February Term 1811.—

Friday 1st February 1811.—

This day a Commission, under the great Seal of the Province, was read, appointing Frederick William Ermatinger, Esquire, Sheriff of the district, in the lieu and place of the late Edward William Gray, Esq. deceased.

Saturday 2d. February 1811.—

Cuvillier .— } v. Macdonell }

Stuart for the Defendant moved that the cause be dismissed for want of proceedings being had therein during two terms —

Ross for Pltff. states, that since last October Term — proceedings have been had in the Cause, by the — examination of a Witness on the behalf of the Plaintiff in consequence of a petition presented to one of the Judges and his order thereon given for that purpose.

The Defendant objects, that such examination cannot

cannot be considered as a proceeding in the Cause, which ought to be had in Court – and further that Defendant did not concur in the said examination. —.

Monday 4th February 1811. —

Baroness of Longueuil — vr. Cheeseman } Action on a promissory note by the plaintiff as Indorsee against the Defendant as Maker. —

Georgen for Defdt. — The Note cannot be negotiated inasmuchas the Indorser, one Sarah Gardner, the payee has not subscribed her name to the Indorsment, but only made her mark thereto, which is not sufficient to render the instrument negotiable under St. 34. Geo. 3. ch. 2. sec. 9th. —

Sol. Genl. for Pltff. The negotiability of the Instrument is not affected by the mark of the Indorser, it is only in cases where the maker of the note cannot write, that the negotiability thereof is affected. —

Beardslee vr. Gillis. — } Action a bail bond. —

Stuart for Defdt. — The Plaintiff has proceeded to Judgment against Robins the original debtor, and has thereby waived his right against the Defendant as his bail

Bender for Pltff. This is no waiver of Plaintiffs right against the bail, and has been so determined in this Court. —

Stuart in reply — where the party is not in Court, or in goal, the Plaintiff cannot proceed in his original action having no person to contend with — his only recourse in that case is against the bail. — but if he waives this right agt. the bail by proceeding agt the original Defendt he is thereby precluded. — cites. 1 Tidd. Prac. p. 156. 158. —

Sanclot
v
Sanclot

Action to rescind a Donation, made by the Plaintiff to the Defendt, pour cause d'ingratitude. —

Sol. Genl for Defdt. — This is a donation onereuse and not liable to be rescinded for cause d'ingratitude it is even to be considered more as a sale than a donation, as besides the alimentary pension stipulated to be paid by him to the Plaintiff, he the Defendt is bound to pay sundry large Sums of money to third persons for debts owing to them by the Pltff

Bender for Pltff. The donation cannot be considered as a Sale, as no equivalent has been given by Deft for the property he has received — and if it were, yet in law such a Donation is subject to revocation in case of the ingratitude of the Donee — cites, Fer. Dic. Vo Revocation de Donation. —
Poth. Don. entre vifs. p. 506. 4to edit —

Langworthy & Day, v. Howard.

The Defendant was in Gaol under a Ca. Sa. at the suit of the Plaintiffs, and had obtained an order for the payment of a weekly allowance of five shillings - The Plaintiffs having failed in the payment of this allowance at the time required by law, the Defendant applied by petition to the Judges in vacation to be liberated from Gaol - but there being some doubt in the minds of the Judges whether they had the power of liberating the Defendant - as the Ordinance of 1785 requires it be done by the Court, and the Prov. Stat. of 1801 although it enables the Judges in vacation to grant the alimentary allowance to the prisoner, is silent as to the release of the prisoner on failure of the payment of that allowance - The Petition was therefore referred to the Court, and upon the hearing thereon the Plaintiffs alledged, that they could prove that the Defendant had secreted and concealed his property and therefore was not entitled to any allowance and prayed a day to make proof to this effect -

The Court were of opinion that the plaintiffs were bound by the order which had been made for the weekly allowance, which they could not withhold until that order had been rescinded or suspended upon their application to be admitted to make proof of the facts they had stated - The Defendant was thereupon liberated from his detention in gaol at the suit of the Plffs -

The

The Court were also of opinion that the Judges in vacation were necessarily vested with the power of discharging a party from his confinement in gaol on the failure of payment of the weekly allowance, without which, the power of granting such allowance must be nugatory.

Decousse v. Turgeon. } The Court were of opinion that the power of attorney given by the Plaintiff to her brother was a sufficient authority to him to receive from the Defendant the payment of three years rent mentioned in the sub lease to the Defendant, and that the Plaintiff was not entitled to demand the same from the Defendant by her present action. Judgt. was therefore given for the balance due to the Plaintiff, deducting these three years. —

Caron.. v. Rochon.. } Action, to obtain possession of lands whereof the usufruit hath been devised to the Pltff — and for Damages

Rolland for the Pltff
Bedard for the Defendr —

The Plaintiff states that on the 18th day of December 1801 the late Jean Laurier, by his last will and testament — instituted and appointed Marie Magr. Miloni his wife as sole devisee & legatee of his property and Estate to be by her held and enjoyed during her life time and upon her decease to revert and belong

belong to the children of the marriages between the Plff & Clemence Laurier, one of the daughters of the Sr. testator, and between the Defendt and Celeste Laurier the other daughter of the said Jean Laurier, but with the right of usufruit to the said fathers and mothers during their lives — That on the 31st July 1809, the said Marie Magde Miloni died, in consequence whereof, and of the decease of the said Clemence Laurier which happened before that time, the Plff became entitled under the said last-will and testament to the possession and enjoyment during his life time, of one half of all the property and estate left by the said late Jean Laurier, and of which the defendant, since the decease of the said Marie — Magdeleine Miloni, holds and detains the unjust possession, and refuses to deliver up the same, or any part thereof to the Plff, and hath also a right to claim and demand of from the said defendt the rents, issues, and profits of the said moiety of the said Estate, which have also been received by the said Defendt and which he also refuses to restore to the said Plaintiff, to his damage £500. — which sum the Plff prays may be now adjudged to him, and that the defendt be also condemned to deliver up to the Plff the possession and enjoyment of one half or moiety of the aforesaid lands and Estate with all the issues and profits thereof. —

The defendt by his plea states, that the Plaintiff, being only a simple legatee, was first bound to demand the delivery of his legacy from the heir of the deceased, before he can be entitled to any claim for the issues and profits

of

of the lands in question, but having never made such demand, his present action must be dismissed — That the defendant is not in his own right, an heir of the late Jean Saurier, and therefore the pltff cannot demand from him the possession of any part of the Estate left by the said late Jean Saurier, without having been first seized thereof by the heir or heirs of the said late Jean Saurier — Says further, that at the time of the decease of the said late Marie Magdeleine — Miloni, he the said Defendant remained in the possession of the whole of the aforesaid lands and real estate left by the said late Jean Saurier, in consequence of a donation of her right therein which the said Marie Magdeleine Miloni had made to the said defendant, at which time the said lands and real estate were undivided, and not of a nature to be divided, and therefore the — defend^t. as having married the said Celeste Saurier was entitled to reap the Corn growing on the said land which had been sown during the life time of the said Marie Magdeleine Miloni, and also the other produce thereof — and was also entitled to sow the land the following year and reap the

produce

produce, in order to defray the necessary expence of keeping the said lands in a necessary state of Culture & improvement, of all which expence the Plaintiff is bound to pay one half before he can recover any part of the produce of the said lands.

