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February Term 1810.

Thursday 1st. February 1810.

Present.

all the Judges. —

Gray
v
Scott. } On the 20th October 1808, the Pltff's suit was dismissed in this Court, from which Judgment there was an Appeal, and by the Judgment of the Court of Appeals the Pltff recovered the amount of his demand — The Judgt. of the Court of Appeals directs that the record be transmitted to the Inferior Court for such proceedings thereon as to — justice shall appertain. —

The Plaintiff now moved that execution might be granted to him against the Defendt. upon the Judgment of the Court of Appeals. —

The defendt. objects that he has had no notice of the Pltff's motion — That he has a right to be called upon by a rule to shew cause why execution should not issue, that he may have an opportunity to examine the Judgt. of the Court of Appeals and see whether it authorises further proceedings

to

be had in this Court, without which authority this Court will not grant any execution, - cites. Case of Henderson Armour & Co. vs Dieffenback 19 Oct. 1809. where it had been refused. -

The Pltff. answers that he is entitled to an Execution of right, and not bound to give any notice of his present application for the same. - That the Judgment of the Court of Appeals expressly states that the record be transmitted to this Court for such further proceedings as to Justice shall appertain, and it is in consequence of this authority that the Pltff now applies for execution thereon. -

The Court were of opinion that the Pltff was entitled to his execution as a matter of course, and that notice of his applying for the same was not necessary - and awarded execution accordingly. -

Friday. 2.d Febru.y 1810.

Present,
All the Judges.

Porter
vs.
Marston
cui
Jones ux.

Mr Stuart, on behalf of the defendants Jones & wife moves, that he may be permitted to fyle an exception peremptoire to the plaintiffs action, in consequence of the circumstances which have happened since the filing of the plea, namely, that the defendants have acquired a title to the lands in question by a deed under a Sheriffs Sale, which destroys the pretentions of the Plaintiff.

The Pltff answers that the lands appear to have been sold in 1807, (subsequent indeed to the filing of the plea) and Defendants ought to have proposed this exception the instant they acquired the title - that they are now too late - and have allowed other proceedings in the Cause - That by the rules of practice this exception cannot now be received.

The Defend.ts reply, that no proceedings have been had in the Cause since they acquired the title in question, except upon the plea to the Pltff.s right of action, as being an alien, which was necessary to be first discussed before any other defence became requisite.

Hawley
vs
Trusdale
&
Perkins. T. Saisi

The Garnishee made his declaration that he had nothing in his hands belonging to the defendt at the time or since the attachment — The Plff now moves to examine the Garnishee respecting the delivery to him by the defendant of certain property previous to the attachment and which he had in his possession when the said attachment was made — and states that he is entitled to propose such questions to the Garnishee as may shew that the Plff is entitled to a Judgmt agt. him, — or the Plff may constitute him a party to the suit, in which case he will be entitled to propose the same questions to him by faits & articles. cites. 1 Pigeau. p. 656. — Poth. proc. Civ. 1 vol. 12°. p. 367. —

The Garnishee objects, that the questions proposed tend to inculpate him of a fraud, and therefore he is not bound to answer thereto in any manner upon oath. —

Saturday 3. Febr.y 1810.

Present.

All the Judges.

Hawley v. Trusdale & Perkins. J. Saisi

The Court were of opinion that the Garnishee was not bound to answer to the Interrogatories proposed without being made a party to a Suit. a

Burton v. Rice. et al.

This cause was heard on the exceptions pleaded by the defendants on the 17.th June last, and Judgment given on the 19.th ordering proof. The parties were now heard under the proofs respectively adduced by them.

Mr Stuart for Defd.t states, that by the proof adduced, it appears, that the defend.t cut down wood upon the Plaintiffs Seigniory prior to the time of suing out the action de revendecation agt. Jenner & Phelps, but not since, and that he acted as the servant of the said Phelps in this respect, that the Plff having taken his recourse agt. Jenner & Phelps for that wood, he cannot have the present action agt the Defend.t for the same wood, it being a principle of law that there can be but one remedy for the same right. cites. 1 Com. Dig. p. 63. that if other wood had been cut down besides that attached under the saisie revendication sued out agt. Phelps, still the

Plff

Pliff could, and still may, be fully indemnified for all other wood cut by Defend.t as Servant of Phelps under the aforesaid action en revendication. cites. Repertoire. ve Revendication. p. 625. —

Rolland for Pliff.

To support the exception pleaded by the Defe.t he ought to have proved that the number of oak trees stated to have been cut down by the Defend.t in this action, had been attached upon the Saisie Revendication sued out upon the former action ag.t Phelps, whereas it appears that 17 oak logs only have been so attached whereas the Defend.t is charged for having cut down a thousand, and as by the action de Revendication the Plaintiff can obtain only the number of logs he has so attached, without any compensation for the other wood cut down, he must lose his right wholly for that compensation unless the present action can be supported against the defend.t — That it is charged in the declaration in this Cause, that besides cutting down the wood in question, the defendant, did other damages & wrongs to the Pliff, which were, damaging the Soil, erecting a hut and treading down the grass,

for

for all which the Plff is entitled to his action of trespass agt. the defendt and to which the action en revendication in question can be no bar — That even if the action en revendecation and that now prosecuted agt the defendt were for the same thing, yet the Court ought to suspend giving Judgment in this Suit until it shall be ascertained whether the Plff will be entitled to any recovery against Jenner & Phelps in the other Suit —

On the testimony adduced an objection has been taken to the competency of the said Alexr. Phelps as a witness for the defendt in this Cause on account of his interest to defend the conduct of Rice who was his Servant, acting under his orders. u

Sol. Genl of counsel for Plff. — states, that as the defdt has been guilty of other acts of damage than that complained of against Jenner & Phelps, he must be answerable therefor to the Plff — damages done for injuring the Soil or erecting a building on the Plffs land can never be enquired into by the action en revendecation, which contemplates only the right of property in the thing claimed. —

Stuart

Stuart for Defend.t in reply- That Pliff can have a recourse for all the injury complained of in this action under his former action against Phelps - it is the same injury - no new trespass alledged since the commencement of the suit ag.t Phelps. -

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Whitfield vs Corse. ... } Action for goods sold &c

The defend.t among other things pleads, that it was the agreement between the parties that if the goods were not sold before the first of May next after the delivery they should not be paid for - and as all the goods were not then sold, the defend.t contends that Pliff can have no action for the value of them, but only an action of account. -

To this plea the Pliff demurs & alledges that no such agreement was ever made, and if it had, yet it could be no bar to the Pliffs action. -

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Richardson Tutor &c.a vs Dustin. - } Action en revendication for wood cut down on the Seigniory of Beauharnois by the defendant. -

The defend.t pleads that he had permission from M.r Winter the late agent of the said Seigniory to settle upon a certain lot of ground therein described and make improvements thereon, in order afterwards to procure a title

title thereto by a deed of Concession — That he has cut wood upon this lot only, and if he has exceeded the terms of the permission he so received, yet the Pltff cannot have an action en revendication to take the wood so cut, but only damages for breach of covenant he having the legal possession of the soil whereon the wood was cut. —

The Pltff replies, that the permission given to the Defendant was conditional, and with which he has not complied — That had leave to cut wood on the land in question only for fire-wood or fencing, but not to sell — That the wood in question was cut for the purpose of being sold, having been drawn out of the woods and laid on the River side ready for exportation. —

On the 20th Febv. — The Court gave Judgt. for the Pltff, being of opinion from the testimony adduced that the wood in question had been cut down for the purpose of being sold, which was contrary to the condition upon which the defendt. held the land —

Monday 5th Febry 1810.—

Present.—

All the Judges.—

Foucher v Robitaille.— } Cause argued on 18th Oct. last.

The Court were of opinion that as the Plff had not shewn that the late Mr. Marchand, curate of the parish of St François de Salles, had been removed from the Cure of that parish, the right to the tithes still remained vested in him, and that the Plaintiff had no right to prosecute for the recovery of those tithes as doing the duties of Curate of that parish, but that his only recourse was against Mr. Marchand or his heirs to be paid for the services he had rendered in this behalf— The Plaintiffs action was therefore dismissed, saving his recourse.—

M.Gill. & al' vs Burton.— } Cause argued the 16th Oct. last.—

The Court gave an Interlocutor ordering that the line of division between the lands of the parties should be verified and ascertained according to the titles of the parties, and that the different boundaries and lines heretofore made and drawn should be pointed out with the time when and the authority under which they had been so made & drawn.

Vincent &ux vs Braie & al. } Cause argued the 6th October last.—

The Court were of opinion that the Plaintiffs by accepting the legitime reserved to them in the deed of Cession of 30th Janv 1783 had ratified that deed so as to render it binding on them, and as they had not shewn that the Sale of the Cattle and moveables mentioned in the acte sous Seing privé of 29 July 1796 had been made without consideration, the Court confirmed this act so far as regarded the Sale — but as to the Sheep and poultry given by this act to the Defendts the Court ordered that they should render an account thereof to the Plaintiffs as well as of all the other property of the late Charles Braie their father not included in the said deed of Cession and acte de vente — Also that they should render an account of the whole Succession of the late Marie Charlotte Piedalue inasmuchas the disposition she had made thereof by last Will and testament on the 2d June 1802 was not valid in law, it appearing that the said Will had been made by the geste & signe of the testatrix and not dictated as the law requires.—

Whitfield vs Corse. — } The Court dismissed the exception raised by the Plaintiff to the defendt plea, as the truth of the facts upon which it rests can be ascertained only on the hearing and trial of the merits.—

Porter vs Marston & Jones et ux

The court considering that the defendant Jones at the time of filing his plea to the present action on 9 Febr. 1807, ~~he~~ could not have the knowledge of the facts upon which the plea of Exceptions now offered by him is grounded, as they happened in the month of January 1808, permits the said plea of Exceptions to be filed —

Pangman vs Beaudouin

Action for recovery of a promissory note —

The Defendant pleads, that the note was made by error and without consideration on his part — That it is said to be made for — damages occasioned by the defendt. in cutting down wood on the plaintiffs Domaine — But the defendant can now shew that the land where he cut down the wood belongs to one Bourgouin, whose permission he has for cutting down the same, — and as he was induced to make the note in question upon the plaintiffs representation that the wood had been cut upon his domaine, the Defendr. prays that he may be admitted to prove these facts which are sufficient to destroy the said note and dismiss the Plaintiffs action. —

Rolland for the Plff answers, that the Plff having

sued

sued out an action against the defendant for a much larger sum of money than that now demanded viz^t. for £100 — the defendant came to a compromise with the Pltff and agreed to give the sum of thirty pounds mentioned in the note in question, and for which the Note was made. — That this note ought therefore to be considered as a Transaction between the parties upon a matter litigates, and no proof ought to be received to set it aside such as offered by the defendant, as he had a sufficient opportunity at the time he was sued and before making the note to ascertain the truth of the fact whereof he was charged. —

The defend^t. replies — That error viliates every kind of act, even if executed before a notary or being autentique and à fortiori, an acte sous seing privé such as the note in question — That the defend^t. was also in fear at the time he made the said note, being threatened with a heavy suit in damages, and apprehensive that he might be ruined thereby. —

Hagar. v. Henderson

The defendant moved for publication of a Commission Rogatoire which had been returned into the Court in this Cause.—

The Pltff objects, that the Commission ought to be rejected and no publication thereof granted inas muchas no proof of the Seals or Signatures of the Commissioners thereon has been made, nor does it appear in what manner and by whom the Commission was returned into this Court — That the Chancery practice requires, that some person shall have received the Commission from the hanets of one of the Commissioners duly sealed up, and make oath that he delivers it into Court in the same state he received it from that Commissioner — without this great frauds might be committed, and the return to any commission fabricated — That the Provincial Ordinance which regulates the suing out of Com. Rogatoires refers to the practice in Chancery, and thereby points out the mode to be adopted in a case of this kind —

The Defendt. states, that it has not been required by the practice of this Court that any affidavit should be made of the delivery and safe conveyance of any Com. Rogatoire issuing therefrom — That such affidavit would often be inconvenient and

Sometimes

sometimes impossible to be had.— That in the present instance, the Captain of a vessel received this Com. Rogatoire in England, from a person unknown to him, he delivered it at Quebec to the agent, or some acquaintance of the defendants there who forwards it by the first conveyance to Montreal. That for greater security a duplicate of the same Com. Rog^{re} & return has been sent from England by the way of the United States — it also came from the States by a private opportunity which cannot now be traced, but still must tend to shew the authenticity of the return. —

Lascelles & Boismier
vs
Robertsons, and
D. Sutherland mis
en cause. — —

Plaintiffs moved for a new trial upon the following grounds.—

1st. Because Justice was not rendered to the Plaintiffs by the verdict.—

2. Because the verdict is contrary to law and the evidence adduced.—

3. Because the verdict is contrary to the direction of the Court.—

In support of the motion the Plaintiffs state that

that by the evidence adduced they had made proof of a Sale and part delivery of the goods by the Defendt. to the Pltffs. and therefore the verdict was erroneous, contrary to Justice, and against evidence.

Sol: Genl. for the Defendt. states – The Plaintiffs complain by their declaration that goods were sold to them by the defendant Robertson, delivered to them, and afterwards taken out of their hands and possession by sd Defendt. unlawfully and by voie de fait – to this action, the defendt has pleaded not-guilty, and on the trial no sufficient proof has been adduced to support the declaration. – The action, if at all founded, – ought to have been in the name of Lascelles alone, as no mention whatever was made of Boismier as his partner, or that he was in partnership with any person, when he agreed with the Defendt respecting the goods. –

The verdict is not contrary to the evidence, as there was neither a Sale nor delivery of the goods, merely an agreement to sell – but no Invoice of the goods was ever delivered, – the goods were – indeed sent to Lachine, but under the controul of the defendant, which is usual on Sale of goods to Merchants in Upper Canada – The Store-

keeper

keeper at Lachine had orders from the defdt. not to — deliver the goods to the Plaintiff Lascelles without directions from Defdt — the goods were detained accordingly, and the storage charged to the defendt —

The Plaintiffs action is for a voie de fait, which is wrong, as they never had possession of the goods, if any action lay agt. the defendt. it ought to have been for the delivery of the goods which he had agreed to sell. —

It appears by the evidence of Hoyle that Lascelles waived all claim to the goods in questioned, and entered into a new agreement with the defendt. for other articles he then had occasion for — this may have had weight with the jury, particularly as no damages were suffered by the pltff on account of their not having got the goods from the Defdt. —

Although the verdict may be in some respect contrary to the direction of the Court, yet where Justice appears to have been done, no new trial ought to be granted — Applications for new trials are made to the discretion of the Court, and this discretion will be used in granting them only where the justice of the case requires it — and as no damages are proved to have been suffered by the plaintiffs, there are sufficient circumstances in evidence on other points to shew the Justice

of

of the verdict in favor of the Defendt.—

Ross—in reply.—

What will constitute a delivery of goods, is a question of law, and does not depend upon the opinion of merchants — Here the goods were laid aside by the Pltff Lascelles, packed up in bales, marked with the Plaintiffs mark, some of them put into trunks, and the keys of those trunks delivered to the Sr Lascelles, and under all these circumstances, the goods are sent out to Lachine where the Pltffs boat lay to receive them.— These circumstances shew a delivery of the goods — there was a change of property from the instant the goods left the defendants Store, because from that instant they were at the risk of the Plaintiff— All the witnesses agree that the risk of the purchaser commences here, although some pretend notwithstandg, that the controul of the seller over those goods extends to their delivery from the Store room at Lachine, which is incompatible as there can be no risk if there be no property in the person running the risk.—

The defendant has pleaded not guilty, to the action but at the trial they surprised the plaintiffs by — adducing testimony to prove a new agreement between them and defendt which waived that upon which the present action is founded — The Pltffs trusting

that

that under the general issue pleaded by the defendts such proof was inadmissible, were not prepared with testimony to rebutt it as they otherwise would have been — this is cause for granting a new trial. — The testimony of Hoyle upon this point may have had weight with the Jury, and their verdict if founded thereon, is contrary to law. —

That the Justice of the case is on the side of the Plaintiffs, as they appear to have suffered damages by the conduct of the defendts in retaining the goods, it is in proof, that the Plaintiffs had hired men and a batteau which were ready at Lachine to receive the goods — that the Plaintiffs could have disposed of the goods to great advantage — and the injury done to the credit of the Plaintiffs when they were under the necessity to return without any goods, are considerations which ought to have weighed with the Jury, and must now induce the Court to grant a new trial.

Lawrence & Dayton
vs
Blackwood & al'.—
Blackwood & al' Opp^ts

On Opposition of the Trustees to the Estates of Cuvillier Aylwin and Harkness, & of Cuvillier & Aylwin to the payt of the monies arising from the

the sale of the effects in the hands of the — defendants as Trustees to the Estate of Austin — Cuvillier. —

Mr Ross for the opposants states, that the present opposition is made in the name of the Trustees on behalf of the Creditors of Cuvillier Aylwin & Harkness and of Cuvillier & Aylwin, two different partnerships to obtain out of the monies arising from the sale of the effects of Austin Cuvillier a dividend on their respective claims against the said partnerships, to which they claim a right as every individual partner is liable to the payment of the whole debts of every partnership in which he has been concerned

Mr Stuart for Defts objects to the claim as wholly inadmissible and contrary to the principles established by this Court in the Case of Young. vs. Blackwood and others, and Symes. Oppos.t 18.th Oct.r last. and in several other Cases. —

Sweetman } v. Hamilton }

On rule Nisi, why the award made and returned into Court in this Cause should not be sent back to them to be amended, as by the affidavit

affidavit of one of them it appears they have made a mistake in it.—

Ogden for Defdt. states, that the Defend. was arrested on a Capias in this Case and held to give bail. that Pliff now finding by the Award of the Arbitrators that he is entitled to recover only ten pounds from the Defend whereby he must lose the effect of the Capias as well as the Costs in this Cause, he therefore wishes to draw another opinion from the Arbitrators by a new reference.— The affidavit of the arbitrator upon which the present rule has been obtained states, that it was their intention to have given Costs to the Pliff and that it is an omission in the award not to have mentioned it— but the— Arbitrators have no power to give Costs, this belongs solely to the Court— and a similar affidavit of Arbitrators was rejected upon this principle by the Court, in the Case of Arakouanté. v. Indian Chiefs.—

Sol. Gen.l for Pliff. states that the award is altogether informal and insufficient being only a short memorandum upon which the Arbitrators meant to have it drawn in form and more explicit, which added to the Omission of Costs which they are induced to give to the Pliff under particular circumstances, is sufficient to send the matter back to the arbitrators for a more perfect report.—

Dominus Rex..
In Bte vr Hervieux
& al'. Justices —

On Certiorari upon a Conviction before the Justices at Lassomption on St. 47 Geo. 3. respts Post-houses. —

Rolland for the Justices moved that the writ of Certiorari should be quashed and superseded by reason of the same having been irregularly and illegally sued out. —

1. No sufficient grounds were stated or laid before the Judge in vacation for granting the writ. —

2. Six days notice ought to have been given to the Justices of the application for the writ, and an affidavit regularly made of the service of that notice — no proof of this was laid before the Judge, only a bailiffs certificate, which is not sufficient, as the Statute requires an affidavit. —

3. The writ of Certiorari ought to have been allowed and signed by the Judge who granted it — this has not been done. the writ appears signed only by one of the Prothonotaries of this Court and tested in the name of the Chief Justice. —

4. The St. 5. Wm. 3. ch. 11 requires, that the names of the party suing out the writ should be indorsed thereon, which has not been done. —

Mr

Mr. Ogden for Jean Bte Labelle, who sued out the writ, answers. —

1. It is not now a question whether reasons were stated or not to the Judge who granted the writ, the writ having been granted necessarily implies that sufficient grounds were offered at the time to induce him to do it, ~~and~~

2. The certificates of the bailiffs of this Court have always been taken and received as being upon oath — the fact therein stated of the notice given has not been controverted. —

3 Certiorari may be granted to remove Summary convictions before Justices by the fiat of the Judge granting it — cites Com. Dig. vo Certiorari. —

4 There is no law which requires that the names of persons suing out writ shall be indorsed thereon

Georgen in reply. —

Grounds for granting the writ must be shewn to the Judge to whom application is made in — vacation. cites. 2 Term Rep. Rex. v. Eaton. 89. Six days notice and affidavit of service thereof on the Justices must be shewn — Hands Prac. p. 34. — and the

names

names of the persons applying for the writ ought to be indorsed upon it.— See form. Hands Prac. App. Nº 15.—

Symes. v. Sutherland Cur.— and N. Robertson

Action for goods sold to P. Robertson & Co charging the Defendants Patrick Robertson & Niel Robertson as the partners composing that firm.—

Stuart for Pltff.

The only question before the Court is whether the Defendant Niel Robertson at the time of the sale and delivery of the goods in question was, or could in law be considered to be a partner of Patk Robertsons.— The testimony adduced shews that a partnership did exist between Patrick & Niel Robertson some time prior to the sale of the goods in question, and although it now appears that in fact that partnership was dissolved as between the parties themselves, yet as this dissolution was a private transaction, not intimated publicly to the world, it can have no avail as to third persons— The dissolution of every partnership must be publicly notified. cites. 2. Esp. N. P. p. 776 —

2. Cowp. Rep. p. 449

1 Esp. Rep. p. 371. Godfrey. v. Turnbull & McCawley

That the dissolution of the partnership between the

Defendts

defendants although it may have been known to some who were intimately acquainted with them, yet it was far from being notorious or generally known, as may be seen from the testimony of Messrs. McGill Richardson & Blackwood, who are all men at the head of very extensive Commercial Concerns in this Country.—

Ross for N. Robertson.— There is no law of this Country which requires public notice of the dissolution of a partnership.— On the contrary it is the business of every one who deals with a firm to make himself acquainted who are the persons composing that firm, if he trusts them without knowing this, he does it at his own risk. cites. Poth. Soc. Nº 149. & seq. and Nº 157. in fine

The partnership between the Defts. was dissolved by an act before a Notary, which was equally well known as that the partnership had been contracted.— Since that dissolution the Defendt Neil Robertson has never interfered in the business carried on by his brother, has not lived in the house nor been known to be concerned therewith in any way except as a Creditor.— And at a meeting of the Creditors of Patrick Robertson & Co held after the

the decease of Patrick Robertson the said Niel Robertson was recognized by them as being a Creditor of that firm and not a partner. — That partners may dissolve their partnership whenever they please. Domat. tit. Societé. liv. 1. p. 89. sec. 4.

That testimony of Austin Cuvillier ought to be rejected on account of interest — he was the seller of the goods and has a benefit thereon as broker & agent of the Pltff. —

Bedard of Counsel for N. Robertson.

The Plaintiff ought to have shewn, that when the rum in question was sold, there existed a partnership in fact between the Defts the only written proof of this fact, is the act of Copartnership between them, but this act shews at the same time that the partnership had been dissolved long before the sale of the rum viz^t. in 1801 — According to the articles of Copartnership the time limited for its duration was only till 1806, when the firm must have been dissolved — The name of Niel Robertson has not since that time appeared in the firm nor has

any

any thing been held out to the world to induce a belief that Niel Robertson was a partner.—

That where a partnership is dissolved before the time limited for its duration, a notice becomes necessary, but when the whole term has expired no such notice is necessary, as after that period people ought to inform themselves of the persons composing a partnership before giving credit, cites— Poth. Soc. N° 157.—

All the proof that the pltff has produced to shew the existence of a partnership between Niel and Patrick, shews at the same time the dissolution of it long before the credit given in question—

Austin Cuvillier the witness on behalf of the Pltff is the <u>mandataire</u> of that pltff, and bound in certain obligations towards him— as he may be responsible for the sum sold in case he does not establish a partnership between the Defts— his testimony ought therefore to be rejected—

Sol. Genl for Sutherland Curator.—

That same testimony which pltff has adduced to prove a partnership in this Case, destroys it at the same time— If Pltff fails in establishg Partnership the

action

action against both Defendants ought to be dismissed —

Stuart in reply —

The ploffs have made sufficient proof of partn. between Defds. by persons who had a knowledge of the existence thereof before the credit given by the Plff —

Public notice was requisite by the French law of the commencement & articles of a partnership and if a creditor did not attend to that notice and give credit after the expiration thereof it was his own fault — this is what Pothier alludes to Soc. N. 157. — But where no such public notice is given of the commencement or duration of a partnership, all the world must be ignorant of it, and they can have no rule to go by but the conduct of the persons who act as partners, until such public notice shall be given —

Cuvillier, although the agent of the Plaintiff is a legal witness. —

Thursday 8th Febry 1810.—

Present.

All the Judges, excepr Mr J. Ogden.

