Arnold, (then and there personally present " and accepting thereof,) the sum of three hun- " dred and twenty six pounds fifteen shillings and " two pence current money of this Province, that " is to say ; one just moiety or half thereof with " legal interest thereupon on the first day of No- " vember, in the year one thousand eighthundred " and twenty, and the other moiety or half there- " of on the first day of Novemher one thousand " eight hundred & twenty one, they the said John " Boyle George Boyle and Felix Boyle there-

" by

" by then and their mortgaging and hypotheca-
" ting all the property and Estate real and present,
" and to come, of them the said John Boyle, Fe-
" lix Boyle, James Boyle and Richard Annett,
" for securing to him the said George Arnold
" the payment of the said sum of money and in-
" terest at the periods and in the manner above
" mentioned, and the better to secure to him the
" said George Arnold the said Sum of Money
" with interest thereupon, James M'Callum se-
" nior of the said City of Quebec, Merchant,
" did in, and by the said Notarial Act or Ins-
" trument in writing, also bind and oblige him-
" self *solidairement* with them the said John Boyle,
" George Boyle, Felix Boyle, James Boyle and
" Richard Annett, as upon reference to the said
" Notarial Act or Instrument in writing would
" more fully appear, which said Notarial Act or
" Instrument had not since the making and exe-
" cuting thereof, been cancelled, revoked or an-
" nulled, but still remained in full force and effect.
" And the said George Boyle, John Boyle, Fe-
" lix Boyle and James Boyle, in fact said, that
" the said sum of money in the said Notarial Act
" or Instrument mentioned, was the same iden-
" tical sum of money or debt specified in the said
" promissory note, in the declaration in the said
" cause filed, and upon which the said action was
" instituted and that no new consideration of any
" kind or description, had at any time been made,
" given or allowed by him the said George Ar-
" nold to them the said John Boyle, George
" Boyle, Felix Boyle and James Boyle for and
" in consideration of the said promissory note, but
" that the same (if any such existed) were at any

" time

" time made which the said Defendants never-
" theless denied had been unduly, unjustly and
" wrongfully obtained from George Boyle, one
" of the Defendants in the said cause by the said
" cause by the said George Arnold, and that
" the same was to all intents and purposes, null
" and void at Law. By reason whereof the said
" action could not be maintained inasmuch as
" the action of him the said George Arnold (if
" any he had against the said Defendants which
" nevertheless the said Defendants denied) ought
" by Law to have been instituted upon, and in
" virtue of the said Notarial Act or Instrument
" in writing above mentioned."

To these Pleas the Plaintiff filed general Replications—He also filed a Petition, alledging that no Instrument as stated in the Defendants last mentioned, Plea was ever executed by him that the Copy filed in the cause was a false Copy and praying that the Defendants might be ordered whether a certain time to declare whether they intended to avail themselves of the said pretended Act or Instrument. The Defendants having thereupon declared that it was their intention to avail themselves of the said Instrument, the Plaintiff filed a formal *Inscription en faux* and obtained an order upon L. M'Pherson, Esquire, the Notary Public, before whom the said Instrument purported to have been executed, to produce and file the original thereof, which he accordingly did —The Plaintiff then alledged and propounded as *moyens de faux* the causes, matters and things following, that is to say:—

" That they, the said Respondents, heretofore
" to

" to wit on the seventeenth day of November one
" thousand eight hundred and nineteen were in-
" solvent and unable to pay their just debts and
" being so insolvent they, the said Respondents,
" on the day and year aforesaid at Quebec afore-
" said wickedly and fraudently, intending and con-
" triving to injure the said party complainant, did
" execute and carry into effect the following false
" and fraudulent acts, deeds and transactions to
" to the great and manifest injury and damage of
" the said party Complainant, and without his
" knowledge or consent, they, the said Defend-
" ants, under several false pretences, and as they
" alledged and pretended to induce the other Cre-
" ditors of them, the said Defendants, to give and
" grant them a term of two years for the pay-
" ment of their respective debts, did procure the
" said L. T. Mac Pherson to draw and prepare,
" or cause and procure to be drawn and prepared,
" the said alledged act or instrument, then pur-
" porting to be a Bond or Obligation, as well in
" favor of the Party Complainant, Robert Rich-
" ardson, John Macnider & Co. Jean Huot,
" Pierre Doucet, Ann Sprowl, and James Hunt,
" whose names and signatures appear to have
" been set and subscribed thereto, as in favor of
" John Thompson, acting as well for himself as
" for and in the name of William Thompson, his
" Copartner, trading under the firm of John and
" William Thompson, James Ross, Michel Clou-
" et and William Hall whose names have been
" obliterated from the said paper, writing or instru-
" ment whereby they the said Respondents should
" have a delay of two years for the payment of
" the several sums of money due by them to their
" said several Creditors respectively. " That

" That the Party Complainant did set and sub-
" scribe his name to the said paper writing or in-
" strument, but in truth and in fact at the time he
" so set and subscribed his name and signature
" thereto, the said several persons whose names
" had since been obliterated therefrom as afore-
" said purported to be parties thereto, and no unjust
" preference should be shewn to any of the said
" Creditors of them, the said Respondents, but
" on the contrary, mutual and equal rights crea-
" ted and constituted by and between them res-
" pectively.

" That although the said paper writing or al-
" ledged instrument ought to have been signed
" by all the persons purporting to be Parties
" thereto as aforesaid, in order to render the
" same binding and obligatory upon him the Party
" Complainant, yet the names of the said several
" persons aforesaid, were after the same had been
" so signed by him, and without his consent and
" contrary to the intention of the Party Complain-
" ant and greatly to his prejudice struck out and
" obliterated from the said alledged original *mi-*
" *nute* of the said Act or Instrument."

" And the Party Complainant did further say,
" alledge and propound, that since the same had
" been so signed as aforesaid, the amount for which
" the said alledged Instrument was to have been
" given, had been falsely obliterated and defaced,
" and the sum of six hundred and eighty six
" pounds fifteen shillings put, and substituted in
" the place of eleven hundred and thirty pounds
" eleven shillings and one halfpenny, greatly to the
" prejudice

" prejudice of the said Party Complainant as afore-
" said.

" And the Party Complainant further alledged and propounded " that the words alledged to have " been struck out of the said Writing or pretend-" ed Instrument were not authenticated or *para-* " *phé* in the presence of the said Party Complain-" ant, or before the same had been signed by him " or with his knowledge or consent."

For these causes the Plaintiff prayed that the aforesaid Instrument, alledged to have been made and executed before McPherson & Confrêre on the 17th Nov. 1809, might be declared to have been falsely counterfeited and fabricated, and that the same might be rejected and not received as evidence, but be taken from the record in the said cause.

For answer to the above *moyens de faux* the Defendants pleaded.

First.—That " all and singular the allegations, " matters and things in the *moyens* contained, ex-" cept as to the making and signing the said Act " or Instrument by him, the said Complainant, in " presence of the said Notary, were wholly and " altogether insufficient, untrue and unfounded ', in fact.

" Second.—That the said Notarial Act or In-" strument was full, perfect and entire, and had in " no wise since the signing of the same by the " said Complainant, been falsified, fabricated or

 " coun-

" counterfeited, and as such remains, and is still in " full force and effect with respect to the Com- " plainant and Respondents in this cause.

" That it was apparent by the said notarial Act " or Instrument, that the said Respondents *en* " *faux* far from being insolvent debtors, and as " such, contriving and intending to injure and de- " fraud the said George Arnold, the Complainant " *en faux*, did by the said Act or instrument give " good, sufficient and approved Security, to him, " the said Complainant, and to divers others " therein mentioned, for the full and entire pay- " ment of their several demands against them, the " said Respondents.

" Fourth.—That the said Act or Instrument, " contained as many separate, distinct and perfect " promises, undertakings or agreements, as there " were parties, Creditors of the said Respondents, " thereto, each agreement perfect in itself, and " independent of the others.

" Fifth.—That the obliterations in the said Act " or instrument were immaterial with respect to " the said Complainant, and did not invalidate or " annul the agreement between them, the Com- " plainant and Respondents, the said Act or Ins- " trument remaining, in every respect as when " executed as far as the same related to them, the " said Complainant and Respondents."

" Sixth—That no letter, word, sentence, clause " or stipulation of any kind, *sworn* in the said " act or instrument, had been obliterated, ex-

" punged

" punged or altered, whereby the nature or sub-
" stance of the agreements, undertakings or en-
" gagements entered into, between the said par-
" ties to the said act or instrument, had been al-
„ tered or changed, either to the advantage of
" them, the Respondents or to the prejudice of the
" said complainant, who was still in the full pos-
" session and enjoyment of all the rights, bene-
" fits and advantages, in virtue of the said act or
" instrument, which by the execution thereof, he
" intended to have, possess and enjoy."

The Respondents prayed in consequence" that
„ the *Moyens de faux* of the said Complainant by
" him filed, might by the Judgement of the Court
" be declared irrelevant and altogether insufficient
" to enable him, the said Complainant, to have
" and obtain the conclusions of the said *Moyens*
" *de faux*, and that the said inscription *en faux*
" might be dismissed with costs."

To these answers a general Replication was filed by the Plaintiff, and the Parties went into Evidence upon these several issues.

The Evidence in the Cause, as well Parole as written, is to be found at the end of this case.

The Case was finally argued on the 9th April 1822.

For the Plaintiff it was said;

So far as the Plea of general issue was concerned, the Plaintiff had proved that the Defendants

 were

were Co-partners, and that the note in question was signed by one of them for himself and his Co-partners for a valuable consideration, which was all that the Plaintiff was bound to do. This indeed is not denied by the Defendants but it is alledged.

1. By the Plea of temporary exception, that Richard Annett was a Co-partner with the Defendants in this transaction, and that he not having been made a party to this Suit, the Plaintiff has not yet a right of action against the present Defendants.

And first, are we upon this question to refer to the Law of England or to that of Canada as the rule of decision?

It is contended by the Plaintiff that the decision of thisquestion is to be regulated by the Law of Canada.

The general rule is "that in all matters of con-
"troversy relative to property and civil rights, re-
"sort shall be had to the Laws of Canada as the
"rule for the decision of the same; and all causes
"which shall hereafter be instituted in any of the
"Courts of Justice, to be appointed within and for
"the said Province, by His Majesty, his Heirs and
"Successors, shall, with respect to such property
"and rights, be determined agreeably to the said
"Laws and Customs of Canada, until they shall
"be varied or altered by any ordinances that shall
"from time to time be passed in the said Province,
"by the Governor, Lieutenant-Governor or Com-
"mander in Chief for the time being, by and with
"the advice and consent of the Legislative Coun-
"cil

" cil of the same, to be appointed in manner here-
" in after mentioned."—14, Geo. III. c. 83, 5,
" 8.