The Plaintiff in reply says, that he was not bound to demand from the heirs of the late Jean Laurier, the delivery of the legacy made to him or to be put into the possession of the lands in question, he being thereof seized by law from the time of the decease of the said Marie Magdeleine Miloni, and therefore entitled to claim from the defendant the issues and profits of the said lands and his damages by reason of the unjust detention thereof- And further that the defendant not being an heir of the said late Jean Laurier, has no interest in raising the question he now pleads as to the delivery of the legacy- That the Defendt acknowledging himself to be in the possession of the whole of the land in question, the usufruit whereof hath been bequeath to the said Plaintiff & Defdt and their wives who are the heirs of the S. late Jean Laurier, the right of the Plff therein can be well established as the S. Defendt by this action-

The Plff joining issue on the other parts of the Plea-

Upon hearing before the Court this day upon the points of law raised by the pleadings, the following authorities & arguments were were adduced by the Defendant.—

1. Deliverance of the legacy is necessary — cites — Pothier — Des Donations Testres ch. 5. sec. 2. § 2. page 370. 4to.—

2. Defendt was in possession at decease of M. M. Miloni as Donataire, and besides his wife is a presumptive heir of the late S. Laurier

Ibid. sec. 3. pp. 372. —

3. The only heirs of the Testator, are the wife of the Defendt and the Daughter of the Plaintiff — It is from them the delivrance of the legacy shd have been demanded by the Plff

Ibid. art. 1. — sec. 3. — Sec. 8 —

4. The Defendt being alone prosecuted, in his own name only, cannot be considered only as a Tiers Detenteur. —

Ibid: art. 2. §. 1. De l'action de Revendication. —

5. A simple sommation is not sufficient to give Plff a right to the Issues & profits of the land —

Lacombe. vo Fruits. sec. 6. No 2
Lebrun Successions. liv. 2. ch. 7, sec. 5. No 8
Gr. Comre art. 295 — glose. 2e No 2. 3. 4. & 5. —

It was contended on the part of the Plff —

1. There are exceptions to the rule of delivrance du legs. —

Pothier Traité des Substitutions. sec. 3. art. 1. +
Ibid. sec. 5. +

2. As to the right of taking the Issues and profits of the lands

Gr. Comre art. 92. Somre No 8 + No 9. —
Ibid + art. 263 — Des Douaires + Som. 15. The same doctrine as to a Douairiere —

Tuesday 5th. February 1811.

Sorquenil vs Cheeseman's.

The Court were of opinion that the note in question was a negotiable instrument, inasmuch as the St. 34 Geo. 3. ch. 2. s. 9. restricts the negotiability of notes only where the maker cannot write, which is not applicable in the present case.—

Church vs Hoesapple

The Defendant made his promissory note payable to one A. B. or bearer, for value received, upon which the plaintiff, stating himself to be bearer for a valuable consideration, brings his action agt the Defendant, who made default— The only proof adduced by the Plaintiff in support of his demand, was the testimony of one witness to prove the signature of the Defendant as maker of the note, and thereupon prayed Judgment— The question was whether this proof was sufficient to entitle the plff to his Judgment against the Defendant—

In support of his demand, Pliff cites. Bayley on bills. p. 30. 31. & 32.

Jac. Cartier
Pre vs Cheval
Pre et Grisé
opp.

On the opposition of Pierre Grisé afin de conserver

Ross for. Pltff.
Levêque for Dfdt. & Oppt

The opposition was founded on the following grounds - That on the 3d day of March 1800, by deed of exchange made between the defendant and one Martin Hudon dit Beaulieu, the said Martin became proprietor of a certain lot of land or farm which belonged to the Community that had subsisted between the said defendant and his late wife, which said lot of land had been sold under an autorisation de Justice obtained upon the advice and opinion of an assemblée de parens of the minor children of the said Defendant who were proprietors for one half of the said land, and of which the said Defendant then became purchaser. That afterwards on the 19th June 1803, by deed of Exchange made between the said Martin Beaulieu and the said Pierre Grisé the Opposant, the said land became the property of the said Opposant - That the said Opposant afterwards by deed of Sale made and executed on the 13th day of July 1803, sold and conveyed the said lot of land to one Louis Laplante who now holds the same. - The said Opposant therefore states, that inasmuch as the Minor Children of the said Defendant will be entitled when they come of age to their action hypothecaire against the person in possession of the said lot of land, for such rights

as

as may be due to them in the Community that subsisted between the said Pierre Cheval and their mother, and as the said Opposant under the sale he made of the said land is bound to warrant and defend the purchaser against all such claim, he is therefore entitled to exercise the same right upon the property of the said Pierre Cheval under the aforesaid deeds of exchange, as if such claim were now made by the said Minor Children, and to demand by his present Opposition, that so much of the monies arising from the sale of the lands and tenements of the said Pierre Cheval as shall be sufficient to cover the rights of the said Minors do remain in the hands of the purchasers of the said lands and tenements, that the same may be forthcoming when required to indemnify the said Opposant in case such claim shall be hereafter made as aforesaid by the said Minor children against the possessor of the said land, or that the opposant who is entitled to rank next in order to the said Pierre Grisé do take the said monies upon giving good and sufficient security against such trouble on the part of the said Minors.

The plaintiff pleads to the said Opposition, that the said Pierre Grisé cannot by law claim any right in or upon the monies arising from the sale of the Defendants lands and tenements under the reasons

by

by him alledged in his said Opposition - and therefore prays that the same be dismissed — upon which plea issue was joined - and the parties heard thereon this day before the Court. —

Ross for Pluff. states, that no opposition can be made unless the right or debt upon which the same is founded does at the time of making such opposition, really exist — That no claim has hitherto been made by the minor children of the defendant upon the person possessing the lot of land sold by the Opposant, nor is the nature or extent of such claim known or ascertained in anywise so as to give any Judgment thereon — The present is a Conditional opposition to ward off claims, the nature whereof is uncertain, and which may never be made, and therefore cannot be supported —

Levegue for the Opposant — A demand en garantie may be formed before eviction, and an opposition, made thereon, if the Cause of such eviction exist at the time - cites. Ter. Com^{te} art. 354. —

Loyseau - Deguerpissement. liv. 3. ch. 8. N°5. -
Charondas sur l'art. 354 — cites an arret of 1608
Pothier, Introduction to Tit. 21. des Criées N° 139.

Here then a Cause of eviction does exist in the unsatisfied claims of the minor children of the Defend^{t} against which the Opposant has no other guard than the present Opposition. —

Jac. Cartier
Pre v. Cheval
Jos: and Caravan
Opp.t

The plaintiff stated that he declined to take the monies claimed by the opposition of Joseph Caravan, under the condition of giving security as ordered by the Judgment of this Court of the 7th June last, but consents, that the said Opposant shall take the same upon giving the like security to refund the same, in case upon the discussion of the land specially mortgaged for the payment of his debt, there shall be sufficient proceeds to satisfy the same.-

The Opposant says, he ought not to be bound to give such security, as he is entitled to take the said monies without such condition.—

Wednesday 6th. February 1811.—

Dupré... vs M.Lean...

The Defendant filed his plea at the office at four o'clock in the afternoon of the third day after appearance, having previously served a copy at the opening of the Court in the morning — It was moved by the plaintiff that the plea should be taken off the fyles, as having been ~~fyled~~ too late and not within the three days agreeable to the rules of practice.—

The Plaintiff also moved that a peremptory exception fyled by the Defendant to the pltffs action should be taken from the record, inasmuch as the deposit of two guineas had not been made at the time of fyling the said plea, as required by a late rule of Practice —

The Defendt answers, that the exception fyled by him is not within the rule, it being a fin de non recevoir, or plea to the pltffs action, and not to any matter of form in the Declaration.—

Thursday 7th February 1811.—

Demers—
vs
Bissonet—
and
Longtain
Opp.t—

The Plaintiff moved to dismiss the opposition of Longtain, as no moyens or reasons in support thereof have been filed agreeable to the rules of Practice.—

Bedard for the Oppos.t says, that it was unnecessary to file any moyens, or reasons in support of the Opposition as the said opposition contained all the reasons he had to alledge in support thereof, and to which the Plff ought to have pleaded—

Lacroix for Plff, answers, that if the Opposant had no other reasons to alledge than those contained in the Opposition already filed, he ought to have declared so, and given notice thereof to the Plff, otherwise he was not bound to plead thereto.—

Friday 8th February 1811.—

Cuvillier v. Mc donell } The Court were of opinion that the taking the examination of a witness, in the vacation, unless done under an order of the Court, is not a sufficient proceeding in the Cause to stop the peremption, as this can be done only by proceedings had in the Court or under the order of it.— The action dismissed.—

Demers v. Bissonet & Longtain Oppt. } The Court were of opinion that the Opposant was bound to give notice to the plaintiff, that he had no further reasons of opposition to fyle than those contained in the opposition already of record, otherwise the Plaintiff was not bound to plead thereto but to consider the Opposant as in default in this respect and therefore entitled to the benefit of the rule.—

Opposition dismissed.—

Dupré. v. Mc Lean } The Court were of opinion that a plea filed, on the "quarto die post" within office hours, is in time and therefore admitted the plea in this Case — as to the Exception, they considered it a temporary bar to the action, "celui qui terme ne doit rien", & therefore not within the

the

the rule requiring the deposit of two guineas to be made at the time of filing the same.—

Bricault v. Bricault & Meunier Opp^t.