Sweetman } v. Hamilton. }

The Court were of opinion to confirm the award of the Arbitrators without sending it back to them for alteration or amendment — It is a summary matter under twenty pounds St.— and the allowance of costs must depend upon the Court, and is not in the power of the Arbitrators to decide upon.— But under the circumstances of the case, and as the Plff's demand could not have been instituted in the inferior Court, being for £13. 10, the Court gave costs as in a cause under £30.

Burton } v. Rice.— }

The Court being of opinion that the action instituted by the Plaintiff against Phelps was merely for the recovery of the wood, it did not preclude the Plaintiff from his action agt the defendant for the trespass in cutting down the same wood — and therefore dismissed the Plffs exception reserving the Costs upon the defendants representation that he could not move before the adduction of proof & opinion of the Court in this Cause, for the junction of it with that instituted against Phelps, which now becomes necessary so as to prevent the plaintiff from a double recovery for the same wood.—

Pangman. — v. Beaudouin

The Court were of opinion that even if the Note in question could be considered as a transaction upon the damages in question, yet the defendant could set it aside by proof that it had been made either by erreur on his part, or by dol on the part of the Plaintiff, and therefore admitted the parties to their proofs

Lemoine de Longueuil. — v. Charland & Allaire. Gar.

The Court were of opinion that on the Donation by Allair, lods & ventes were due to the plaintiff, as it appeared that Patenaude had entered into possession under that donation — but on the resiliation of that deed the Court were of opinion that no lods & ventes were due, having been made from the inability of Patenaude to pay the rente therein stipulated in qu. case it was the same whether the Resiliation by retrocession of the property was made in or out of Court. — But as Plff had omitted to make proof of the value of the articles of rente & pension stipulated in the deed of Donation, the Court dismissed the Plaintiffs action, saving her recourse. It appearing that Defd. had paid the lods & ventes upon his own purchase. — See authorities (6)

(6)
Prudhomme, liv. 3. ch. 46. p. 350
= Poquet de Livonnieres. liv. 3. ch. 6. p. 216. §. 2. Tr. des Fiefs. —
= Dumoulin. Tr. des Fiefs Tit. 2. p. 103. —
= Argou. liv. 2. ch. 4. p. 170.
= Guyot. Fiefs. 3. Vol. ch. 12. §. 19. p. 489 max. 3. —
= Rep.re de Jurisp.ce v.o Lods & Ventes. §. 28 dist. 7. —
=

Hagar v Henderson } The Court admitted the publication of the Commissions rogatoires, being of opinion that they were not bound by the Chancery practice in this instance, and that there was no rule of practice requiring the observation of the formalities stated by the Plaintiff. – That in this as in every other case if any fraud or improper conduct could be shewn about the execution of these Commissions the party should have a day in Court to prove it. –

Dominus Rex v Hervieux & al'. – } The Court were of opinion that the writ of Certiorari sued out in this Cause ought to be quashed on two grounds, the one, because there was no affidavit of the service of six days notice on the Justices – and the other, because no grounds were laid before the Judge who granted the writ – but as it appeared that the counsel ~~where~~ before the Judge at the time the writ was granted, ~~was~~ objected, ~~saving~~ on behalf of the Justices, only to the sufficiency of the Security offered for costs, and stated no other objection, as he then might have done – the writ was quashed, without Costs. –

Lascelles & Boimier vs. Robertson. — and Sutherland mis en Cause

The Court were of opinion that the Verdict of Jury was contrary to law, and to the evidence adduced as well as the direction of the Court in this, that there was proof of an agreement for the sale of goods between the parties, that there was an actual delivery of part, and therefore the verdict ought to have been for the Plffs — A new trial was granted — reserving the question of costs to follow the result of the trial. —

Parker Gerrard Ogilvie & Co. — vs. Jas & A. McGill & Co.

The plaintiffs having moved for fixing a day to adduce verbal testimony in the Cause, the Counsel for the Defendts moved that the Com. Rog. which had been sued out by the plaintiffs and returned into Court should be first published that the parties might have communication thereof — The propriety of this publication was doubted by the Court, and as the Plaintiffs counsel did not consent thereto the Court took time to consider of it.

Berthelot vr Chaulet & Contra } On action for goods Sold &c.

Ross for Pltff. states that he has made proof of his demand, & prays Judgt. thereon. —

Lacroix for Dfdt. states, that he has delivered to the Pltff four pieces of pine wood for which no credit is given him, and that the value of this wood will reduce the pltffs demand under ten pounds Sh on which account he ought to be allowed Costs only as in the Inferior Court. —

Ross in reply says, that there is no sufficient proof of the delivery of any pine wood by the defend to the Pltff. —

Sutherland Curr. &c. vr Vancoughnet } action for goods sold by the late Pk Robertson to the Defendt. —

The Plaintiff states, that the only question before the Court was respecting a receipt for £11. 7. 3 filed by the defendt. alledged by him to have been received from the late P. Robertson for so much money paid him on the 12 Novr 1806 — That this receipt is a forgery, as it is evident that the figure 6 has been inserted instead of 4 which has been defaced.

That

That the defendant did pay to the late Patk Robertson a sum of £11. 7. 3 on 12 Nov: 1804 is true, but not in 1806 — That the difference of these two figures is very material here, for if the receipt be truly made as alledged by the Defte it will exonerate the Defendt from the present action as it is subsequent to delivery of the goods and stated to be in full of all demands up to the date of it — if on the contrary it shall turn out to have been made and given on 12 Novr 1804, it is prior to the transaction upon which the defendant is sued and can prove of no use to him — The Plaintiff contends that the above receipt has been falsified upon the following grounds — 1st By the testimony of Hoyle & Reeves it appears that the late P. Robertson made this figure (six) in a different manner from that now inserted in the receipt — 2d. That in Novr 1806 the late P. Robertson ~~had~~ been sick, and was in that state of bodily weakness as to be unable to write — 3d. That on 12 Nov: 1804, there appears on the books of account of Mr Robertson a sum of £11. 7. 3 credited to the defendant but in Nov: 1806 no monies whatever

appear

appear to have been paid by, or to be credited to the defendant in those books. — Pltff therefore contends that the receipt ought to be set aside and Judgment given agt Defendt —

Stuart for Defdt. The proof relied on by the Pltff of the change of a figure in the receipt is wholly insufficient — The witnesses were not present when the defendant paid the money or when the late Mr Robertson made the receipt in question, and the mere probability raised by their testimony can form no proof — That the books of account of the late ~~defendant~~ P. Robertson can never make proof in his favor, agt the contrary allegation of the defendant, who alledges that in Nov. 1805, he never paid any money whatever to the late Mr Robertson. —

Molloy v Connolly } Action for goods sold &c

The Pltff states that he has made proof sufficient to entitle him to his Judgt agt Defendt — relies on an exhibit filed by defendt which states that in June 1805. a balance was due to pltff

The Defendt contends that there is no sufficient of Pltffs demand — That defdt ought to have Judt on his Incidental demand for credits given by the

Pltff

Plaintiff in his account for monies paid him by the defendant, as Sd Pltff has not proved so much of the said account as will amount to the extent of the said Credits. —

Pangman
v
Duprat. —

Action for damages agt Defendt for carrying his grain to be ground at another mill than the plaintiffs banal mill

Ross for Pltff. states that Pltff has made proof of his damages to the extent of his demand, and that according to the law of the Country he is — founded in his demand for the same —

Cites. 2 vol. Edits. p. 131. — arret 20 Juin 1667
" Id — p 147
" Id. p 290. —— Juillet 1728. —

Lacroix for Defdt. states, that there is a contrariety of proof respecting the sufficiency of the Pltffs mill — and which is a matter fit to be left to Experts. — Contends that Pltff has filed no title to shew that defendt is bound to grind his grain at Pltffs mill, without which his action must fail. —

Shuter. —
vs
Bouthillier
&
Cuvillier & Co
Intervs —

Stuart for Pltff. —

Action for recovery of eleven barrels of potash which came to the hands of the defendant as Inspector of Potash in Montreal. — The facts in proof are, that on 25th Augt. 1805, one Robt. Randall then at Cornwall gave an order to Fredk Delisle his clerk at Cornwall to forward as quick as possible what potashes he had to the Pltff, to mark the barrels FS, and to desire Mr Grant of Lachine when he received these barrels to forward them to the house of inspection at Montreal for the use of the Pltff. — That in Sept. following Delisle marked eleven barrels as above, and an opportunity having occurred of forwarding them by means of a boat which the Intervs party had freighted from Lachine with Salt, he put them on board of same with a bill of lading addressed to Mr Grant & directions to him to forward same to the Inspection Store on acct. of the Pltff — Delisle wrote at same time to Pltff that he had forwarded the eleven barrels of potash marked as above & numbd from No 1 to No 11 — also, that after the barrels were so marked & numbered he had received a letter from the Intervs party inclosg an order from S. Randall to send them some potashes also, but as he did not know what quantity to send them, had marked all the barrels with Pltffs mark, the Pltff shd take the quantity Randall promised him & let Cuvillier & Co have the rest — On the 6th Sept. Delisle wrote to Cuvillier & Co nearly in the same terms, tells them to apply to Mr Shuter who wd let them have the quantity of potash they were to have. On the 9th Sept. after the potash had arrived at Lachine the Intervs party wrote to Mr. Grant, that as they had engaged the boat and were liable for the expences of transporting the ashes they had a right to them, requests. at same time that he would forward the ashes

to

to the Inspection Store to their address, & they would keep him harmless for deviating from the orders he had received from Mr. Delisle – with this order Mr Grant improperly complied and acquainted the Pltff that he had done so that he might claim the ashes if they belonged to him, which the Pltff did, and the same being refused by Defendt. the present action was instituted for the same.– These circumstances constitute a property in Pltff, before even any order was received by Delisle for sending any ashes to the Intervening party – and the error of Mr Grant in forwarding the ashes to the defendants Store to the address of the Intervs party cannot be considered as a delivery to them.–

Rollard for Dfdt– The pot-ashes came to defdts hands as the property of the Intervs party, and he was not justifiable in delivering to the Pltff wt out order of the Court.

Ross for Intervs party. The Pltffs action is ill founded there is no ground for a revendication of the pot ashes by the Pltff, as he never had the possession of them – The Pltff and Intervs party had an equal right to receive the ashes under Mr Randall's order, and they came first to the possession of the Intervening party which gave them a preference — the putting the ashes on board the boat hired by the Intervs party was a delivery to them, and being afterwards forwarded to the Inspection Store as their property and by their directions constitutes a preferable right in them to that of Pltff

Friday 9th Febry 1810.

Present

All the Judges except Mr Justl. Ogden.

Berthelot
v
Chaulet.
& Contra.

It appearing from the evidence that the defendt had furnished four pieces of pine wood to the Pltff for which no credit had been given him, the Court deduct 20/.– from Pltff demand, and gave Judgt for £10.13.8 agt. Defdt wt. Costs as in the Inferior Court.–

Sutherland.
Curr. –
v
Vancoughnet

The Court were of opinion from the evidence adduced that the receipt produced and filed by the defendant had been falsified in the date, and therefore gave Judgment for the Pltff.–

Shuter. –
v
Bouthillier.
Curillier & Co
Intervs

The Court were of opinion, that the marking the potashes in the Plaintiffs name and forwarding them by Randall's Clerk on account of the Pltff and to be delivered at the Inspection Store for him, constituted a property

in

in the Plaintiff and entitled him to claim the said ashes - That the claim of the Intervening party was founded upon an improper interference respecting the destination of the potashes, by inducing the Store-keeper at Lachine to forward them to the Inspection Store at Montreal as the property of the Intervening party, which was contrary to the directions of the person who had sent them to Lachine - The Court therefore awarded the potashes to the Pltff, and condemned the Intervening party in all the Costs. -

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Lasaussaye. v Burton. -

The Court were of opinion that the Pltff had made sufficient proof of her marriage with General Hazen, & of his death - That General Hazen not having been attainted for treason, his having joined the rebel army was no cause to exclude the Plaintiffs right of Dower on his Estate and by the treaty of peace of 1783, the rights of the parties concerned in the revolution were secured to them. - That the Pltff can have no right of Dower upon the Seigniory of Bleury, as it was purchased by the late Gabriel Christie and Moses Hazen jointly and afterwards the right of Hazen therein was adjudged to General Christie at a Sale thereof made under an Execution by the Sheriff, which prevented Dower from attaching thereon

thereon, as by that Sale the said Christie was in law considered as the Sole purchaser of the whole of that Estate - That Pliff is founded in her claim for Dower on the Seigniory of Sabrevois as Christie and Hazen appear to have been proprietors thereof par indivis at the time of Hazen's decease - The Court therefore dismissed the Plaintiff's claim for Dower on the Estate of Bleury, and adjudged dower to her on Sabrevois, that is, on one half of the undivided moiety thereof, and ordered that the rents and revenues of that half should be accounted for to her since the death of her husband.

Beek. - v. Dewar } Action of Trover. -

Stuart for Pliff. - States that on 27 Febr last the Pliff being an officer of the Customs, seized at Montreal three chests of tea with a Sleigh and two horses, on account of the tea having been imported from the States without a permit - that after the seizure was so made and while the Constable was conveying the articles seized to the Custom house, one Bourdeau, the servant of the defendant drove off the horses & Sleigh with the three chests of tea - the horses and sleigh were returned into the possn of the defendant, the tea was delivered, as alledged by

Bourdeau,

Bourdeau, to the person from whom he received it, — without being able to name him —

That Defendant is bound and liable for the acts of his Servant, and must make restitution of the goods seized. —

That Pliff had a special property in those goods which entitles him to his action for same. cites. — 2 Esp. N.P. p. 577. —

Rolland for Dfdt.

The Pliff cannot maintain his action — he sues in his own name and for his own goods, and not as a Custom house Officer, in which capacity only he had a qualified property in the goods seized, but none in his own individual right and name — cites Comyns Dig. Tit. Act. on Case on Trover. — "who has the property can bring the action". —

That there is no proof that there was tea in any of the three chests, or that it had been imported from the States, and therefore the Pliff had no right to seize the horses and Sleigh of the Defendt. and consequently no right to demand the same by this action —

That Defendt. cannot be liable for acts of Bourdeau, he was not his Servant, and in the present instance took upon himself to bring Defendrs Sleigh and horses to Montreal without his knowledge or

consent

consent, and therefore if Bourdeau had been guilty of any improper or illegal conduct, the defendt. or his property ought not to be answerable for it.—

Objects to the testimony of Bourdeau, as being an incompetent witness.—

Stuart in reply— The public character of the pltff here is not in question, if he had the possession of the goods he is entitled to his action to recover them— It is alleged that Pltff is a public officer, and that he had possn. of the goods, this is also proved, and in this action, the defendt cannot by a tortious act such as his servant has been guilty of, contest the right of seizure of the Pltff.— The Defendt. usually employed Bourdeau to drive his Sleigh and horses, and must stand to the consequences of employing him or permitting him to use the same, and there is no doubt but under the circumstances of having tea in the Sleigh it was liable to Seizure—

Bourdeau, although the servant or agent of the defendt. is a good witness from the necessity of the case

Saturday 10.th Febv. 1810.—

Judge Ogden Abst.

Bouthillier vs Landry.— The Defendt. pleaded for Excep. à la forme, that he was not commorant in the County in which he is stated to reside.—

The Pltff moved that this exception be rejected from the record, as if founded, it ought to have been made by motion agreeable to the rules of practice.—

The Defendt. answers, that this matter is rightly pleaded the rules of practice requiring only that objections to the regularity of the writ or process be made by motion, but not as to form of the declaration.—

Augé.— vs Bouc.— action for certain articles of alimentary pension

The Pltff states, that the late M.r Bouc, the defendt.s father devised certain real property to Defendt. & charged same with payment of articles demanded.

Stuart for Defdt. says, that there is no proof that Defdt. ever entered into possession of the property bequeathed to him, & therefore he is not liable to pay the articles demanded

The Pltff replies — that there is proof sufficient of Defendt.s possession.—

Courtelée. v. Paternaude } action for payt. of Cens & rentes.

Quesnel for Pltff. states that cens & rentes are due to Pltff on the land occupied by the defendt since 1797, and which she claims by present action.—

Drigé. for Dfdt. alledges that there is no proof of the defendants possession before 1802, nor of the land having been granted before that time.— That defendt. owes only £7. 10— to Pltff. & ought not to pay Costs in this Court, but on contrary Pltff ought to pay the extra Costs of Defendt. by suing him in this Court.—

Quesnel in reply, says, that by deed of Concession of the land made to the Defendt. it appears that a Survey and grant had been made of it in 1797, since which time the Cens & rentes are due.—

Courtelée v. Cotté. } action for exhibition of titles & for payt. of Cens & rentes.

Quesnel for Pltff. states that defendt. admits the amount of Plaintiffs demands, but alledges that delay was given him for payment, which he has not proved.—

Bender for Defdt. That all objects in contest are not of the value of ten pounds Stg. and therefore Pltff. ought to pay costs

Poitras
vs
Bouthillier

The defendant moved to file a certain paper in support of his plea, which the defendant had by mistake omitted to deliver to his attorney whereby the same had not been filed with his other exhibits – and also that he should be permitted to amend his Incidental demand by changing certain dates therein mentioned –

The Pltff objects to the motion, & states that issues have been formed on the pleadings in the Cause, and it is therefore too late to file any papers or make any alteration in the pleadings. –

Saturday

Monday 12th Febry. 1810.

Present

All the Judges. except Mr Just. Osorn.

Bouthillier vs Landry. — The Court rejected the pltff's motion, as the rules of practice do not direct that objections to the declaration or to any want of formality therein, should be made by motion. —

Poitras vs Bouthillier — The Court were of opinion that the defendt was too late in his application to obtain any of the objects stated in his motion — and that he did not shew a sufficient ground to induce the Court to grant the same. —

Augé vs Bouc. — The Court gave Judgment for the pltff. considering that the Pltff had made sufficient proof of the possession of the defendant on the property devised to him by his late father. —

Courtelée vs Collé. — The Court gave Judgt. for £8.4.6 for Pltff, with Costs as in the Inferior Court. —

Courtelée. v Paternaude } The Court gave Judgt. in favor of Pltff for £10. 5. 1 & costs as in the Inferior Court. —

Molloy. v Connolly } The Court after examining the testimony adduced in the Cause and the nature of the accounts between the parties, ordered that the whole matters in contest should be submitted to arbitrators — This power the Court thought fit to exercise in this Cause notwithstandg they had rejected the plaintiffs application for a reference to Arbitrators on the 19th. October last, considering that as the parties had thought fit to bring their proofs before the Court a reference to the opinion of arbitrators was improper until the parties should be heard upon the proofs so adduced, when the matter would be regularly before the Court for its opinion either to give a final Judgment in the Cause or make a reference to Arbitrators as they should see fit. —

Dupesne v Vinet } The Court being of opinion that the Pltff had made a better proof of his possession in the woodland in question than Defdt and that he was entitled to his action at. Defend. for disturbg him in the enjoyment of the Coupe de bois, gave Judgt. for four pounds damages & Costs —

Whitfield v. Corse. } Action for goods sold & deliv^{d} — £404. 19. 6

The pleas put in to this action were. 1st Non. assumps^{t} — 2^{d} That the goods were not to be paid for if not sold on 1st May next after delivery, with an averment that a large quantity of them were still on hand — & lastly an Incidental demand for £1000 damages by reason of the Pl^{ff} not having imported for Def^{dt} by the early spring ships a certain quantity of goods, which Pl^{ff} had undertaken to do. —

On trial by special Jury. —

Stuart for Pl^{ff} opened the case, and stated the transaction as a Sale between the parties which admitted of no doubt —

Francis Badgley sworn, says, that he lives in Montreal — that in August 1808 a parcel of goods which came up from Quebec in some of the river craft, was lodged by Pl^{ff} in the yard & Stores of the witness — That Pl^{ff} sold part of them to Def^{dt} — which was delivered to him to the amount of £123. 13, as stated in the acc^{t} now shewn — That Defend^{t} gave his note or acceptance for £63. 13, which left a balance of £60 — on that account. —

John Ross. That in Aug^{t} 1808 a quantity of paints which came from on board a vessel was deposited in M^{r} Badgley's yard, and was deliv^{d} to a Carter sent by M^{r} Corse to take them That he saw the Pl^{ff} and Def^{dt} on board the vessel where they were

were talking about goods then on board – that other parts were afterwards landed from the vessel & sent to Mr Badgley's yard, and wit.e thinks that they were delivered to the same carter who had previously been sent for goods there by Defdr.

x.d

Heard no agreement made between Plff & Defendr respecting those goods on board the vessel.–

Robert Frost. says, that in Sept.r 1809, he applied on behalf of the Plff for payment of the account now exhibited to him, amounting to £501. 19. 6 – when defendant acknowledged to have received the articles mentioned in that account.–

cross-exd.

says, that as to the articles mentioned in the second account now shewn, the defendant said he did buy them, but received them from Plff to sell on commission

Here the Plff closed his testimony

—

Defence.

Franc.s Badgley proves the plffs signature to defendants exhibit No 3. being an invoice of goods which Plff promised to import the then next ensuing Spring.–

Joshua Wharton. Sailed from Canada to Britain in fall of the year 1808, when Plff told him it was his intention to return to the Country next Spring.– says, that if he were to

give

give or take goods for Sale on Commission, he would not state the Invoice or account thereof as stated in the exhibit now shewn wherein it is stated D^r Corse - bought of Whitfield - That the words at the bottom of that account, "to be paid on the first May next if disposed of" would not in his opinion bar the Plff of his right to payment for those goods, if they had been really sold to the defendant, altho' it might prevent him from - recovering it before the first of May -

Lewis Lyman says, that in 1808 he saw the Plaintiff in Quebec who was then about sailing for England, and he heard him say, that he would use every endeavour to return to Quebec by the first of May next Spring - On looking at the Invoice shewn him, says, that it is always better to get such articles early in the Spring as the Sales thereof are generally better in the Spring and early Summer months, although Sales may be made thereof at all times of the year - That if he ordered goods from England to be sent him by the early Spring ships, and they did not arrive till Autumn he should conceive himself not bound to take them, and be besides entitled to damages for the disappointment in receiving them. -

Nahum Mower - printer, says, that in August 1808 the defend^t caused an advertisement to be put into his paper, the

Canadian

Canadian Courant, for the Sale of sundry articles of paint, which was continued for 20 weeks.—

Arthur Webster. a merchant, deals sometimes in the articles of glass and paint — the Sales of which are always better in the early part of the year than in the Autumn — same testimony as Mr Lyman.—

Franc. St Pierre. That in Summer 1808 he was one of Defendts apprentices and worked in his Shop — that he remembers to have seen the Pltff at the Sd Shop, and heard him press the defendant to buy a quantity of paints which he had, which defendt refused to do, saying it was too much — That soon after a large quantity of paints came to the defendants shop, and the witness heard the defendant & some other person say, that part of them had been sent for Sale on Commission. —

Pre Lamoureux — demeure chez le defendr depuis trois ans — sait que le Demandr a laissé une grande quantité de peintures chez le defendr en 1808, mais ne peut dire si le Defendr a acheté ces peintures, ou si il les a eu à Commission — qu'il y a une certaine quantité de ces mêmes peintures chez le Defendr qui sont encore invendues. —

John

John Grant. painter - says, that he tried an experiment on some stone coloured lead which the defend^{t} has for sale, but found no lead in it - that he is unacquainted with this article and cannot tell the value of it

Wm Polley.- That he selles goods on commission - that he sometimes receives goods with certain fixed prices at which he is limited to sell them, and sometimes without any price. "

Roswell Corse. brother and Clerk to the defendant - states the different kinds of paints now in the possession of the defendant unsold.-

Here defend^{t}. closed his testimony

The Pliff adduced the following testimony on his defence to the Incidental demand.-

Robert Frost. That in Sept^{r} 1809 he asked Defend^{t} if he would receive the goods which the plaintiff had imported for him that year, which he refused. -

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The Ch. J. in charging the Jury observed, that the defendant was chargeable with all the goods he had received from the Pliff, - that from the state of the transaction

transaction between the parties, the goods in question appeared to have been sold to the defend ant - the bill of parcels produced by Defend^t. states a Sale on the face of it, and the words written at the bottom must not be considered as varying the nature of the transaction but as modifying the payment - But a stronger ground than this was, that defend^t. by his plea does not deny the Sale, but says, that if the goods were not sold before the 1st May he was not to pay for them at all, - a thing not to be presumed -. On the - Incidental demand it appeared that Pltff had become bound to import goods for defend^t. in the Spring of the year 1809, and that he had failed therein - that defend^t. had not made proof of any Specific sum in damages on this account, but that Jury had the right to allow a reasonable damage thereon.-

Verdict for Pltff on both demands. -

Tuesday 13th Febry. 1810

Ch. Just. absent.-

Ex parte
Anna Starke.-

Gale on behalf of Starke moved for a rule on one Joseph Whitman, a Justice named and appointed under Prov. Stat. 47. Geo. III. for hearing & trial of small causes under £5.— to shew cause why a prohibition should not be granted by the Court to prevent his taking cognizance of two Suits instituted agt. said Starke by one John Odell and now pending before the said Justice in which Suits the said Starke is charged as administratrix in her own wrong, and for payment of articles lent - and for a book debt - inasmuches the Statute aforesaid does not give cognizance to the Justice in such cases.

