

The Defendant, Thomas Dunn, lastly pleaded that he had not undertaken and promised *infra sex annos*.

Upon these several pleas issues were joined against the other Defendants & the Plaintiffs proceeded *Ex parte*.

Upon these several pleas evidence was ordered; Mr. Sargeant, who had been the Clerk and principal Book-keeper of the Batiscan Iron-works Company, was examined as a witness. His testimony establishes the balance due by the Batiscan Iron-works Company to Messrs. M^cTavish, Fraser & Co. on the 31st Dec. 1807, was, as stated by the debtors themselves, £3867 7 0½, a sum corresponding with that contained in the account of the Plaintiffs against the Defendants, authenticated under the seal of the Mayor of London, and filed in the cause; it appears also, from Mr. Sargeant's deposition, that the accounts of these houses were made up in the usual way in which interest accounts are made up by mercantile houses in England, in making shipments to this Country; this usage, in relation to mercantile accounts, is further established by a commercial gentleman in the cause.

No attempt was made, on the part of Mr. Dunn, to support by evidence the litispendence stated by him in his first plea, nor to establish that the right of action had been extinguished by the operations of the Statute of Limitations, as urged in his last plea. The enquiry was narrowed down to this single point, had a novation of the debt demanded in this action been by law effected, in virtue of the before-mentioned deed, of the 30th Dec. 1808?

On the part of the Appellants, it was urged that whether the Law of England, or of this Country, was taken as the rule of decision; the debt here claimed had not been effected by that deed.

By the Law of this Country, Novation can only be operated by express words, and is never presumed. Cod. S. 42. 8.—D. 45. 2. 2.—Acosta ad Just. lib. 3. cap. 29.—Menochius, lib. 3. praeump. 134 num. 55.—Accursius ad Just. quib. mod. tolli: oblig: Voet ad Pandectas, lib. XLVI. Tit. 2. § 5.—Argentarius ad Consuet. Britan. art. 273. No. 17 & 19.—Du Moulin de usuris, quest. 15.—Bourjon II. p. 453 sec. 4. § 42—Ibid: in Nouis Domat liv. 4. Tit. 3. sec. 1. § 2 & 3. p. 286; Poth: Ob: No. 594—Journal du Palais, Tom. II. p. 119.—(Euvres de M. Claude Henrys, Tom. II. p. 875.—Despeisses partie 4. Tit. 15. No. 2.—Loyseau, liv. 6. chap. 7. No. 8.

By the Law of England the payment of a less sum than that which is due cannot under any circumstances, operate as a satisfaction of the Debt actually due.... Fitch vs. Sutton, 5 East. 230—Cumber vs. Wane, P. 7. G. Strange, 426—Pinnel's case 5. Rep. 117—1 Id. Rayn. 122—Cro. El. 193—1 Ro. Abr. title record pl. 11—But upon reference to the agreement, it will be found that it contains nothing from whence the slightest inference can be drawn it was the intention of the parties to extinguish the debt now claimed and to substitute the promise in the deed in lieu of it, to establish this last position the Appellants submit a copy of the said deed.

PARDEVANT les Notaires de la Province du Bas Canada, residant à Montréal, Soussignés,

Fut présent Thomas Coffin, Ecuyer, demeurant en la Ville des Trois Rivières, Directeur des Forges de Batiscan et fondé du pouvoir et Agent de l'Honble. John Craigie, Joseph Frobisher et Benjamin Joseph Frobisher, Ecuyers, propriétaires conjointement avec le dit Thomas Coffin, Ecuyer, des dites Forges de Batiscan, et en sa qualité de Directeur et Agent d'icelles à reconnu devoir à Messrs. John Fraser, Simon M^cGillivray, et John Tulloch, associés négociant à Londres, et faisant commerce sous le nom de M^cTavish, Fraser & Co. William M^cGillivray, Ecuyer, demeurant en cette Ville un de leurs procureurs et agents à ce présent et acceptant la somme de deux mille trois cents Livres du cours actuel de cette Province, pour pareille somme que le dit Sr. Coffin en sa dite qualité a reconnu avoir reçu des dits Srs. M^cTavish, Fraser, & Co. en effets pour l'usage des dites Forges de Batiscan, et dont il se content et satisfait, laquelle dite somme de deux mille trois cents Livres courant, le dit Sr. Coffin, en sa dite qualité promet et s'oblige payer à Messrs. M^cTavish, M^cGillivray & Co. en cette Ville comme ci-après pourvu avec l'intérêt légal, suivant le compte entr'eux.

Et pour sûreté de la dite somme de deux mille trois cents Livres courant et intérêts, le dit Sr. Coffin a par ces présentes vendu, transporté et assigné aux dits Srs. M^cTavish, Fraser & Co. le dit M^cGillivray, ce acceptant pour eux.

1o. Une somme de huit cents livres courant, due aux propriétaires des dites Forges de Batiscan par divers personnes faisant partie de l'état ou liste qui sera cy-après annexés à ces présentes.

2o. Tous les effets en fer et manufactures des dites forges évalués, à une somme de quinze