An execution having been sued out on a Judgm^t rendered in the Inferior Court by virtue whereof sundry goods and chattels had been seized as belonging to the Defendant — The Opposant having claimed those goods and chattels as his — property, a return was thereupon made upon the said execution to the Court with the Opposition annexed — The Opposant appeared in that Court and made an evocation of the Cause to this Court — and upon hearing upon the right to make such evocation stated, that the goods and chattels seized exceeded the value of ten pounds Sterling and therefore not only beyond what the execution warranted, but beyond the competence of the Inferior — and the Opposant was besides interested in the decision of the question, as to the right and authority of the Plaintiff to seize his goods to the above or any amount whatever in satisfaction of a debt due by a third person.—

The Court were of opinion that the Opposant shewed no ground whatever to make an evocation before this Court, and therefore ordered the proceedings to be remitted to the Inferior Court.—

Grant. v. Skeek. } Action on a promissory Note. – Trial by Jury. –

The defendant had sued out a Commission Rogatoire addressed to Commissioners in Upper Canada for the examination of witnesses there – upon examining the return it appeared, that all the depositions of the – witnesses were bound together in one parcel, and the Commission with some papers given in by the witnesses on their examination, in another parcel – The return was not made upon the Commission, but upon the – enveloppe or cover in which it was inclosed together with the depositions – which cover was sealed with the Seals of the Commissioners –

The Plaintiff objected to the regularity of the execution of the Commission – Because no return appeared to – have been made thereon – and also because the names of the witnesses to be examined under the said Commission had not been communicated to the Plaintiff previous to the suing out thereof, whereby he had been prevented from preparing the necessary cross-interrogatories to them – and lastly, that there appeared no affidavit or proof to shew in what manner or by whom the said – Commission had been returned into this Court, so as to render the proceedings accompanying the same authentic. –

The

The Defendant in reply says, that no regular practice has hitherto been settled as to the mode in which returns upon Com. Rog.ª shall be made, it has generally been recognized by the Court as sufficient, if in substance the Commission had been executed, although form had not been strictly complied with — nor has an affidavit been always required to shew in what manner the Commission had been conveyed to this Court from the Commissioners — cites case, Hagar. v. Henderson. 8 Febᵛ 1810. That all here is regular, except that the return is not indorsed on the Commission although in substance that return appears to be made, and the Commission to have been executed, by the depositions being sworn to, & the return made on the Cover, but under the seals of the Commissioners, and he was ready to remedy any defect in form by the testimony of the Clerk to the Commissioners, who was present when the whole was executed and was the bearer of the Commission to this Court — As to the names of the witnesses, the plaintiff did not at the time know what persons it would be proper to call upon to prove the facts stated in the Interrogatories, and could not therefore give the names of the witnesses to the adverse party at the time of suing out the Commission. cites case McDonald & Cº v Cuvillier & Cº Ap. Term. 1807.

The Court were of opinion that the Commission was not regularly executed, in this, that the Commission and depositions

depositions of the witnesses were not bound together, nor the return indorsed on the Commission – but from the circumstance of the whole being under the seals of the Commissioners, they admitted the evidence of the Clerk to authenticate the execution of the Commission – They were also of opinion that the depositions of the persons named in the defendants plea, taken under the said Commission, ought not to be read in evidence, as their names must have been known to the defendant at & before the time of suing out the said Commission, and ought to have been communicated to the Plaintiff as persons to be examined under that Commission. –

Saturday 9th February 1811. —

Mays, ux. v. Trestler } On the account rendered by the defendant, of the Community that subsisted between him and Margte Noel, his late wife. —

Objections taken to the Account by the Pffs. —

1st That the defendant wrongfully claims the usufructuary enjoyment of that part of the real property of the said Community which belonged to Marie Josette and Marie Margte two of his children who have deceased since the making of the Inventory of the S. Community — whereas this right goes with the property itself to the surviving children by the S. Margte Noel — Cites. 230. & 314 art. Cout. — Pothier Succn ch. 2. art. 2. p. 83 — Case of Durand v Dautour, in this Court — 5th April 1808 —

2. That the defendant, in the account by him rendered of the moveable property of the said community, charges himself with the amount of the valuation thereof stated in the Inventory without the <u>crüe</u>, which ought to have been added, as he is not entitled to take the said moveable property at the valuation of the Inventory. — cites. Dictn Droit. von "<u>Crue</u>". —

3. That the oath of the Defendant is not a sufficient proof of the existence of debts due by the said Community

Community – such as that stated in the said account to be due to James Dunlop – to Mr Murray – to Messrs Alexr and James Robertson – and for Clerks & Servants Wages – of all which there is no other proof than the said oath of the Defendant. –

4. That the defendant is not entitled to the crüe upon his preciput, it being a specific sum payable in money upon which there is no crüe allowed

5. That the defendant claims a right to keep and retain as his own property, the real estate of the said Community, on accounting to his children for their shares therein according to the valuation contained in the said Inventory – The pltffs on the contrary contending that they cannot be divested of their right of property in the said realties without their Consent – That the Pltff and his wife are entitled to one fourth part of the said real estate, with the issues and profits thereof since the 23d. day of October 1793, the day of the death of the said Margt. Noel. –

6. That the plaintiffs wife being heir to one half of the real property left by her said late Sisters Marie Joselte & Marie Marguerite, is also entitled to the issues and profits of such half since the day of the decease of her said Sisters. –

The

The Defendant in answer says. —

1st That he admits, the right of the plffs to have the enjoyment of their share of the real property in the said Community, as well in their own right, as heirs at law of the said Marie Josette and Marie Marguerite Trestler deceased. —

2°. That the criée ought not to be added to the valuation of the moveables in the present Case, as by the Inventory it appears the valuation thereof was made la criée Comprise — And further, as the said moveables consisted almost entirely of merchandises, no criée is due thereon, as their value can at all times be clearly ascertained from the Invoices and books of account of the party —

3. That there is proof sufficient besides the defendants oath, of the debts due by the Community to Mr Murray and to the Robertsons. — that stated to be due to Dunlop, is a mistake, and ought to have been stated as due to Mr Schieffelin — this was owing to an error in the copy of the Inventory, which has been corrected from the minute, as appears by the testimony of Mr Latour — As to the debts due to Clerks and Servants for their wages the defendants oath is in law a sufficient proof. —

4. The defendant submits to the Court his right to the Crue upon his preciput. —

5th & 6th —

5th & 6th The defendant admits the pltffs right to claim their share of the real property of the said Community, and also the issues and profits thereon, but in this Case he contends, that all the charges and burdens paid by him, and all the improvements he made on the said real property, ought to be first allowed and paid to him — and also that the charges and expences he has been at for the education of the plaintiffs wife ought to be reimbursed to him —

Colvert. v Woolsey.

On motion by the bail to surrender the defendant on the 5th day after the return of the writ, and after a second default entered against him.—

Stuart for Pltff — It is too late — there can be no surrender by the bail below to the Court, because the bail below is given to the Sheriff and the surrender must be made to him — But after the writ has been returned the bail below must become bail to the action before they can make a surrender to the Court, as it is to them the body of the defendant is committed by the Court, and they are thereupon enabled to make such surrender to the Court — cites Tidd's prac.