An exception to this rule is found in the Provincial Ordinance, 25, Geo. III. cap. 2, 1, 10, which provides that " in proof of all facts concerning " commercial matters, recourse shall be had in all " the Costs of Civil Jurisdiction in this Province, " to the rules of Evidence laid down by the Laws " of England."

The inquiry comes to be then whether the rule upon which the Defendants rely, be a rule of Evidence or not. It can only be held to be a rule of Evidence upon the ground of a variance between the Contract laid, and that proved. This doctrine was formerly adopted Carth. 56; Boson vs. Sanford; 2 Salk. 440.—3 Mod. 321.—S. C.-6 Term Rep. 329. Shepperd & Baillie—However in Rice & Shute 5 Burr. 2611—it was adjudged that if an action be brought against *one* partner or a partnership account, the Defendant must plead it in abatement and cannot give the partnership in evidence; the same point was afterwards adjudged in Abbott and Smith 2 Blac, 947.—The same rule was afterwards extended to all cases of joint contracts—Cowp. 832, Rees & Abbott per Buller J. —— This rule is clearly established by the above and other authorities collected in a note of Mr. Searjeant Williams to the case of Cabell & Vaughan 1. Saund. 2916.

Now, nothing is more clear in the Law of this Country than that an action may be brought by the Creditor

Creditor against one, several or all of his joint, several debtors at his option.

" The effects of solidity between several debt-
" ors are 1. That the Creditor may recover from
" which of the debtors he pleases by action if the
" debt lies only in action, or by distress if it lies
" in Execution, the whole that is due ; this is a
" necessary consequence of each of the debtors
" being such for the whole" a little lower down
" observe," that the choice which the Creditor
" makes of one of the debtors against whom he
" exercises his pursuits does not liberate the others
" until he is paid : he may discontinue his pur-
" suits against the first, and proceed against the
" others ; or if he pleases he may proceed against
" them all at the same time, l. 28 *Cod. de Fedes.*"
Evans Poth. Obl. N. 270. I. Authorities might be multiplied without end to the same effect.

The whole of the doctrine of Joinder as treated in the English Law Books is unknown to the Law of this Country.

But 2.—If the Law of England be taken as the rule of decision, then it was the duty of the Defendants to have filed a Plea in abatement, or as it is here called a peremptory exception to the form. He cannot avail himself of this matter under the present Plea, which is a Plea to the merits. By the Law of this Country, matters touching the form of the action and those relating to the merits of the demand, are carefully distinguished, and the former disposed of before proceeding to the latter. Indeed this is a rule of sound sense which obtains

obtains no less in the Law of England than in the Civil and French Laws.

Over and above these fatal objections, the Plea is not made out in Evidence. The alledged partnership was in the cognisance of the Defendants. It was their business to offer the best Evidence that the nature of the case admitted of—such as the articles of Co-partnership—the books of the Co-partnership—evidence of public and unequivocal acts done by Annett as Co-partner in this particular trade, The only Evidence that the Defendants offer is that of hearsay. They carry on various branches of Trade at Quebec and at Gaspé. Is Annett a partner with the Defendants *universorum bonorum ?* If not, and that he is not, is manifest from the Judgment in other Cases which were filed at the Trial, in two whereof his name is not at all included, and on the other his name having been erroneously introduced, he obtained relief in the Court of Appeals by a judgement of this Court, which had awarded judgment as well against the said Annett as others, the Defendants; then, in which of the particular trades and business of the said Defendants, had the said Annett an interest ? had he any interest in the transactions which constitute the subject matter of the present contestation ? If the Defendants refer to the instrument which has been impugned in the present Suit, it will be shown when we come to the consideration of the Plea thereby pleaded, that this instrument is null and void, and can therefore not be evidence, for or against any of the parties to this Suit. *Fides Scripturæ indivisibilis est.* The Plaintiff knew the Defendants at Quebec only, and the

the simple inquiry is whether the Evidence in this Suit would be sufficient to charge the Defendants in the present action if he had been made a party to it.

The third Plea of the Defendants being founded entirely upon the alledged deed, stated to have been executed by the Plaintiff and other Creditors of the Defendants, to and in favor of the Defendants, granting unto them a term of payment, it is here that the inquiry arises, whether the Plaintiff has succeeded in establishing the falsity and nullity of that instrument, under the incidental issue on the *Inscription en faux.*

Upon the sanctity of notarial instruments depends the lands and goods of the people of this Province. Whatever in the slightest degree touches their purity, tends to render property precarious, the administration of the Laws uncertain, and all the acts of civil life insecure and fluctuating. Where the Notary violates his duty direct and positive testimony cannot be expected, presumptive evidence can alone be resorted to, for in proportion to the dangerous consequences of the offence, and to the temptations for committing it, will be the care and precautions taken for its concealment.

Upon this occasion the presumptions are so weighty and multiplied, as to be equal to the most direct evidence.

The first presumption is derived from the difference of the colour of the Ink with which words are obliterated and added, and that with which the body

body of the Instrument is written, the former being much fresher than the latter. *Secunda est Conjectura* (says Menochius) *quando adest apostilla diversi atramenti in loco substantiali ipsius Scripturæ. Ita Anchar. in Cons.* 431. *Col.* 2. *Vers. descendo. Ruinus in* Cons. 68. n 5. lib. 4. *Cur. jun. in Cons.* 52, *infi: Parisius in Cons.* 28. *nu.* 1. *lib.* 2. *Soc. Jun. in Cons.* 41, *numb.* 7. *lib.* 1. *& Crau. in Cons.* 134, 27, *quos Secutus sum in Cons.* 199 *n.* 8, *lib.* 2. *Et diversitatem atramenti cum alia conjectura arguere falsitatem decidit Rota in decis.* 137 *in Secunda parte.*

Menochius de Presumptionibus
lib. 5, *Pres.* 20. *s.* 8 *&* 9.

The second presumption is derived from the circumstance of important parts of the instrument having been obliterated.

These are 1. The names of divers persons who purported to be parties to the said instrument, consisting of as many as four names.

2. The sum of money for which the instrument purported to have been originally drawn.

Idem est (Says *Menochuis*) *quando acta publicata sunt cancellata*—Bal. a Cons. 320—*Marcius* in 9, 151—Crau. in Cons.

That these are material parts of the instrument, it will be necessary under another branch of this enquiry to establish.

The third presumption is derived from the cir-

" cums-

cumstance of the substitution of a principal sum in the body of the instrument, different from that which was originally written, and this in a hand writing different from that of the body of the instrument, and also from that of the Notary.

Et quando apostilla est facta diversa manu quod fidem non faciat copiose replicat Ruinus, Menoch *Ib.*

The fourth presumption is derived from the circumstance that the number of words which are stated at the end of the instrument to have been obliterated, are partly written between the lines not in the margin with the initials of the parties subscribed as is customary, when it becomes necessary to write out of the ordinary lines, and that these words, are written in ink different from that of the body of the instrument and of the same same shade and freshness as that with which the obliterations throughout the instrument were made. *Ii sane scripserunt* (says *Menochius,* whom we are obliged again to cite,) *apostillam diversi atrimenti non arguere falsitatem : sed solum quando apparet factam diversa, manu & non observatis Jure requisitis. Idem sensit Curtius Jun. in Con.* 145.—*Menoch* ibid.

In stating the above as presumptions only, it is conceived that the case is put weaker than it really stands.

The instrument it is manifest by inspection has been altered.

It is for the party producing it to shew how it has

has been altered, and that it was done with the knowledge of the Plaintiff and previous to his signature.

This could only be done, and is uniformly done, by causing the party who signs at the foot of the instrument to sign his initials to whatever is written in the margin;—to write in the margin whatever does not come into the ordinary lines,—" in other words to have no interlineation,"—and to specify particularly in the body of the instrument, whatever has been obliterated.

If to all this be added the direct testimony of divers of the Witnesses examined in the Cause, it seems impossible to entertain any doubts of the instrument having been falsified and fabricated.

But the Defendants themselves in their answer to the *Moyens de faux*, almost admit the alterations to have been made, and insist that they are immaterial. They pray not that the *Moyens de faux* be overruled, as *false*, but only *be declared irrelevant and altogether insufficient.*

The instrument in question until it had received the Signatures of each and every the persons who purported to be parties thereto, was merely an inchoate and imperfect instrument conferring no rights and creating no obligations.

This would have been true if the instrument had been one *sous seing privé*, and *à fortiori* must be so as to a notarial instrument. " Where there is an instrument (says Pothier Obl. n. 11,) under private

 " Si-

" Signatures which has not received its intire per-
" fection by the Signatures of all the parties, some
" of them having withdrawn without Signing,
" those who have Signed may recede, and are al-
" lowed to alledge, that on entering into the a-
" greement, they intended it should depend up-
" on the entire completion of the instrument.—
" Upon this principle the sale of an office made
" by a widow as well in her own name as in the
" character of Guardian to her Son, who was a Mi-
" nor, was declared imperfect and the person
" who had agreed for the purchase was discharg-
" ed, bécause the instrument had not received
" its completion by the Signature of the Curator
" of the Minor, who was named in it, as assenting
" on behalf of the Minor *though that was unneces-*
" *sary.*"

By obliterating the names of the parties which were in the body of the instrument when the Plaintiff Signed it, and giving a certified copy of it without any notice of those parties, the Notary gave to an instrument inchoate and imperfect, the outward form and figure, and with it the substance of an instrument, perfect and obligatory, upon all the parties thereto.

There is no difference between the rendering of an instrument perfect, and binding upon the parties by obliterating words, or producing the same effect by adding words.

In either case the instrument is not that which the party executed or commenced the execution of.

It is then not a *true* but a *false* instrument.

Its validity or invalidity is made to depend not upon the will and act of the parties thereto, but upon the will and act of the Notary, before whom the same is executed.

Whilst these names remained in the body of the instrument, the Plaintiff was not bound except conditionally, and the condition was that all the other creditors should sign. The act of the Notary alone has converted this conditional obligation into an absolute one, and this without the consent of the party to be bound–Can this be Law!

But supposing this Instrument to be a good and valid one, it forms no bar to the Plaintiff's action.

The Defendants being indebted to the Plaintiff grant their obligation for the amount thereof payable in two equal annual Sums of money, and James McCallum becomes surety for the fulfillment of this engagement.

Two days subsequent to this the Defendants make their note of hand for the same sum payable in *one* year.

This note is in the nature of a *Pactum Constitutæ pecuniæ* And there can be no doubt, that it was competent to the Defendants thereby to abridge the term of payment.

By the Law of England if a Bond be taken for a simple Contract debt the latter is merged

ged in the former, but the converse of this proposition is not true. Nor is it believed that this is a rule of the Law of Canada. It will be for the Defendants to shew that it is.

It is true that if all the Creditors of an insolvent, consent to accept a Composition for their respective demands upon an assignment of his effects by a deed of Trust, to which they are all parties, and one of them before he executes, obtain from the insolvent a promissory note for the residue of his demand, by refusing to execute till such note be made, the note is void in Law, as a fraud on the rest of his Creditors. It is also true that the decisions of the English Courts upon this Subject, have been held to be Law in this Country, (Blackwood & Chinic K. B. Quebec and in Appeal.)