Wednesday 14th Febry. 1810.-

Ch. J. absent

Ex parte
Anna Starke. } The Court were of opinion to grant the Rule on the Justice demanded by the party.

Thursday 15th Febry 1810.

Present.

All the Judges.

Mallard vs Roi. — The Defendt had been examined on faits & articles and the Plaintiff now moved that Defendt should be held to appear and answer over to certain of the Interrogatories proposed to him, to which Pltff alledged defendt had not answered pertinently, and on default thereof that the said Interrogatories shd be taken as confessed against him. —

Defendt objected to the motion - inasmuchas he had answered pertinently to all the interrogatories. —

Sarault vs Marmier & Noel. Gar. & Boutbillier arr. Gar. — On an Action Negatoire. —

Bedard for Pltff. by his Declaration, states. — That Pre Boutbillier being proprietor of two certain houses adjoining each other in the City of Montreal, on the 19 Febry. 1781 sold one of them to Jean Marie Calvé, without any burden or incumbrance. That by deed of sale of 1st Oct. 1782, the said Clavé sold and conveyed the same house with its appurtenances

to

to the Plff, consisting of the four external walls or gros murs with a certain allonge being part of the said house.— That Defendt now the proprietor of the adjoining house claims a right of mitoyenneté in the wall which separates his house from that of the Plff, and on the month of August 1806 built a small house agt the said allonge and broke the wall in several parts and put beams and rafters therein without using any of those precautions which the law requires even if the said wall were mitoyen.— That the said wall being wholly the property of the Plff and not mitoyen — prays, that his right therein may be declared, and the defendt condemned to demolish and remove the said small building he has so erected against the same, and to repair and put the wall in the same state it was before the building thereof, and to pay £25 to Plff for his damages in this behalf & costs.—

The Defendant called into the Cause Margaret Noel & Amable Noel as his Garants — and they called in the said Pierre Bouthillier as their Garant.—

Ross for Dft. Marmier — pleads, that the wall of separation between the two houses is mitoyen, and has been enjoyed as such for 50 years & upwards, which he offers to prove as well by titles as by other proofs.—

The Garants, Noel, made no defence to the action.—

Rolland

Rolland for the arriere Garant,

For exception to the action en Garantie instituted against him by the said Noels says – that by the deed of sale of the house now occupied by the defend^{t}. which he made on 30^{t}. April 1781, the pignon only and not the wall of the house he sold to Calvé, as stated to be mitoyen and as it does not appear by the action en garantie of the said Noels, that the defendant had erected any building ag^{t}. the said pignon or broken any part thereof, or that it was for reason of any thing done to the said pignon, that the Pltff had instituted his action ag^{t}. the defend^{t}. or for which the said Noels were troubled – concludes that Bouthillier ought not to be held to answer to the action –

And (reserving his right to the benefit of the above exception) pleads to the action en garantie of Marmier against the said Noels – That there is no dispute raised as to the pignon of the house, but only the gros mur and allonge, which runs behind the houses and separates their yards and lots – That by the warranting of the pignon to be mitoyen, it cannot be from thence inferred that Bouthillier warrantes also the wall which separates the emplacement of the parties – That the pignon of the Pltffs house is really & truly mitoyen to Defend^{t}. house and has always been so, which is evident as well from the titles & possession of the parties as by the said pignon being partly built on the defendants ground –

Mr

Mr Panet for Noels, in answer to the exception pleaded by Bouthillier, says, that the said Bouthillier having guaranteed to them the right of mitoyenneté in the wall in question, & for which they are now troubled by the action afores.d of the defendant, they are entitled to their indemnification and demand afores.d ag.t him the s.r Pre Bouthillier.

Ross, for Marmier - in answer to Bouthillier's plea, says, that the Plff disputing the right of mitoyenneté in the whole wall which separates the two houses, the defend.t is well founded in his demand en garantie ag.t the said Dess Noel.

Bedard for Plff - replies to the defendants plea - by joining issue with him on the facts therein stated.

The parties were heard on the exception pleaded by Bouthillier on the 4.th april last - and judgment given thereon the 17.th of the same month dismissing the exception, the Court being of opinion that the word pignon extended to the whole wall

On the 7.th Oct.r last - The Court by an Interlocutory Judg.t ordered that Experts should be named by the parties, to - examine the gable end (pignon) which separates the houses of the parties, and the mur d'allonge, to ascertain from the titles and other outward marks and vestiges whether the said wall and continuance thereof ought to be considered as mitoyen or not - to make a figurative plan - and to point out the degradations made in the said wall by the defend.t -

ou

on the 5th. inst. the parties signed a consent rule for discharging the experts from the oath of office - and that they make their report, even if they shou. have operated without being sworn. - The report was thereupon filed instanter. -

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On hearing on the report this day

Rolland for arr. Gar. - The Court has not decided by the Interlocutor that the wall in question is mitoyen, but has referred to the experts to determine and report the state of the wall and such facts relative thereto as shall enable the Court to determine thereon. - The report of the Experts has not however stated sufficient facts for the information of the Court but has determined the point, by saying that the wall is not mitoyen - and in support of this opinion they give the same reasons as set forth in the Pltffs. declaration upon which the Court was competent to determine without the opinion of the experts - they say, that there are no marks of mitoyenneté, but the titles of the parties are contrary to this opinion - they have not stated any thing to shew that the mur d'allonge is mitoyen, and as the building erected by Defendt. was supported by this mur d'allonge, the arriere garant cannot

be

be bound to any warranty under the present action which relates only to the apros mur or pignon of the house of the Pltff.—

Lacroix for Noel - that if Bouthillier be discharged from the warranty in question, so ought the Dlles Noel, as they are prosecuted for the same object.—

Ross for Dfdt. The wall between the houses has been used and considered as mitoyen for 70 years & upwards as appears by the titles — and if the wall be mitoyen, the prolongation of it must be so also.— The Experts do not state facts sufficient in their report to warrant their opinion they only make a statement from the titles of the parties, which was not the only matter referred to them, as the Court was competent to have drawn every legal conclusion from those titles without any reference to them.— as the house now occupied by Defend. was sold to him with four walls and a right of mitoyenneté in the wall of separation between the houses, he is entitled to his recourse agt. his vendors in case the pltff prevail in this action.—

Bedard in reply— The whole wall in question belongs to the Pltff and is not mitoyen — the facts shew this — as Pltff's house was the first built and this wall is entirely on the Pltff's ground — it was sold by Bouthillier without reserve of any right of mitoyenneté in the wall in question

question, and as such a right must be considered as a Servitude, it cannot be claimed by the Deft without a title – It appears by the marks and facts stated by the experts that the wall is not mitoyen, particularly, that the defendants chimney upon that side is built against the wall but not into it – prays Judgment on report of Experts.–

Trinque
v
Marois

Or action en declaration d'hypotheque.–

The defendt pleads, that he possesses only two acres in front by all the depth of the land in question which he is ready to abandon as required – That before abandoning the same he ought however to be reimbursed a sum of which he paid to the bailleur de fond of the said land, and for which he has a preferable claim thereon to that set up by the Plff.– cites. Poth. Hyp. ch. 2. sec. 6.
Gr. Cout. 2. Vol. tit. 6. p. 36.

The Plff answers that Defendt has sold part of the land and obtained money thereby more than sufficient to indemnify him for what he alledges to have paid to the bailleur du fond, were such claim founded – but contends that Defendt is not entitled to claim same from him before abandoning the land – cites, case. McKenzie v Wurdele. –

Friday 16th Febry 1810.—

Present—
All the Judges.

Babcock v Ruiter & al } On trial before Sp. Jury on action for false impris.t

The defendts objected to any testimony being adduced upon this Cause in support of the facts stated by the Pltff, inasmuchas the action being ag.t Justices of the Peace, who acted under a complaint and information made to them, was wrong brought, being an action of trespass, whereas it ought to have been case.— and it is a settled distinction that where an act is done which is in itself an immediate injury to another's person or property there the remedy is usually by an action of trespass vi et armis 3. Bl. Com. p. 122.— and where the act of imprisonment proceeds from the defendt the action must be trespass & trespass only, but where the act of imprisonment by one person is in consequence of information from another, there an action on the Case is the proper remedy— cites—

6. Com. Dig. p. 392
2 Term Rep. p. 225
——— p. 231
4 do ——— p. 222.—

That the Pltff having been imprisoned under a conviction before the defendants of an offence of which they had cognizance he cannot institute any action whatever against them in this respect so long as the said conviction remains in force as them.

cites

cites. 7 Term. Rep. 633.. in notes -
Cowpers de 172. Fabrigas at. Moyston -

That ~~no~~ action could lie agt the defendants as brought, ~~unless~~ unless it be shewn that they had acted from corrupt motives, which is not alledged Doug. Rep. p. 427 -

The Court over-ruled the objection - being of opinion that the distinction respecting the forms of action in England did not hold here, it being sufficient that the Plff stated a ground of complaint which if true would entitle him to redress, which the Court were of opinion the Plff had done here. - That the Court would consider the conviction before the magistrates as regularly made under the law, but as to the imprisonment to which they had adjudged the Plff beyond the time limited by law, the Court must consider them as acting beyond their jurisdiction, & on that ground maintain the action, and leave it to the Jury to enquire under the circumstances of the Case whether they had acted from an upright, or a malicious motive, in this respect, as in the latter case only, could the action be supported -

~~It appearing from the testimony produced -~~

The Defendants, on their defence, offered in evidence the proceedings had before them under which the Plff had been convicted of being a rogue and a

vagabond

vagabond in consequence of which conviction he had been committed to the house of Correction, under Stat. 17. Geo. 2. ch. 5.— the said proceedings consisting of,

1. Affidavit & complaint of Griffin Reynolds agt. Pluff, stating him to be a man who obtained his living in an illegal manner
2. Affidavit & complaint of J. Piper, to the same effect.—
3. Warrant to search house of one Mandego where Pluff lived,— with Constable's return—
4. Examination on oath of Pluff under Stat 17. Geo. 2. ch. 5.—
5. Affidavit & complaint of one John power at Pluff
6. Conviction of Pluff as a rogue & vagabond.—

It was objected by the Pluff counsel that the depositions & affidavits taken before the defendants could not admitted as proof in the cause, inasmuchas they were ex parte proceedings, and not authenticated by the persons who had made them — that if the persons making those depositions could be had it was necessary to produce them, that they might be cross-examined by the Pluff on the subject of those depositions —

By the Court — The Conviction making a reference to the above depositions must be considered as making part of it, & although they may be objectionable in point of form if they stood alone, by being coupled with the Conviction which is in itself a record & legal, they ought to be received —

The Court and Jury being fully satisfied that the defendants had acted with upright intentions and from the best motives — a verdict was found for Defendants.——

Whitfield
v.
Corse. -
&
Contra

On motion by defendt. for a new trial -

Sol. Genl. for Defendt. states as grounds of his application, that the verdict is contrary to the direction of the Court, and to the Justice of the case - The direction of the Court inclined to give damages to the defendt. on his incidental demand as from the undertaking of the plaintiff to furnish the goods mentioned in the invoice and his failing - therein a certain damage resulted to the defendant and it was contrary to the justice of the case not to - allow such damage. - There were besides many - circumstances to shew that the goods with which the defendant is charged were not sold to him but delivered on Commission - the unusual quantity of them, the little or no value of some part of them, and the act of the Pltff - at the foot of the invoice stating that they should not be paid for if not sold, seems to shew that the goods had never been sold to Defendt. or at all events to require that he should use his exertions for the dispodal of them for the benefit of the Pltff, which he had done -

The Pltff objects to the motion - that there are no sufficient grounds shewn for a new trial - the whole circumstances of the Case were left to the consideration of the Jury who had it fairly before them under all the proofs adduced. -

Saturday 17th Febr. 1810.

Present.

All the Judges.

Turcot v. Valois

Action ex vendito. —

Lacroix. for Pltff states, that on 22. Febr. 1802, the Defdt sold him a butchers Stall in the old market place of Montreal with promise of warranty agt. all trouble and disturbance in the enjoyment thereof. — That in the month of Augt last he was turned out of possession of the s° stall by the magistrates of the City, who by virtue of the Provincial Stat. of 47. Geo. 3. ch. 7. S. 11. took down and carried away the said Stall, whereby the Pltff hath been deprived thereof, and notwithstanding he notified the trouble aforesaid to the s° Defendt. he refused to quiet the same, or to indemnify the s° Pltff for his loss & damages in this behalf which he now claims. —

Vigé for Defdt. pleads, that he is not bound to the warranty pretended & claimed agt the act of the magistrates in this Case — The Defendt never sold the Soil upon which the bench or Stall is erected, but only the use and enjoyment of that Stall as he himself held it — The magistrates were authorised by a Subsequent law to remove the Stalls in the old market place. their authority in this respect could not be disputed, nor was the Defendt bound to warrant the Stall to the Pltff contrary to that authority — the power of the

legislature may be compared to the fait du prince, against which there was no warranty in law. cites. Poth. vente. № 92. — That according to the prov. Stat. an indemnification is provided for the actual proprietors to compensate the loss of their Stalls which the Pltff as proprietor of the Stalle in question received. —

Lacroix in reply. The Dfdt. sold as well the place where the Stalle stood as the Stalle itself and all its appurtenances, which he legally could not do, and it was therefore a fraud in him to sell & warrant to the pltff what he knew the s^d Pltff could not retain — cites. Poth. vente — № 86 — also № 183. 184 —
2 Argou. ch. 2. p. 384 —

The Defendt. ought therefore to return to Pltff the price he received for the said Stalle. —

Desautels vs Viret — } Action for payment of certain articles of rente viagere. —

Bedard for Dfdt. states, That when the donation was made which stipulates the payt. of the annuity in question the Pltff lived in her apartments reserved in the house on the land given, but has since left it and now resides in another parish, to which place the

Dfdt —

Dfdt. contends he is not bound to carry the articles demanded. That Pliff does not claim the articles en nature but the value of them in money, to which Pliff is not entitled as she has not put the defendt. en demeure by demanding the said articles from him after they became due at the house on the said land where he lives, and where only he is bound to pay them. — That defendt. having found an opportunity for disposing of the said land to an advantage, the Pliff sollicited him not to sell it, and agreed to deduct 500.# from the annuity which the defendant is bound to pay her, to which defendt. acquiesced and is now therefore entitled to a deduction of the said sum of money from the present demand. — This agreemt. is proved by Pliff's answers on faits et articles. —

Ross for Pliff in reply, says. that there is proof of a demand of the articles before the institution of the present action - but this was not necessary, for where a day is fixed for payment no demand is necessary, after that day elapses the party is ipso facto, en demeure, and on this account the Pliff is entitled to the value of the articles in money, as the day stipulated for the payment thereof had elapsed before the commencement of this Suit. —

Courville. v. Fissiau. } On action for rescision of a deed for a lesion d'outre moitié de juste prix. –

The Plff moved that Court would name Experts to ascertain the value of the land according to law. – Poth. Vente. № 344. –

The defendt objects to the appointment of Experts and says, that the Court ought to be first informed by the testimony of witnesses if there be any ground for this action, and from the value of the object in question not to leave it altogether to the opinion of two or experts what was the value of the land when the same fact may be better known and enquired into by such testimony. –

Bender v. Durocher & Brennet mis en Cause } On rule Nisi on Brennet the gardien, why he should not be held to represent the effects seized which had been committed to his custody. –

The Plff states that in July 1808 he sued out a writ of Execution against the goods & chattels of the defendt and by virtue thereof seized the different articles mentioned in the P. verbal of Seizure dated in Augt. 1808, which were committed to the charge and custody of Brennet, as gardien. – An opposition having

having been made to the Sale of the s^d articles by one Monat, the parties were heard thereon in Court and on 18^th Oct^r 1808 a writ of vend. expon. was directed to issue agt such of the said articles as had not been adjudged to Monat— This writ having issued, the bailiff charged with the execution thereof went to the domicile of the defend^t but not finding the goods seized there, afterwards on the 10^th Nov^r 1808 went to the domicile of the s^d gardien and demand them, which were refused, under pretence that he had not got them.— On the 10^th April 1809 the Pl^ff obtained a rule on the gardien to shew cause why he shd not be bound to represent the effects seized, or on default thereof to pay the plaintiff's debt— nothing was done on this rule by reason of the irregular service thereof. On the 9^th June 1809 an alias vend. exp. was sued out, to which Sheriff made his return in October last stating that neither the defend^t nor the gardien would represent the effects to him; which was the reason he could not proceed to the Sale thereof as required by that writ— To this return was annexed the Bailiff's P. verbal. dated 14 June 1809, wherein he states that on the 10 Nov^r preceding he had summoned the gardien to represent the effects seized that they might be sold under the first writ of vend. expon. which he had refused to do, and that afterwards on s^d 14 June 1809, he had again

required

required the said gardien to represent the Sr. effects who had reiterated his refusal in this respect.— That on the 20th. of October last the present rule Nisi was obtained agt. the said gardien to compel him to represent the said effects and in default of his so doing that he should be adjudged to pay the Plffs debt & Costs.—

Bedard for Gardien.— That the gardien is not bound to answer before this Court on a rule nisi, but ought to be brought in by the Kings writ of Summons.— That he has a material interest to defend in this Case and is entitled to have his plea put in in writing to the demand of the Plff, and to make an incidental demand for fees due to him as gardien which he cannot do under the present rule.—

That in Case the Court shall consider the gardien bound to answer upon this rule — he pleads, that he is discharged by law from the garde of the said effects, inasmuch as two months after the oppositions have been discussed, or one year after the Seizure, the gardien is discharged de plein droit, without any order or Judgment of the Court, where the party seizing allows such time to elapse. this is the Case here — the seizure was made in August 1808 — the oppos.ns of Monat was determined on the 18th. Oct. 1808 — no proceedings thereafter had until 10th. april 1809 when Plff moved for a rule to shew Cause agt. the gardien — but nothing was done

on

on that rule, and as to the gardien it was the same as if it had never been sued out – for want of due diligence therefore within the two months the gardien was discharged cites. Poth. proc. Cw. p. 182. –

That if the Court shall be of opinion that the gardien is still liable, he ought not to be bound to represent the effects – seized without being paid the charges for keeping them up to the present time, which according to the tariff established by the Court will amount to £82. –

Rollard for Pltff. in reply, says, that the gardien by signing the proces verbal of seizure of the defendants effects makes himself answerable as an officer of this Court. That the opposition of Monat was not decided two months before proceedings were had for the sale of the defend^{rs} effects – and if it had, the practice as to the responsibility of the garant is different from that cited from Pothier, the rule being that the gardien cannot be discharged from the representation of the effects committed to his charge in less than thirty years from the time of his appointment, unless sooner exonerated by a Judgment of the Court – cites 1 Duplessis. Cw. 4. p. 624. – 1. Pigeau. proc. Cw. p. 640. –

That 15 days before the expiration of the two months from the time Monat's opposition was determined, to wit on 10 Nov^{r} the gardien was called upon to represent the effects seized and refused to do it see bailiffs return to this effect –

Bedard – observed, that bailiffs return was not a regular P. Verbal but a mere certificate which did not constitute a proof –

Jewett. —
v.
Farrar & al'
&
Hagar opp.

On opposition of Jon. Hagar, claiming some of the articles seized as his property

Georgen for the Oppt. stated, that the Opposant had purchased the articles seized from the defts Farrar, and it was agreed that they should remain during the ensuing season in the hands of the defendt. to enable him to carry on his potash manufactory — that this agreement operated a tradition feinte of the said articles, thereby constituting the defendt. holder of them a' titre de precaire for the Opposant —

Sol. Genl. for Pltff. There is no actual delivery alledged to have been made of the effects on the sale in question, and it is a principle in law that a sale of goods without delivery is not binding as to third persons, and particularly in cases of this kind where great frauds might be committed — that a tradition feinte cannot hold here, there must be an actual delivery, or deplacement of the goods. —

Brisset
v
Brisset

Debt on Obligation.—

Georgen for Dfdt. states, that the Obligation in question as well as a prior Obligation dated 30th Augt. 1808, were granted paid and advanced, and to be paid and advanced by the Pltff on account of the defendt. to different persons to whom the defendt. owed the same — That since the passing of the said Obligations the defendt. finds that the said monies so alledged to have been paid and undertaken to be paid by the said Pltff, are still due and unpaid, and payment thereof hath been demanded from the said defendt. by the persons to whom the said monies are due.— That the Obligations aforesaid having been consented by the defendant in error and on a belief that the statement therein made was true, and that the monies alledged to heve been paid by him had been bona fide paid or settled in such manner by the Pltff that defendt. would not be troubled in future by any demand being made on him in this respect — That Defendt. ought to be admitted to make proof of these facts, and the Pltff. suit thereupon dismissed.—

Rolland for Pltff. The defendt. ought not to be admitted to prove any thing contrary to his own act — By the obligation aforesd. it is acknowledged by Defdt. that he is indebted to Pltff. in monies he had

paid

paid for the defendant - it is his own acknowledgment, not the assertion of the pltff, and it ought therefore to be binding upon him. cites. Poth. Obl. Nº 758. -

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Monday 19th Febr. 1840. -

Present. -

All the Judges. -

Courville. v Fischeau - } The Court ordered the parties to proceed to their proofs by the adduction of testimony before it, reserving to direct a further examination by experts if they should see fit. -

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Bender. - v Durocher. & Brunet. } The Court were of opinion that the mis en cause was discharged as gardien and therefore not answerable under the present proceeding - That according to the redaction of the Code Civil, and the authorities cited, particularly from Poth. in his Proc. Civ. the gardien was ipso facto discharged after the expiration of a year and a day from the time of his appointment, if no proceedings were had by the saisissant for disposing of the effects committed to his charge before that time - that in this

this case more than a year had elapsed from the time of the appointment of the gardien in Augt. 1808, to the time when a legal proceeding was had for the Sale of the effects.- The Court were however of opinion that a gardien is liable to answer on a rule nisi for the effects committed to his charge under the process of the Court, considering him in this respect as an Officer thereof.-

Jewett. v. Farrar. & Hagar. Opp.t

The Court were of opinion that the opposant had not in his reasons of Opposition stated a sufficient delivery of the articles under the Sale made to him by the defend.t- and therefore dismissed it.-

Turcot v. Valois.

The Court were of opinion that the defendant was not liable to the warranty claimed by the Plff aq.t the act of the legislature.-

Brisset v. Brisset

The Court were of opinion that the defend.t ought to be admitted to make proof of the facts by him alleged as containing sufficient ground of error on the part of the defend.t and fraud on the part of the Plff. not to grant the conclusions of the demand-

Desautel v. Vinet.

The Court considering that the defendt. had not been put en demeure for the payment of the articles in question, gave Judgt. directing that he should deliver the same en nature at the house upon the land within 15 days & on default thereof to pay the value of them in money.