The

The Court were of opinion, that according to the practice established here, it was not necessary that the bail below should become bail to the action in order to enable them to make a surrender of the defendant to the Court, which may be at any time before Judgment — Motion granted. —

Monday 11th. February

Beardslee vs Gillis. } The Court dismissed that part of the plea regarding the plaintiff's right of action in consequence of his having proceeded to Judgment against the principal debtor before prosecuting the bail, being of opinion that the proceeding was regular. —

Colvert. vs Woolsey } The defendant came into Court the fifth day after the return of the process, and after a second default had been entered against him, and stated that he had been taken sick on his road to Court to appear to the present action and was thereby delayed from appearing before this day notwithstanding

his

his utmost diligence – of which he fyles his affidavit, and thereupon moves that he may be permitted to take off the defaults entered against him, and to appear and plead to the action. –

Stuart for Pltff. The Court has no discretion in this Case, the law is imperative that after a Second default there can be nether appearance nor pleadings on the part of the defendant. –

The Court, upon examining the Defendants affidavit were of opinion under the circumstances therein stated to admit the defendant to appear and plead an issueable plea to the plaintiffs action to morrow –

Dubois
Pᵒtevin

Action on deed of Sale. –

Lacroix for Pltff. action is founded on a deed of Sale of a lot of land made by one Christin to the defendᵗ and upon an assignment or transport of the purchase money made by the said Christin to the Pltff. –

Ross for Dftt. The defendant has never been able to obtain possession of the whole of the land sold to him by Christin, who appears never to have been himself possessed of more than one half of what he sold. –

Lacroix

Lacroix for Plff. in reply, says, that the Defendant cannot complain of any want of title or possession in and to the land in question, he having since sold the same to another person under the same description and title as he held it from Christin and without warranty on his part. —

Indian. vr Raymond } On exception to regularity of service of the process. —

Rolland for Defdt. It appears from the evidence adduced, that the writ of Summons in this Cause was served on the Defendant while he was acting in a public capacity as a returning Officer for the County of Huntingdon The law requires that the poll be kept open during eight hours every day, within which time the process was served, which is contrary to law — cites Nouv: Denizart. vo assignation". —

Ross for Plff — It is in evidence that the process was served during the time the poll was open, but the Defendant was not in the actual discharge of his office at the time — for he had left the house where the poll was kept, and was walking on the Kings highway when the process was served — so that this service occasioned no interruption of his duty as a public Officer. —

Racicot.— vs Stansfield & Kay.—

Action to rescind a lease.—

Bender for Pltff. The Pltff made a lease of a house to the defendant with an express condition that the defendant should not sublet it or assign that lease to any other person without the consent of the Plaintiff.— That Defendant assigned his lease to Kay without the plaintiffs consent, which was — contrary to the terms of the lease to the Defendant, and therefore the plaintiff is entitled to demand that the lease be so made to the Defend^{t} be rescinded, and that Kay, who is now in possession under the s^{d} Defendant be adjudged to deliver up the house immediately to the Pltff.— cites. Denizart. v^{o} Bail. N^{o} 12. 13.—

Lacombe. v^{o} Bail.—

Beaubien for Defd^{t}.— Had the Defd^{t} even assigned the lease in question without the consent of the Plaintiff yet the Plaintiff is not entitled to demand the rescision thereof so long as the Pltff is not thereby exposed to run any risk for the payment of his rent— Here the Pltff has a double security for his rent, that is, the goods and furniture of Mr Kay, which the witnesses declare to be sufficient for this purpose, and also the responsibility of the Defend^{t} Stansfield under the lease— and

under

under such circumstances a Sub lease has been held good although made without the Consent of the proprietor cites - 2. Pigeau. 464. — That the answers of the Plaintiff to the Interrogatories upon faits & art. with the depositions of the witnesses John Diehl this wife, shew, that the Plff did consent to the sublease in question, and cannot therefore maintain his present action. —

Porteous qui tam. v. Vandandaigue } Action for recovery of penalties incurred on St. 48. Geo. 3. ch. 27. s. 13. & 14. —

Lacroix for Defdt. - The 13th. 14. & 15th. sections of this Statute are not in force, having never been read and published at the church door of the parish where the Defendt resides, in the manner directed by that Statute - therefore the Defendant was not bound to take notice of it —

Lacroix v. Denis. — & Bissonet } Action of assumpsit. —

The Plff by his declaration, stated, That on the 6th. day of February 1805, the defendant purchased a certain lot of land from one Franc. Bissonette

in

in consideration of the sum of £25.— payable in different sums at different periods — That the said Bissonette being indebted to the Plaintiffs, did transfer and assign to them the sum of 294# livres, the balance remaining unpaid of the aforesaid sum of £25,— by an acte sous seing privé, by reason whereof the Pltffs became entitled to demand and receive that balance from the Defendant —

That the Defendt is indebted to the Pltffs as Legatees of the late Hubert Lacroix in a sum of 122# livres by his promissory note dated the 2 Novr 1805 — for the payment whereof and of the aforesaid sum of 294# making together £17. 6. 8 Cy, this action is brought —

The Defendant by his plea states, that as to the sum of 294# livres assigned to the plaintiffs by Bissonette he the Defendt paid and satisfied the same to the said Bissonette, long before the assignment thereof to the said Plaintiffs was known to him, and therefore the plaintiff cannot now demand the same from him — And as to the other sum of 122# he acknowledges the same to be due and owing to the Plaintiffs, and is ready to satisfy the same upon the Plaintiffs paying the Costs of the suit —

In

In consequence of this plea, the plaintiffs called in the said François Bissonnette as their garant in respect to the payment alledged to have been made to him by the Defendant of the aforesaid sum of 294$^{\#}$. livres, and concluding that in case the said Denis, the Defend^{r} should be able to make it appear that he had paid to the said Bissonnette the aforesaid sum of money in manner as by him alledged that then the said Bissonnette should be adjudged and condemned to pay and reimburse to the said pltff the said sum of money with Costs. —

To this demand en garantie, the said Bissonnette pleaded, that he never made the assignment to the Pltff of the s^{d} sum of 294$^{\#}$. — nor did he ever receive from them any consideration therefor —

Upon this plea issue was joined and testimony adduced — and the parties were this day heard before the Court thereon. —

Lacroix for Pltff^{s} contended, that they were entitled to Judg^{t} ag^{t} the defendant for the amount of his note viz^{t} £ 5. 1. 8 — and ag^{t} his garant for the 294$^{\#}$ transferred to them, and which he had himself received from the defendant. —

Beaubien for Def^{t} says, that Pltff ought to pay Costs to Defendant for having instituted an action in this Court ag^{t} him, when he owed them only the sum of £ 5. 1. 8.

Vigé

Vigé for Garant. – The transport made by the Garant to the late Mr Lacroix was without consideration – none is stated in the transport, nor has any been proved, the action en garantie ought therefore to be dismissed

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Terrien v. Baroness of Longueuil & al. –

Bedard for Pltff
Sol. Genl. for Defdts. –

The declaration states, – That by the laws in force in this province, a Seignior is bound to grant concessions of the ungranted woodlands in his Seigniory at certain fixed rents and redevances Seigneuriales, but cannot sell such lands for money under penalty of being held to return the money so taken, and of the land so sold being reunited to the domain of the Crown. –

That in the month of February 1801 the late David A. Grant then Seignior of the Seigniory of Longueuil did sell to the plaintiff a certain lot of uncultivated and till then ungranted land within the said Seigniory, and charged the same with certain annual rents & duties and for and in consideration of the sum of 4000 livres, of which it was agreed that 3000 should be paid before the plaintiff should have or obtain any deed for his said

land

land, and that after the said pltff had paid to the said David Alex. Grant the said sum of 3000 livres, the said D. A. Grant instead of making a deed of sale to the Pltff, which was contrary to law, and in order to avoid the penalty of such sale, did make a deed of Concession of the said lot of land by deed executed before Chaboillez public Notary on the 9th day of March 1801, to one Louis Honoré Joubert, being a confidential person and merely lent his name for this purpose, which deed of Concession was made upon the same terms and conditions in respect of annual rents and duties towards the Seignior as had been agreed upon between the said Pltff and the sr David Alexr Grant — and the said Joubert on the same day and before the same Notary did immediately afterwards execute a deed of Sale and Conveyance of the said lot of land in consideration of the said sum of 4000 livres, of which 3000 were therein & thereby acknowledged to have been paid by the said pltff — That as to the remaining sum of 1000. livres the said pltff afterwards paid the same to the said Joubert except 28 livres which were deducted on account of a defficiency in the quantity of land so sold to the pltff. — That the said deed of Sale by the said Joubert to the said pltff, is an acte Simulé, and made merely to give effect to the intentions of the said D. A. Grant in obtaining a sum of money illegally from the said pltff for the said lot of land — And