But the Defendant's Plea contains no averment of a fraud of this nature. And the evidence excludes every idea of such a fraud having been even contemplated still less carried into effect.

For the Defendants;

It was contended that the Plaintiff having taken two Securities for his debt namely, a Notarial Obligation of 17th November 1819, and the promissory note (upon which the present action had been instituted,) of the 19th of the same month, was bound to proceed upon the higher. That the promissory note could only be considered as a *Collateral* or double security. No Novation had taken place, because such is never presumed unless expressly stipulated by the parties. The former

former obligation was therefore not extinguished by the promissory note in question, which seems to have been intended only to abridge the delay granted by the first obligation, for there is no dispute about the identity of the debt for which these acknowledgments were given. If an extinguishment of the former debt and a Novation had been intended, Mr. Arnold would have discharged the Notarial Obligation of the 17th November, which he might have done by calling upon the Notary before whom it had been passed, and entering satisfaction on the original minute. Nothing of this kind had been done or spoken of, if any thing of the kind had in fact taken place, the Plaintiff was bound to make it apparent, otherwise the Law was opposed to his recovery of a Judgment for a debt upon a minor security, while he retained in his pocket a higher one, and upon which at some future period the Defendant might experience trouble. A Judgment is the highest security which the Law can give to a Creditor. To obtain this he must bring in and relinquish, as it were in exchange for it, all others. This cannot more effectually be done than by proceeding upon the highes the holds, in which all others of an inferior nature are merged.

Secondly.—If the objection above taken were even overlooked, the omission to join all the Defendants must be fatal, the Defendants having taken advantage of the omission by their Temporary Exception or Plea in Abatement.—(Rice vs Shute 5 Burr,)—The Debt for the recovery whereof this Action had been brought, was a Copartnership debt, and the Copartners were *solidai-*

dairement bound.—The Plaintiff might therefore at his own option sue them all separately by separate actions, or he might sue them *all* in one action, But the obligation being joint and several *(solidaire)* must necessarily be treated as wholly joint or wholly separate, no action being maintainable against two or more of a greater number of *Co-obligés solidaires* (Evan's translation of Pothier, vol. 2, page 62.) In this instance he *professes* to treat it as *joint* and to sue all the *Co-obligés solidaires* namely, John Boyle, George Boyle, James Boyle, aud Felix Boyle, as constituting the firm of John Boyle & Brothers, whereas there is Evidence that the firm consists of those persons and of *an another person*, namely, Richard Annett, their brother in law, and also that the Plaintiff was *conusant*, that the said Richard Annett was a partner in that firm. Further if the Plaintiff had chosen to treat the obligation as *several*, and to have proceeded but against one of the partners, still it would have been incumbent upon him to declare upon it properly, by naming all the persons constituting the firm, for the debts of which he was sued, it being essential, that the Defendant should know the quality in which he was summoned, his liability by reason of that quality, and his recourse in consequence of it. This would equally hold were it even lawful for the Defendants to sue two or more of a greater number of joint and several Debtors. In actions by or against several persons, whose interest and qualities are the same, each of them, must be named without indicating them by the vague expression of Copartners *Consors*. In this case the Plaintiff had erred in two ways; first in *professing*

to

to sue *all* the Copartners in the firm of John Boyle and Brothers, he had in reality not done so, having only sued four out of five of them— Secondly supposing that by Law it was competent for him to take his recourse against any *four* out of the five, still he had omitted to define the firm with proper precision, by not naming *all* the persons who composed it, which is essential, it being only as partner of *all* the persons constituting the firm, that the liability to answer for its debts is incurred. The omission of a Copartner might cause the Defendants much inconvenience. They might set off against this Action a debt due to him by the Plaintiff. He might even have a discharge. No matter what might be the Defendant's motive for insisting that the fifth Copartner be put in Cause—this they were not now bound to explain. It was a legal right which they thought proper to insist upon, probably for good reasons and insisting upon it, the advantage could not legally be refused them.—Finally, with respect to the issue raised upon the *inscription en faux*, there is in fact no evidence or record, that the obliterations or the original Minute of the Notary, filed in Court, took place subsequent to it's execution by Arnold. The impropriety of the least obliteration of an authentic act after its execution, will not admit of an argument, but there may be cases in which it may not only be excusable, but even proper. In this instance admitting such to have been the Case, yet there is no *faux* in the act with respect to the Plaintiff, nor does his interest in the least suffer, his security not being by it in the least altered or diminished. This so happens from the peculiar form of the Instrument, in which

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there are as many distinct and independant acknowledgments, as there were Creditors, each acknowledgment or obligation, totally independent of the other. So that if any number of the Creditors had refused to accede to the simple terms of the instrument, the obliteration of their names, and the sums due to them respectively, so far from operating any injury to those who had become parties to it, became even the duty of the Notary in order that the names of those persons *who were no parties to the act, should not stand upon the face of it, as if they were so.*

The Plaintiff's Counsel was heard in reply. And on the 17th of April 1822 the Court pronounced the following Judgment.

APRIL 17th 1822.

LA Cour après mure délibération sur la demande en faux incidente en cette cause, la rejette avec dépens.

La Cour faisant droit sur les issues levés et parfaits par les plaidoyeries des parties, sur la demande principale, déboute ladite demande principale, quant à présent, avec dépens.

La Cour sur la motion de Mtre. CHRISTIE, Procureur des Défendeurs, lui accorde distraction de frais.

The Honourable the Chief Justice stated the reasons of the Court, the heads of which are as follow :

That the present Case embraced several questions, some of fact, others of Law. That the facts were simple, the action was upon a note of hand, and one of the Pleas

Pleas that a higher security had been taken—This Plea was founded upon a Notarial Instrument which had been impeached by an *Inscription en faux*, and the first inquiry would be concerning that inscription—the court could not see that any erasure had been made of a nature to render the Notary responsible. The Boyles appeared to have been insolvent. An agreement is prepared and the act left at a Notary's for Signature. Apparently some mistake had taken place. Some of the Creditors did not choose to come into the arrangement. The Notary strikes out the names of those who did not execute the instrument, and makes the deed conformable to the facts of the case. Perhaps it had been better if he had taken another course, and had not given any copy until a *Compulsoire*; but that the Notary had not acted fraudulently.

The inscription *en faux* was therefore dismissed, and the next enquiry would be what was the effect of this instrument. On the second day after the Execution of this instrument the note of hand, in question in this cause, is given.—The Plaintiff alledges Novation, which compels him to sue on the note of hand. There is a wide distinction between Novation, as between Debtor and Creditor and as between them and surety. Perhaps this note might discharge M'Callum, but is the debt discharged as between Debtor and Creditor?

The note of hand and the instrument executed before the Notary are for the same debt with time for payment. The Court took it up as if the note were mere matter of evidence. The Court thought that the action could not be supported, and this on the ground that the fifth partner had not been made a partner to the suit. Whether the instrument executed before the Notary carried with it an hypothec or not as higher security, it was evidence of the state of the facts, and shews the admission by the Plaintiff of a fifth partner in the firm of John Boyle & Brothers. A question had been made whether this should be considered as a question of Evidence and whether it was to be delivered by the French or by the English Law. But by any Law it was a matter of fact pleaded by exception and the Court must notice it. The authorities all show that all the parties must be included—Denisart *verbo Consors** is express. What was the issue? the Plaintiff says, *four* only are responsible, the Defendant denies this and adverts that the Contract was executed with *five*. That upon this fact the instrument was conclusive; and though it were invalid it would be as good Evidence of the admission of the parties, as when a Judgement is set aside the Evidenc still stands good.

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* Une assignation qui seroit donnée à la requête d'un particulier dénommé, et de ses *Consors* qui ne seroient pas nommés, seroit nulle, relativement à ceux qui ne seroient désignés que sous la qualité de *Consors*.

Il faut pourtant excepter de cette règle, les assignations qui se donnent à nn des intéressés dans une société de commerce, tant pour lui que pour sa compagnie relativement à la société.

L. C. Denisart verbo Consors Tom. 5, p. 337.

APPENDIX.

Province of Lower-Canada, }
DISTRICT OF QUEBEC. }

In the King's Bench.

No. 34. GEORGE ARNOLD, Plaintiff.

vs.

JOHN BOYLE and al. : Defdts.

JAMES ROSS of the City of Quebec, Merchant, being duly sworn doth depose and say—

I am aged about fifty years ; I know two of the Defendants in this cause, and also the Plaintiff, I am not related to either of them, nor interested in the cause of this suit—I am acquainted with John Boyle & George Boyle the other two Defendants, I am not acquainted with them personally. The Defendants are reputed co-partners and traders, carrying on the whaling business at Gaspé, I have had commercial transactions with them from 1810 to 1816. In the year 1819, the Defendants were indebted to me in the sum of about or better than one hundred pounds Currency. In the year 1819 or 1820, George Boyle one of the Defendants in this cause, applied to me to suspend the execution of a Judgement which I had obtained against the Defendants. I never authorised the insertion of my name as one of the parties to an obligation or instrument executed on the 17th of November, 1819, before M'Pherson and confrere, Notaries, between John Boyle and Brothers, on the one part, and the Creditors of John Boyle and Brothers

thers on the other part. I think that the Notary applied to me to sign that instrument, and if he did so, I declined signing it.

Cross examined.

The name of the firm of the Boyles has always been entered in my books under the name of John Boyle and Brothers, and in that name the bill of parcels in my dealing with them have been made out—I never knew Annett, and one and the principal cause why I would not sign the instrument mentioned, was because I had then a Judgment against the defendants, which I considered better security than offered by the terms of the said Instrument.

The foregoing deposition having been duly read the deponent persisted therein, & signed the same.

(Signed) JAMES ROSS.

Sworn and examined this 14th February 1822. sitting Court.

(Signed) PERRAULT & ROSS.

JEAN HUOT of the City of Quebec, aged 35 years, being duly sworn doth depose and say, I am a creditor of the defendants in this cause, I was present at the meeting of their creditors at the time of the imprisonment of George Boyle one of the defendants, at the suit of the Plaintiff in this cause. It is true that I am bound to remit to the securities in this cause, a dividend of from seven to eight pounds, should the Plaintiff succeed in his present demand.

And

And the said John Huot being duly sworn upon the Holy Evangelists, doth depose and say—

I know John Boyle one of the Defendants in this cause. I cannot possitively say that I am personally acquainted with the other Defendants. I know the Plaintiff. I am not related to either of the parties in this cause nor interested in the event of this suit, otherwise than in the manner I have already declared. In the year 1819 I was one of the Creditors of the Defendants in this cause, they requested of their creditors a delay of payment—Mr. M'Pherson came to me to obtain my signature to an act of compromise between the Creditors and the Defendants I signed it. The paper written marked A. A. No. 34, and now actually exhibited as the act of compromise of which I have spoken.