Tringue v. Marois

The Court adjudged the defendant to deliver up the land, or such part thereof as he possessed to be disposed of according to law — reserving his right of preference on the proceeds of the Sale for such monies as he may have paid to the bailleur du fond the Court being of opinion that he could not demand the reimbursement of such monies before abandonning the sd. land. +

Whitfield v. Corse & Contra

The Court were of opinion that defendt. had shewn no sufficient ground to entitle him to a new trial, and therefore discharged the rule nisi. —

Symes
v
Sutherland
& N. Roberts

Action for goods sold –

The Declaration stated that on March 1808 the late Patrick Robertson and Neil Robertson traded together as Partners, under the firm of Patrick Robertson & Co and that the Plff then sold them certain goods to the amount of £ for the recovery whereof he now sues Sutherland as Curator to the estate of the s. Patrick Robertson, and the said Niel Robertson by reason of their said partnership.–

To this action the defendants pleaded severally non-assumpsit – and under the order for the adduction of testimony, the following facts appeared –

That the Plaintiff, who lives in Quebec, did on the March 1808, sell and deliver to the firm of Patrick Robertson & Co the merchandises in question to the amount stated in the declaration.– That the firm of Patrick Robertson & Co was first established in October 1800 between the said Patrick & Niel Robertson who at that time had agreed to carry on business as Copartners for five years under this firm, and that Niel Robertson was and continued to be an active partner in that firm from the s. month of October 1800 until May 1801 when the partnership was dissolved by a Notarial agreement between the parties and the said Niel Robertson became a Creditor of his brother,

who

who continued to carry on the business under the same firm, for £5000, and payable to him by different instalments. No public notice was given of the dissolution of the partnership, but it was generally known and talked of in the neighbourhood and among the friends and acquaintances of the parties - but it appears not to have been known to some of the commercial houses of Montreal until particular information was given them to that effect either upon enquiry made, or from particular transactions which took place between them & the said Patrick Robertson - That after the dissolution of the partnership the plff left the house where the business of the joint concern was carried on, and where he had lived during the time he acted as a partner, he interfered in none of the business of the house but was considered as a stranger thereto, and at a meeting of the Creditors of Patk Robertson held after his deceased, the said Neil Robertson was admitted to be a Creditor of the said Patrick Robertson for the monies which he had left in his hands since & under the said act of dissolution of the said partnership. The broker who sold the goods in question states in his evidence that prior to that ~~that~~ time he understood that Neil Robertson was a partner in the said house, and although he had heard that arrangements had taken place between him and his brother patrick Robertson,

yet

yet in consequence of such arrangements he never knew that Niel had ceased to be a partner.—

The Court were of opinion that no sufficient proof had been made of a partnership between Patrick and Neil Robertson, as the same witnesses who proved the existence of it proved also its dissolution.— That it is the duty of persons trading with a Company to inform themselves who compose that company if the names of all are not publicly known, otherwise they are supposed to trust only such as are known, and as Patrick Robertson was the only person whose name was publicly held out in the firm of Patrick Robertson & Co., he alone must be considered as the only person trusted, unless it had been made to appear that Niel Robertson at the time held an interest in the Concern.— That the dissolution of the partnership between the parties in 1801 was notified to some, and was generally and publicly known and talked of in Montreal — and from the understanding and information which the broker had, that arrangements had taken place between the parties, the nature of which he did not know, it was on that account the more incumbent on him to inform himself who were the persons composing the firm of Patrick Robertson & Co., if he meant to require the credit of any other than that of the person who was known — and it does not appear that any credit was given by him to Patrick Robertson & Co. upon the belief or supposition that

Niel

Niel Robertson was a partner - The action dismissed -

I differed from the opinion of the Court upon the following grounds -

It is in proof that a partnership existed between Patrick & Niel Robertson and that Niel Robertson took an active part in the concerns thereof from Oct. 1800 to May 1801 - The dissolution of that partnership - which then took place, although it was binding on the parties, was not effectual as to the world, or third persons - and although it has been objected that the same testimony which proves the partnership proves at the same time its dissolution, yet this is not strictly the case, because the proof made of the partnership is such as shews the existence of that partnership in such a manner as to make it liable to third persons for the debts it contracted - the proof of the dissolution cannot affect third persons, as it was not publicly notified - Public notice of the dissolution of a partnership must be given, so as to exonerate the Partners from the debts which may be thereafter contracted in the name of that partnership - It has been asked how this public notice shall be given, as we have no law to guide us in this respect - So it may be said in England, where no Statute can be produced

that

that requires such notices to be given in the London Gazette or any paper, — but as Gazettes are found to be the — readiest and best means of conveying intelligence to the world of any fact which may be inserted therein, they have generally been used in this respect, and a notice of the dissolution of a partnership inserted therein has been considered as a public notice to the world of that dissolution. There are two descriptions of people to whom such notice must be given.— 1st. The persons who are in the habits of dealing with the partnership — and — 2dly. Third persons, or the world at large.— and a different kind of notice of the dissolution of a partnership must be made to each of these persons — To the first description of persons there must be a particular signification of that dissolution, a general notice will not bind them, unless it can be shewn that it came to their knowledge — As to the second description a general notice is sufficient — upon these points the English and French law agrees —

As to first — see. Watson on Partn. p. 384. Graham & al. v. Hope & al.
As to second. see. 1 Esp. Rep. p. 371. Godfrey. v. Turnbull & Macawley
See also. Ordre 1673. tit. 4. Des Societés. art. 4. — on note. —
Dic. des arrets. vo Societé. tit. Dissolution de Societé. p. 209. tom. 6.
Despeisses. Cont. Soc. sec. 2, no 19. p. 142. 143.—

It has been objected that the time for which the partnership here had been contracted was elapsed before the sale of the goods

in

in question, and therefore according to the principles of the French law, it was the duty of the Pliff to have enquired who the persons were who composed the firm of Patk Robertson & Co before trusting them - to this it may be answered, that the articles of Copartnership been made publicly known at the time they were agreed on, by enregistration and exposure in a public office, this principle might have applied, and no further notice of dissolution been requisite - but as no such previous notice was given, the dissolution could not be known until notified, in this respect it is the same as a Partnership contracted in England, where such notice must be given - Some proof of a notice has been offered in this case, but it is not a public notice, and goes merely to say, that the dissolution of this Partnership was generally talked of among the friends of the Concern one witness says, it was notorious in the neighbourhood, and by reason of the broker who sold the goods being a neighbour a presumption is taken that he could not be ignorant of it - but this is no legal notice to the world nor to the Pliff unless a knowledge of the fact had been brought home to him - particular circumstances ought not to be received when they are not consistent with the general rule, because they are always uncertain and liable to a variety of constructions, and it is better that ~~an Individual should suffer~~ than that the law should

be

be uncertain — the testimony is vague, and insufficient, and the fact of dissolution of the partnership not being brought home to the knowledge of the Pltff, the circumstances of notoriety in the neighbourhood and of being generally talked of cannot constitute a proof — see — Watson on Partp. p. 384. Gorham val. v Thompson. —

That the broker being a good witness in law — see. Dixon. v. Cooper. 3. Wilson. 40. — and Benjamin. v. Porteous. 2. H. Black. 590 — and it appearing from his testimony that he understood the parties to be partners, he must be presumed to have trusted them as such —

Beek. v Denard } The Court were of opinion that the action was irregularly brought, as it appeared to be instituted by the Pltff in his own name and right, and not as a public officer and for goods which he had seized and were in his possession as such — Action dismissed

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Mallard v Roi — } The Court were of opinion, that as the defendt. had answered to all the Interrogatories proposed to him he ought not to be compelled to answer over thereto — but consented that advantage might be taken on hearing of the Cause on the merits of the insufficiency of any of the defendts answers to the Interrogatories proposed to him. "

In the same Cause.—

The Pltff moved that he should be permitted to adduce verbal testimony in the Cause, in consequence of the defendants answers on the Faits et articles, and in support of his motion states, that as the Defendt. in his said answers admits the principal fact in question, vizt. the Sale of the lot, but alledges that it was made under certain terms and conditions which are all together unfounded, the Pltff ought therefore to be admitted to adduce verbal testimony to shew the conditions upon which the Sale was made.— That there are several legal grounds upon which this motion is founded — It appears that the defendt. wrote a letter to Mr. Chaboiller, the notary, instructing him of the conditions of the sale and directing a deed of Sale to be made out in consequence — this letter the defendt. afterwards obtained from Mr. Chaboiller and upon being now interrogated respecting the said letter and its contents. the defendt. says, that it is lost, and he does not recollect its contents — now — when a writing is lost, the contents may be proved by verbal testimony. Poth. Obl. Nº 815 —

but

but more especially against the party by whose act and default this paper was lost, and who had an interest in suppressing its contents. — Poth. Obl. Nos 804 to 808, points out what will constitute a commencement de preuve par ecrit, — the present is a much stronger case than either of those he states. —

That the answers of a party to Interrogatories upon faits et articles, are equally strong as an acte autentique, and such an acte forms a good & sufficient commencement de preuve par ecrit. 1. Pigeau. p. 199. 200. —

That the variant and contradictory answers of a party can be taken against him as a com. de p. par ecrit, and in some cases will be sufficient to condemn him. 1 Pigeau. p. 267. — in this case the answers of the defendt. are variant and contradictory to the plea. —

Rolland for Dfdt. —

The motion is irregular and cannot now be received inasmuchas the Plff already made an application to be admitted to produce verbal testimony upon certain papers and depositions which are filed in the cause, and which he considered as a com. de p. par ecrit, before he had examined the defendt. upon faits et articles, this having been refused, the Plff cannot reiterate his motion for the same kind of proof in consequence of the defendts answers upon the faits et articles, the day for such proof is lapsed in consequence of the opinion of the Court upon the first application, it is the same, as if a day for proof had been

fixed

fixed and no proof adduced, the party failing to adduce his proofs on that day cannot have another day for that purpose.— But it is a principle of law that no com. de p. par ecrit can be admitted in case of a Sale of real property, particularly where the property is of any considerable value, as is the case here — and in cases of sale, where it forms part of the agreement that a deed shall be executed for conveying the property, and no deed appears, it is no Sale, and neither of the parties can avail themselves of the other parts of the agreement. Poth. Obl. № 767. — And even after the parties have signed the deed, they may alter their opinion and brake off from the agreement before the deed be compleated by the signature of the Notary — Lepretre. Parf. Not. — 1 vol. p. 63.

The Court were of opinion that the motion was irregular as the Plff could not reiterate upon new grounds a motion which had already been adjudged upon.— they, however inclined to think, that if no such prior motion had been made, the Plff would have been entitled to his motion on the Defend^{rs} answers to the faits et articles, as being a sufficient commencement de preuve par ecrit — but upon this they gave no opinion. —

April Term 1810.

Monday 2d. April 1810.

Present

All the Judges.

Gillespie
vr
Yeoward
Cur'. —
and
Stuart & and
Fisher. Garn's.

The Pltff, a Creditor of one Peter Grant, represented in this Cause by the defendant as Curator to his estate, sued out an attachment upon all the monies of the said Grant in the hands of one Duncan Fisher, and also upon a certain note of hand, in the possession of James Stuart attorney at law, which had been made and given by the said Duncan Fisher to the said Peter Grant, and put into the hands of the said attorney by the said Grant or some person on his behalf. — The Garnishee, Fisher, had made his declaration whereby he acknowledged to be indebted to the said Peter Grant the amount of the said Note, and Stuart had declared that the note of hand had been put into his possession by some person acting on behalf of said Grant for legal advice thereon. — The Plaintiff now moved that the said garnishee Stuart should

should ~~~ be held to deliver up and deposit in Court the said Note, that the same may be at the disposal of the Court.-

Stuart- objects to the regularity of the proceedings, and contends that there can be no saisie arret made of a promissory note or any other paper or document establishing a debt, but that the debt itself only is liable to such saisie.- That the note of hand in question cannot be considered to be the property of Peter Grant as it is payable to him only as a Trustee for third persons.-

Ross for Deff- contends that a note of hand may be seized as well as the debt or money due thereon cites case, where it was done - Alex.r & Ja.s Robertson. v.s Castongué - & Dunlops & Arakouanté. Tiers Saisis- 1798.- That money due on the note in question is the property of Peter Grant.-

Thursday 5th. April 1810.

Present.

All the Judges.

Robitaille. v. Marchand & E Contra. — The matters in contest in this Cause had been referred to Arbitrators whose report thereon had been made and filed in the Cause, and the defendant now moved to be permitted to examine the Plaintiffs on faits et articles. —

Stuart for Pltff. objected to the motion as irregular, and too late to be made in the Cause.

Lacroix for Defdt. refers to a Case in which a similar motion was granted — Choret. v. Gatignon — June 1809.

Mc. Donald v. Lecuyer. — Action for monies due on a Sale of land. —

Ross for Dfdt. objects that there were arrears of rent and lods & ventes due to the Seignior at the time the Pltff sold the land in question — in proof whereof he has filed the certificate of the Seignior stating such arrears to be due — and therefore contends that the Pltff ought to be bound to procure the receipt and discharge from the Seignior from such arrears before he obtain Judgment

Ogden for Pltff — admits the hand writing of Mr Lotbiniere the Seignior to said certificate, but says that such certificate

is

is no proof of a debt being due to the Seignior, and cannot be opposed to the plaintiffs demand.—

—

Murray v. Wales, & al'.

Action for lods & ventes &c—

Ross for Dft.— The Pliff is not the Seignior of the Seigniory of Argenteuil where the lands & property in question are situated, nor was he the Seignior thereof at the time of the Sale upon which he claims lods & ventes—

The Pliff has filed a deed of Sale of that Seigniory by Patrick Murray to him dated 30th April 1803, but there is no proof that the Pliff ever had possession under that deed— That the Seignior in possession is the person entitled to the lods & ventes, as he alone can claim the Cens, which generate the lods & ventes.—

The defendt never entered into possession of the property sold to him under the deed of Sale upon which the lods et ventes are now claimed— The testimony adduced on this point fixes no certain time of possession, but states that some time since 1806 the defendant was in possess[n]— which might have been after the Pliff ceased to be Seignior.—

That the defendant with several others were Copartners in a certain paper mill and manufactory, and that the deed in question was intended only to ascertain the right and share of the defendant therein, and

therefore

therefore no lods & ventes were due thereon, such act being similar to a licitation among partners or Coheirs

That even if lods & ventes were due, they cannot be estimated upon the full consideration mentioned in the aforesaid deed of Sale, as the moveables and manufactured utensils about the mill constitute nearly nine tenths of the whole sum - the amount and value whereof ought to be estimated by Experts -

Ogden for Plff -

The Plff was Seignior at the time of the Sale made to the defendant, and therefore entitled to the lods & ventes - cites. Prudhom. Roture - p. 174. - 184. 5. —

The Defdt has not pleaded specially that the Plff did not obtain possession under the purchase he made of the Seigniory nor does he deny that he was Seignior at the time of the Sale made to the defendt which ought to have done to entitle him to the benefit of the argument he now makes — he says only, that the Plff is not now, nor was he, at the time of instituting the present action, Seignior, which is not material —

That Defdt was not a partner, nor had he any interest in the mill in question before the Sale made to him of a share therein - and although no possession may have been taken under that Sale, still the deed of Sale when perfected gives a right to the Seignior to claim his lods & ventes — but there is proof that the Sale was followed by a possession.

Monday 9th April 1810

Judge Panet absent.

Burton v. Phelps & others.

These causes being of a similar nature, the same arguments were used as extending to the whole of them.—

and

Richardson v. Hacket, Jones, & others.

Actions of Revindication by enticement of certain quantities of wood cut down by the Defendants on the Seigniories of the Pliffs.—

To these actions it was pleaded.—1st That the King of France when he granted the said Seigniories, granted them upon this express condition & charge, "de conserver et faire conserver par ses tenanciers les "bois de chêne propres pour la construction des vaisseaux "du Roi"— That by the treaty of Peace of 1763 between Great Britain and France all the rights and privileges which His Most Christian Majesty the King of France held and enjoyed as Sovereign of Canada became vested in our Sov. Lr the King — That on 2. Oct. 1807. by licence or warrant of that Date, His Majesty did give leave licence and permission to Messrs Scott, Idles & Co. their agents and workmen to travel into and search His Majestys woods in this Province, and where a right of cutting down trees had been reserved to them, and there

to

to fell and cut down so many good and sound trees as might answer the number and dimensions mentioned in a certain contract entered into by the principal Officers of His Majesty's Navy with the said Scott, Idles & Co. and referred to in the said licence, and to carry the said trees through His Majesty's said Woods to the water side in order to the transporting and bringing into His Majesty's Stores, without incurring any penalty or forfeiture by reason thereof.— That the defendants as workmen & servants of the said Scott Idles & Co. did enter upon the said Seigniories and did cut down the Oak timber in question, being trees fit for constructing vessels as reserved thereon and being the property of His Majesty with a view to fulfill the said Contract of the said Scott Idles & Co referred to in the said licence — and that the timber they so cut down was in their possession as the servants of the said Scott Idles & Co when the same was seized by the said Plffs — and that the said timber was the property of our Sov. Lo the King when it was so seized, and not the property of the Plffs —

2°. That the Plffs ought not to have their action ag^t Defends because, at the time of cutting down the timber in question Our Sov. Lo the King was seized as owner & proprietor of all wood fit for the building of vessels for the Royal Navy then standing growing and being upon the said Seigniories and being so seized thereof did give licence and leave to the said Scott Idles & Co their agents and workmen to enter in and upon the said Seigniories and there fell and

cut

cut down certain of the said trees and timber for the use of His Majesty, by virtue of which licence the defendants as workmen and servants of the said Scott Idles & Co did enter upon the said Seigniories and did therein cut down the wood in question, which are the proper goods & chattels of our said Lord the King, and at the time of the seizure aforesaid were in the possession of the s^d Defendants as the Servants and workmen of the s^d Scott Idles & Co—

3^dly That at the time of cutting down the timber in question, our said Sovereign Lord the King was seized as true and lawful owner of the afores^d Seigniories and of all the trees and woods thereon and being so seized did give a licence to Scott, Idles & Co their Agents & workmen to enter into and upon the said Seigniories and there to cut down and carry away certain trees then standing & growing thereon — by virtue of which s^d licence the defend^ts as workmen and servants of the s^d Scott, Idles & Co— and by their commands did enter upon the s^d Seigniories and thereon cut down the wood in question, which at the time of the seizure aforesaid were in the possession of the Defend^ts as the property & for the use of our s^d Lord the King

The Pltffs reply –

1. That His Most Christian Majesty the King of France in the grants made by him of the said Seigniories did not reserve to himself any timber fit for the building vessels for the Royal Navy, without paying an – indemnity therefor to the proprietors – Further that our Sov. Lord the King did not in any manner grant leave and permission to Scott Idles & Co. in the defendants plea named to enter upon the aforesaid Seigniories and there fell or cut down any wood or timber thereon standing or growing, and that the wood and timber seized under the writs of attachment sued out in these causes was not cut down by the said Defendants as the workmen or servants of the said Scott Idles & Co. or by their command nor is the same the property of our said Lord the King, nor was the same at the time of the seizure thereof held & possessed by the said Defendts as the workmen and Servants of the sd Scott Idles & Co. & for the use of our sd Lord the King.

2dly That the defendts without any lawful right or title did possess themselves of the said wood and trees, then and before that time being the property and in the possession of the said Pltffs –

3. That our said Lord the King was not seized as owner and proprietor of the said Seigniories nor of the wood and timber thereon standing and growing, nor did he at any

time

time grant a licence or permission to the said Scott Idles & Co or to their agents or workmen to enter upon or cut down any wood or trees upon the said Seigniories, nor did the said Defendants under or by virtue of such licence or permission or by command of the said Scott Idles & Co enter upon the said Seigniories or cut down the wood in question, nor were they possessed thereof and hold the same when so cut down as the proper goods & chattels of our s.d Lord the King.

On the motion of the Pltffs a hearing was now had, whether the Defend.ts should have a day to make proof of the allegations contained in their plea

Sol. Gen.l for Pltffs.

The Defend.ts justify the cutting of the wood in question under the licence and authority of the Crown — in support whereof a licence has been filed, but it refers to a Contract said to have been entered into between the principal Officers of His Majesty's Navy & Messrs Scott Idles & Co for supplying the Dock Yards with Canada Masts & Oak timber — this Contract specifies the quantity, quality and dimensions of the wood to be cut, but is not filed — without it the licence is nothing as it refers to a Contract which does not appear — the defendants ought to have filed it as representing the persons who are parties to it — not having done so they cannot be admitted to make verbal proof thereof —

But

But even if such Contract had been filed with the licence yet the defendants could not by virtue thereof cut down any wood or timber on the Seigniories of the Plaintiffs without their leave and permission - the reserve in the Grants states, that the Grantees shall keep and preserve on their respective Seigniories all wood and timber fit for the construction of vessels for the Royal Navy, which does not carry with it a right in the Crown to enter and cut down such wood so reserved, but only that the Crown shall be entitled to such wood and timber upon indemnifying the proprietor for the same - The terms of the licence ought also to have been strictly complied with - it is addressed to the Surveyor General of the woods, requiring him to mark out by himself or his deputies all such wood & timber as shall be judged fit and proper for the uses stated in the reserve - this has not been done, but a violent trespass has been committed by the Defendants who have entered upon the Seigniories of the Plffs and cut down whatever trees they thought proper without the participation or knowledge of either the Surveyor General or the Plaintiffs - The justification therefore of the Defends is not sufficient even under the licence which they produce, and no day ought to be granted to them to make proof of such justification -

Ogden for Plffs.

Grants by the Crown are favorably interpreted for the Subject - cits. Domat. the grants

reserves in the grants in question under such interpretation ought to be considered as requiring the Plaintiffs to preserve all wood and trees of a certain description for the use of the Crown, but this does not imply that the Crown shall take by force, or without consideration - the Contrary must be presumed as being more consistent with Justice and the principles of Law - this interpretation also appears to have been contemplated from certain clauses in some of the grants, wherein the Crown reserves the right of taking fire wood, bois de chauffage, upon some of the Seigniories without paying any thing to the proprietor for the same, which implies, that for other wood a consideration was to be paid. -

Stuart for Defdts -

The actions instituted here are en Revendication, for the property of the wood, and not in Trespass, for the manner of taking it, which will make a material distinction in the determination of the points in Issue - The only question now before the Court is, whether the plea contains sufficient matter of justification so as to entitle the Defendants to make proof thereof - It is not a question now whether the papers or proofs filed by the defendants are sufficient, this can be determined only after all the proofs shall have been adduced -

The

Pltff. have gone into the merits, which was unnecessary on the point now before the Court – It may however be proper to state, that the wood reserved by His Majesty, never was vested in nor became the property of the Grantee of the Estate, and therefore there could be no indemnity for what did not belong to the Grantee – cites. 4 Com. Dig. p. 163 – and as to the bois de chauffage, it was necessary to stipulate that the Crown should not pay for what it might want thereof as no reserve of this kind of wood had been made, but on the contrary had been granted with the other parts of the Estate –

Powers } v. Savages }

Action for recovery of monies paid to Defendts order.

Rolland for Pltff. states, that on the 25th Augt. 1804 the Defendt. drew a draft or order on Pltff in these terms

"Mr Henry Powers –

"At sight please to pay Elias Pratt or bearer "eighty seven dollars, it being for value receivd – the same "shall be indorsed on the note which I hold against "you – St. Armand Augt. 25th. 1804. "John Savage" –

That on 16th February 1809 the said Elias Pratt presented the above draft for payt. when Pltff pd. same with the interest thereon up to that date, making in all £28. 9. 9 Curz

That Defendt. not having indorsed the said sum of money on

on the note he held against the Pltff, the Pltff is entitled to recover the same back from the Defendt as paid on his account, and which he now claims by his present action —

Gale for Defdt —

The Pltffs action ought to be dismissed, as by his own shewing the money in question & he paid to Pratt was to have been indorsed on the note which the Defendant held against the Pltff — all that the Pltff therefore could have asked was that the money so paid by him should have been indorsed on the said note, but not be paid back to him —

That even if Pltff be entitled to recover back the amount of the said draft from Defdt — the Defdt ought to be allowed to sett off agt the same a Sum of £11. 1. 2 being the amount of a Judgt which the Defdt obtained against the Pltff on the 31st May last, which will in that case leave a balance of only £10. 13. 10 — and therefore the Costs ought to be limited as in the Inferior Court — as to the sum of £6. 15. 9 for Interest paid by Pltff on the draft the Defdt ought not to be charged therewith, as the draft did not bear interest —

Rolland in reply — The Defendt has pleaded a non-assumpsit to the Pltffs demand, and cannot be permitted to make any sett-off under that plea —

That

that defend^t has filed nothing to justify such sett off, nor can he take advantage of the copy of Judg^t of the 31^st May last which Pl^ff has filed for another purpose, viz^t to shew that no credit or indorsment of the monies paid on s^d draft was made on the Pl^ffs note which defend^t held, but that he recovered the amount thereof from the said Pl^ff.—

Storm & Co
vs
Powers } Action for recovery of money on defend^ts promissory note.—

Rolland for Dfd^t

The power of Attorney filed by Pl^ff for the prosecution of this action is not authentic, nor has any proof of the execution thereof been made— That proof of the signatures to the note is made only by one witness which is insufficient.—

Sol. Gen^l for Pl^ff. No exception has been taken to the power of attorney which was regularly filed, and therefore proof of the execution thereof became unnecessary. the Defend^ts signature to the note is sufficiently proved

Tuesday 10th April 1810.

Mallard v. Roi } Action to obtain a title to a lot of land sold by Defendt. to the Pltff.