The declaration contained two other Counts for other lands sold to the Pliff in the same manner – and the usual money Counts for £194. 13. 4 – Concluding, that the said several deeds of sale should be declared null and void, and the Defendants condemned to reimburse and pay to the said Pliff the aforesaid sum of £194. 13. 4, and that the said several lots of land should be declared to be reunited to the domain of the Crown, and the pliff authorised to hold and retain the same upon paying to the Receiver General of His Majesty or such other person as the Court shall appoint the annual rents and services for the same according to the usual rates of Concession of lands in the said Seigniory of Longueuil –

The Plea denied generally the matters of law and fact stated in the declaration – The Replication joined issue thereon –

On hearing on the matters of law this day before the Court, it was argued on the part of the Pliff – That the arrets of the 6 July 1711 and 15th March 1732 prohibit the sale of waste lands by Seigniors – That the reunion of lands to the domain of the

the Seignior upon failure by the censitaire to fulfill the conditions of his grant by cultivating the soil and making a habitation thereon, is founded upon the arret of 1711, and if the dispositions of that arret have been received as law against the Censitaire, they must also be received against the Seignior in regard to the mode of granting the lands of his Seigniory.— That the arrets of 6 July 1711 and 15 March 1732 have been followed and observed as law in this Country and Judgments have been founded thereon, whereby deeds of Sale of waste lands made by Seigniors have been resiliated and annulled — cites. arret du Conseil Superieur, du 10 Mai 1741. p. 316. des arrets. vol. — This being the law, the attempt to evade it by the late D. A. Grant in this Case, by indirect means, through the interposition of a third person, is as much to be repressed & prohibited, as if done in open violation thereof.—

Sol. Gen.l for Defts. The Plff cannot maintain this action, even if the law were as stated by him, because he cannot be received to come against his own act, namely the Sale made to him by Joubert—

Jf

If there was any fraud in that Sale, the pltff cannot come against it, because he has participated therein, under a knowledge of all the circumstances under which it was made, and of the deed of Concession which had been previously made to the Sr Joubert cites. Nouv. Denizt. vo Fraude Normande. —

Rep. de Jurisp. - v Fraude. —

That the arret of 1711 has long since become obsolete, it was applicable only to the first settlement of the Country, and for the encouragement of persons making improvements therein — But the improved state of the Country, as it was in 1801 and more especially since that period is evidently not within the purview of that arret and therefore it ought to be considered only as temporary regulation extending to the immediate grantee of the Crown. —

Stuart for Dfdt. — The pltff cannot maintain this action unless he can show that it is particularly given to him — because he has participated in

all

all the fraud of which he complains - and it is a maxim that no man can come against his own act nor be benefited by his own wrong -

The arret of 6 July 1711 cannot be considered as forming any part of the antient laws, usages, & customs of the Country introduced under St. 14. Geo. 3. ch. because from its nature it was only of temporary regulation - being a mere arret - It is different from an Edit, Declaration, or Ordonnance, which proceed from the legislative power of the King and are binding as laws - but an arret, can be considered only as an act of the Executive Council, either as an interpretation of an existing law, or a regulation for a temporary purpose. - The dispositions of this arret are mostly of a temporary nature which have long since expired, such as, that the Censitaires should within a year and a day from the date of the arret hold fief & lieu upon and clear their lands - but this cannot be construed to extend to all future grants and tenants, as if it had been a permanent law. -

That the dispositions of this arret are not applicable to the present case - There was no Sale here

here by the Seignior - he made a deed of Concession of the land to a person who made the Sale - thus the plaintiff knew and concurred in that Sale -

But if there was any fraud in the transaction, the defendants are not charged with having participated therein, and they cannot be made liable for the fraud of another person, nor made subject to the penalty of the law in this Case - nor ought the law to be extended beyond the letter of it, and the cases expressly mentioned therein -

Ross for Plff. in reply - The arret of 1711 is part of the old laws of the Country which have been introduced and continued in force under the St. 14. Geo. 3. - The Judgmt. of the Superior Council of 1741, recites and refers to the arrets of 1711 and 1732 as being the law of the Country at that time - which shews that the dispositions of those arrets extended beyond the year and day from their date, and that they were not considered as regulations of a mere temporary nature -

That

That the arret of 1711 has since the St. 14 Geo. 3. been followed and observed in all the Courts in this country until the present day in so far as regards the reunion of the lands of tenants to the Domain of the Seignior on their failing to keep feu & lieu and clear the lands granted to them — and if considered to be in force as to this part, it must be in force as to all the dispositions contained in it. —

That the arret warrants the recovering back from the Seignior the money paid him on any sale of his waste lands, and therefore the pltff in this case, being the person who paid the money is entitled to his action agt the Defendants — There was no fraud on his part, on the contrary he was the party injured, and in such a case he is admitted to come against his own act — cites. Case. Foretier. v. Seminary of Montreal.

That the deed of Concession by Mr Grant to Joubert and the Sale by Joubert to the pltff ought to be considered as but one act, and done merely to effect the purpose Mr Grant had in view

view, of obtaining a sum of money for the lands in question beyond the redevances stipulated in the deeds of Concession —

That the Defendants as heirs and representatives of the late Mr Grant are liable for his acts, and bound to indemnify those who have been injured thereby —

Moor ... v Struthers } Action on Judgment rendered agt. Defendant in the State of Vermont —

Stuart for Defdt — The Defendant was never legally called before the Court in Vermont — he is not a citizen of that State, but a Subject of His Majesty domiciliated in Lower Canada — It appears that the service of the process upon the defendant in Vermont was by attaching the same to a stumps of a tree in the highway — The defendant being a traveller through that Country had no notice of such process, and was therefore condemned without being heard — Actions upon Judgments rendered in another Country are admitted only from principles

of

of policy and good understanding between nations, but when it appears, as in the present Case, that they have been rendered contrary to the principles of natural Justice none of His Majesty's Courts have ever enforced them.

Sol. Genl. for Plff.. The Judgment was rendered according to the laws of Vermont, which is the only fact to be enquired into - for if the Judgments of that Country are to be enforced in this, it can be only on this principle, and this Court have no controul over the Judgments of that Country to say that they are right or wrong in this or any other Case. - If the Court should however be of opinion not to sustain the Plaintiffs action under the Judgment the ought to be allowed to go into proof to establish the debt against the defendant upon which that Judgment was rendered. -

Tuesday 12th. February 1811.

Jos. Brisset
Jac. Brisset
vs.
Fra. Brisset and
Opp.

On the opposition of Franc. Brisset afin de distraire. -

The pltff having seized a certain lot of land under an execution sued out against the lands and tenements of the Defendant, the sale thereof was opposed by Francois Brisset, in the name and for and on behalf of Joseph Brisset the minor son of the defendant, to whom the defendant had made a donation of the said lot of land by Deed executed before a notary on the 17 Febry 1807, in which deed the said Opposant appeared and accepted the said donation on behalf of the said minor, - which deed was afterwards on the 20th Febry 1807 - enregistered in the Registers of Insinuation -

To this opposition the pltff objects, that the Opposant has no right to make his said opposition, he being neither the natural tutor, nor the tutor appointed to represent the said minor - And that the donation made to the

said

said minor is null and void in law, not having been accepted by such tutor, either natural, or dative, and no tradition having been made of the property given under the said Donation, the defendant having still continued in the possession thereof until the same was taken in execution in this Cause at the Suit of the pltff, and therefore the property in the said lot of ground was never vested in the said Minor.

cites.— 1 Pigeau. p. 69
1 Duplessis. Donation. p. 555. sec. 3.—4.—
1 Riccard— Donation. Nos 836. 838. 850. 853. 854. 860. 864.
Art. 7. of Ordce 1731.—
Poth. Donatn sec. 2. art. 1. p. 458. 459.—

The Opposant contends that the donation made by the defendant to his son was valid and legal, & that the Opposant is founded in his opposition to claim the above lot of land as the property of the said minor— That the opposant is the uncle of the minor, and by law is authorised to accept a Donation made to him, as being his ascendant. cites. 2. Prevot de la Jannes. p. 181.—

Pangman
v
Beaudouin
&
A. Beaudouin
Opp^t.