The foregoing deposition having been duly read the deponent persists therein and signed the same.

(Signed) JOHN HUOT.

Sworn and Examined in open Court, February, 1822.

(Signed) PERRAULT & ROSS.

COLIN M'CALLUM of the City of Quebec, Clerk, aged twenty-two years being duly sworn doth depose and say—

I know the Plaintiff and John, George, and Felix Boyle three of the Defendants in this Cause, I do not know the other Defendant. I am not related to either of the parties in this suit, nor interested in the event of this suit. I am Clerk to James M'Callum and Company, carrying on gene-

general trade. That firm has been in the habit of dealing with the Defendants under the firm of John Boyle and Brothers for a number of years, longer than I can recollect. The accounts with them are entered in Mr. M'Callum & Co's Books, under that title. I believe that under that cause the four brothers Boyles, the Defendants in this Cause, were Copartners in trade and business, a certain degree of friendship existed between the two firms of M'Callum & Co. and John Boyle & Brothers. The firm of M'Callum & Co. engaged to become security, in 1819, for the Defendant's to their Creditors, upon their giving Mortgages upon all their Property, and consigning their goods to the House of Mr. M'Callum & Co. from the Bay. The Spring following they did consign a part in part payment for the supplies they had received previously. The House of James M'Callum & Co. have received no consignment from John Boyle and Brothers, since that period. In the Fall of 1820 they come up with a quantity of Oil which the House of James M'Callum & Co. expected to receive. When a conversation took place in my presence between John M'Callum and George Boyle, when M'Callum asked if James M'Callum & Co. were not to have his oil from them, remarking at the same time that they, James M'Callum & Co. had gone security for them, to which Boyle observed that the act or instrument, had not been executed, and therefore that M'Callum & Co. were liberated from their security. I cannot say that it was about the time of executing this instrument, that there was some mention made of one Annett, or since, but I had never heard of him before.

before. I haveno knowledge that there had been any application by the creditors of John Boyle and Brothers, made to the House of James M'Callum & Co. for the payment of any sum whatsoever, on account of the said security.

Cross examined.

The firm is entered on the books of James M'-Callum & Co. under the name of John Boyle & Brothers. I was not acquainted with all the persons composing the firm of John Boyle & Brothers. I know three of them and have heard of a fourth Boyle, and a fourth partner, but I do not know him, I never heard of a fifth partner until latterly, I have a knowledge of my father James M'Callum having signed an Instrument purporting to be security. The piece marked " A. A. No. 34." is the Instrument I speak of. I was present when he signed. I do not know that the Instrument has been since cancelled.

Re-examined in Chief.

The different obliterations upon that Instrument or the words thereon obliterated, I think, to the best of my knowledge were not so obliterated at the time James M'Callum signed. The words " six hundred and eighty six pounds fifteen shil- " lings currency," upon the fourth page of the said Instrument were not to the best of my belief, written there at the time, James M'Callum, so signed it, but the sum thereon expressed was much larger, I think the words written under " eleven hundred and thirty pounds seven shillings and one

half penny," were the words which were thereon written, at the time it was so signed.

Re-cross examined,

I did not read the instrument particularly at the time of its being so signed—I merely looked at it while it was signing—It did not strike my attention that the name of Annett was in the *Acte*—I observed my father put his initials to most of the marginal notes upon the said Instrument—I believe the piece marked " A. A. No. 34" to be the minute of the said Instrument, which was by my father so signed, I believed the signature of my father was the first and the only signature to the Instrument at the time he so signed it—I did not see the Plaintiff sign that Instrument, and do not know in what state the *Acte* was when he signed it.

By the permission of the Court :

Q. Do you know what persons compose the firm of John Boyle and Brothers?

A. To the best of my knowledge it is composed of John Boyle, George Boyle, Felix Boyle, and James Boyle.

The foregoing deposition having been duly read, the Deponent persists therein and signed the same.

(Signed) COLIN M'CALLUM.

Sworn in open Court, 14th February 1822,

(Signed) PERRAULT & ROSS.

MARTIN SHEPPARD of the City of Quebec, Student *en Droit*, aged nineteen years, being duly sworn, doth depose and say:

I know the Plaintiff, and John George and Felix Boyle, three of the Defendants in this cause; I do not know the other Defendant; I am not interested in the event of this cause; I am a Clerk in the Office of Mr. M'Pherson, a Notary Public in this City; I entered there in 1820; I know the hand writing of the said M'Pherson, having frequently seen him write and sign. The words "one hundred and thirty-three" written in and above the last line of the page marked Z. of the piece marked "A. A. No. 34," are to the best of my belief of the proper hand writing of the said Notary, Thomas Laughlin M'Pherson.

The foregoing deposition having been duly read. the Deponent persists therein, and signed the same.

(Signed) M. SHEPPARD.

Sworn in open Court, 14th February 1822.

(Signed) PERRAULT & ROSS.

GEORGE WHITFIELD of the City of Quebec, Clerk, aged 32, being duly sworn, doth depose and say:

I know the parties in this cause; I am not related to, or in the service of either of them; I know John Boyle, George Boyle, and Felix Boyle, three of the Defendants in this cause; I understand and always understood that the firm of John Boyle and Brothers, was composed

of the four brothers, Boyles; I know of no other Partner to that firm; I have been for some years in the employ of John White and Co; they have had considerable dealings with the firm of John Boyle and Brothers, for five or six years past; I never knew that Richard Annett was a member of that Firm.

Cross-Examined,

I have been upwards of eight years in the employment of John White & Co. and since the dissolution of that Firm I have remained in the employ of Mr. Languedoc. They have not continued to deal with John Boyle and Brothers since the Fall of 1819, when the accounts were cleared off.

The foregoing deposition having been duly read, the Deponent persisted therein, and signed the same.

(Signed) G. W. WHITFIELD.

Sworn in open Court 14th Feby. 1822.

(Signed) PERRAULT & ROSS.

JOHN RORERT ROBINSON, Clerk to the Plaintiff, aged 18 years, being duly sworn, doth depose and say:

I know the Plaintiff, and three of the Defendants, John, George, and Felix Boyle; I do not know the other Defendant; I am not interested in the event of the suit; I am a Clerk to the Plaintiff,

Plaintiff, and have been for about four years and a half; I attend his shop and make entries in his book; I have seen the three Defendants at the Plaintiff's; I have seen the account on the Plaintiff's Books of the Plaintiff against the Defendants, copies of which accounts have been delivered to the Defendants several times, for the payment of which is formed the consideration of the present demand; I know the hand writing of John Boyle, one of the Defendants in this cause, also the signature of Edward Glackemeyer, Notary, having frequently seen them write and sign their names; the signature "John Boyle and Brothers" to the exhibit marked A. to me now shewn, and in this cause fyled, is the proper hand writing of the said John Boyle, the signature "Ed. Glackemeyer," N. P. to the same exhibit, is the hand writing of the said Edward Glackemeyer, and was written in my presence, and the signature of "John Robt. Robinson" thereupon, is my proper hand writing, and written thereupon at the time of the signing of the same, by the said Boyle and Glackemeyer; previous to the making of that note, there had been a running account between the parties, which extended as far back as the year 1813, and continued down through the years 1814, 1815, 1816, 1817, 1818, 1819, and it was in liquidation of that account, that the said note was given. The charges in the Plaintiff's Books, were entered under the title of John Boyle and Brothers; I never heard of the name of Annett, as being one of the co-partners of that firm.

Cross

Cross examined.

The account rendered in 1819, contained an account of all the dealings with the Plaintiff up to that time, and the note was for the whole amount due at that time.

The foregoing deposition having been duly read, the Deponent persists therein, and signed the same.

(Signed) JOHN R. ROBINSON.

Sworn in open Court, 14th Feby. 1822.

(Signed) PERRAULT & ROSS.

JOHN MOUNT of the City of Quebec, aged 28 years, a Clerk, being duly sworn, doth depose and say.

I know the Plaintiff, and John, George and Felix Boyle, three of the Defendants in this cause; I do not know the other Defendant; I am not related to either of them, nor interested in the event of this suit; I have known the Boyles since 1814; I am a Clerk in the House of James Ross & Co. It appears from the Books of that Firm that they have had dealings with the Defendants from the year 1810 down to 1816; I never heard that during that period any other persons but John Boyle & Brothers were the co-partners of the Firm of John Boyle and Brothers.

Cross Examined.

What persons may belong to the concern at Gas-

Gaspé, I do not know—I understood the principal establishment of that firm to be at or near Gaspé.

The foregoing deposition having been duly read, the deponent persists therein and signed the same.

(Signed) JOHN MOUNT.

Sworn in open Court 15th Feby. 1822.

(Signed) PERRAULT & ROSS.

RICHARD DALLOW of the City of Quebec, Tailor, aged 43, being duly sworn doth depose and say.

I know the Plaintiff and John and George Boyle, but I do not know the other Boyles, I am not related to either of them nor interested in the event of this suit. I have known the two Boyles since 1809, I never understood that there were any other persons partners in the firm of John Boyle & Brothers, than the said John Boyleand his three Brothers until and after the said George Boyle was let out of prison after having been arrested by the Plaintiff—George Boyle told me then, that he had been confined at the suit of the Plaintiff, but that the Plaintiff would probably lose his cause, as he had omitted to put into the *demande* one of the co-partners—he told me that one Richard Annett was a partner of the firm of John Boyle and Brothers—I never heard before of his being a co-partner of that firm—I had been in the habit frequently of seeing the Messrs. John & Geo. Boyle

Boyle; that was the only objection which George Boyle stated to me relative to the action.

Cross examined

I have never had any dealings with the Messrs. Boyles and co-partners, but on their separate and private accounts only, and that too, only in articles of my line of business as Merchant Tailor.—I do not know that James Boyle and Felix Boyle belonged to the firm.—I know Annett.

The foregoing deposition having been duly read, the deponent persists therein, and signed the same.

(Signed) RICHARD DALLOW.

Sworn in open Court 15th Feby. 1822.

(Signed) PERRAULT & ROSS.