Bedard for Pltff. – Sufficient proof appears of all necessary facts to constitute a Sale, viz. of the price, the consent or agreement, and the thing sold – this appears from the Defendants answers to the faits & articles – It has been objected that in order to constitute a Sale, a deed or agreement in writing ought to have been produced – but this is not necessary unless it had been specially stipulated as constituting an essential part of the sale as a verbal agreement to sell may be as binding and equally inforced. cites. Poth. Cont. Vente. № 33.– From the evidence before the Court it appears that the Defend. had agreed to sell the lot of ground in question for £618.15. but he screens himself from giving a title under that sale by saying, that he and the Pltff were not agreed on the Conditions of the sale – this is not sufficient to excuse the Defendt – for after the sale made, or after the essentials constituting a Sale were agreed on, further conditions were inadmissible as coming from the defendt unless they formed part of the sale – Now the defendt does not

state

state in his answers to the Interrogatories what were the conditions upon which the Plff and he disagreed, or that they made part of the sale in question - on the contrary it would appear that this was an afterthought of the defendants, for we find from his own statement, that after he had written to the Notary that he would attend at his Office to execute a deed of sale of the premises to the Plff and had sent his own title deed with that intelligence to the Sr. Notary in order to prepare such deed, and after he himself had gone to the Notary's Office and the Notary in the presence of all the parties had begun to make out the deed, he then refuses to execute it, under pretence that the terms of the Sale had not been agreed upon. Now as no sufficient reasons have been assigned by the Defendt for such refusal, he ought to be adjudged to execute a good & sufficient title deed of the premises to the Plff and in case he shall refuse to comply therewith, that the Judgt of the Court be held to be a good and sufficient title to the Plff. cites. Poth. Vente. Nº 479 - At all events the Court ought to adjudge the Defendt to execute such title, and in case he shall refuse, the Plff will be founded in an action of damages against him. -

Rolland for Deft - There can be no verbal sale of a Real Estate, particularly when the value is at all considerable as is the Case here, and therefore the authority cited from Pothier

No. 33

Vente. N° 33. does not apply, and also where it was in view that a deed of sale should be executed in order to settle the convention between the parties — The Plff states in his declaration four requisites or conditions which had been agreed on in this Sale, viz.t 1. the lot to be sold — 2.° the price for which it was sold — 3. That a deed of such sale should be executed. & 4.th That the Defr. should deliver up his deed duly quittancé et ensaisiné — The Plff has made no proof that the Defend.t ever acquiesced to these conditions — from his answers to the faits & articles it does not appear that he ever did — on the contrary it is evident that his consent to the sale was never perfected — There can be no Sale without a Contract, where it is part of the agreement that such Contract shall be made & executed by the parties — see Poth. Obl. N° 11. — The parties may at any time break off the Sale even after signing, if the deed has not been perfected by the signature of all the parties — see 1 Parf. Notaire. liv. 5. ch. 1. p. Lepêtre. 2 Cent. ch. 46. —

Cartier
vs
Cheval
&
Cazavan opp.

On the opposition & claim of Cazavan. —

The Plff. Cartier, had caused certain real property of the Defendants to be sold under his writ of Execution, upon the proceeds whereof the opposant

claimed

claimed to be paid in preference to Cartier, as having the more antient hypotheque upon the Defendants property.—

The Pltff objects, that the Opposant has a special mortgage upon a certain lot of land which he sold to the defendant, and as this lot of land has not been sold but is still in the possession of the defendant, the said Opposant ought to be held to discuss the property specially mortgaged to him before he be entitled to claim anything from the other property of the Defendant under the general mortgage, at all events the Pltff ought to have the monies now levied upon giving security to refund the same in case the claim of the Opposant shall not be satisfied out of the afores^d. lot of land.—

The Opposant answers that his mortgage upon the defendants property is general as well as special, and that he is not bound to discuss the the special before being entitled to the benefit of the general.

—

Burton. v. Phelps. & Others. — & Richardson v. Hacket, Jones & others.

The Court considering that the right of property in the wood cut down was in question, and not the trespass for cutting it, were of opinion that the Defendants ought to have a day to make proof of their right under the Contracts stated by them.—

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Wednesday 11th April. 1810

Saraust vs Marmier & Garants.

The Court not being satisfied with the Report of the Experts, and from the circumstance of the Pltff not having filed some of the title deeds of his house, nor communicated them to the Experts, it was therefore ordered that the parties should have a day for the addduction of further proof.—

Thursday 12th April 1810.

Charron vs Menard

Action on deed of sale of a certain lot of land

Bender for Dft.— The only question is respecting the interest claimed by the Pltff, which the Defendt contends ought to be granted only from the time of the Service of process in this Cause, and not from the time the principal became due as demanded by the Pltff—, inasmuchas by the deed of Sale certain terms or days of payment were stipulated without interest, and therefore until the defendant was put en demeure no interest could accrue to the Pltff, even in the case of a Sale of land. cites. Fer. Dict. de Droit. vo Interet— and Lacombe. vo Interets.—

Beaubien.

Beaubien for the Defs. contends that interest begins to accrue from the moment of the expiration of the delay of payment, and that it is not necessary to put the party en demeure. cites. Domat. liv. 3. tit. 5. sec. 1. Som. 4.

—

Tuesday 17th. April 1810.

On Petition of Montigny & al. Exrs of Grezingher & Jos. and Brown, claim.

On claim of Brown for medicines sold to the late Grezingher. —

The claimant made proof that the account filed by him was fairly extracted from a book of accounts kept by himself, and in his own handwriting, that the prices charged in that account are the usual and ordinary charges for the articles therein contained, and that he keeps no clerk, and can make no other proof of his claim. — Upon this proof he now moves that the serment suppletoire may be referred to him to compleat the proof of his demand. —

It was objected that the proof made was of no validity, as no man can by his own act form a proof for himself against another — and unless some proof is made so as to raise a presumption in favor of the claimant, he cannot be admitted to the benefit of the serment suppletoire — cites. Poth. Obl. Nº 831. —

Pangman vs Beaudouin } action of Indeb: assumpt. on a promissory Note.—

Bedard for Dfdt. pleads, that the Defdt. never made the note, and that pltff hath not made legal proof of that fact — The note bears the mark of the Defendant who can neither read nor write, and the witnesses examined to prove the making of the note, do not say, that they were both present & saw the defendt. subscribe the note, and if they had, still such proof tends only to shew that the defendt. acknowledged the contents of the note, and as the note is for a sum above an hundred livres such proof cannot be made but by an authentic act — cites Poth. Obl. N° 744. — That if there were sufficient proof of the note, yet it is without consideration, as it is for cutting wood, which according to the proof made, was upon the land of one Bourgouin, and not upon the Seigniory of the Plaintiff as by him pretended. —

Rollard for Pltff. — The note is sufficiently proved, not by the acknowledgment of the Defendt. but by proof of his having made his mark thereto after the same was read to him. — as to the consideration of the note, it is a valuable one — the Defendt. was prosecuted for damages for cutting down wood on the pltffs Seigniory, he acknowledged the fact & gave this note for the damages — he now says, that this acknowledgment was made in error, if so he must prove it, otherwise the Pltff will be entitled to his Judgment.

Rouillard
v
Pangman

action of damages for trespass committed by Defendt in depriving Plff of the use & possession of Defendrs grist mill. —

Rolland for Defendt pleads not guilty, and sets up an Incidental demand agt Plff for thirty pounds damages occasioned by the improper conduct of the Plff while in the possession of the mill, by applying the grist to his own use and otherwise disposing thereof to the prejudice of the Defdt. —

Bedard for Plff excepts to the Incidental demand as inadmissible — The Plff leased the defendt mill, and was accountable to him for a certain proportion of the revenues thereof, but if the Plff did not account regularly for such revenue, it was not competent for the defendt to turn him forcibly out of the mill; and it would be no sufficient plea to this action for the defendt to say, that the damages done by the Plff in this respect warranted the trespass - and if such plea could not be made to the action neither can it be set up in the form of an Incidental Demand. —

Wednesday 18th. April 1810.

Murray. — Wales & al's. — It appearing to the Court that the Pltff was Seignior of the Seigniory of Argenteuil at the time of the Sale in question, and that the defendant was in the possession of the property he had purchased, therefore owes the lods & ventes thereon to the Pltff — as to the other allegations made by the Defendant, the Court did not find them substantiated by the proofs adduced. —

Powers — Savage — As the defendt. did not produce the Pltffs note to shew that the amount of the draft had been indorsed thereon, the Court were of opinion that he ought to repay to the Pltff the amount of that draft, but not the interest, as the Pltff was not directed to pay any Interest to the payee of the draft, nor bound in law to do it — As to the Judgt which the defendt. obtained against the Pltff on the 31st. May last and which the Defdt. claimed to set off

off against the Pltffs demand, the Court thought, that as the money mentioned in the draft was directed by the defendt to be paid in a particular manner and for a particular purpose, such sett off ought not to be allowed, and besides as it appeared that execution had had been sued out upon that Judgment, it was — uncertain whether the same had been satisfied or not.

M.Donald v Secuyer.

The Court were of opinion that the Defendt had not made proof sufficient to establish that a debt was due on the land in question to the Seignior for arrears of rent, — and therefore adjudged the Defendt to pay the sum demanded, saving his recourse for the recovery of such arrears in case he should be troubled for the same by the Seignior. —

Thursday 19th April 1810.

Robitaille. v. Marchand & e Contra.

The Court were of opinion that defendts motion to examine the Pltff on faits & articles after the report of the arbitrators had been made, was irregulen - That the Case cited by Defendt. in support of his motion, was under particular circumstances and not to be drawn into precedent as forming a general rule.-

Storm & Co. vs Powers. —

The Court were of opinion that it was not necessary to make proof of the power of Attorney which has been regularly filed in the Cause by the Pltff, unless the Defendant had taken particular exception to the sufficiency thereof - and as the proof was compleat in other respects, Judgment was given for the Pltff.-

Mallard v Roi. —

The Court were of opinion, that from the proofs adduced it did not appear that the Convention between the parties for the Sale of the property in question was sufficiently perfected to entitle Pltff to obtain a specifi performance

performance thereof, and therefore dismissed the Suit.

Charron
vs
Menard

The Court concurred in opinion with the Pltff on the authorities cited, that interest began to accrue from and after the expiration of the delay given for payment, and that no demand was necessary for this purpose.—

On Petition of
Montigny & al. Exers
of Grezingher. —
and
Ls. Jos. Brown. Claimt.

The Court were of opinion that the claimant had not made sufficient proof to entitle him to be received to the Serment supplétoire.—

Rouillard
vs
Pangman

The Court rejected the Defendant's Incidental demand.—

June Term 1810.

Saturday. 2. June 1810.

Dominus Rex
v.
Jas Veitch. } On motion, under Hab. Corp. to admit the Prisoner to bail on a charge for assaulting a Justice of the peace with an intent to kill him while in the execution of his office.—

Georgen for the pris.— The offence charged is a misdemeanor, and all misdemeanors are bailable. cites 4 Bl. Com. p.

Sol. Gen.l The power of the Court to bail is discretionary and will be exercised in all cases according to circumstances for although this Court have the power to bail in all cases yet it does not follow that in all cases they ought to bail; The Pris.r in this case is charged with an atrocious offence, the obstructing the execution of the law, by attacking the person & threatening the life of an officer appointed for this purpose. therefore contends that Court ought not to bail the prisoner.—

M^r Bellefeuille
v^s
Bourque
&
Mondelet, Gar^t.

Action for recovery of Lods & ventes & rentes due on the land now in the possession of the defend^t and which dread accrued during the possession of the pre-occupants, and now claimed from defend^t under an action hypothecaire.-

The Defend^t called in I. M. Mondelet as his Garant Beaubien for the Gar^t pleads payment of such part of the lods & ventes & rentes demanded as became due during his possession - and sets up an Incidental demand for services done for the Pl^ffs & at their request in and about the gestion & management of the Seign^ie Cournoyer, the property of the Pl^ffs & in which the land in question is situated.-

Vigé for Pl^ff The Incidental demand is inadmissible the debt claimed by the Garant is unliquidated and uncertain, and cannot be set off against the demand of the Pl^ff which is liquidated and certain.-

Cuvillier. &
v.
McLauren
&
Howard Int.s

Action for the recovery of a certain quantity of Staves. &

On the hearing of this Cause objection was taken by the Plaintiffs counsel to the Com. Rog. sued out by the Defendant, and a motion made that the same with the depositions annexed should be rejected from the fyles inasmuch as it did not appear in what manner or by whom the said Com. Rog. had been returned into this Court there being no affidavit annexed to shew the regular carriage there of. —

The Defendants counsel objected to the motion as being now too late, and contended, that if the Plaintiff had any objection to make to the regularity of the Com. Rog. he ought to have proposed it at the time the motion was made for the publication thereof, whereas on the contrary the — Plaintiff consented to that publication —

Cuvillier.
v.
Slater.
&
Merkell, Int.s

Action for the recovery of a certain quantity of Staves. &

On the hearing of this Cause, it was moved by the plaintiffs counsel, that the Com. Rog. sued out by the Defendant should be rejected from the record inasmuch as the

the same had not been regularly executed, the answers of the witnesses to the Interrogatories being taken down in a continued deposition, instead of a particular answer being made to each Interrogatory and no answer is made to the Cross-interrogatories -

The Defendants counsel objects, that this motion is too late and ought to have been made at the time the Defendant applied for publication of the Com. Rogue, to which Pltff consented - says further that the Commission has been regularly executed -

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Riché. v Campeau } Action of debt on an obligation transferred from One Crevier to the Pltff. -

Rolland for Dft. There was no signification of the transfer of the obligation before suing out the present action, the only intimation the defendant had of a transfer was the writ of Summons & declaration which was served on him in this Cause - The principle of law is, that the simple transfer, does not convey a right, it is the signification thereof to the debtor, - and therefore the Plaintiffs right ought

certainly

certainly to have been compleat before he could institute an action thereon - compares this to case in Pothier. Vente. No. 554.

Quesnel for Pltff - The signification by summons to pay the debt is sufficient - the only objection the defendt could have made, provided he had tendered the debt, would have been to the Costs, but this is now too late -

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Tuesday 5th June 1810.

Dominus Rex v. Jas Veitch. - } The Court were of opinion, that from the violence of the assault committed, and the dangerous tendency of the Offence, the prisoner ought not to be admitted to bail. -

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Huckens. - v. Pease. - and Folsom. - v. Pease. - } The defendant had been committed to Gaol on mesne process sued out in the first of these Causes, but had escaped therefrom - a writ of Saisie-arret was sued out in the second Cause, for attaching the property of the Defendt.

service

service whereof was made upon the defendant by leaving a copy of that process at the house of one Beach in Chateauguay, and another copy with the jailor at the jail, after however the defendant had escaped therefrom.—

It was now objected on the part of the defendant that the service of this Saisie arret was irregular, not having been made to him personally nor at his domicile — that he never had any domicile at the house of Beach, and he cannot be considered to have any domicile in jail; as it can be established only by the will and consent of the party, and he cannot therefore be considered to have a domicile in a place where he was confined contrary to his will and consent — cites, Repert^re v^o "Domicile". —

Ross for Pltff. The Defend^t had two domiciles — one at the house of Beach — the other in the jail of this district at both of which regular service of the Saisie arret was made — the jail must be considered the actual residence of the defend^t when the process was served there, having been committed to that place, and not discharged therefrom at the time — the defendant's escape from jail cannot be taken notice of by the Court, and it is besides a wrong of which the defendant can take no advantage.

Indian.— v Raymond } On motion by the defendant to quash the process sued out in this cause, as being irregularly served.—

Rolland for Dfdt. states, that Defendant was appointed Returning officer for the election of two persons to represent the County of Huntingdon in the ensuing House of Assembly and that while the Defendant was in the execution of his office, and receiving the votes of the electors, the writ of summons in this cause was served upon him.— That such service was irregular, as according to the laws of this Country, any person while in the actual discharge of a — fonction publique, cannot be served with process — cites —

Denizart. vo assignation.—
Repertre eod. verb. —
Dolb. proc. civ. ch. 1. art. 2.

Ross. and Sol. Genl } for Pltff. A returning Officer cannot be considered as a Judge, upon whom in the execution of his office the service of process might be considered as improper — cites. 2. Raymond, 938. Ashby, v. White.

That service of summons may be made upon suitors and others while attending the inferior Courts in England cites 4 Term Rep. p. 377. and 5 Term Rep. p. 209.—

That the ordre of 1785, makes no distinction or exception as to the service of process, which may be made to all persons and at all times — and by the redaction of the Code Civile there is

no

no exemption in favor of public functionaries. —

That the defendt. was not in the actual discharge of his duty as returning Officer at the time the process was served, but was at or near the door on the outside of the house where the votes were received —

Rolland in reply. That the Ordre of 1785. must be explained agreeable to the law of the Country, otherwise according to the latitude contended for by the Plff a Summons might be served on the Judge while on the bench — Contends that Defendant was in the execution of his office when the process was served on him. —

Woolrich vr McFarlane } Action on a promissory Note. —
Defendt. pleads prescription agt the Note —

Plff replies, that the prescription has been interrupted by the defendants acknowledgment of the debt. —

Rolland for Dfdt. The question before the Court is whether verbal testimony can be received of any — acknowledgment of the debt made by the defendant, under which he can be made liable to the payment of the Plffs demand — it is contended, that it ought not, as the same proof ought to be made of that acknowledgment

which

which is the same as creating a new debt, as of the Note upon which the action is brought.— That the acknowledgmt made by the defendt., if received under the proof adduced, will not apply to the present demand, he having merely said, that if the Pltff had not sued him he meant to have paid him.—

Beaubien for Pltff.— The debt demanded is a commercial one and therefore the same testimony must be admitted to substantiate the demand as would be received in England agreeable to which the testimony adduced would be sufficient.—

Castorgué vs Laberge.— } Action for recovery of damages on breach of Covenant entered into by Defendt. to build a certain wooden house for Pltff.—

Ross for Defdt.— There is no proof of any Covenant having been made by the Defendant,— the instrument subscribed by the mark of the defendant in the presence of two witss cannot be considered as an acte sous seing privé, whereof the verification can be made,— the signature of the Defdt ought to have been affixed to the instrument, without which no proof can be received of its authenticity, unless the sum demanded had been under an hundred livres.— The

mark

of a person to an instrument attaches nothing characteristic thereto peculiar to any particular person as all marks are generally the same or nearly so, and to admit verbal testimony to prove such an instrument would be the same thing as receiving such proof of an act which the party had never seen, signed, nor heard read, and the same inconvenience would exist here as to the possibility of corrupt testimony, which the law had in view to correct. — That the Covenant in this case ought to have been made double, being of the order of Contrats Synallagmatiques, whereas it was made single and remained in the hands of the Pltff, and is therefore void in law — cites. Denisart vo. "Ecrit double" —

Lacroix for Pltff. — An act signed by two witnesses attesting the mark of the party making the act, is a sufficient writing obligatory on the party, and may be proved by the attesting witnesses — That there was no necessity for making the Covenant double in this instance, as the Defdt. received the Consideration which the Pltff had agreed to pay him, at the time of making the agreement, & nothing further remained to be done on his part — that Defdt. had besides entered upon the execution of the agreement by laying some of the beams of the house. — — see p. 161. —

Thursday 7th June 1810.

Cartier
vs
Cheval
&
Cazavan
Oppt.

The Court were of opinion that the Plaintiff should take the monies under discussion, upon giving security to refund the same in case the opposant should not find sufficient property in the possession of the Defendant to satisfy the mortgage the Defendt owed him. See. 2. Vol. Qr. Com. art. 99. p. 30. nº 9.

Riché.
vs
Campeau

The Court dismissed the exception pleaded by the Defendant, being of opinion that the signification of the process in this Cause was a sufficient signification of the assignment of the Obligation

Bellefeuille
&
Bourque
vs
Mondelet
Gart.

The Court sustained the Incidental demand and admitted the parties to their proofs thereon.

Day & Gilston
vs
Lampman

The Plaintiffs prosecuted the Defendant for negligence in carrying a puncheon of rum for them, whereby the puncheon was stove in, and the rum lost.

At the hearing, the Defendant produced two persons

persons, as witnesses on his behalf, who had charge of the rum at the time the puncheon was stove -

The Plff objected to their testimony, as being interested in the Suit - it being evidently for their benefit to - exonerate the defendt by their testimony, as they would by that means secure themselves from all responsibility to the Defendant, who then could have no demand against them, as he otherwise would have if the Plaintiffs recovered against him. -

The Defendt answers - That the witnesses have no present interest in the Cause, and any future interest that may arise will not be sufficient to exclude their testimony in this Cause, as they cannot avail themselves of the Judgment that may be given - cites opinion of L. Kenyon, 7 T. Rep. 62. Smith v. Prager. and the bare possibility of an action being brought against a witness is no objection to his competency 1 T. Rep. 165. Carter v. Pearce - That even if such interest did exist, yet it may be released and the witness rendered competent. - 4 T. Rep. 589. Green. v. The New River Compy. - which release the Defendant now produced and filed. -

Saturday 9th June 1810.

Coutelée vs Faubert & Dumouchel Gar.

Action for lods & ventes upon different mutations and other Seigneurial rights due since on the land now occupied by the defendant.

The Defendt. called in his Garant on that part of the demand which had become due prior to the Defts purchase.

Lacroix for Garant. says, that the sum demanded by the pltff is not due to them, that they are entitled only to such lods & ventes & rents as have become due on the land in question since the 19th Sept. 1808, which is the date of a deed of Sale from one Gagner to Lefevre which deed appears to have been ensaisiné by the Pltffs. and therefore they are presumed to have received all their rights due prior to such ensaisinement, which in law is equivalent to a receipt for the same. cites. Pothier. Rot. ch. 8. p. 398-399.

Quesnel for Pltff The ensaisinement was made by mistake, and by the fraud of Dumouchel the Gar. at whose instance the same was made, and it ought not therefore to bar the Pltff of their rights.

The Court admitted the pltff to make proof of the error and fraud alledged.

Monty. —
vs
Goguet. —

On rule Nisi. —

M. Vigé for Pltff. states, that the Pltff having, obtained Judgment in this Court agt. the defendant for damages for Seduction, had thereupon sued out execution as well against the lands and tenements as against the goods and chattels of the defendant, and that by the return of the Sheriff thereupon it appr. that he could not find lands or goods belonging to the defendt. whereof he could make or levy any part of the aforesaid sum of money, and now moves, that Defendt. do shew cause why a writ of Ca. Sa. should not be granted against him, in consequence of the previous lapse of four months since the notice given him to this effect. — cites, Ordce 1667. Tit. 34. art. 2. —

Ross for Defdt — states — That the return of the Sheriff cannot be taken as a proof that the defendt. had no goods or lands — that the fact is, the defendt. was possessed of goods at the time the writ of Execution was sued out agt him and at the time of the return thereof — and the Pltff ought to be held to discuss the same before further proceedings be had agt. the defendt — That even if it legally appeared that the defendt had no goods or lands, yet the Pltff cannot obtain a Ca. Sa. agt the Defendt — there being no law in force in this province

to

to warrant the same, the code Civile, as modified by the redaction thereof and received as law, making no mention of any such proceeding. —

Vigé for Pltff. The right of obtaining a Contrainte par corps for satisfying a Judgt. for damages above two hundred livres, not being mentioned in the redaction of the Code Civile is the reason why it ought to be considered as in force and in nowise altered or changed by that redaction — That this Contrainte has been heretofore granted by the Court in the Case of Molson. v. Peaken. — That the return of the Sheriff is a sufficient proof of the fact stated in it, and if the defendant has any goods or Chattels or other property he ought to produce it, as the Pltff cannot be compelled to search for it —

Woolricks v. McFarlane } The Court admitted the plaintiff to make proof by verbal testimony of the interruption of the prescription pleaded by the Defendant. —

See 1. Selwyn. N. P. p. 151. —

Monday 11th June 1810.

Oldham Curr. &c v Lacroix. } Action for recovery of money on a deed of Sale – for seigniorial rights – and for goods Sold & delivered

Rolland for Dfdt –

The different demands contained in the Plaintiff Declaration are incompatible and cannot be joined in the same suit – that different issues may be raised thereon, which may be tried in a different manner, as one may be tried by the Court, another by a Jury, and a third submitted to Experts or Surveyors –

Sol: Genl for Pltff. The demands are all for the payt of a sum of money & therefore not incompatible, as to there being different issues triable by a different course, this is every days practice, still one Judgment & one Execution can be had thereon –

The Court rejected the exception pleaded by the Defendt being of opinion that suits for different objects which have the same conclusion, and upon which one Judgment and execution can be had, ought to be joined to avoid a multiplicity of actions. –

See. Ordce 1667. tit: 20. art. 5. – on note – in fine –

See also. 1 Pigeau. p.