On the opposition of Antoine Beaudouin afin de ~~xxxxxxx~~ distraire. —

In consequence of an execution sued out by the Plaintiff, sundry goods and chattels were seized at the domicile of the defendant and as being his property — They were claimed by the opposant as his property, and as being in the possession thereof, by virtue of a donation made to him by the Defendant by deed of the 23^d. May 1810, at which time the Opposant alledges that tradition was made to him of all the said goods and chattels. —

The Plaintiff in answer to the said Opposition states, that the said deed of donation is null and void in law, inasmuchas it did not contain a particular and detailed description of all & singular the goods and chattels therein & thereby given — the words in the donation being on the contrary of a general nature and not in the form required viz^t. "tous les outils de son metier telle qu'est sa "boutique garnie, ainsi que de tous autres effets qui "peuvent se trouver dans le hangard & autres dependances"

That

That the Opposant never obtained the possession of all or any of the said goods chattels or effects under the said donation — And finally that the said donation was made in fraud by the Defendant to elude the payment of a just debt to the pltff. — cites. — Denizart. Vo Donation. Nº 37. 38. 39. Ordnce 1731. art. 15. — 1 Riccard. Don. p. 214. Nº 960. 961. 962. 3. 4.

The Opposant contends, that he obtained the tradition and possession of the goods & effects in question at the time of executing the deed of donation, whereby a detailed description thereof became unnecessary — Ordce des Don. 1731.

Lilly, Cur'
Beach. } On Petition of Lilly, for calling in the creditors of the late R. Simpson to take a dividend upon his Estate. —

On the claim of Beach for medical assistance & drugs furnished during last illness of the sr Simpson. — who states, that having made proof of different attendances & medicines furnished

furnished, his oath ought to be taken as a supplementary proof of the quantum of his demand, and this under the disposition of the 124th article of the Custom. —

Beaubien for the Curator. — The claimant has not made sufficient proof of his attendances — and if his oath be admissible, it ought to be received only as to the quantum of the charge upon the attendances proved and not upon the whole of his demand. —

Friday 15th February 1811.—

Indian. v. Raymond } The Court were of opinion, that as the Defendt had not been interrupted in the execution of his office, and that he was not in the actual discharge thereof at the time the process in this Cause was served upon him, the exception taken by him ought to be dismissed.—

Church. v. Hoesapple. } According to the course in England, a bill payable to bearer, is a negotiable instrument, and transferrable by deliver— & consequently an action in the name of the bearer will lie thereon— 3. Bur. 1523. Grant. v. Vaughan—

But it is said, that to entitle a bearer to maintain his action under such a transfer, he must shew and prove that he gave a valuable consideration for the note— This however can be meant only in cases where a defence has been set up, as the practice seems there to be, when the defendant allows Judgment to go by default, that the Case is referred to the master to calculate the amount of principal and interest due to the pltff on the note, without any other proof or proceedings by writ of enquiry of damages before the Sheriff.— see Chitty on bills. 270.— Peake's Ev. 235.—

The provincial Stat. of 1796 does not take into contemplation, notes or bills payable to bearer, and therefore cannot apply —

In France, prior to the year 1650, the use of billets payables au porteur, had become so common as to be considered inconvenient, and by two arrets of the parliament of Paris, one of 16th May 1650, and the other of the 7th Sept. 1660 — and by a Declaration of the French King of 9th Janv. 1664, they were — prohibited, and declared illegal — But notwithstanding this prohibition the use of these notes was still continued, and seems even to have been warranted by Ordre of 1673. tit. 1. art. 1. and a Declaration of 26 Febs 1692. — In May 1716, with a view of favouring Law's projects of Finance then in vogue an edict was made prohibiting the further circulation of these notes payables au porteur - but after Law's projects were overturned the use of these notes was re-established by a Declaration of 21 January 1721. in these words — "voulons qu'en tous commerces et negotiations que pourront faire nos Sujets pour prêt d'argent, vente de marchandises ou autrement, ils puissent en stipuler par lettres ou billets, le paiement au porteur sans denomination de personnes certaines —

Ce

ce faisant, que tous negocians et Marchands comme aussi tous ceux qui sont chargés du maniement ou recouvrement de nos deniers et qui auront signé des billets payables au porteur pour valeur reçu comptant ou en marchandises puissent être contraint par corps au paiement des dits billets."—

Since the time of the above Declaration these notes appear to have continued in force and in use, and by it the bearer is always considered to be the proprietor, and not liable to prove the consideration for which he obtained the note, unless he be charged with coming by it unfairly, or by connivance with others

See. Nouv. Denizart. vo Billet au porteur. No 3. 4. 5. Rep. de Jurisp. vo Billet payable au Porteur. p. 386.—

The above Declaration of 1721 has likewise re-established the enactment of the Ordinance of 1673. art. 1. tit. 7. which says, "Ceux qui auront signés des lettres ou billets de change pourront "etre contraint par corps, ensemble ceux qui (cites several instances) "auront signés des billets pour valeur reçu comptant ou en "marchandises, soit qu'ils doivent être acquittés à un "particulier y denommé, ou à son ordre, ou au porteur."

In this case therefore, as no defence has been set up to the action or the validity of the transfer of the note called in question, the Court were of opinion that the Plff was entitled to his Judgment—

Watts, & al'
vs
Hall, &c

This day the Court gave the following opinion and Judgt. in this Case. &c

The Court having heard the parties by their counsel and inasmuchas it appears by the facts stated as admitted by the parties, that the Defendt. had authorised Messrs. John & Henry Newman to order certain goods to be shipped to him in Montreal in the year 1809, and that the said Newmans did on behalf of the Defdt. order Messrs. Robert & Wm. Bentley, hat manufacturers residing near Manchester in England to ship the said goods to the Defendt. and which they did on the first April 1809 on board the ship Active, Jos. Winders, master, to sail from Liverpool in England to Montreal, amounts in the whole with shipping charges to £311. 1. 7 Stg. That at the time of shipping the said goods the said Bentleys the shippers delivered a certain bill of parcels or Invoice thereof, whereby the Defendt. and the said Newmans (who ordered the goods) were jointly charged as indebted to the said Bentleys for the amount thereof. That the said Newmans became bankrupt on the 8th. June 1809, and since that time, to wit, on or about the 20th. April 1810, the said Bentleys in consequence of the joint Obligation with the Defendt. to pay for the said goods shipped by the Active, have received a dividend

of

of three shillings and four pence in the pound, amounting to £51. 16. 11 Stg — And inasmuch as the said Messrs Bentleys have legal rights to claim the remaining sum due for the payment of said goods from the Defendant, the Court adjudged that the pltffs in so far should be dismissed from their — claim and demand — and further adjudged that the Plaintiffs, as assignees of the Estate of Newmans should recover from the Defendt the aforesd sum of £51. 16. 11 with interest thereon at the rate of 5 ℔ Cent from 20th April 1810 until paymt and also the sum of £39. 12. 6 for the amount of the Insurance on the said goods and Commission in ordering the same Costs divided — As to the other sums claimed by the Pltffs in their declaration, the same not being supported, are dismissed. —

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Moor v Struthers } The Court were of opinion that the service of the process upon the Defendt by leaving the same near the highway upon a stump of a tree without any other notification, could not be considered to be consistent with the principles of Justice to give the Defendt an opportunity of being heard before Judgment was rendered against him — That a Judgt of any foreign County grounded upon such service of process cannot be enforced here

and

and made binding on a Defendt. — That as there was no Count in the declaration for any other debt or demand agt. the defendt. than the above Indt the action could not be maintained upon any principle agt. him — Dismissed with Cost.

Jackson vs Brown

This was an action, stated to be for False Imprisonment, but charging facts agt Defendt for a malicious prosecution.