E. B. LINDSAY, of the City of Quebec, Student *en Droit*, aged 23 years, being duly sworn, doth depose and say.

I know the Plaintiff and John Boyle, one of the other Defendants in this cause—I do not know the other Defendants in this cause—I am not related to either of them, nor interested in the event of this suit—I am a Student *en Droit* at Lauchlin Thomas M'Pherson's, Esquire, a Notary Public, residing in the City of Quebec, The body of the piece now shewn to me, and marked A. A. No. 34, is not in my hand writing—I have frequently seen it in the office of M'Pherson—I saw

saw it shortly after it was signed by the parties which appear to be annexed thereto; I think it was in the autumn of 1819—I have no knowledge that any copy of that instrument was given earlier than the winter of 1820-1821. I think that I was not present when any of the parties to the said instrument signed it—I looked through it sufficiently to say that it was signed, but I do not recollect whether I noticed that there were an unusual number of obliterations in the said instrument at the time or not.—The words " one hundred and thirty-three, " in and above the last line of the page marked Z. of the same piece is in the hand writing of M'Pherson, the words " six hundred and eighty six pounds fifteen " on the fourth page of the said instrument are in my hand writing; the following word is in the hand writing of M'Pherson.—The body of that instrument is in the hand writing of one Dumais, who was then a Clerk in the office.—I think I saw the instrument while it was drafting; I think that I saw it lying every day upon the desk, until the signatures to it were completed; I am certain that I saw the signatures, but am not positive whether I read them or not, but I think I did; I cannot state the probable time that may have elapsed from the time of drawing the instrument, to that of signing it; I do not recollect of seeing any of the parties sign that instrument. The figures in the fourth page of the said instrument " £686 15 0. " are of my hand writing.

Cross examined.

I think that there were about three weeks from

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the time I saw the instrument drafting to the time that I saw the signatures to it ; I do not recollect that at the time I saw the instrument signed, there was an impression on my mind that there were any unusual obliterations on it. I am certain that I saw the present obliterations on the instrument the first time I saw it after it was signed, which might have been one day or it may have been three weeks after it was signed ; I made the alteration which is in my hand writing in the presence of M'Pherson.

Re-examined in Chief.

I did not observe what number of obliterations, or whether there were any or not in the fifth page of the said instrument ; I do not recollect on which page the obliterations were ; I do not recollect having read the instrument all over the first time ; I saw it after it was signed.

Q. What part of the instrument did you read ?

A. I do not recollect what part ; I did not count the number of words obliterated ; I do not know the number of lines obliterated on the instrument, as near as I recollect, the obliterations are of the names of some persons who are inscribed in the body of the instrument.

Re-examined.

The instrument being now shown to me, I think from the general appearance of it. that it is now

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in the same state that it was when I first saw it with the signatures to it in the autumn of 1819.

The foregoing deposition having been duly read, the Deponent persists therein, and signed the same.

(Signed) E. B. LINDSAY.

Sworn in open Court, 15th February 1822.

(Signed) PERRAULT & ROSS.

BENJAMIN RACEY, of the City of Quebec, merchant, aged 32, being duly sworn, doth depose and say.

I know the Plaintiff, and John and George Boyle, two of the Defendants in this cause; I do not know the other Defendants; I am not related to either of the parties nor interested in the event of this suit.—I know the firm of John Boyle & Brothers from about the year 1816; I never understood that any persons were co-partners in that firm except John Boyle and his brothers.

The foregoing deposition having been duly read, the deponent persists therein, and signed the same.

(Signed) BENJAMIN RACEY.

Sworn in open Court, 15th February 1822.

(Signed) PERRAULT & ROSS.

ROBERT RICHARDSON of the City of Quebec, merchant, aged 29 years, being duly sworn, doth depose and say.

I know the Plaintiff and John and George Boyle two of the Defendants in this cause; I do not know the other Defendant; I am not related to either of them, but consider myself interested in the event of their suit, being one of the creditors of the Defendant in this cause, and as a counter security for the Defendants, shall be obliged to refund a certain dividend which I have received from them in part, as satisfaction of my claim against them, should the Plaintiff succeed in this action; I am the same with and am the one mentioned in the piece now shown to me marked "A. A. No. 34," in this cause; I signed that instrument, and therefore consider myself doubly interested in the event of this suit.

The foregoing deposition having been duly read, the deponent persists therein and signed the same.

(Signed) ROBERT RICHARDSON.

Sworn in open Court, 15th February 1822.

(S'gned) PERRAULT & ROSS.

DEFENDANT'S EVIDENCE.

JAMES LAMPRIERE MARETT, Merchant, of the City of Quebec, aged 49 years, being duly sworn, doth depose and say,

I know the Plaintiff and John, George and Felix Boyle three of the Defendants in the cause; I do not know the other Defendants, I am not related to either of them nor interested in the event

vent of this suit; I know also one Richard Annett; I have been in the habit of doing business at the Bay of Gaspé to a considerable extent since the year 1792; I have known the firm of John Boyle and Brothers, since the year 1814; I have dealt with them to a considerable extent; I know that firm to consist of John Boyle, George Boyle, Felix Boyle and James Boyle and the said Richard Annett; and I think it has consisted of these persons since 1814, Annett is a brother in law of the Defendants; he has taken an active part in that firm since I have known him to be of the firm, I think I have seen him in Quebec once or twice, but I do not recollect of having transacted business with him; I have always considered that they were Copartners since 1814, and I dealt with them as such.

Cross examined,

The Boyles, and Annett himself informed me that Annett was a partner of that firm more than three or four years past. I have been in habits of friendship and personal intimacy with the Defendants ever since they were children. I never saw the articles of co-partnership between the Defendants, nor was I ever present at any verbal agreement between them, on that subject, neither do I know the share of each in that co-partnership, nor from what period the co-partnership began, or what is its duration of.—The four Boyles live together with their mother on a farm which I believe is their joint property in Gaspé and is cultivated by them jointly. They build boats & schooners for themselves, fish for the whale, cod-

fish

fish & salmon which is their business. The produce of the fishery is generally brought to Quebec, where they generally provide themselves with their outfits and in purchasing goods, which they take down, and sell to their neighbours. I think the conversation which I have had, that induced me to believe Annett a partner, I had from John and George Boyle and also from Annett. I have not had frequent conversations with those individuals upon that topic. The conversation which I had with them on the subject took place previous to, and more particularly about 1819. They are also employed in the wrecking business. I think the first conversation was in 1814 and am led to think so from the following circumstance, to wit, that they were concerned that year in taking goods out of the Minerva, Jackson master, and from another wreck coming to Mr. Brown, the same year. The Boyles were then in Quebec, and I observed to them and others that it was a pity that they were not there to render assistance to that vessel ; when I was informed that Felix Boyle and Annett were there, and were perfectly able to do what was necessary being the partners of Boyle. I cannot say that it was by Boyle or some other person that this observation was made I understood this myself before that period, and this circumstance brought it to my mind. I Think that I had at different periods from 1814 to 1819, conversations with the Boyles about their copartnership. I have not seen Annett for many years past, I cannot take upon myself to state when the conversation between me and the Boyles about their copartnership took place, but that they more particularly took place in 1819, about

about the time of their difficulties, I cannot say whether they were copartners in any one branch of their business exclusively, or whether they were so in all their business generally. Goods were shipped to John Boyle & Brothers and it is only since the time of their difficulties in 1819, that it has been a matter of more general consideration Annett's being a copartner in that firm; my commercial transactions with that firm, in this firm have always been with George Boyle and the firm of Boyle and Brothers are debited with the accounts of those transactions.

The foregoing deposition having been duly read the deponent persists therein and signed the same

(Signed) JAS. Ls. MARETT.

Sworn in open Court 15th Feby. 1822.

(Signed) PERRAULT & ROSS.

Louis Brulot, of Point Levy, Mariner, aged 31 years being duly sworn, doth depose and say—

I know the parties in this cause I am not related to, nor a servant of any of them, nor interested in the event of this Suit. I know one Richard Annett. I am master of a Schooner belonging to the last witness examined in this cause—I have for the last ten years performed voyages yearly from this to Gaspé. I often saw all the Defendants at Gaspé, and also the said Richard Annett—There were five, John, George, Felix, and James Boyle, and the said Richard Annett, partners there, Mr. Annett told me that he had been in partnership with the Boyles since 1815, and that he was so still

still. That firm has been there generally known for many years and even previously to 1819.—its trade consists in the Whale, Cod, and Salmon Fishery. Mr. Annett in the name of and for the firm, has every year since 1818, put on board of my schooner oil for Quebec, some of which I delivered to the Plaintiff and G. Boyle—I think it was sometime between 1819 and 1820, but I cannot say particularly at what time. I cannot say whether the goods I brought for the Plaintiff were the property of the Defendants or not, but I think that it was Annett who put them on board in the name of the said firm—Annett is a brother in-law of the Messrs. Boyles—The name of the firm below is Boyle & Brothers—Whenever I had goods or letters for that firm I delivered them to either of the parties without distinction—They transact their usual business in the same *chauffaux* and *signeau*, and they have two vessels which go upon the whale fishery—Mr. Annett is in the vessel called the Annabella which belongs to the firm and which I think was built by it.—I was formerly acquainted with Thomas Boyle now actually deceased—I cannot recollect in what year he died—There is no Priest in the District of Gaspé where the defendants live nor was there an English Minister at that place—I do not know whether James Boyle and Felix Boyle were partners of the firm at the time of the decease of Thomas—I do not know whether Annett was then one of their partners, but he has been a partner since 1815—Before the last year, Mr. Annett lived with the Defendants, at least three years to my knowledge.

Cross Examined, An-

Annett, Felix and John Boyle told me last fall and the year before that they were in partnership —I have no knowledge that these Gentlemen ever spoke to me of this before—During three or four years that the vessel whereof I am master has been in that trade, several Gentlemen told me that those Gentlemen were partners—I have no other knowledge of the partnership in question but what I have acquired from hearing as aforesaid—I do not know the proportions which the several partners have in that partnership—The Gentlemen who spoke to me of it, did not say when the firm had commenced nor when it would expire, nor the trade it was to carry, nor did they explain the conditions of such trade, nor the names or firm under which it was carried on—I know that the Schooner Anna-bella belongs to the said Partnership, and I was told so last fall; I do not know that Mr. Annett was a partner of the Messrs. Boyles at Quebec—I do not recollect whether the oil which I delivered to the Plaintiff in 1819 and 1820 came from Messrs. Balnor and Patterson or from Mr. Annett or not, I do not know whether Mr. Annett is interested in the trade which they carry on at Quebec or not.

The foregoing deposition having been duly read the deponent persists therein and signed the same.

(Signed) LOUIS BRULOT.

Sworn and Examined in open Court the 15th February, 1822.

(Signed) PERRAULT & ROSS.

Province du Bas Canada, } *Dans le Banc du Roi,*
District de Quebec. } 19 Février 1820.

James Ross, de la cité, comté et district de Québec, Marchand, faisant commerce sous le nom et raison de James Ross & Co.

Demandeur.

No. 1859. *vs*

John Boyle et George Boyle du district de Gaspé dans la province du Bas Canada, de présent à Québec, marchands, associés,

Défendeurs.

La Cour, après mure délibération sur les productions et preuves du Demandeur en cette cause, vu la demande pour le profit des défauts faute de comparution de la part des défendeurs, demande la permission de procéder *ex parte*, et tout considéré, la Cour a déclaré et déclare les deux défauts faute de comparution bien et valablement obtenus contre les défendeurs, et adjugeant le profit d'iceux, condamne les défaillants à payer au Demandeur la somme de soixante-quatorze livres quatre chellins et sept pences courant, valeur en marchandises, avec intérêt à compter du trois de novembre dernier, jour de la signification de la demande judiciaire, jusqu'au parfait paiement, et les dépens, sauf au dit demandeur son recours, si aucun il a, pour le surplus de sa demande, quand et comme il avisera.