Tuesday 12th June 1810.—

Caron Tutor &c. v. Rochon } Action to rescind an acte of partage for cause of lesion.—

Rolland for Pltff states — That there was issue of the marriage between the late Jean Laurier dt Cottineau and Marie Magdeleine Miloin his wife, two children, viz. — Clemence Laurier dt Cottineau, the wife of the Pltff, now deceased and Celeste Laurier dt Cottineau, the wife of the Defendant —

That upon the death of the s.d Clemence Laurier, the said Pltff was named and appointed Tutor to Marie rose Caron the only issue of the marriage between him and his said late wife, and was further specially authorised by an assemblée de parens, to prosecute the present action —

That at the time of the dissolution of the Community that subsisted between the said late Jean Laurier Cottineau and Marie Magdeleine Miloin, which happened by the — decease of the said Jean Laurier Cottineau in June 1805, his heirs were the said Marie Rose Caron by representation of the said Clemence Laurier her mother then deceased and the said Celeste Laurier, each for one half of his succession

That the said Jean Laurier Cottineau by his last Will and testament bearing date the 18 Dec.r 1804, did

give

give and bequeath the enjoyment of all his property and estate to the said Marie Magdeleine Maloin, and after her death to the said Plaintiff & Defendants with — remainder in fee to the child or children of the said Plff by his said late wife, and to the children of the marriage between the said Defendant and Celeste Laurier Cottineau his wife. —

That after the decease of the said Jean Laurier, his widow the said Marie Magdeleine Miloin made an Inventory of the property of the Community that had subsisted between them, dated 13 July 1805. —

That on the fifth day of October 1805, the said widow together with the Plff in his capacity of tutor to his said minor child and the said defendants proceeded to make a Compte and partage of the property of the said late Jean Laurier and of the Community that subsisted between him & his s^d widow. by which account the said minor is greatly dammified, particularly in the following sums —

1st By an error in the said account of — 52.^s —
2d. By a sum of ~~240~~ as being the sum due to the said Defend^ts for wages, or Salaire, whereas no part of it was due.
3d. By a sum of 2570.^s as being the amount of the — augmentations, or improvements made upon the proper estate and lands of the said Jean Lorier — whereas it by no means appeared, nor can be made to appear

that

that the said improvements were made on the propre estate of the said Jean Laurier, more than upon the conquets of the s^d Community, and if it did, it would still be necessary to make another estimation thereof, on account of the usufructuary enjoyment which the said Marie Magdeleine Meloin has had of the same during her life time, and of the waste done thereon by reason of the want of timely repairs to the property during the said usufruit. —

Ad^g By a sum of 4500^liv. carried en reprise by the said Marie Magdeleine Miloin in the said act of Partage, as being the amount of the evaluation of a propre belonging to her which had been disposed of during the Community, that is to say, by a deed of Cession or Donation made by the said Jean Laurier Cottineau and the said Marie Magdeleine Miloin by act bearing date the 28. Oct. 1802. in favor of the said plaintiff and the said Defend^t. for an annual rent or pension of 120. bushels of wheat, to be paid by the s^d Donees, each one half, to the said Donors during their life time; which annuity hath been received by the said Marie Magdeleine Miloin since the decease of her said husband in June 1805 until the day of her death, one half of which was paid to her by the said Pltff, and amounted to 240 bushels of wheat. That it would be an avantage indirecte prohibited by law, to allow to the said Marie Madgeleine Miloin the said annuity

and

and the full value of the propre that had been alienated also cites. Pothi. traité de la Comté Nº 585. 586. 589. — particular case of an alienation of a propre for a rente viagere. Nº 594. Duplessis de la Comté 1 vol. liv. 2. ch. 4. Sec. 2. p. 445. —

States further — That on the 29th day of July last the said Marie Magdeleine Miloin died, leaving as her heirs the said Marie Rose Caron and the said Celeste Lorier, who were entitled each to one half of the property left by her but that the said defendants became possessed of the whole of the property and refuse to account for any part of it to the Plff in his capacity aforesaid as by law they are bound, and which the said plff prays they may be adjudged to render an account. —

That the plff is entitled to his present action to rescind the acte of partage on behalf of the minor whom he represents, notwithstanding he was a party thereto and signed the same, inasmuchas this acte was not made en Justice, with the necessary formalities attendant thereon, and even if it had, in such cases, where the lesion appears enorme (as in the present instance) the minor may come against it before he comes of age, but in any case, upon his coming of age he is entitled to his action en rescision, where he has been injured — cites. Denizart. vo Partage. Nº 30. —

— arret 21 May 1762 —

Dit.

Dic. de Droit. vo Partage.
Poth. traité des Suc. ch. 4. art. 4 — art. 6. rescision des partages. —
Borjon. 2. vol. liv. 6. tit. 5. des actions. — ch. 1. Sec. 2. art. 21. p. 420.
Lebrun — Traité des Successions — partage avec Mineurs. —

Bedard for Defendants —

The plaintiff, in his capacity of tutor to his minor child Marie Rose Caron, having acceded to the acte de partage of the 5t. Oct. 1805, he cannot now come against it, as it is his own proper act, although the minor may after he comes of age — as to the authority given to the tutor to bring the present action under the opinion of an assemblée de parens, it is of no avail, as such assemblée cannot decide on the lesion, nor give any authority to the tutor which he does derive from law —

That the acte de Partage is correct and regular, except as to the objection first taken of 52s. which he admits to be an error of calculation and ought to be accounted for —

That every partage with a minor must be considered as provisionnel but the minor cannot come against it during his minority. cites. — Lacombe. vo partage. +

The estimation of the augmentations made on the propres of the late Jean Laurier Cottineau, was made by Experts, against which nothing has, or can be alledged —

That the alienation of the propres of the wife in consideration of a rente viagere, carries a right of remploi of that propre, it being of no moment to what purpose, or on what consideration that alienation is made, were it even for a rente payable

to

to the wife alone.—

That should the acte de partage in this case be set-aside yet the tutor ought to be bound by the facts he has admitted and the acknowledgments he has made by that acte.—

That as to the moveable property and effects left by the said late Marie Magdeleine Miloin, the Defendants hold them by virtue of a deed of Cession which was made to them by the said M. M. Miloin,— a Sale was made thereof and the same were bought by Defend.ts— Subsequent to which the acte de partage in question was made.— That as to the wearing apparel of the said M. M. Miloin, being of the value of 100.* she bequeathed the same by a nuncupative will to the Defendants—

Rolland for the Plff. in reply states, that the Defendants cannot hold and retain the moveable property and effects which they now are possessed of under the deed of Cession made to them by the said M. M. Meloin, as there was no actual delivery made thereof at the time, nor any description thereof made in the said deed, which on this account is null and void in law—

cites. Denizart. vo Donation. No 37. & 38. de meubles
See also. No 39. & 40.

Riccard. des Don. 1 vol. 1 part. ch. 4. Sec. 2. dist. 1.—
p. 214. a

Denies that late M. M. Meloin ever made any nuncupative will

Morarque
vs
Dupéré. } Action for recovery of monies paid by mistake

Bedard for Pltff states, That Defendt who is one of the bailiffs of this Court, being charged with the Sale of the effects of one Beique, the Pltff purchased sundry articles at that Sale to the amount of 216ℓ. That before the Plaintiff received his account from the Defendant he paid to Sr Defendt at two different payments 209ℓ and took receipts for the same - When Pltff came to settle his acct with the Defendant, and not knowing how to read or write, he requested of Defdt to tell him how much he had still to pay to compleat the balance of the account - That Defdt told him there remained a balance of sixteen pounds, or 384ℓ which the Pltff paid - and at the request of the Defendt gave up the two receipts he had already given to the Pltff and obtained in lieu thereof a receipt in full upon the account. - That upon a future examination of the account the Pltff found that he had paid 317ℓ too much, as the balance he justly owed at the time he gave up the two receipts and settled the account was only 67ℓ instead of 384ℓ which he paid - The Pltff now contends that he ought to be admitted to make proof by verbal testimony of the above facts, upon two grounds - 1st - Because, there appears on the back of the account the

Defendt

Defendt. deliv.e to the Plff. there are certain figures in the hand writing of the defendt. which tend to shew the payments made by the Plff and for which the two receipts were given by the Defendt. that under the circumstances of the case this ought to be admitted as a commencement de preuve par ecrit, and it depends upon the discretion of the Judge to say what shall constitute this com. de preuve par ecrit. cites. Poth. Obl. N.o 805. —

Ordce 1667. tit. 20. art. 3. —

2.ly That if there were no com. de preuve par ecrit in this case, yet the defendt. by demanding and receiving a greater sum than was really due to him, and by artfully withdrawing from the hands of the plff the two — receipts already given for the two sums of money already paid, and thereby depriving him of the means of proof of the sums which had been so paid, it was a gross fraud on the part of the defendt., whose situation as an officer of this Court led the Plff to put implicit confidence in him, and more particularly as he himself was an illiterate person — That fraud can be proved in every case by verbal testimony, on this principle such testimony ought to be admitted here cites. Lacombe. v.o preuve. sec. 1. N.o 2. —

Lacroix.

Lacroix for Defdt. Contends, that the figures written by the Defendant on the back of the account in question give no room for a commencement de preuve par ecrit, as nothing certain can be drawn therefrom applicable to the present question — That there has been no fraud committed by the Defendant, he has received no more than the just amount of the account which he settled amicably with the defendt, and the taking back the two receipts given by the defendt was done as a mere convenience in settling the account — That something certain should be shewn by the Plff to entitle him to make proof by verbal testimony in this Case, the bare statement of facts is wholly insufficient for this purpose —

Turcot. vs Mailloux } Debt on Obligation —
Plea — nil. deb. & Incidental demand for certain profits of a Schooner rec^d by Plff in wh the parties were partners. —

Beaubien for Plff — objects to the Incidental demand as inadmissible, inasmuchas it is not for a liquidated debt, and is besides prior to the Obligation granted by the Defendant in this Case, which is a presumption against the existence of any debt being due to him by the Plff. — That an unliquidates demand cannot

be

be set up against a liquidated and certain demand nor even a demand that requires too long discussion. cites. Poth. Obl. N. 592.. — That the Defdt retains the papers respecting the vessel in question so that the Plaintiff cannot render any account respecting the same. ac

M. Vigé for Dfdt. The Obligation in question was made for the share the Plff held in the Schooner, who undertook at the time to account with the Defdt respects respecting the profits which the Plff had before that time received. — That there is a connexion between the incidental demand and the demand in chief as they both regard the same object — that the Plff has acknowledged his liability to account to the Dfdt respecting the vessel in question, having since the commencement of the present action made a notarial demand and protest agt the Dfdt respecting the deeds and papers belonging to the S. Schooner under pretence that the defendt retained the same whereby he the Plff was unable to account for any profits respecting the S. Schooner. —

Wednesday 13th. June 1810

Monarque v. Dupéré &c. } The Court admitted the pltff to make proof by verbal testimony of the facts by him alledged, upon the principle of the fraud said to have been committed by the Defendant. &c

Careau &c. v. Berthelet, & alexis Fauteux & Lawzon Opp.t } On claim of Franc. Lawzon by Opposition afin de Conserver upon the monies levied by the Sheriff, for payment of two Obligations carrying mortgage on the land sold.-

Rolland for the Oppost. States, that on the 3 Sept. 1784 the late Jean Bte Fauteux, and the Defd. Berthelette his wife made an Obligation before Soupras, Notary, for 615th. 10. for value recd. of Oppost. - and afterwards on the 18th. day of Septr 1790, the said J. Bte Fauteux by act before Gagner Notr. promised to pay Oppost another Sum of 112th. for the payment of which sums the said J. Bte Fauteux mortgaged the land sold by the Sheriff in this Cause, and upon the proceeds of which Sale the Opposant claims to be collocated according to the date of his said Mortgages. &c

Bender for Alexis Fauteux, one of the defendants, states that the said late Jean Bte Fauteux, and Marie Jos. Berthelet

his

his wife made a conveyance of the land in question to him by a deed of Donation dated 5t. Janv. 1797, from which time he has remained in the possession thereof until the day of Sale by the Sheriff, and by reason thereof he is entitled to set up a prescription agt the claim of the Oppost the same having never been demanded nor made known to him during all his possession aforesd.

Rolland for answer, says - That at the decease of the said Jean Bte Fauteux, he the said Alexis Fauteux his son, was one of his heirs, and as such personally bound for the payment of the debt so contracted by his father jointly with the St. Marie Josette Berthelet, and being thus personally bound for the payment of the St. debt the sd defendt cannot set up the prescription he now invokes against it - To exonerate the said Defendt from the payt of the debts of his said father it was necessary that he should have made a renunciation to his succession and caused the same to be insinuated, which has not been done and therefore the responsibility to pay attaches to him. cites Lebrun Suc: liv. 3. ch. 4, N. 79.

Bender in reply says - that the said Alexis Fauteux is not the heir of his father, having never accepted his succession nor intermeddled therewith, and that a Renunciation in such case is unnecessary. —

Saturday 16th. June 1810

Riché. v.
Campeau
Crevier. v.
Gar.

The Defendant had obtained the Plaintiffs examination on faits & articles, and now moved that he should be permitted to withdraw the answers given thereon from the record as he did not mean to use the same - cites. Pigeau. faits & art. -

The Pltff objects to the motion & says, that the examination cannot be withdrawn from the record - that the Defendt may or may not make use thereof as he thinks fit, but when once taken and filed it becomes alike the property of both parties and cannot be withdrawn without their consent.

The Court rejected the motion. v

Day & Gilston
vs.
Lampman

The Court were of opinion that the testimony of the witnesses ought to be admitted in consequence of the release filed by the defendant, without which their testimony could not have been received on account of their interest. v

Coutelée. ua
vr
Faubert. ua
et
Dumouchel
Qart

The Court after hearing the parties on the proof adduced respecting the error and fraud by which the ensaisinement in question had been made were of opinion that no sufficient proof had been made that could invalidate this act on the part of the Plffs and they therefore held the ensaisinement to be equivalent to a receipt for all arrears of seigniorial rights due prior thereto. ce

Monday 18th June 1810.

Gray Exr. &
v.
Charbonneau

Action of Debt on an Obligation. &
The Defendant made default. &

The Obligation appeared to have been executed before one Michau, a public Notary, but he being unable to write, the expedition was made from the minute by one Bourdages, another Notary and by him certified as being conformable to the minute. &

The Court considered this expedition not a sufficient proof of the Obligation - the Notary who made the obligation is the proper person to certify the expedition, and in case of his death or incapacity, his notariat becomes a public record and ought to be put into the possession and custody of the Prothonotary of this Court, whose certificate in that case is a legal proof, but in no case can one Notary certify the acts of another in such way as to form a legal proof. - See Ordre of 1785 - and. Nouv. Denizt. vo Collation de pieces - §.2. No 3. &

Vassal
v
Rea. } Action for recovery of freight.—

Bedard for Plff. states, that by a Charter party made between the parties bearing date at Quebec the 24th. Augt. 1808 the Plff affreighted a certain Schooner, "The Fortitude", to the Defendt. to make a voyage from Quebec to Halifax and back again, in consideration whereof the Defdt. agreed to pay to the Plff £62. 10 ℔ month for the freight & hire of the said vessel during the time he should detain her on the S. voyage That Defendt. detained the said Schooner eight months in consequence whereof there became due to Plff £500 for the freight, for which sum the Plff now prays Judgt—

Stuart for Dft— pleads, that immediately after the delivery of the said Schooner to him by the Plff, to wit, on or about the Sixth day of September, he proceeded with all convenient speed to the S. port of Halifax, and did thereafter as soon as could be done depart from that port on his return to Quebec with the said Schooner, but on the voyage about the third day of November the foremost of the said Schooner was carried away, the the Defendt. by this accident, by Stress of weather, & by the insufficiency of the said vessel forced to make for the port of Charlotte-town in Prince Edward's Island in the Gulph of St Laurence, being the nearest port she could make, to obtain another mast and to refit & repair the said Schooner, but from the lateness

of

of the season, and notwithstanding all the diligence of the said Defend^t the prosecution of the said voyage then became impracticable until the following Spring, and the said Schooner was laid up and unavoidably detained at the said port of Charlotte-town from the 7^th day of November 1808 until the 7^th day of June 1809 when the S^d Schooner sailed from the S^d last ment^d port and on the 25^th day of the same month arrived at Quebec, and was then and there delivered up to the Pltff who received the same — That during the greatest part of the eight months in the Pltffs declaration mentioned, viz^t. from the said 7^th day of Nov^r 1808 till the 20^th day of April 1809 the navigation between Quebec and Charlotte-town is so closed and impracticable that the Defend^t could have no use or benefit of the S^d Schooner and during which time he ought to pay no freight or hire for the same to the Pltff — cites, Poth^r Louage. N^o 139. & seq. —
— Ch. partie N^o 83. —

Bedard in reply States, That Defend^t hath not made sufficient proof of any force majeure, stress of weather, or inevitable accident — whereby he can exonerate himself from the payment of the freight demanded — That all the matters pleaded by the Def^t even if true, are not sufficient to exonerate Defend^t from Pltffs demand aforesd under the terms of the agreement between the parties —

Auldjo Maitland & Co. — Jno. Blackwood. } Action for damages for the non-delivery of Potashes

The state of facts appeared to be, — That on the 17th day of april 1809 the Pltffs purchased from the Defendt 134 barrels of pot & pearl ashes at £52. 10 ₰ Ton then lying in the Stores of Messrs Munro & Bell at Quebec, and in quality conformable to the Inspection bill then delivered to the Pltffs — That at the time of the said purchase the Pltffs knew that the said ashes had wintered in the said Stores at Quebec, and on the 25th day of the said month of April the Defdt delivered to the Pltffs an order to receive the said Ashes, which order they lost and applied for a Second on the 24th. day of May following which the Defendt gave, in these words —

"Please deliver the 134 ashes E.S. to the order of "Messrs Auldjo Maitland & Co, they paying the usual "charge for turning out and Storage since the first "inst Montreal 24 May 1809" "Jno Blackwood"

"John Stewart, Esq."

The Pltffs made no demand for the ashes until towards the end of June following, when part of them was then taken out of the said Stores by them and part of them in July to the extent of 106 barrels, they refusing to take the other 28, as they appeared damaged and not merchantable nor fit for exportation —

It

It appears that the said ashes were inspected and shipped in good order in November 1808 at Montreal, and were conveyed to Quebec without injury or damage and stored in the said Stores of Monro & Bell, which are stated to be good dry stores, and not likely to have occasioned any damage to the ashes - one witness however says, that when the ashes were taken out of the Store in June last, it was damp & wet, and likely to have occasioned damage to the ashes -

All ashes by being long kept are more or less liable to be damaged by the external air according as the cooperage of the barrels is good or bad - a crust is formed on the ashes of the part injured, which thereby diminishes their value in proportion to the thickness of such crust - That the usual course in such case is for the person who inspects the ashes to make an allowance or deduction of so much p Cwt. for this crust, which is sometimes from one shilling to 2/6, and sometimes it is of that extent as to reduce ashes of the first Sort to be of the value only of the second, in which case they are branded as of the second sort - That when the barrels are coopered late in the season, or when the weather is wet and damp, the ashes are more liable to be crusted, as the barrels are more liable to shrink and admit the air, and it therefore is proper that the barrels should

be

be re-coopered early in the spring – and it is the opinion of the two Inspectors at Montreal that between May and July considerable damage must have arisen to the ashes in barrels that were coopered in November preceding. That ashes when crusted are not to be rejected as not merchantable, but a deduction is to be made according to the Inspectors report on the bill of Inspection, which is always allowed by the Seller to the buyer, and the Judgment of the Inspector is decisive between the parties as to the extent of the damage

Upon this state of facts it was urged on the part of the Pltff. that as there had been no delivery made of more than 106 barrels of ashes, and as they had paid to the Defendt. the full value of the 134 which he had sold them, he ought to pay back the value of the 28 barrels which were found not merchantable or deliver others in their stead. –

Stuart for Dfdt.

The delivery of the Defendants order to the Pltff. on 25th April 1809 to receive the ashes at Quebec was tantamount to a delivery of the ashes, and there is no proof that at that time they were of an unmerchantable or bad quality, and the testimony on this point ought to apply to that time in order

to

to invalidate the Sale - cites. Poth. Vente. Nº 313. -
That from 1st May the Pltffs paid for Storage of the ashes, which was considering them to be their property and that a delivery thereof had taken place. -

That on the 14th. June it appears that part of the ashes was actually removed by the Pltff. out of the Stores, which ought to be considered as a delivery of the whole, even if there had been no prior delivery in the eye of the law.

That the probability is, that the damage arose between the 25th April and the month of July, in which case it was occasioned by the laches of the Pltff in not applying immediately for the potashes and doing the necessary diligence on the said Order to ascertain the State of the ashes at that time, and if they were in a perishable State to give immediate notice thereof to the Defendt that he might have taken means to secure them from greater damage - nothing of this was done - and when the delay in the delivery arises from the act or default of the purchaser, the Seller is discharged from any damage that may accrue to the thing Sold during such delay - cites. Poth. vente. Nº 55. -

At all events the action can lie only for 18 barrels. as it appears that Pltff actually received the other 10 of the 28. in question. -

Beaubien

Beaubien for Dft. says, that it is evident from the testimony adduced that the ashes must have suffered damages in the Spring after the 25th April by them not having been recoopered, — this should have been done at the diligence of the Pltff., or they must stand by the consequence. —

Gray, Exr. —
v
Charbonneau

Action of debt on Obligation. —

Bender for Pltff.

This was a default Case — The Pltff produced in support of his demand a copy of the Obligation upon which his action was founded, extracted from the original or minute in the notariat of M. Michau the Notary before whom the same was executed, which extract was made by Bourdages, another Notary, by reason, as alledged, of the ill health & debility of the said Michau who was unable to certify the same. — But the Court were of opinion that such a copy could not be received as proof, even if the Notary had been dead, and refused to give the Pltff his Judgment

See. Ordre 1785. ch.

Denizart. vo Collation de pieces. §2. No. 3. —

Riché
v
Campau
&
Crevier
Garr.

Debt on Obligation. —

On the 19th day of April 1806 the Defendt made his Obligation before Brunelle notary public & witnesses to Jos. Crevier, the Garant in the Cause for the Sum of 450.— stated to be for money lent, the same to be paid at the expiration of three years without interest.— On the 13th day of June 1808, Crevier made an assignment of this Obligation to the Plff who now sues for the same. —

To this action the Defendt pleaded that the Obligation was given for an usurious consideration and therefore void.— In consequence of this plea the Plff called in Crevier the Obligee as his garant, who took issue thereon with the Defendant. —

To support his plea the Defendt produced two witnesses viz. Michel St. Marie, who declared that he was married to the Defendant's aunt, and Marie Cappée, the wife of the said Michel St. Marie and Aunt of the Defendant who proved the acknowledgment made by Crevier, that the sum lent by him to the Defendt was only three hundred livres. —

Objection was taken to this testimony at the hearing on the merits, that the witnesses were not competent, on

account

account of their relationship to the party producing them. and that the law made no distinction between the Case of usury and any other transaction — cites. Code Pr. art. 11. tit. 22. —

The Defendt. contends, that usury is a Crime, or delit, and that proof thereof may be made by the relations of the party. — cites. Dunty. p. 235. — And that usury is considered to be of that pernicious nature that all kinds of proof are admitted to ascertain it. Id. p. 519. —

Tuesday 19th. June 1810

Casionqué. v. Laberge.

The Court were of opinion that the instrument in question had been sufficiently proved by the testimony of the two witnesses in whose presence the Defendant made his mark thereto, — the making of such mark being a fact competent to be proved by witnesses, even where the sum in question is above an hundred livres — That there was no necessity for a double ecrit in order to validate the agreement between the parties, inasmuchas it appeared that the Defendant at the time of entering into the P. agreement had accepted and received the full consideration of the labor to be by him performed under that agreement — and as nothing further remained for the plff to do under the said agreement a double ecrit became unnecessary as the obligation thereby became single, the performance of which lay with the Defendant alone. — The Court therefore gave Judgment for the Plff.

see authorities. Dic. de Jur. — v. Verification d'ecritures
Rep. de Jur. v. Verification. —
1 Pigeau. 10. 11. note (e)

October Term 1840

Tuesday 2d. October 1840

Widow Baillé
v
Brunelle. — } Rolland for Plff
Viger — for Defdt —

This was an action instituted by Geneviève Aubert, widow of the late Michel Baillé, against Jacques Brunelle for the recovery of a sum of 800ll., which the said Michel Baillé in his life time jointly with the Plff lent to one Jean Bte. Brunelle, son of the Defendant, and for the payment whereof the Defendt. by his undertaking or acknowledgment in writing dated 26th. May 1795, became bound and liable as Caution, in the terms following

" Est intervenu Jacques Brunelle son pere, habitant de
" la dite paroisse qui se porte pleinement Caution de la dite
" somme de 800ll. pretée par les dits Sieur & Dame Baillé au
" dit Jean Bte. Brunelle, et ledit Jacques Brunelle pere —
" garantit les dits Sieurs prêteurs de tout proces et aussi
" de la rente pour qu'il soit payé à son echéance, si

" ledit

" ledit Jean Bte Brunelle devint insolvable, ledit
" Jacques Brunelle pere promet et s'oblige par ces —
" présentes de payer le Capital et la rente d'arrerages
" qui pourroit se trouver dûe sans troubler les dits Sieurs
" et Dame Baillé." — On the 13th July 1797, a further sum of 200# was lent by the Plff, then a widow to the said Jean Bte Brunelle, and a similar Caution and acknowledgment given for the same by the — Defendt. — Afterwards on the 20th May 1798, the Defendant gave a new obligation to the Plff in her own name for 1000#, being the amount of the two foregoing sums, as a Caution or garant for his son. — Upon these several acts the Plff demands Judgment against the Defendt as personal debtor for the above Sum of 1000#. and this in virtue of the above acts and of an acte de partage between her and the heirs of her late husband whereby their right and interest in the above sum is transferred to her. ea

The Defendant states, — that the 800#. first lent is the property of the Community that subsisted between the Plff and her late husband - and that there has been no legal acte de partage made between her and the heirs of her late husband whereby their interest in this sum has been transferred to her, inasmuchas there is no proof that

the

the persons stiling themselves children and heirs of the late Michel Baillé in that act, are his legitimate issue — and further that one of those children appears to have been absent at the time of passing that act, and that the Curator who represented him has not signed the said act, nor has it been ratified by the absentee. — That the Obligation upon which the Defendant is now — prosecuted ought to be considered the same as a promissory note, and therefore prescribed by Law, and now presumed to be paid quoad the Defendant, who is only a Caution. — That at all events the Defendant is not liable to be called upon as the personal debtor of the Pltff, supposing the debt to be still due to the Pltff, he being only the Caution and bound to pay upon the Contingency only — "si debit "Jean Bte Brunelle devint insolvable" — that therefore the said Jean Bte Brunelle ought to be first discussed.