The Case, as stated in evidence, was, That Defendant had purchased a certain paper mill & utensils belonging to it, at Argenteuil, of which the plff had formerly been a part owner, and who still continued to work as a labourer at the mill after the Defendt had purchased it. — At the time of the Defendants purchase, there remained a certain quantity of unfinished paper in the mill, which the Defendant considered as his property under his purchase, and which the Plff and other prior owners of the mill claimed as belonging to them. — The plff and his associates carried off this paper from the mill as being their property, in consequence whereof the Defendant lodged an information

agt

against them in the usual course, and they were arrested for a felony in stealing the said paper, and lay in gaol until last September Sessions, when a bill of Indictment for the felony was presented to the Grand Jury against them at the instance of the Defendant, but ignored, in consequence whereof the Pltff was discharged. —

Here the pltff having closed his evidence the Defendant moved that a non-suit should be entered, inasmuchas the evidence adduced did not support the action, which is stated to be for false imprisonment, in which case the Pltff ought to have shewn that he had been unlawfully arrested, and imprisoned by illegal and undue authority - cites Bull. N.P. 22. - That considering this even as an action for a malicious prosecution, the evidence adduced cannot support it, as malice must be shewn in the Defendt and a want of probable Cause - Selwyn. N.P. 1063. - Esp. N.p. 529. this has not been done, nor does it even appear that any information was ever lodged before any magistrate by the Defendant against the Pltff, inasmuchas that information has not been produced by the magistrate - Therefore as no Onus has been thrown upon the Defendant under the evidence adduced he ought to be discharged without being held to enter upon his defence : —

The Court considering the action in substance to be for

a

a malicious prosecution, were of opinion from the evidence adduced that Defendant was not entitled to a non Suit. —

Whereupon Defendt. entered upon his defence thereby shewing the nature of his claim to the paper in question and the taking thereof by the Plaintiff

The Defendant having finished his evidence the pltff offered testimony to rebut that given by Defendant respecting the property in the paper in question. —

It was objected by Defendt. that no such testimony ought to be allowed, it being contrary to all practice, and the nature of this action — requiring that Pltff should shew by every means in his power that the paper was his property and not that of the Defendant, in order thereby to shew a malice in the Defendant. —

The Court admitted Pltff to adduce his testimony

Saturday 16th. February 1811.

Drake vr Goudreau } Action on Judgment rendered in Upper Canada
Plea — Nul tiel record.—

An Exemplification of the Judgment rendered against the Defendant at York in Upper Canada was produced certified by the Clerk of the Court whose signature and capacity was further certified by the Chief Justice of the Court —

The Defendant contended that this did not constitute a sufficient proof of the record, no more than it would have done had it come from a more distant Colony of Great Britain.—

Ross for Plff — Rolland for Defendt

M.Clement vr Pattinson } On Action of account &c.—

Defendt. pleaded to the jurisdiction of the Court, alledging, that he lives at Sandwich in Upper Canada where he has lived & resided for many years last past, and not at Montreal nor anywhere else within the jurisdiction of this Court That the service of the process in this Cause, by leaving a copy thereof at a house in Montreal said to be the last domicil of the Defendant, is wholly insufficent,

as

as such service of process at a dernier domicile of a Defendant is not by law sufficient to warrant any proceedings thereon before this Court — That the Provincial Ordinance of 1785 regulates in what manner process shall be served upon a Defendt and it does not recognize the leaving a copy at his dernier domicile, as a legal means of calling him into Court. —

The Plff answers that the Service of process at the dernier domicile of a Defendant was recognized by the old laws of the Country prior to the Ordinance of 1785, which does not vary this mode of service but only gives relief in some other cases not before provided for. —

Sol. Genl & Ross for Defdt — Bedard for Plff

Morison v. Raymond } Action agt Defendt ~~as returning Officer~~ for recovery of penalty for having refused as Returning Officer to take the Plaintiffs vote as a freeholder for the election of a representative for the County of

At

At the return of the process the Pltff filed among other papers a notarial protest which he had caused to be made against the Defendant at or about the time of his having refused the Plaintiff's vote — The Defendant raised an Inscription de faux against this protest, and the parties having gone into proof upon the moyens de faux, they were now heard thereon the Defendant contending that he has sufficiently proved his said moyens de faux, and the Plaintiff denying the same. —

—

Parker & Co
vs
McGill & Co

On action of account. —
Ross for Pltff.
Beaubien for Dfdts.

The Pltff. state that on and before 1st June 1807, Robert Dickson, Jacob Franks, Allen Cameron Wilmot and James Aird, merchants and Copartners trading together at Michilimackinac in the territories of the United States of America, and as such became indebted to them the Pltffs in a Sum of £2637. 12. 9. for goods sold & delivered to them. That in August 1807 certain furs pettries monies & effects of the said Robert Dickson & Co came to the hands of the

Defendts

Defendants, ~~who~~ in consequence of an arrangement made between the pltffs Defendants & other Creditors of the said Robert Dickson at a certain meeting of the said Creditors held at Mackinac, the said Robert Dickson & Co then finding themselves unable to pay all the claims of their said Creditors then due – That the said Defendants represented by Thos Blackwood then & there promised & agreed to accept and receive the said Furs & peltries, to ship them to England with directions for the sale thereof, and to pay to the pltffs their proportion of the proceeds of that Sale – this being now refused by the Defendants the present action is brought against them to account –

The facts stated as above were made out in evidence, for the proof whereof the said Robert Dickson was called by the pltffs as a Witness. –

The Defendants having pleaded ~~a~~ non assumpserunt to the pltffs demand, now argued, – That at the time the furs and peltries in question came to the hands of the Defendants, to wit, in Augt 1807, the said Robert Dickson & Co were not insolvent, nor does it appear that such insolvency happened until 15 Oct. 1808 the time at qr a letter of licence appears to have been given to them by their Creditors, the Defendants therefore are not accountable as having received the property of

insolvent

insolvent debtors – The pretention of the plaintiffs, that it was in consequence of their promise and agreement of the Defendants to account for and pay to the Pltffs their share of the proceeds thereof that the same were delivered to the said Defendants, has not been proved – Verbal testimony of this fact is insufficient and inadmissible, if ever such an agreement was made, it ought to have been proved by some act or consent of the parties in writing, as it is above an hundred livres in value, and cannot be considered as a Commercial transaction – That the said Robert Dickson & Co ought to have been parties to the Suit, and an opportunity given them to contest the amount of the pltff's demand, which the Defendants are unable to do being wholly ignorant of the transactions between the said pltff's and the said Robert Dickson & Co –

That the said Robert Dickson is an incompetent Witness to prove any part of the plaintiffs demand – he is interested in the Suit – besides being a bankrupt, his confession or admission of a debt ought not to be received. –

That Defendants promise or agreement to account as alledged, even if considered as a mercantile transaction cannot be proved by verbal testimony – because it would be a promise to pay the debt of a third person for the proof of which by the St. of Frauds & Perjuries,

there

there must be an agreement in writing. —

The Plaintiffs in reply, state, That the necessity the said Robert Dickson & Co. felt of calling their Creditors together for the purpose of entering into arrangements with them, is a sufficient proof of their insolvency which is further ascertained by the letter of licence of 15. Oct. 1808, by which it appears, that the same debts which the said R. Dickson & Co. owed were unable to pay in June 1807, were still unsatisfied —
That the objection comes now too late that R. Dickson & Co. are not parties to the Suit, this should have been pleaded — but it was not necessary that they should have been parties to this Suit, the undertaking alledged was made by the Defendants to the Plffs — besides, the property in question is at Montreal, and the said Robert Dickson & Co. now without the Jurisdiction of this Court —
That Robert Dickson, although a bankrupt is a competent witness — cites. 3. T. Rep. 27. Bent. v. Baker
That the promise of the Defendants in this case cannot be considered as an undertaking to pay the debt of a third person, but is an undertaking on their own behalf in consequence of having received the property of R. Dickson & Co., and therefore verbal testimony is admissible to prove it — cite. 3. Bur. 1886. Williams. v. Leper. 4. Bur. 2101. Clayton. v. Andrews. Peake's Ev. 227. a —

Leprohon vs Widow Sarault & al:

Action to obtain possession of a certain tenement.