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Province du Bas Canada, } *Dans le Banc du Roi,*
DISTRICT DE QUEBEC. } 19 Février 1820.

JACQUES LEBLOND et
JOSEPH LEBLOND,

vs. *Demandeurs.*

GEORGE BOYLE et JOHN BOYLE,

Défendeurs.

La Cour, après mure délibération sur les productions des demandans en cette cause, vu la demande pour le profit des défauts faute de comparution bien et valablement obtenus contre les défendeurs, et adjugeant le profit d'iceux, condamne les défaillants à payer aux demandeurs la somme de vingt-neuf livres un chellin et demi courant, pour le montant de leur obligation en faveur des demandeurs, passée devant Mtre. Ch. Huot et son confrère notaires à Québec, le seize de novembre mil huit cent dix-huit, avec intérêt à compter de la date d'icelle jusqu'au parfait paiement, et les dépens, sauf aux demandeurs leur recours pour le surplus de leur demande, ainsi qu'ils aviseront.

Province of Lower Canada, }
DISTRICT OF QUEBEC. }

In the King's Bench, 20th day of April 1816,
JOHN DENNOYE' of the City of Quebec, in the County and District of Quebec, Ship Carpenter, *Plaintiff.*

vs.

JOHN BOYLE, GEORGE BOYLE, THOMAS BOYLE and RICHARD ANNETT, all of the Inferior District of Gaspé, in the County of Gaspé,

pé, in the District of Quebec, joint owners of the Schooner Mary Boyle,

Defendants.

La Cour ayant entendu Mtre. Vanfelson Procureur du Demandeur, et Mtre. Christie Procureur de John Boyle, sur les issues levées et parfaites par leurs plaidoyers en cette cause, vu les défauts duement obtenus contre les autres défendeurs et la permission de procéder *exparte*, encore les preuves données de part, et tout considéré, la Cour condamne les défendeurs à payer au demandeur cinquante-neuf livres seize chellins courant, pour les causes mentionnées en la déclaration filée en cette causes avec intérêt à compter du onze de Janvier dernier, jusqu'au parfait paiement, et les dépens.

From the above an Appeal was instituted on the part of Richard Annett one of the Defendants, and on the 29th July 1816, *the following Judgment was given in Appeal.*

Province of Lower-Canada. } COURT OF APPEALS.
29th July, 1816.

RICHARD ANNETT, Applt. *vs.* JOHN DENOYE', Repdt. } THE Court having heard the parties by their Counsel, examined the proceedings of Record, it is considered that the judgment of the Court below be reversed in so far as the said Judgment respects the Appellant ; each party to pay their own cost of this Appeal, and it is ordered that the Record be remitted to the Court below, for such further proceedings, as to Law and Justice may appertain.

By Order of the Court,

(Signed) LOUIS MONTIZAMBERT,
C. C. A.

PROVINCE OF
LOWER-CANADA.

IN APPEAL.

GEORGE ARNOLD,

(PLAINTIFF IN THE COURT BELOW.)

Appellant.

AND

JOHN BOYLE AND OTHERS

(DEFENDANTS IN THE COURT BELOW,)

Respondents.

UPON the return of the Writ of Appeal in the above Cause, it appeared that the original Instrument executed before M'Pherson & Confrère, Notaries, on the 17th day of November 1819, between the Respondents and certain of their Creditors, had not been returned—Whereupon the Appellant alledged a diminution, and obtained a Rule to shew cause why the Record should not be compleated—In support of this application, he filed the following Letters:

Quebec, 30th May, 1822.

Gentlemen,

Being desirous of obtaining a *fac simile* of the original Instrument, executed by certain of the Creditors of Messrs. John Boyle and Brothers, and filed in the cause of Arnold against Boyle and others, I would be obliged to you to inform me at what time the person whom I have employed

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can most conveniently to yourselves perform this work under your own eyes.

Gentlemen, I am,

Your obedient Servant.

(Signed) A. STUART.

Messrs. PERRAULT & ROSS,
Prothonotaries of the Court of
King's Bench.

(Copy of Answer.)

Sir,

In answer to your note of the 30th instant relative to the obtaining a *fac simile* of the original Instrument, executed by certain of the Creditors of Messrs. John Boyle and Brothers, and filed in the cause of Arnold against Boyle and others, we have to observe for your information, that we have applied to the Honorable the Chief Justice, previous to the receipt of that note, to know if we could, (it having been suggested to us by the Counsel for the Defendants in that cause that we could not) allow the person whom you have employed, or any other person to take a *fac simile*, or even an ordinary Copy of that Instrument.

His Honor is of opinion that he has not the right to grant that liberty to any one without the consent of the Notary before whom that Instrument was excuted, and has directed us accordingly not to allow it to be done. We will however submit your note to the Court of King's Bench to-

to-morrow, that you may have the determination of the Court upon the contents of that application.

We have the honor to be

Your, very humble Servants.

(Signed) PERRAULT & ROSS.
P. K. B.

To Andrew Stuart, Esqr.
Atty. & Counsel at Law.
Quebec, 31st May, 1822.

This Rule was made absolute by Consent—and the Record having been compleated, the Cause came on to be heard in the Term of January 1823.

For the Appellant it was said :—

That since the rendering of the Judgment of the Court below, the Cause had assumed a much higher importance than it had in that Court.—That if the Judgment of that Court remained unimpeached, a principle with its Sanction, would go abroad to the public, which it was apprehended would render all Notarial Titles and Instruments uncertain, and thereby destroy all security for property.

That the Judgment of the Court below was a Judgment upon two several Issues, to which the Counsel would apply themselves severally.

And first—as to the issue upon the truth or falsity of the Instrument, purporting to have been executed before McPherson and Confrère, on the 17th day of November 1819.

After insisting upon the arguments stated in the Court below, it was said, that the Court below had maintained the validity of the instrument on the ground that there had been no fraudulent intention on the part of the Notary, and that the Instrument had been made conformable to the facts of the case.

With all due deference to the Court below, it was the duty of the Counsel here to examine the validity of those reasons.

It was contended, firstly—that there was evidence of an evil intention on the part of the Notary; and secondly—that if no such evil intention existed, still the instrument would not have been the less invalid.

The Evidence of the intentions of men, was to be found in their actions—He who did an illegal action could not be admitted to justify himself in a Court of Justice, upon a Plea of a supposed innocent intention; nor could innocence of intention be supposed in the Notary upon the present occasion, without presuming an ignorance of the Law on his part; and it was an ancient and salutary Maxim of the Law *ignorantia juris neminem excusat.*—That this Maxim which was true even as to the most ignorant Classes of Society, was eminently so upon the present occasion as to the Notary *qui spondebat peritiam Artis suæ.*—If therefore the strongest Evidence had been offered of an innocent intention on the part of the Notary, that evidence would have been counteracted by the above legal *presumptio Juris et de Ju-*

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re, of knowledge of the Law—But when the Court came to look at the Evidence, it would be found that the supposed innocence of the Notary was a gratuitous assumption on the part of the Court below, unsupported by any evidence whatsoever.

But next supposing that innocence of intention had been proved, and that it would have exempted the Notary from any consequences *criminaliter*; could it also have done so *civiliter*? And supposing this also, could it cure the inherrent falsity of the Instrument? and have the effect of substituting in the place of the Instrument which the party *had* signed, another and different Instrument, viz, the altered Instrument, which the party *had not* signed in that shape? And of subjecting the party to obligations under the *latter* Instrument which he was not liable to under the former? And this whilst the other parties to the Instrument were manifestly exonerated from their obligations?

It might be worth while to advert to some authorities of the English Courts upon this head.

" If the seal of any deed be broken off, the deed shall be void. So tho' it be broken off by a stranger, 5 Co. 23 a. 1 Rol 40. Or destroyed by mice before plea, 1 Rol. 40.

So if A and B by deed covenant jointly with divers persons, and the seal of one be broken off, the whole deed shall be void, 5 Co. 23 a.

So if bound in an obligation jointly and severally,

rally, and the seal of one be broken off, R. 2, Lev. 220.

Comyn's Dig. Fait F. 2 A letter of which a considerable part appears obliterated is not evidence.

Per Wilson J. Apud 1 Anst. p. 227.

That authorities might be multiplied to the same end.

But the Instrument carried upon the face of it legal and conclusive evidence of its own falsity. There were words obliterated and interlined, without the Initials of the Parties to verify such obliterations and interlineations.—That this was a legal ground of nullity established by the Arrêt of the Parliament of Paris of the 4th Sept. 1685.

Mr. Le Camus in his *Nouvelle Collection de Jurisprudence* after specifying a variety of formalities, required for the validity of Notarial Instruments, went on to say :—

La plûpart des règles précédentes se trouvent rappelées dans l'Arrêt rendu contre Odompet, Notaire de Noyen, le 4 Septembre 1685, qui en contient en outre, plusieurs dont il n'a pas encore été fait mention. La Cour, &c. " Lui fait défense de faire aucune apostille dans les minutes, comme aussi de raturer, soit les lignes entières, ou des mots, que la radiation ou apostille ne soient approuvées à la marge, l'approbation signée et paraphée dans l'instant, des parties, des Témoins et des

des Notaires; le tout *à peine de nullité* des Actes, de dommages et intérêts, et de 100 Livres d'Amendes.

L. C. Denisart Verb. Acte notarié, §. VII. No. 9.

That upon the above Grounds the Appellant had reason to expect that the Court below would have set aside the Instrument as a falsified Instrument:—but that on the contrary the *Inscription en faux* had been dismissed; thereby virtually declaring the Instrument as altered and changed a good and valid Instrument, and constituting so long as the Judgment remained unreversed a *res Judicata* to that effect, as between these parties.

As to the second issue upon the peremptory Exceptions to the Appellant's action—the Court below had abstained from giving any determination whether the matter was to be regulated by the French or the English Law. Yet this was material—It was *luce clarius* that by the Law of Canada, an action could be brought against one, any, or all of several Debtors *in Solido*—the whole current of authorities of the Civil and French Laws went in this direction, without one solitary exception. The authority cited in the Court below from Pothier was referred to, and the matter gone into at length, for the purpose of shewing that the Rule in England was a rule of Law and not of Evidence; that it was true there had been cited in the Court below, an authority from the Nouvelle Collection de Jurisprudence Verbo "Consors" (Ante P. 27 in Notes)—As establishing

ing a rule that one out of several debtors *in solido* could not be sued alone: but on referring to that authority it would be found that it had not the slightest bearing upon this question; it established the rule that an action brought against A. B. & Company, without naming the persons, comprized under the designation of *Company* was bad, and this manifestly by reason of the uncertainty of the Judgment which would be to be rendered upon such an action. But the authority itself contains a special exception as to Mercantile Companies, anddeclares that action well lies for a partnership debt, against any individual partner, "as well for himself as for his Copartners."