Cites. Domat. liv. 3. sec. 2. art. 1.
Lacombe. vo Caution. sec. 3. No 1.
Jr. Obl. No 407. — 9. 13. —

The Pltff replies — That her right is sufficiently made out by the acte de Partage and inventory of the — Community between her and her late husband, which she has filed — and that the legitimacy of the heirs cannot be drawn into question under the present issue. —

That

That the nature of the Defendants obligation is such as to render the discussion demanded unnecessary he having by the terms of that obligation renounced to that right, and become bound as the personal debtor of the Pltff.— That if such discussion ought to be made, the defendant ought to make the necessary offers of money to enable the Pltff to make it, which he has not done, and the Pltff is not bound to make it at her own charges. —

—

Busby— } Stuart for Defdt. moved that the writ & process
Sizer. — } sued out in this Cause be quashed by reason of the irregularity of the service thereof on the Defdt. The Defendant has no domicile within the jurisdiction of this Court, notwithstanding which, the return of service of the process states, that the same was left at his domicile— The question therefore to be settled here is whether the Defendant ever had such domicile, for if he had not the Court has no jurisdiction over him— That the rules of practice require all objections to the regularity of the service of process to be made by motion and not by pleading, and on this account he makes the present motion, but submits, whether a question respecting the jurisdiction of the Court had not better

be

be settled by a plea and issue thereon - as the rule of practice must be meant only to extend to those cases where the domicile of the Defendant was avowedly within the jurisdiction of the Court - That in case the Court should be of opinion to admit the parties to plead on this point, the Defendt has already filed a plea to that effect, which however he proposes to withdraw should the Court be disposed to hear the question on the motion now before it. -

Mr Ross for the Plff states, that the objection now raised by the Defendant to the regularity of the Service of process can be heard by motion only, under the rules of practice - as no distinction is therein made whether the Defendt has a domicile or not within the jurisdiction of the Court - That the hearing ought therefore to be had on the motion now before the Court and the plea filed by the Defendant rejected with Costs. -

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Tiagouenté vs John. -

Stuart for Defdt objects, that the Saisie-arret sued out by the Plff in this Cause is irregular inasmuchas, the Plff states in the affidavit made by him upon which that writ issued, that the

Defs.

Defendt. is indebted to him in a Sum exceeding ten pounds Sterling, and that without the benefit of a Saisie arret he will lose his debt or sustain damage, but does not alledge that the Defendt. is about to secrete his property or to abscond, nor does he state any of those causes for which such Saisie-arret can be granted under the Ordinance of 1787. — Now moves that writ of Saisie arret be quashed. —

Bedard for Pltff. states, that the right of the Pltff to sue out a Saisie arret in this Cause rests upon the priviledge to which by law he is entitled upon the wood and timber seized, inasmuchas he was the engagé of the Defendant, and as such, aided and assisted in cutting down the said timber and navigating it to Montreal — this timber is the pledge and security for his payment and the Pltff has a right to attach it until he be paid — That the motion now made by the Defendt. tends to try the right which the Pltff has to sue out the Saisie arret under such priviledge, which ought not to be admitted, as no right of action should be tried by such a Summary course — That motions are allowed to be made to the regularity of process and to the service thereof, but this cannot be meant to extend to cases where the right of action comes in question.

Wednesday 3d. October 1810.

Caron. v. Rockson } The Court being of opinion that the Pltff had a right to maintain his action against the Defendant upon the facts alledged, ordered by their Interlocutor of this day that the parties should name practicians in order to examine and report to the Court, how far the facts alledged respecting the account and Inventory made and rendered by the Defendant, were founded. —

Busby v. Sizes. } The Court were of opinion that every question touching the jurisdiction of the Court ought to be raised by plea, and not by motion — that the rules of practice had in view only such questions — touching the regularity of service of ~~the~~ process, when they arose upon services made avowedly within the jurisdiction of the Court — They therefore dismissed the Plaintiffs motion for rejecting the plea filed by the Defendant to the jurisdiction of the Court in this Cause and ordered the Pltff to take issue thereon. —

Tiagowenté vs. John. ux.

The Court considering that the point to be determined in this Cause respecting the plaintiff right to obtain a Saisie arret may form a precedent in future, therefore admitted the parties to bring forward the question by pleadings thereon. ux

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Spur. vs. Coldbath

Georgen for Plff. – states, that the action is founded on a promissory note made and signed by the Defendant, of which he has made proof, and therefore prays Judgment. –

Ogden for Dfdt. – states – That the action is not founded upon a promissory note, but upon an agreement alledged to have been made by the Defdt – to deliver a certain quantity of Salt to the Plff – but of this agreement there is no sufficient proof, as one witness only has spoken to the Defendants signature thereto – That the parties are not stated to be traders or merchants, and the transaction cannot be considered as mercantile, so as admit the testimony of one witness as sufficient evidence. –

The Plff contends, that the transaction as stated is mercantile, & therefore the proof is sufficient –

Logan. — v Catchum } The Defendant moved to examine a witness about to leave the province. —

The Pltff contends that the motion ought not to be granted until after issue joined between the parties, and that the Defendant has not filed his plea. That until issue be joined it is impossible to ascertain upon what facts the parties are entitled or ought to examine a witness, and under the Prov. Ordce of 1785 he conceives that such issue must be previously joined.

The Defendant answers, that the said Ordinance does not require that issue should be joined between the parties to entitle either of them to examine a witness about to leave the province — it would often be inconvenient and impossible to do so — in case a witness were about to leave the province in vacation before the return of the writ — or where Defendt wishing to obtain this benefit should file his plea — yet as Pltff is entitled to a certain delay before joining issue thereon, he might deprive the Defendt of the means of procuring the testimony of such a witness — That the ordinance has therefore not included the case of a witness being about to leave the province in the same paragraph with witnesses who are sick and unable to attend Court, whose examn can be had only after issue joined. —

Grant
vs.
Sheek.

Stuart for Plff – moved that he might be permitted to amend his declaration by adding a new Count thereto of the same nature with those already stated therein – In support of this motion he states, that according to the practice in the Courts in England amendments were favourably received and always allowed where no injury could arise to the adverse party – That in the present case the Defendant had not yet filed his plea, and the addition of a new Count could be productive of no inconvenience – cites 2° Tidd's Prac. p. 653.

Rep. de Juris. vo amendement. p. 373. – and the Case of Symes. v Sutherland in this Court adjudged 15th Feby. 1809. where Plff was allowed to amend after issue joined and hearing on the merits. –

Mr. Sol. Genl for Defdt – objects to the motion, and states, that in order to entitle a party to amend it is – generally required by the Court that he shall shew – something in the Declaration whereby to amend – without this, instead of amending it would be making a new demand which is inadmissible – The Plaintiff has brought his action upon a promissory Note made in the usual way and stated in general terms to be for the payment of money by the defendant to the

Plff

Plaintiff, but the amendment now demanded is upon a conditional note, which is a new demand and totally different from that stated in the declaration. —

Stuart in reply, says, that the amendment he now prays for, is upon a note of the same date & for the same sum & between the same parties as that stated in the declaration and the further statement of the terms and conditions of that note, which is nothing more than a fuller and more perfect statment of the instrument upon which the action is brought than is now contained in the Declaration which cannot be considered as introducing new matter or forming a new demand. —

Thursday 4th. Oct. 1810.

Vve. Baillé v Brunelle

The Court were of opinion that the Plaintiff was bound to have discussed Jean Bte. Brunelle the principal debtor before proceeding against the Defendant.— But considering the right of action which the Plaintiff had against the Defendant as Caution, and that the discussion was an exception which the Defendant may not at all times avail himself of, that therefore the Plaintiffs action ought not to be dismissed, as "sa demande "et ses poursuites contre le fidejusseur sont bien faites, — "jusqu'à ce que le fidejusseur ait opposé l'exception de "discussion. Poth. obl. No. 410.— The Court therefore suspended all further proceedings against the Defendant in this action until the Plaintiff should discuss the principal debtor. —

Spurr. — Coldbatti

The Court considering the proof made by the Plaintiff as insufficient, dismissed his action.

Vassal
v
Rea..

The Court being of opinion that the proof adduced by the Defendant was sufficient to shew that the Schooner in question was by stress of weather dismasted and that she was necessarily and by unavoidable accident detained in Charlotte town in Prince Edward's Island from the 8th. Novr. to the 3d June following, rejected the Plffs demand for the hire of the said Schooner during all the time she was so detained, and adjudged to him only the hire for the rest of the voyage.—

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☞ This Judgment was reversed in appeal.—

Cazeau v Berthelet et al. & Lauzon opp.t

The Court admitted the Defendant Alexis Fauteux to fyle a Renunciation to the succession of Jean Bte Fauteux his father, saving to the Opposant his right to make such Objections thereto as he should see fit.—

The principle of this decision was that an heir who has abstained from interfering with the Succession of the deceased may at any time renounce thereto, "tant que les choses sont entieres" see 1. Borjeau. p. 906. art. 14.— and Repv. de Jurisp. vo Renonciation. p. 136. 8e— The only question to arise would be respecting the Costs occasioned by the want of such Renonciation which the heir ought no doubt to pay.

But should proof of any interference with the Succession of the deceased by the heir, be made, his renunciation cannot in that case avail him.—

Grant v Sheek

The Court granted the plaintiffs motion upon payment of Costs.—

Logan v Catchum

The Court granted the ~~Plaintiffs~~ Defendts motion— and in order to remedy the inconveniencies which may arise respecting the examination of witnesses about

about to leave the province, the Court settled a rule of practice to be observed in future. —

Hayes
Lux
vs
Trestler

Ross for Defendt. — states that Defendt has been sued to render account, to the Pltff his Son in law, of the succession of his late wife, the mother of the Pltffs wife. That in conformity to the demand the Defendant has made and filed the said account, since which time he has found certain papers and documents which are material for elucidating and supporting the said account, and which at the time of filing the said account were mislaid so that the Defendant could not then find them — in support of which fact he files the Defendants affidavit, and moves that he may be permitted to fyle the said papers. — States further that upon comparing the minute of the Inventory which the Defendt made of the Community between him & his late wife, with the copy filed by the Defendt. he perceives that there is an error in the said copy to the prejudice of the Defendant, which he now also moves to be allowed to correct. —

Beaubien & Stuart for Pltff. object to the motions as irregular and inadmissible, inasmuch as the papers in question which the Defendant now wishes to fyle appear to have been always in his possession and it was his

own

own latches not to have produced them in proper time, or to have mislaid them so as not to be found — As to the error in the Copy of the Inventory it cannot be corrected in the summary way demanded by Defendt but he ought to have compelled the Notary to bring in the minute of the Inventory under an Inscription en faux — made for that purpose. —

The Defendant in answer says, that it would be improper and inconsistent to make an inscription en faux against an act produced by himself — & that the only means to correct a clerical error of this kind is by bringing in the minute & making the correction thereby

Friday 5th Oct. 1810

Pangman. v. Beaudouin

The Court were of opinion that a promissory Note, such as mentioned in the Plaintiffs declaration, although subscribed only by the mark of the maker who declares he cannot write, can legally be proved by two witnesses if present at the time he made his mark and heard the contents thereof read – That in the present case they considered the proof of the note sufficient. – That as to the consideration for which the note was given, the Court had only to examine whether any fraud, force, or misrepresentation was used to induce Deft. to sign the note, and they found that none had been used – the value of the wood cut down by the Defendant could not now be examined into, as he had agreed to put that value upon it which was now demanded – He had the means of knowing whether this was the true value or not before he signed that note, as he was at the time prosecuted by the Plaintiff for a larger sum in damages for the wood so cut down – to settle which action the Defend. gave the note in question – it ought to be considered as a transaction upon a law suit, which cannot be set aside unless grounds upon fraud, force or misrepresentation. – Judgment for the Pltff. –

Ferr. Dic. v° Verification d'Ecriture.
Rep. de Jurisp. v° Verification.

see case Castonguay v. Labrie ant. p. 161.

see also 1 Pigeau Proc. Civ. p. 10. 11 – Note (e) –

Auldjo & Maitland & Co. — Pltffs
vs
Blackwood — Defendt

The Court were of opinion that the ashes in question were at the risk of the Pltffs from the time they received the order for the delivery thereof from the Defendant viz^t. 25. April, or at farthest, so soon after as they could have ascertained the State of the ashes — (a) That the agreement on the part of the Plaintiffs to pay store-rent for the ashes from the 1st May was equivalent to a delivery of the article — (b) That although the ashes may have sustained damage in the Store from air or water prior to the 25th April, yet from the weight of the evidence it appeared that the damages might have been greater from the air than from water, and that this damage must have encreased as the warm season advanced and must therefore have been greater between the 25th April and the end of June, than it was prior to that period. — That if the Defendant was liable to any damage, it could be only to that which had accrued at the time of the Sale and delivery of the ashes — this was not ascertained — and it was the latches of the Plaintiffs — whose duty it was to have examined the ashes immediately.

The entire damages found to have arisen at the end of June when the ashes were examined by

(a) 1 Camp. N.P. p. 236 Hodgson v. Lebert on notes.

b. Id. — p. 452 Hurry & al. v. Mangles & al. —

by the Plaintiffs, cannot therefore be charged to the Defendt, and it is impossible to say whether any or what part of that damage existed at the time of the Sale by the Defendt — Action dismissed —

Brehaut & Co vr Cuvillier } Sol. Genl for Pltffs — moved for leave to amend his Declaration, by changing the name of one of the Plaintiffs from Samuel to William. —

Stuart for Defdt objects, that this will be introducing a new Plaintiff into the Cause, which can never be admitted — That Plaintiffs are besides too late in making the present motion, as issue has been joined between the parties and a day fixed for trial. —

Folson vr Pease — } Action on a promissory Note. —

Ross for Pltff, prays Judgment on evidence adduced by him

Rolland for Defendt objects, that the Pltff is an alien, and the affidavit under which the Defendant was arrested in this Cause, was made by one Huckens who states himself to be the Attorney of the Pltff. It is true a paper appears to be filed by the Pltff whereby this Huckens is authorised to make such affidavit, but no proof

has

has been made that this is the act of the Plaintiff, and without which he cannot obtain any Judgment against the Defendant. —

Ross in reply — The objection to the sufficiency of the affidavit is too late — it ought to have been made in limine litis by motion — but the Defendant has acquiesced in the regularity of his arrest and has pleaded to the action — It is now enough that a power of attorney from the Plaintiff appears, and proof of what has been acquiesced in by the Defendant will not now be required. —

Tuesday. 9th October 1810.

Brehaut & Co. v. Cuvillier. a — The Plaintiffs motion was granted on payment of Costs, and permitting Defend.t to withdraw his plea and plead over. a

Rea. v. McNeil — The Defendant was in Custody on mesne process, and the Plaintiff had two defaults entered against him and afterwards rested him with notice to plead. —

Mr. Fortune appeared, and moved to be permitted to enter appearance for the Defendant and to file a plea for him. —

Mr Stuart for the Plaintiff objected to the motion, as no appearance can be entered for any person after a second default obtained against him. —

Decousse v. Surgeons — Action for recovery of rent.

Ross for Pltff states — that on the 30th October 1802 the plaintiff leased to one Pre Decousse two certain lots of ground, and buildings thereon erected, for and during the term of nine years, to be computed from the 1st November 1802, for and in consideration of an annual

rent

rent of 300^{tt}. and did thereupon receive from the said Decousse the rent in advance up to the 1st May 1806.— That on the 26th Sept^{r} 1804 the said Decousse transferred the remainder of the said lease not then expired, to the Defendant under the same conditions as he himself held it from the plaintiff, and particularly upon paying the above annual rent of 300^{tt}., which the Defend^{t} specially promised, and thereupon entered in the possession of the said lots of ground and buildings on the first May 1805, and continued in the possession thereof since that period until the time of bringing this action.— That there is now due to the Plaintiff by the Defendant the rent of the said premises from the said 1st May 1806 to the first November 1809, being three years & a half, forming a sum of £ 43. 15. for which he prays Judgment. a

Lacroix for the Defend^{t}.— pleads, that he owes — nothing to the Plaintiff.— That he has paid the rent of the said premises from the said 1st May 1805 to the 1st May 1808 to S^{r} Pierre Decousse, who was the Attorney and agent of the Plaintiff, under a power of Attorney made and given to him by the said Plaintiff and bearing date the 30th October 1802, whereby he is empowered, amongst other things to, "recevoir de ses fermiers, locataires, et

"debiteurs

"debiteurs redevables, les sommes qu'ils lui doivent et "pourront ci-apres lui devoir, et du recu en donner quittance "et decharge valables" &c. which power of Attorney he has filed. — That from and after the said 1st May 1808 the Plaintiff and her Attorney, John McKay, received the rent of the said premises from another tenant and thereby discharged the Defendant. —

The Plaintiff answers, that the payment of the three years rent by the defendant to Jr. Decousse appears to have been made at the same time that Decousse transferred his lease to the Defendant, but it is not stated to be made to Decousse as the Attorney of the Plaintiff, nor does he acknowledge to have received it as such, and therefore the transaction cannot injure the rights of the Plaintiff. —

The parties agreed to submit the Cause upon the construction to be put upon the receipt given by Decousse to the Defendant, declaring that all other points of Contest were settled between them. —

See page 250 —

Deshautels v Denau. & Beaudry & Rouville opp.ts

On Oppositions of Beaudry & Rouville. —

Beaudry, as Syndic for building of the Church of the parish of St Jean Baptiste, claims a privilege and preference upon the monies arising from the Sale of the defendants land in that parish, to be paid out thereof a sum of £14. 12. 4 for part of the cottisation laid on said land by the act of repartition for building the said Church. —

Mr De Rouville, Seignior of the Seigniory in which the said land is situated, claims a right to be paid out of the said monies for sundry rents and Seigniorial rights due to him upon the said lands, in preference to the said Beaudry as Syndic as aforesaid, contending that the burden imposed on the said land for building the said Church cannot affect the conditions upon which the said land was granted nor stand in competition with the rights of the Seignior. —

Woolrich v McFarlane

On the 20th day of June last the Court ordered that the Defendant should appear on the 2d day of this term to be examined on oath by the Court touching the points in issue between the parties. — The Defendant

did

did not appear, and the Plaintiff now moved for Judgt against him, considering his default as an additional — proof of the Plaintiffs demand.

Rolland for Defdt objects, that as no copy of the Interlocutor was signified to the Defendant, no default can be entered against him for his non-appearance nor any advantage taken thereof by the Plaintiff — the Defendant had no knowledge of the Interlocutor, and he ought to have had a copy thereof served upon him in the same manner as if called upon by the adverse party to answer upon faits & articles. —

Beaubien for the pltff in reply, — says, that agreeable to the rules of practice of this Court no service of any order thereof is requisite upon any of the parties when they — appear in the Cause. —

Wednesday 10th Oct. 1840

Hayes. vux. } The Court granted the Defendant's motion. —
" Trestler }

Rea. — } The Court were of opinion, that entering a default
McNoil } against the Defendant in custody was neither —
necessary nor proper, inasmuch as he is presumed to be present by being in the custody of the Sheriff. — That the entering of defaults against him does not preclude the Defendant from pleading to the action, if he does so within the time prescribed by the notice — and the Defendt here being entitled to come into Court and fyle a plea to the Plaintiffs action, he is entitled to do so by his attorney.

Motion granted. —

Ex parte. } On Petition of John Niess for a Habeas Corpus
John Niess }

The Petitioner stated that he had been committed to the Common gaol of this district, in consequence of a return made by a bailiff upon a writ of execution sued out of the Inferior Court against the goods and chattels of the Petitioner, stating

stating that the petitioner had refused to open his door to admit the said bailiff to put the said execution in force, in consequence of which return a Writ issued against the body of the petitioner under the provincial Ordnance of 1785. to take and detain him in gaol until he shall have paid and satisfied the amount of the said execution and costs thereon. a That the return of the said bailiff is false and erroneous and the detention of the petitioner under the writ of Capias grounded thereon, is illegal, and consequently the petitioner is founded in applying to this Court to obtain a Habeas Corpus, that inquiry may be had into the premises and the Prisoner discharged.—

Mr Boston, on behalf of the person at whose Suit the said John Ness was committed, objects to the present petition being granted, inasmuchas the said petitr is not committed to jail for any criminal offence over which this Court has cognizance — that he stands committed in execution for the payment of a debt, and however wrongfully that Commitment may have been made, yet this Court cannot interfere in the proceedings of another Court over which it has

no

no jurisdiction, nor grant any relief.-

Vigé for the Petitioner - The right of suing out a writ against the body in this case, is an extraordinary right, and if founded upon injustice or falshood the party is entitled to relief - a Habeas Corpus is the only proper remedy as it may be procured immediately - The writ of Capias is granted ministerially by the Judge, but he cannot ministerially granted the relief now demanded, and a person wrongfully imprisoned ought not to be held in jail until the meeting of the Inferior Court from which that Capias may be said to issue - nor can the Inferior Court grant a Habeas Corpus, it is the prerogative of this Court who are enabled thereby to give relief against every wrongful imprisonment of the Subject. -

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Todd. vs Roi. & Tavernier Gar. &

The Plaintiff prosecuted the Defendant for the arrears of a Constitut which the Plaintiff sold to him. & The Defendant having sold the same Constitut to Madame Tavernier, who thereby became indebted to the Plaintiff for the payment of the said arrears, called her in as his garant simple, in order

that

she should be adjudged to indemnify the Defendant for such sum of money as he might be condemned to pay to the Plaintiff. — The Garant pleads that she has been improperly sued as garant, inasmuchas prior to the institution of the present action by the Plaintiff, she offered to the Plaintiff the amount of his demand which he refused to accept and which sum she again tenders. — The Defendant on his part pleads that the Pltffs action ought to be dismissed inasmuch as prior to the institution thereof the amount of his demand was offered to him by the Garant which he refused to accept, and which is now again tendered to him. — The Cause being fixed for the adduction of testimony, the Garant produced her son in law as a witness to prove the tender of the money to the Plaintiff prior to the institution of the present action; The Defendant made no objection to the witness, but the Counsel for the plaintiff objected to him by reason of his relationship to the Garant who is a party to the Cause, and stated in support of his objection, that the action in chief and the action en garantie, are joined and make but one Cause, in consequence of the plea put in by both and therefore no relation of either of them can be received as a competent witness in the Cause, and the witness now

offered

offered by the garant, is also produced by the Defendt so that both parties have the same interest in his testimony.