It was also urged that under the Civil Law System, which obtains in this Country as in the Court of Chancery in England, want of sufficient parties was no ground for the dismissal of an action or Bill; but only constituted a ground for staying Proceedings until they were called in (Prac. Reg. in Chanc. 29. 263—Com. Dig. Chancery E. 2.)

Upon these Grounds the Appellant prayed the reversal of the Judgment of the Court below.

For the Defendants, it was said. This action is upon a promissory note made by the firm of John Boyle and Brothers. In addition to the general issue, the Defendants have fyled two Special Pleas. First, a temporary exception, alledging in substance that the Plaintiff had erroneously instituted his action against John, George, James and Felix Boyles, as constituting the firm of John Boyle and Brothers, whereas the firm in fact consisted of these four persons and of another person, namely, Richard Annett, (a Brother-in-Law of the Boyles,) whom the Plaintiff had omitted to make a party in this cause. This omission had proved fatal.

Second, a perpetual exception, or plea in bar, alledging in substance that the Plaintiff held a higher security for his debt, than the promissory note upon which the action was brought, and that the note upon which the action had been instituted was unduly and wrongfully obtained by the Plaintiff, and to the prejudice of others, the Creditors of the firm of Boyle and Brothers, and therefore that this action could not be maintained.

In the course of the proceedings another issue had been raised in the cause upon an *inscription en faux*, of a certain instrument, (being the higher security specified in the foregoing plea,) which having himself signed, and by that means induced others to do so also, Mr. Arnold now impeached, upon the supposition of its having been falsified by obliterations after its execution, which in another stage of the argument he would shew to be utterly groundless.

With respect to the first exception (the omissi-

on to make one of the Partners who ought to have been made a Defendant in the cause,) the authorities drawn from the Courts of Justice in England were pointed and conclusive. There could not be a doubt that an action could not be maintained against two or more of a greater number of joint and several Debtors, if advantage were taken of the omission by a plea in abatement.

(He quoted Rice *vs* shute Burrows, vol. 5, p. 2613—Chitty, vol. 1st p. 30—Term Reports, vol. 3, p. 782, case of Stratfield *vs* Halliday—Bacons abridgment, Verbo, Obligation, vol. 5, 164.—Evans' Pothier, vol. 2, p. 62 and post—Denizart, Verbo Assignation.)

From these it was manifest that the action being for the recovery of a debt due by several joint and several obligors must be treated as wholly joint or as wholly separate; that the Plaintiff was at liberty to sue the whole in one joint action, or to sue them all by separate actions, but that an action was not mantainable against two or more of the five persons composing the firm, and in this respect there was no real contradiction between the English and French authorities, for it would be found by referring to Pothier's Traité d'Obligations, No. 271, that there was nothing repugnant in that passage to the interpretations which the Courts of England, not less enlightened than those of France, had put upon obligations of a nature essentially similar to those of which Pothier treated—The obligations in *solido*, of the Roman and French Law, were known in England under another appellation, namely, that of joint and several obligations. The decisions referred to, considered as wisdom only, were therefore of the highest authority, inasmuch

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as they traced the precise method of enforcing in England, the obligations which in that country are called joint and several, and which in France were called *obligations solidaires.* If these were wisdom in the English Courts, they could not be folly here. It is not denied that every one of the Copartners is liable for the whole debt. It is the legal mode of enforcing that liability that the Defendants now insist upon Pothier's words at the conclusion of the No. above quoted (see Obl. No. 271,) This Mr. Evans, the Commentator of Pothier, was not without observing, and be particularly notices it as a coincidence with the English Law, which he illustrates by pointing out the rules adopted by the English Courts for the enforcement of those *solidaire* or joint and several obligations.

The Objection which the Defendants had taken had been treated by the Plaintiff as a matter of form. This was erroneous, such an Exception is nowhere to be found in Pigeau or any other author treating of the Instruction as a subject of pure form; an *Exception à la forme* lies for some Vice or Nullity apparent on the face of the Record. He referred to Pigeau. The present was an exception involving an Essential Matter of Fact. The Plaintiff had prosecuted the four Defendants, as constituting the Firm of John Boyle & Brothers, and as such they were represented both in the Writ and Declaration. If this fact were such as the Plaintiff had there stated it, his form was unquestionably correct. But the Defendants denied the Fact to be as stated, and plead specially that the Firm of John Boyle & Brothers consisted of five persons, naming the fifth Copartner (Richard Annett) whom the Plaintiff had omitted, and

whom the Defendants have proved, was known as such by Mr. Arnold. The Appellant therefore had voluntarily committed the error which had proved fatal to his action, and consequently might only blame himself for not furnishing his learned Counsel with the names of all the Copartners in the Firm he had instructed him to prosecute; for if he had so done, the error would not have been committed.

The essentiality of the Defendants' plea is greater than at first sight it might appear to be; it involved even the liability of the Defendants, for if any one or more of the Defendants were liable for the debt, it could only be in consequence of their concern in the Partnership of John Boyle & Brothers, consisting of the five persons, John Boyle, George Boyle, James Boyle, Felix Boyle and Richard Annett, there being no such Firm as that of John Boyle and Brothers, consisting only of the four persons whom Mr. Arnold had sued. The Plaintiff might indeed recover his debt from the whole or any one of these Copartners, and for that purpose might sue them all in one joint action, or by separate actions as already stated: but, it behoved him nevertheless, in which ever way he might exercise his remedy to sue them in their proper quality, so that he who should pay the whole debt, might have his remedy over against his Copartners for ther respective proportions. A Co-solidary debtor, who pays the debt of his Copartners is entitled to a *Cession d'Actions* of the Creditor, so as to be enabled to recover against his Associates (Arjou Vol. 2, p. 299,) and this *Cession* he has a right to insist upon payment of the debt. The present exception amounts to a demand to this effect; for the

the Defendants not denying the debt, require of the Plaintiff that he sue them in their proper quality, so that upon payment of the whole debt, by any one of them, he who pays may have his recourse against all his Copartners for their several shares or contributions towards this Copartnership debt.

If therefore the essentiality of the Objection be manifest, the next question is, as to the manner in which it must be pleaded. And here again the French and English authorities concur, and indeed were they silent on this subject, the reason of the thing would of itself be conclusive. The omission of a person, who ought to have been made a Plaintiff, may be taken advantage of under the General Issue; and this, because the Plaintiff cannot but know his own Copartners. But with respect to the Defendants it may be different. It is possible that he might have been ignorant of one of several Copartners; and if the Defendant sued thinks proper to raise an objection to an omission of his partner, he must once for all, by a special plea, name the Copartner omitted, so that the Plaintiff be enabled properly to recommence his action. This is done in the English courts by a plea in abatement, in the French courts the objection being something more than to form, namely to the quality of the Defendants, as already shewn, would be pleaded not by an *exception à la forme*, but by *afin de recevoir*, in plain English by a plea in abatement, (he quoted Denizart V. Exception Vol. 8, pages 166 & 639, and Pigeau Vol. I, p. 163.)

If however there had been any doubt on the subject, it was completely removed by the Provincial

cial Ordinance of 1785, Chap. 2, Section X. By this it is provided that with respect to facts concerning commercial matters, recourse shall be had to the rules of evidence laid down by the English Laws. This fact in dispute evidently is one relating to a commercial matter between traders, (both parties in the declaration and pleadings being treated as such). Now this matter of fact according to the English rules of evidence, would only be admissible and effectual inasmuch as it had been pleaded in abatement, and not otherwise. To give the benefit of the evidence to the Defendants, yet debar them of the plea under which it can only be given, would be manifest absurdity. If evidence of this matter of fact would under the English law prove fatal to the action, it is obvious that the special plea under which it is made should precede it, in order to apprize the Plaintiff of the evidence he is to expect. In what respect can the Plaintiff complain of a course manifestly intended to give him information, and prevent him from being taken by surprize?

The next enquiry is whether the partnership be proven, and here the best evidence that can possibly be, is produced; namely the Plaintiffs own admission of it by an authentic *acte*. This *acte* or instrument, he has, it is true, impeached of falsity, but even supposing it to be null with respect to all the purposes for which it was originally intended, yet it proves the Plaintiffs knowledge of the fifth Copartner (Richard Annett) for his name is written in the margin of the Instrument in five or six different places, and the Plaintiff's initials G. A. appear under every marginal note. The Plaintiff has put on the Record copies of two

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Judgments rendered against some of the Boyles, in which no mention is made of Richard Annett as Copartner; this proves nothing except that in those cases no advantage was taken of the omission. In the present cause circumstances are different, and it is found expedient to take the benefit of the exception. A copy of another judgment is filed by the Plaintiff, in which Richard Annett being condemned with Messrs. Boyles appealed, and had the judgment reversed. That case was essentially different from the present; there, he was sued as a joint Owner of the Schooner Mary Boyle, for repairs done to that schooner, whereas he was not in fact a joint owner, nor had he any concern in the vessel, so that he had an interest in extricating himself from the liability to pay for the repairs of her. Here he really is a Copartner in trade with the Defendants, and as such they insist upon his liability. There he was not a joint owner with them, and not being so, he insisted upon being discharged from the liability under which he had been placed by the judgment of the Court below, and the judgment was accordingly reversed upon grounds as substantial, as those now urged in support of the one rendered in this cause, namely upon facts essentially affecting the merits.

With respect to the second plea, that the Plaintiff having a higher security ought to have proceeded upon it, he quoted Chitty, vol. 1, p. 94 and 96. As to the allegation of fraud the facts must speak for themselves, it was a fact that the Plaintiff had signed an instrument by which he ostensibly gave the Defendants *two* years to pay the debt in question.—It was a fact that he was the greatest of all the Creditors by more than double of what

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was due to any one of them—It was a fact that six other Creditors followed his example, and subscribed the *Acte* on the supposition that he had really, and *bona fide* ; given a delay of *two* years ; and finally it was a fact that he had privately and without the knowledge of any other Creditor taken the present note for his debt payable in one year. The Plaintiff himself contends that the Boyles were insolvent, taking him then at his own word, and admitting them for arguments sake to have been so, he referred to decisions of cases in England, to shew that such a course as the Plaintiff had adopted in cases similarly circumstanced had been there held fraudulent (Selwyn's N. P. vol. 1, p. 64 and Evan's Pothier, vol. 1, p. 2 and post.)

The next subject for discussion, was the *inscription en faux*, or pretended falsification of the *Acte* in question, and here he would in the first place enquire what could originally have been Mr. Arnold's motive in signing it.—Was it really and *bona fide* to secure his debt? if so he had fully effected his purpose for a Court of Law had declared the instrument good.—Was it to decoy and mislead the other Creditors ? If so the Law would not allow him thus to avail himself of his own turpitude to the disadvantage of other Creditors. He not only admits the Boyles to have been insolvent, but he insists that they were so : how then is his conduct reconcileable with the fact supposing it to have been such as he represents it. Did Mr. Arnold apprise the other Creditors who had followed his example and signed the *Acte*, that he had also taken a Note payable at a shorter date ? Did he apprise the Notary that he had so done ? Not a word upon the subject to any one, until the year elapses,

elapses, where to the surprise of all the other Creditors, he acts upon his Note, and to inforce immediate payment out of the proceeds of the Summer's fisheries, destined to be divided among the general mass of the Creditors, imprisons two of the Boyles who had come to Quebec to make a dividend among their Creditors, pursuant to their engagements. Having involved himself in a Labyrinth it became Mr. Arnold to extricate himself as best he could. This he now ungraciously attempted to do at the expence of the Character of the Notary who had executed the Instrument, and whom he roundly accused of falsifying it, without assigning, much less proving, any possible motive that Officer could be supposed to entertain for so flagrant a violation of trust. The learned Counsel for the appellant proceeded upon the gratuitous supposition that the Obliterations apparent on the face of the *acte* had been made *after* it had been signed by Arnold. This was utterly destitute of foundation in the evidence on record. There was no evidence to that effect. On the contrary every presumption was on the other side, every *renvoie* or marginal note on the *Acte* being signed by Mr. Arnold himself. The Evidence in support of this charge of falsification by adverting to it will be found contradictory, vague and uncertain. Mr. McCallum, Jun. in his evidence states that he saw his father sign it—that he at no time after that period had seen the Instrument, that when he saw it Arnold had not yet signed it, consequently does not know in what state it was when Arnold put his signature to it. His recollection of it, is evidently very imperfect, for he states that he has no recollection that Richard Annett's name was on the Instrument, although

he recollects seeing his father sign his initials to every marginal note. Now it is a fact that in every marginal Note in the instrument (five or six in number) Annett's name is mentioned. The Evidence of Mr. Lindsay who was then a Clerk in Mr. McPherson's Office is in no wise prejudicial to the validity of the Instrument. He explains away a part of the difficulty by admitting that he himself wrote some of the words, which it is asserted were introduced after the acte had received the Signature of Arnold, but he does not by any means confirm the supposition which it had been attempted to realize. In fine, the alterations on the Instrument were *immaterial,* as far as Arnold and all the other subscribing Creditors were concerned. Their object must have been, as we have every reason to presume, to obtain Security, and this, such of them as subscribed the Instrument, did obtain. It is also to be observed that of all the Creditors who did, or who did not sign the *acte* in question, Mr. Arnold who was the first person to sign it, and by that means induced others to do so in imitation of his example, alone complains. There is no proof that any one of them is aggrieved or dissatisfied–shall he after misleading them, deprive them of the benefits of the *acte,* such as it is? The names of the non subscribing Creditors (four in all) were, as they had not thought proper to accept the security and become parties to the *acte,* struck out by the Notary previous to giving authenticity to it by his own Signature, and it is worthy of remark that all the obliterations, as well as the signatures and initials to the marginal notes and the words introduced in the several Blanks, which had been left to be filled at its execution, are of the same ink.

L. C. Denisart verb. Acte Notarié §. VII. No. 13, was cited to shew that although an Act purporting to be signed by two Notaries, as by law required, be signed by one only it would be binding.

In Reply it was said—

That the arguments of the Respondent's Counsel as well as the Judgement of the Court below, appeared to proceed upon the assumption that there was a variance between the Declaration and the Evidence in this; that the Declaration stated a debt to be due *in solido* by four, and by the evidence it was proved that the debt was due not only by four but also by a fifth.

The Plaintiff in the Court below and Appellant here did not say that four *only* were responsible, but he averred and proved that four were responsible *in solido*.—Whether a fifth was, or was not, *also* responsible *in solido* was immaterial.

If he were so, it would according to the analogies of the French Law, have been the duty of the Respondents (after permission first obtained from the Court) to bring him into the Cause at their costs. The whole doctrine of the exception of division abundantly established this.

If the English decisions were looked at, it was manifested that they did not proceed upon the ground of variance.

The words of Lord Mansfield in the case of Rice & Shute, were too remarkable to be passed over here.

 "To

" To be sure such a distinction is to be found " in the books, between Torts and Assumpsits." " That in Torts all the Trespassers need not be " made parties : but in actions upon Contract " every partner must be made a Defendant." " Many Nonsuits, much vexation and great hin- " drance to justice, have been occasioned by this " distinction. It must have been introduced ori- " ginally from the semblance of convenience, " that there might be one judgment against all " who were liable to the Plaintiffs demand. But " experience shews that convenience as well as " justice lies the other way. All Contracts with " partners are joint and several : every partner is " liable for the whole. In what proportion the " others should contribute, is a matter merely " among themselves; a creditor knows with whom " he dealt, but he does not know the secret part- " ner ; he may be nonsuited twenty times, before " he learns them all ; or driven to a suit in equity " for a discovery who they are." " It is cruel to " turn a creditor round, and make him pay the " whole costs of nonsuit, in favor of a defendant " who is certainly liable to pay his whole demand ; " and who is not injured by another partner's not " being made Defendant, because what he pays " he must have credit for, in his account with the " partnership."

That this rule found so inconvenient in England was to be forced into the Law of Canada, to the exclusion of the more simple convenient and equitable rule of the latter Law.

It was said that the Respondents had an interest in Annett's being made a party to the suit or named

ed in the declaration, as one of the Partners in the firm of John Boyle and Brothers. It was manifest that no such interest nor right existed. The Respondents' Counsel was constrained to admit that the Plaintiff might recover his debt from the whole or any one of the Co-partners, and for that purpose might sue them all in one joint action or by separate actions, but the Respondent said, that it behoved him nevertheless, in which ever way he might exercise his remedy, to sue them in their proper quality, so that he who might pay the whole debt might have his remedy over against his Co-partners for their respective proportions. Now the appellant had stated the note of hand according to its legal effect, which was all that he was bound to do—He was entitled to his Judgment against the four Respondents—It was *one* debt, but each of them was debtor for the *whole* of that debt—If the four debtors had recourse over and aginst any fifth person for the whole or any part of the debt, that could constitute no ground of defence to the action of the Appellant, it would not afford any sufficient ground for a plea of division—Upon this point Pothier is express. The Judgement rendered in the Cause could not affect the fifth person who was not a party to it—As to him it was *res inter alios acta.*—The recourse of the four Partners against the fifth Co-partner is, as stated by Pothier and all the authorities, by action in chief.

Again had the Partnership been proved ? The Evidence upon which the Respondents relied principally, was the admission contained in the notarial Act.—Now that was an admission made by the Respondents, which if it had turned out to be true, might have improved the condition of their

their Creditors generally, and of the Appellant particularly, and could not have injured the Appellant if it had turned out be false—It is not then an admission made *by* the Appellant *to* the Respondents, but an admission made *by* the respondents *to* the Appellant.

The Instrument being manifestly a falsified Instrument, as it could not be evidence for the Appellant, so neither could it be evidence against him.

To the injury which the Appellant had already suffered from the Respondents in his purse from the non-payment of a just and long due debt, it had been attempted on the part of the Respondents to add a serious injury to the character of the Appellant. It had been set up that the note in question had been taken in fraud of the Creditors of the Respondents.

There was not the slightest colour for this charge.

The Appellant had signed an instrument not ostensibly, but really and *bonâ fide*, which instrument contained the names of all the Creditors of the Respondents as parties thereto, and by which they purported to give to the Respondents a delay of two years. Unfortunately for the Appellant, the debt due him was much larger than that of any other Creditor. His name was first put down, and he first asked to sign the Instrument, which he did—Six others followed his example—The remainder of the Creditors refusing to sign, the instrument was then and ever after, until it made its appearance upon the files of this Cause, considered by all the parties as a blank piece of paper.

Subse-

Subsequently to this, the Appellant received the note of hand in question from the Respondents payable in one year. When he called upon them for the payment of it at the termination of this period, the respondents not choosing or not being able to pay it, he sued them for the recovery of its amount. Where was the fraud in all this? Was it not manifest that he and the other six Creditors had granted the delay of two years under the idea that the remaining Creditors would come into the same terms? Would they have consented to have tied up their own hands, and leave the other Creditors free? Would they have interdicted themselves all access to the funds of John Boyle & Brothers, and left the same open to the non signing Creditors to be divided amongst them? Would they have come into the arrangement at all, without the security of James M'Callum & Co? Would this latter firm have had any motive of interest or of Freindship to be come such surety, unless they were satisfied that the commercial operations of Messrs. John Boyle & Brothers would not be interrupted by any legal process from any one or more of their Creditors during the assigned period? This implied condition failing, did not the suretyship of James M'Callum & Co. fall to the Ground? In one word, was it not an inchoate and imperfect instrument.

But it was said that the Appellant had fully secured his debt, for a court of law had declared the instrument good. It was true that the Court below had virtually done so. But could it have done so against James M'Callun & Co? or against Richard Annett? or against the creditors who had refused to sign it, and whose names had

had been obliterated? or against the six creditors who actually did sign it, in the confidence and upon the condition implied in law, that the other creditors named in it should sign also? The principal ground upon which the Appellant asks the reversal of the Judgment in question, is that the Instrument is thereby held to be good and valid against the Appellant, whilst it is manifestly a nullity as to the other parties thereto.

The case was then not that of a creditor signing a valid deed of composition and at the same time taking another security for his debt secretly.

It was only after the negotiation for a compromise had entirely failed, by the refusal of four of the creditors to come into it, that this note was taken.

The evidence of the alterations in the Instrument was too palpable to admit of doubt; but it was said what motive could the Notary have had? It was not for the Appellant to scrutinize the motives of the Notary; with these he had nothing to do—the Instrument had been falsified—he relied upon the Court that that falsification should not prejudice him.

It was also said that the alterations were immaterial in as far as the Appellant was concerned, and that the names of the creditors who had refused to sign, had been struck out to give authenticity to the Instrument.

Was this making the Instrument conformable to the facts of the case? Could a Notary in the absence

absence of the parties by striking out words or names give validity to an Instrument which before that illegal obliteration it had not? Must not the Instrument be good in the whole or bad in the whole? If by reason of any falsification it should not operate as a Mortgage could it have any other effect?

It had been argued that although an Act, purporting to have been signed in the presence of two Notaries, was in truth signed only in the presence of one, it should be binding. This was true; but it was under a long usage sanctioned by the decisions, as well of the Courts of France as of the Courts of this Country, to this effect; nor was it upon the present occasion contended that the presence of Mr. Glackmeyer, the second Notary, was at all necessary, nor is his conduct in the slightest degree impeached.

But the great power which these decisions put into the hands of a single Notary, would render it more necessary that the other provisions of the Law, in respect of them, should be more strictly enforced, without which there was no security for property.

Judgment affirmed with Costs.