Mr. Stuart for the Garant - Madame Tavernier is no party to the action brought by Todd aft Roi, but is called in another suit by Roi to indemnify him in case Todd shall recover aft him - the two causes are not joined, although the pleas in both be the same, nor can they be joined, this being an action en garantie Simple aft. Madame Tavernier - cites. Code Civile. Tit. Garant. - and even if the causes were joined, stile the witness is - competent, because this is a personal action between Plaintiff and Defendant and the Garant is not entitled to take fait & cause for the Defendant as in a real action Tit. Garant. art. 12. - nor can the Judgment given aft Roi be made executory against Tavernier - The objection therefore which is made to the witness, is not that he is related to a party in the Cause, but that he is related to a person having an interest in the Cause, which is no legal objection to his competency -

Thursday 11th October 1810.—

On Petition of John Niess } The Court were of opinion that they could not grant a writ of Habeas Corpus to a person in execution under the process of another Court.—

Ex parte Leblanc, Exer } On petition of — Leblanc, Executor of the last will and testament of the late
praying that the Court will give an order to call in the Creditors of the said deceased in order to make their claims against his Succession and receive a dividend or payment thereof as the case may turn out, it being uncertain whether the property left by the said deceased will be sufficient to pay his debts.—

The Court were of opinion that they ought not to give such an order, nor take upon themselves the settlement of all the debts & affairs of the Succession. That the only instances where such assistance had been given by the Court was where there was an evident deficiency of assets to pay Creditors, there, in order to prevent expence, the Court exercised an equitable jurisdiction by calling on the Creditors to receive a dividend of the property.— Application rejected.—

Monday 15th Oct. 1840.—

Busby v Size. a } On objection raised to the regularity of the service of process on the Defendant. a

Stuart for the Defendt. states, that at the time of the service of the process in this Cause the Defendent had no domicile within this district, but lived at Kingston in Upper Canada.— The testimony of the bailiff serving the process ascertains that the Defendt. had no domicile where that service was made— he merely states that he had information that the Defendt. had lodged in the house some days preceding, but had left it at the time to return home, and because the bailiff saw a trunk which he was told belonged to the Defendt. in that house he thought that constituted a sufficient domicile to warrant him to leave the process there.— That the transient passage of a person from one place to another does not constitute domicile— actual residence in a place, with the intention of living in it, are essentially requisite to constitute domicile— cites. Repv. de Juris. vo Domicile Pothier. 1 Domat. eod. vo.—

Ross

Mr Ross for the Plaintiff in reply, states, that the Defendant is a dealer in timber, and came to Montreal with a view of carrying on business in that line and for the purpose of selling certain quantities of timber he had brought thither — That while at Montreal, the Defendt hired a room in a house near the place where he kept his timber, and there resided. — That the suit in question regards the very wood the Defendant was then selling and therefore the process was served on him by leaving a copy thereof at the said house, which for the time was the domicile of the Defendant — That it appears that although the Defendant had gone off, yet part of his property still remained in the said house, and the copy of the process was delivered to his father in law then there. a

The Defendant's counsel, cited the Case of Farrar. v. Stors — where service of process made at a house where the Defendant had lived and carried on business, after he had left it, was adjudged to be insufficient. a

Donegani vs Normandeau & Dupéré. Govt.

In an action petitoire. —

Ross for Pltff. Action to recover from the Defend the possession of a certain part of a lot of ground which Pltff purchased from one Dupéré. —

Stuart for the Defendt. — That from the Plaintiff own shewing he has not acquired a sufficient title to the premises he purchased from Dupéré, to authorise him to bring the present action in his own name, as the Plaintiff has never been put in possession of any part of the lot he so purchased or obtained tradition thereof, and therefore the right of action, if any, belonged to Dupéré. — cites. Poth. propriété. Nos 284. 286. — Repertre vo Revendication. —

Ross in answer — observes, that the action is rightly brought by the Pltff, although he was never in possession, — That Dupéré was in possession and the Plaintiff is vested with all his rights, and can exercise them against every other person, particularly the Defendant who is a wrong doer and holds a tortious possession of the pltffs property. — That after the sale made by Dupéré to the Plaintiff, he, Dupéré — could not bring the action, as it would then have been objected to him, and rightly, that he had no property in the thing he had so sold. —

Bedard for the Garant Dupéré, Says, that by

by the sale he made to the plaintiff he transferred to him all his rights in and to the property in question, and that therefore the present action is well founded, against the Defendant, who has no right to any part of the said lot of land.

Stuart in reply.- The Defendant cannot be considered as holding a tortious possession of the property, as in a petitory action, the Defendant is presumed to be the legal possessor till the contrary be shewn.

Watts & al' vs Hall

Action of assumpsit for goods sold &c.

Ross for Pltff. states,- That Messrs John & Henry Newman of London, merchants shipped sundry goods and merchandises to the order and on the risk and account of the Defendant - That since that period Messrs Newman's have become bankrupts and the Plaintiffs were appointed trustees to their estate, and now in consequence demand of the Defendant the amount of the debt due by him the said Newmans.

Ogden for Defendt. pleads, that the Newmans shipped the goods only as the agents and brokers of the Defendant, and that the bills of parcells were

were made out and sent to the Defendant by the Messrs Bentleys of Houghton Hall near manchester the manufacturers of the goods, who thereby appear to have given a credit to the Defendant, and to have charged the amount to his account.- That the letters sent by the said Bentleys to the Defendt at the time of sending the said Invoice, & since, shew that they consider the Defendant as their debtor for the said goods - That the Defendant ought not therefore to be adjudged to pay the Plaintiffs demand aforesaid as he does not consider himself their debtor for the same - Submits however to the Court to order the payment thereof in such manner as shall save the Defendant harmless from any future demand, either by ordering the Pltffs to give security in this behalf to the Defendant or in such other manner as the Court shall direct -

Ross in reply. - The Plaintiffs are entitled to their Judgment against the Defendant, because he appears to have dealt with the Newmans as his Creditor, and as bound to pay the manufacturers for him for the goods

goods they shipped – That the manufacturers appear also to have considered the Newmans as their debtors for the said goods as they appear to have proved their debt upt them under the Commission of bankruptcy and to have taken a dividend in common with the other Creditors of that estate, as appears by their letters filed by the Defendant. – That Trustees – cannot be bound to give security – they are appointed to recover debts and pay what they so recover to Creditors and their demand ought therefore to be adjudged to them without any security being required of them. –

—

Tuesday 16th Octr 1810.

Doregani
v
Normandeau
&
Dupéré Gart.

The Court dismissed the Defendants exception being of opinion, that the Seller by the deed of Sale made over to the Plaintiff all his rights, droits & actions, and thereby gave the Pltff a right to claim the possession of the property, in consequence of which he was entitled to the present action against the Defendant see. Poth. Vente. No. 317. a

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Leblanc
v
Blaisdux

On Deed of Sale. —

Bedard for Pltff — states, That by deed of Sale of the 9th June 1806 the Defendants sold a certain lot of land to the Plaintiff, for and in consideration of the sum of 2200#, declaring the same to be free and clear of every mortgage and incumbrance, and at the time of executing the said Deed, received from the said plaintiff the sum of 500 livres in part payment thereof, it being stipulated that the remaining sum of 1700 livres should be paid to the Defendants in manner following, viz — 150 livres in the month of April 1807, — 150 livres in the

month

month of April 1808, the balance to be paid in equal annual payments of 200 livres at the same period in every succeeding year. — That at the time, and long prior to the said Sale the said land was mortgaged and bound for the payment of several sums of money, to the knowledge of the said Defendants who concealed the same from the Plaintiff in order to obtain from the said Plaintiff the aforesaid sum of 500 livres – viz.t – for a sum of 349 ℔. 9 s. due to the Seigniors – for 1263 livres due by the defendants obligation to one Jean Bte. Pilon executed before a Notary on the 15th. April 1804 – for 800 ℔ – livres due by another obligation made by the said Defendt. to one Harvey. – That on the 3. Oct. 1806 the Plaintiff with the consent of the defendants paid to the said Harvey a sum of 150 livres, which with a like sum of 150 livres paid to him by the said defendants, reduced his demand to 500 livres. — That the plaintiff having discovered that the land he had so purchased from the defendants was mortgaged for the aforesaid several sums of money forming in all a sum of 2112 ℔. 9 s. demanded of the Defendants to pay and satisfy the same, or to procure a discharge of the mortgages which existed on the said land for the payment thereof, which they refused. — That the plaintiff being threatened by the said Pilon with

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a prosecution for the payment of the said sum of 1268$^{\text{tt}}$ livres, which he was then unable to satisfy, but being desirous to save the expences which would have accrued on a prosecution against him in this behalf and to pay the same, he was under the necessity of selling the said land to one Antoine Boucher for a sum of 2400 livres, - on condition that the said - Boucher should retain so much of that sum in his hands as would be sufficient to pay and satisfy the aforsaid mortgages due on the said land, and as to the balance of 565 livres which remains due to the plaintiff by the said Boucher after payment of the said Mortgages, the said Boucher retains the same until he shall have received the titles of the said land duly acquitted and ensaisinés by the Seignior.

That one Joseph Langlois, one of the former proprietors of the said land having paid to the Seignior part of the arrears due thereon, their claim has in consequence become reduced to 235$^{\text{tt}}$ 5$^{\text{s}}$. which was the balance due on the said land at the time it was so Sold by the Defendants to the Plaintiff. - That the plaintiff, by paying and discharging the afores$^{\text{d}}$ Mortgages and sums of money due by the Defendants,

that

that is to say, the sum of 1263$^{\#}$. livres to the said Jean Baptiste Filon — the sum of 500$^{\#}$ livres to the said Harvey — and by consenting that the said sum of 565$^{\#}$. livres should remain in the hands of the said Antoine Boucher until the titles of the said land should be delivered to him duly acquitted and ensaisinés by the Seigniors, and which can be done only upon payment of the said sum of 235$^{\#}$. 4^{s} remaining due to them — hath thereby advanced the payments he was bound to make to the said Defendants under the aforesaid deed of Sale of the 9th June 1806, and hath thereby paid a sum of 417$^{\#}$. 17^{s} more than he was bound to pay to them in consequence of the said deed, including the legal discount which he is entitled to claim upon the monies he has so advanced and the delay of payment of the said sum of 565. livres by the said Boucher until the demand of the Seigniors be paid and the titles of the land ensaisinés — Which said sum of 417$^{\#}$. 17^{s}. the plaintiff now claims from the defendants with interest thereon from the 15th day of August 1809, and also that the Defendants be adjudged to procure and deliver to the said plaintiff, a good and sufficient acquittance and discharge from the Seigniors

for

for the said sum of 235ˢᵗ 4ˢ, or on default thereof to pay the same to the said plaintiff.—

Beaubien for Defendᵗˢ pleads— That the facts alledged by the plaintiff are unfounded, and even if true, would not entitle him to his present action against the Defendants.— That no injury has been done to the plaintiff, as he has not advanced any money on account of the defendants, but only agreed to pay to another what he was bound to pay to the defendants and at the same periods.—

Bedard in reply, says, There is evidence of the existence of the debts due by the Defendants, as stated in the declaration, and that the persons to whom these debts were due would not wait for the payment thereof, which is all that is necessary to be proved on the part of the Plaintiff— That the Defendants are stellionataires by selling a property as free from Mortgage, when they knew it to be otherwise, and the least they owe to the plaintiff, is the reimbursement of the monies which he has proved to have advanced for them beyond the

prix

prix de vente, with the interest accrued and to accrue thereon – cites. Denizart. & Lacombe. vo. Stellionataire. –

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Oldfield v. Park. u. } On Defendants petition. –

The Defendant stated, that at the time of the service of the process in this Cause and at the time of entering the defaults against him, he was absent from the Province, viz. in the United States of America, and as the said process was not served on him personally nor at his actual residence he is entitled under the Provincial Statute. 41. Geo. Ch. 7. S. 5. to have the said defaults taken off and to plead to the action –

Ross for Plff – objects to the prayer of the said petition being granted, inasmuchas the service of the process in this Cause was made at the domicile of the Defendant in the City of Montreal, and a copy thereof delivered to his wife, and therefore the Defendant by a temporary – absence from home cannot claim the right he now demands under the law he has cited –

Stuart for Defendt. The law expressly provides, that where the process hath not been personally served on the Defendant, and when he can make it appear, that the

plaie

place where the said process was so served is not his real domicile, or usual, or actual residence, he is entitled to have a re-hearing in the Cause — Now the Defendant does make it appear in this Cause, that the service of the process was not made upon him — personally, nor at his actual residence, which brings him within the law. —

Hutchinson & Torrance vr Livingston. —

The Defendant was arrested on mesne process and gave bail to the Sheriff — At the return of the writ in Court the Defendant did not appear, nor did he appear on the third day afterwards, in consequence whereof two defaults were entered against him — The bail now obtained a rule on the Pltffs to shew cause why they should not be exonerated from the bail they had given to the Sheriff, on their giving special bail to the present action. —

Ogden for the Pltffs states, that in consequence of the defaults obtained against the Defendant, the Plaintiffs have obtained an assignment of the Bail bond to the Sheriff and have prosecuted the bail thereon,

that

that the plaintiffs ought not therefore to be retarded in their proceedings against the bail by recurring to a discussion in the Original action, which is a benefit to which the Defendant himself was not entitled in consequence of the defaults entered against him —

Sol. Genl for the Bail in support of the rule, states, that on a Capias ad resp.m no default ought regularly to be entered against Defendt — and under the English practice the bail are allowed to come in within a reasonable time, and even in a subsequent term to the return of the writ, and give special bail to the action — That Pltffs will not be unnecessarily retarded by any discussion, as they must shew their right of action against the Defendt on the Suit brought against the bail, and it is immaterial whether this be done in the one suit or the other, the Pltff will have the same security. —

Wednesday 17th Octr 1810.

Oldfield vs Park. } The Court were of opinion that the service of the process at the domicile of the Defendant was sufficient, and that the words of the law, "or usual "or actual residence", were meant to apply, where the party had no real domicile, in which case, if the service of the process were made at any other place than his usual or actual residence, he was entitled to the benefit of the law, but not otherwise. — Petition disallowed —

Atkinson vs Stockton. } On demand for damages for the non-execution of a Contract to furnish Staves. —

The Defendant, with John Kay her husband entered into a Contract jointly & severally to furnish to the Plaintiff the Staves in question, but having failed herein the action was brought against the Defendant alone in consequence of the death of Kay — An appearance was entered for the Defendant but no plea made, in consequence whereof the Plaintiff proceeded to the proof of his damages ex parte —

On

On the hearing this day it was objected by the Defendt that the Plaintiff had made no proof that John Kay her husband was dead and therefore his action against her could not be maintained - That the only proof in the case was by some of the witnesses who described the Defendant as the widow of the late John Kay but this was not sufficient proof of his death - therefore contends that plaintiffs action ought to be dismissed.

Stuart for Pltff. The death of John Kay is not a fact essentially necessary to be proved to support the Plaintiffs action - the Defendant is sued as the widow of John Kay - she has not contested this fact - the proof therefore which has been made is sufficient to shew that the Defendant is considered to be the widow of John Kay, and she is proved to be the person who made the agreement with the Plaintiff -

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Hall v McKay } Action of assumpsit for goods sold

The facts were - That the plaintiff sent a quantity of Muskrat skins to the auction room of Mr Fraser with directions to sell them for what they would fetch - The

Sale

Sale of these skins was anounced in the usual way, and the conditions of that days sale were " That all " articles should be taken as they were found, good, bad " or indifferent and be at the risk of the purchaser " from the moment they were adjudged, who should " pay 2½ ℔ Cent duty besides the amount of purchase"

The muskrat skins being set up to sale, the auctioneer told the persons present, that there was a lot of musk= rat skins in the corner of the room, pointing to them, the number whereof should be ascertained after the sale, — and requested a bid for them, at so much à piece — That no body bid for several minutes, when the Defendant coming in, asked what was selling, the auctioneer said it was muskrat skins, and continued asking for a bid, when Defendant bid "vingt sols", upon which they were immediately adjudged to him. — The auctioneer in his evidence says, that contrary to his usual custom he adjudged the skins immediately on the defendant's bid, and before he had an opportunity of looking at the skins, as he saw he was advancing towards them, being convinced that if the Defendant once saw the skins, he would retract his bid, as they were worth nothing — that this was done by the auctioneer in a laughing manner

as

as, he says, he considered it to be no sale to the Defendt but done in joke, and in order to raise a laugh at his expence.— That the Defendt upon the skins being adjudged to him, went to look at them, and immediately told the auctioneer that he would have nothing to do with them.— The Defendants name was entered in the book of Sales as the purchaser.— That the auctioneer did not consider this as a sale, and in consequence did not include the government duties thereon in the accounts he made up of the Sales of that day, and also refused to give any bill of Sale thereof to the Plaintiff.— That Plaintiff afterwards came to the auction room, had the skins counted, and sent them to the Defendants lodgings with a bill thereof— That it was the general opinion of the persons present at the sale, that the sale of the skins to the Defendant was a fair one, and such as would make it compulsory on him to pay for them, that the value of the article cannot affect the validity of the Sale, as articles are often sold much above and much below their value at a public sale, but they considered it unconscionable in the Plaintiff to take advantage of the circumstance under which the purchase was made.—

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Hutchinson
& al^e v
Livingston.

The Court made the following order in this Cause, on the motion of yesterday. —

It is ordered upon the motion of Cornelius Trusdell and John Sealey, the bail to the Sheriff in this Cause, that the Defendant be permitted to fyle special bail to this action, on condition that the bail bond of the said Cornelius Trusdell and John Sealey shall stand as a Security for the payment of such Debt and costs as may be recovered by the plaintiff against the Defendant in this Cause, and also upon an issuable plea being pleaded thereto and paying all the costs accrued to the plaintiff under and in consequence of the assignment of the bail bond — upon the performance of which conditions all further proceedings against the said bail shall be staid. —

1 Tidd. Prac. 249. —

Thursday 18th October 1810. –

Bernard
& ux. v
Poirier

Rolland for Pltff states, That on the 9th April 1809 Jean Bte Barbary, the father of Marie Barbary, the Plaintiffs wife, died, leaving her as his sole heir – That on the 5th day of November 1804 the said late Jean Bte Barbary & Marie Elizabeth Haillon his wife, made a donation, by deed executed before Bellefeuille, Notary, to the defendant, of a certain lot of land with the buildings thereon erected, together with a considerable quantity of moveable property, cattle and effects – and this in consideration of a certain annuity to be paid to them by the said defendant – by means of which donation the plaintiffs are injured inasmuch as the said Marie Barbary hath thereby been deprived of all her rights in the succession of her said father and particularly of her right of legitime therein. – The Plaintiffs therefore demand that the Defendant be ordered to render an account of all and every the estate property and effects which he became possessed of under the aforesaid deed of Donation, that the plaintiff's right of legitime therein may be adjudged to them. –

Bedard for Defdt. pleads – That the said deed of Donation is onerous, and charged with so many burdens as to constitute a sale and not a donation of the property thereby given. – That at the time the said deed was

executed

executed, the annual rent and other reserves therein stipulated to be paid to the said Jean Bte Barbary & his wife, were equal to four times the value of the profits and revenues of the said land and property given. That the value of the whole land and property so given did not exceed Six thousand livres, whereas the obligations the Defendant became bound to pay and fulfill were equal to the Capital of 15,690#. which shews that the defendant paid the full value of the land, and therefore that the Plaintiffs are not entitled to any legitime thereon. —

The Plaintiffs joined issue with Defendant as to the value of the land and effects given and of the burdens imposed by the said donation —

After hearing the parties, the Court by an Interlocutor of the 20th Oct. 1809, directed the following points to be referred to the opinion of experts to be named by the parties.—

1st. What the value was of the land, cattle, property, and effects given by the late Jean Bte Barbary and his wife to the defendant by the deed of Donation of the 5th Nov. 1804, as well at the time of executing the said deed, as at the time of the decease of the said Jean Bte Barbary. —

2. What the value was, of the rente et pension, and of the other burdens stipulated in the said deed to be paid and performed by the said Defendant. —

3dly

3dly What the amount and value was of the yearly produce of the said land at the time and in the situation it was, when the said deed was executed – also the value of the usufructuary enjoyment had by the Defendant of the said moveable property and effects since the time of executing the said deed. –

Upon which points, the Experts reported as follows.

1st That the value of the said land at the time of making the said Donation, was. – – – – – – £316. 13. 4

And at the time of the decease of the said Jean Bte Barbary by means of the improvements made on the said land by the Defendant, it was worth £20. 16. 8 more –

That the value of the effects given at the time of executing the said donation, was. – – – – – – – £37. 8. 4

which was augmented at the time of the decease of the said Jean Bte Barbary in a further sum of £21. 7. 6. – and Defendant had besides received from the sale of sundry effects, a sum of £8. 13. 4. – And the value of the produce of the Cattle was estimated at £10. 6. 8. –

2dly That the rente & pension, and other burdens, paid and discharged by the Defendant, from the time of executing the said deed of Donation to the time of the decease of the said Jean Baptiste Barbary, amounted to £313. 16. 8. –

3dly That the produce of the land between the time of executing the said deed of Donation and the decease of the said Jean Bte Barbary, amounted to £235. 10. –

Friday. 19th October. 1810.

Richer. vs Campeau & Crevier. Gar.

The Court were of opinion that relations were not competent Witnesses to prove the usury pleaded by the Defendant; and therefore gave Judgment against him.

Todd. vs Roi & Tavernier. Gar.

The Court were of opinion that the action en garantie was nowise connected with the principal action, and therefore that the witness produced by the Garant and not objected to by the Defendant on account of relationship, was a competent witness.

Saturday 20th Oct. 1810.—

Blackwood
v.
Cuvillier et al

On rule to shew Cause why a Ca. Sa. should not issue against the Defendants in satisfaction of a Judgment obtained against them by the Plaintiffs, and after discussion had of the real and personal property of the defendants.—

The principal proof of the discussion rested on the answer made by the Defendants to the Officer who went to make a seizure under the executions sued out agt. them— when called on by him to point out where their property was that he might proceed to the seizure thereof, Cuvillier, one of the Defendants, told him that he was not bound to point out any property to him— in consequence whereof a return of nulla bona &c. was made by the Sheriff, and a writ of Ca. Sa. now demanded against the Defendants.—

The Defendant, Cuvillier, insisted on making proof of his being possessed of certain real property which the Plaintiff had not discussed, and under it now prayed that the rule Nisi should be discharged with Costs.—

The Court were of opinion that the Defendant was

bound

bound when called on to shew the property he was possessed of, otherwise he could not afterwards delay the Pltff by requiring a discussion of such property — That he was as much bound to shew his property upon such demand as he is bound to do it under the present rule, because if he shewed no property the Pltff was justifiable in suing out a Ca. Sa. agt the Defendt immediately without any application to the Court for that purpose, and the Defendant could not then avail himself of any irregularity by shewing that he was possessed of property, which he did not chuse to shew —

The Court therefore made the rule absolute —

Woolrich. v. M.Farlane } The Court were of opinion that signification of the Interlocutory order of the 20th. June last to the Defendant, by serving a copy thereof upon him was not necessary, but that agreeable to the rules of practice, he was bound to take notice thereof at his peril — The Court therefore gave Judgment against Defendt. for amount of Pltff. demand

Busby v. Size. } The Court were of opinion, that the service of the process was regularly made, it appearing to have been made at the usual residence of the Defendant within the district — which is sufficient under Provl. Stat. 41. Geo. 3d. ch. 7. S. 5. —

Mr Justice Reid differed in opinion from the Court — he considered, that under the provincial ordinance of 1785. ch. 2d. sec. 2d. service of process is directed to be made on a Defendant personally, or left at his house with some grown person there belonging to the family — allowing a year and a day to the defendant after Judgment, to come in and contest the plaintiffs demand in case of his absence in certain distant parts of the province at the time such process was served. —

Two

Two modes of service of process are here pointed out – one upon the defendant personally – the other at his domicile, with some one of his family – which domicile must be understood to be the veritable domicile as laid down by the law writers. – see. Fer. Dic. vo Domicile.
Rep. de Jurisp. – do
Denizart ——— do §.1. sec. 2. & 3 – §7.
Lacombe ——— do ———

Afterwards by the provincial Statute of the 41. Geo. 3. ch.7. §.5. it was provided, that when the writ of Summons had not been personally served on the defendant, he was entitled to the benefit of a rehearing upon his making it appear that the place where the process had been served was not his real domicile, or usual – or actual residence. – This Statute extends the mode of serving process beyond what is limited by the provincial Ordinance of 1785, and by inference admits it to be made at the usual or actual residence of the Defendant by requiring him to shew in case he claims a rehearing, that such service was not made, neither at the one nor the other of these places – the only question is, in what manner ought the process to be served at this usual or actual residence, when it is not the real domicile of the defendant? The Provincial – ordinance of 1785 points out in what manner service of process shall be made at the domicile of the Defendant,

but

but the provincial Statute of the 41st of the King, which admits service of process at the usual or actual residence, does not say, that such service shall be made in the same manner as at the real domicile of the Defendt that is, by leaving the process with some person at the house or place of such residence — Something certain should be established in this respect, as great injury may arise by admitting every kind of service of process at such places — The term usual or actual residence, as distinguishable from the real domicile, is in Law called, simple residence, and a wide — distinction is made between veritable domicile and simple residence, as to the service of process — as in case of such service at the simple residence of the defendant it was necessary that it should be made to him — personally, or at least that personal knowledge should be given to him thereof, as the leaving the process with a servant or any other person for the defendt is insufficient — see. Denizart — vo assignation. §. 7. No 3.
Id. — vo Domicile — §. 7. No 1.
1 Pigeau. p. 133. on note (b)
Pothier proc. Civ. p. 2. Ch

And as the Provincial Statute has said nothing in this respect, it is better to follow the antient law

than

than adopt any uncertain rule of decision on this ~~respect~~ point. — And as it appears from the evidence adduced in this Cause that the defendant had not any knowledge of the service of the process, and that he had left the house or place of his temporary residence to return home, two days before the process was served the same ought to be set aside as insufficient. —

Atkinson v Stockton } The Court were of opinion, that as no contest was raised respecting the death of John Kay, proof thereof was not necessary. —