The pltff being possessed of a certain tenement or house in the City of Montreal under lease from the Nuns of the Hotel Dieu dated 15th Sept. 1796, — permitted one François Sarault to enter into and possess the same as a retail shop for several years but without lease or agreement of any kind... On the 16th day of Novr 1809, the plaintiff transferred the remainder of his lease not then expired to one Michel Fournier; but Sarault refusing to deliver up the possession of the tenement to Fournier, he thereupon protested against the Pltff for his damages accrued and to accrue from such refusal, he also, on the 1st Febry. 1810, protested against the said Sarault for his unjust detention of the said house, and at the same time served and left with him copies of the aforesaid lease from the Nuns to the Pltff, and transfer from the Pltff to him the said Fournier — A subsequent protest was also made by the said Michel Fournier against the said Sarault on the 9th day of the same month of February thereby notifying to him, that on default of his leaving and giving up the said tenement, he shall be charged with the annual rent of One hundred pounds for the same — By a transaction and agreement made and executed between the pltff and the said Michel Fournier, on the 24th Decr 1810, the plaintiff not being able to put the

said

said Fournier into the possession of the said tenement he consented to pay to Fournier a Sum of £43.17.3 for his damages in this behalf, and now prosecutes the Defendants, the widow and Son of the said Francois Saraunt who retained the possession of the said tenement after his decease, demanding by his action as well to be put into the possession of the said tenement, as — £120. for his damages by the unjust detention of the said tenement. —

The Defendants pleaded, that the late Francois Saraunt rent the said tenement from the plaintiff from year to year, and that neither he nor the Defendants ever received any legal notice from the Plff to quit the said tenement, and without which notice they are not bound to quit the same, contending that they are entitled to three months notice in this behalf. —

The plff. in answer says, that the late François Saraunt had sufficient notice to quit by the protests made against him by Michel Fournier — and that as the said late Franc. Saraunt never held under any lease he was not entitled to the notice of three months. — cites. Dic. Fer. V°. Congé. —

Monday 18th Febv. 1811.—

Morrison
vs
Raymond

The Court were of opinion that the Inscripn en faux ought to be rejected, as being formed upon an act nowise material in the Cause, vizt. the Protest made at the instance of the pltff against the Defendant for not accepts his vote — as without this protest the Pltff was entitled to his action if his plaint was well founded, so that it was deciding nothing in the Cause, by making a determination upon the truth or falsity of the matters contained in this Protest.—

N.B. This opinion ought to have been given by the Court upon hearing the parties as to the relevancy of the moyens de faux.—

Smith &c
vs
Kay & Smith
and
Ros.a McClements
Robt. McKenzie

Action to rescind a transfer of an Obligation

Ross for Pltff
Bedard & Beaubien for Defdts—

The Defendants Kay & Smith were merchants and Copartners trading in Montreal, and were indebted to the pltff and several other persons in very large sums of Money — On the 28th March and 2d April 1807, being unable to satisfy the demands of those Creditors, different actions were instituted agt them — On the 4th day of April 1807 the said Defendts being possessed of a certain bond or obligation due to them by one Pre Franc Careau for a sum of £1029. 13. 10 they transferred it to the other Defendants Rosina McClements and Robert McKenzie, in consideration as stated in the transfer for so much money by them paid to the said Defendants Kay & Smith, but really with the intent of paying to the said McClements and McKenzie so much of a debt which they the said Kay and Smith owed to them — By an act or declaration made by Kay & Smith before Chaboiller Notary public on the 18th day of April 1807, they declared themselves to be in a State of insolvency and unable to pay their Creditors - and on 20th of the same month several Judgments were rendered against them on the suits which had been so commenced — The Pltff

having

having come to the knowledge of the above transfer brought his action against all the parties in order to have it rescinded, complaining that there was fraud in the transaction, and an evident intention in the Defendants Kay & Smith to give an undue preference to the said M^c Clement and M^c Kenzie who were favoured Creditors at a time when they, the s^d Kay & Smith could not legally made any payment to any Creditor nor do any act to the prejudice of one or the benefit of the other, they being in law at the time of making such transfer, insolvent — It being contended that the bankruptcy of the defendants Kay & Smith was open and declared from the moment they were served the processes at the several suits of their Creditors whom they could not pay, and therefore it was a fraud on their part to make the assignment of the Obligation in question (1 Domat. tit. Fraude. p. 188. That a transfer of this kind under such Circumstances was of itself an act of bankruptcy — (1 Bur. 467. Worsley & al. v. De Mattos & Slader — and 2. Bur. 827. —) And even if the other Defendants were in good faith yet such an act of bankruptcy rendered the transaction null, and they were liable to refund the money they had received in consequence of the transfer (5. Term Rep. 197. Bradley & al. v. Clarke. —

It

It was contended on the part of the Defendants that their bankruptcy was not open before the 18th. April 1804 - The mere service of process upon them at the suit of the plff & some other of their Creditors did not constitute a bankruptcy in the eye of the law - The transfer having been made long before their bankruptcy to wit, on the 4th. April and not within the ten days limited by the Ordinance, it was a legal act - and must be presumed to be made in good faith - it being in proof that the Defendants M^c Clements & M^c Kenzie were Creditors of the said Kay & Smith to a much larger Sum than that mentioned in the transfer. -

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Sewell ... vs Cogswell } Action on a promissory Note. -

The witness to the note was absent in the United States, this the plff proved, and also the Defendants handwriting to the note, and thereupon demanded Judgment -

Boston for Dfdt - objected to the sufficiency of the proof, as a Commission Rogatoire might have been sued out to procure the testimony of the subscribing witness

as

as his place of residence in the States was known, and as his testimony alone constituted legal evidence in the Cause.—

Sol. Genl. for Pltff - Contended, that where the absence of the subscribing witness from the Province is ascertained the signature of the party can be proved by any other witness — cites — 7. Term Rep. 266. note (c)
Douglass. 93. Coghlan v Williams —

Griffin dux vs Georgen. } Action for recovery of rent of a lot of ground or emplacement sold on Constitut by Pltffs to Defendant —

The Pltffs had purchased a large quantity of land, of which the emplacement in question made parcel, of one Langan; By a Judgment of the Court of Kings Bench of the Sale by Langan to the Pltffs had been declared null and void, the property being adjudged to belong to one McCord — this Judgment had been confirmed in the Court of appeals, and was now undetermined in consequence of an appeal to the King & Council.

The Defendants thereupon alledged that the Pltffs could not maintain their action as the property

property has been declared to belong to another person at the time of the sale by them made to the Defendant— this was a sufficient cause of eviction existing at the time of such sale, which was sufficient to entitle Defendant for security and indemnification in case of eviction before he could be held to pay any part of the rent in question.

Ross. & Sewell for Plff— The Sale was made in good faith by the Plaintiffs, under which the Defendant obtained possession and still holds the same without molestation or disturbance— The Contest respecting a right which cannot affect the Defendant is no cause for his demands security — etc — Poth. Vente— Nos 88. & 239 - also Obl. No 467. —

Hart vs Dupré & Joliffe, & Allen—

The Sheriff having taken certain lands & tenements belonging to the Defendant in execution, gave a warrant to his bailiff to sell the same in the usual manner, after which, and before the Sale, the Sheriff died - the bailiff ignorant of this fact

proceeded

proceeded to make the Sale – the purchasers, Joliffe and Allen thinking their title doubtful, refused to pay the purchase money, whereupon a rule was obtained against them to shew Cause why the lots of land they had respectively purchased should not be sold at their folle enchere –

Stuart for Joliffe – Contended, that the Sale made to him being vicious, there could be no folle enchere – That the death of the Sheriff was a legal stay to all further proceedings, and the officer acting under him had no power to proceed after the decease of the person from whom he received his authority – There being no Sheriff there could be no Sale –

Ross for Defd.– By Stat: 20. Geo. 2°. ch. 37, the business of a deceased Sheriff is carried on for Six months after his decease so that there may be no failure of Justice by a vacancy in the Office – Here the same reason must apply – The Instructions for Sale were given on Saturday and on the monday following the Sheriff died – Of this all the parties were ignorant – But had this fact been known still the Sale would have been good, because the decret is made under the direction & by the authority of the Court and the power given to the Sheriff in this behalf – extends to all those acting under him – and the

Defendt –

Defendant being the person more immediately interested in this matter, his consent, which he now gives that the present Sheriff shall under the order of the Court give a title to the purchasers of the lots of land by them respectively purchased at the said Sale, ought to cure any defect which can be presumed to arise.

Stuart in reply. The Stat. 20. Geo. 2d. is not applicable to the state of things in this Country, and the making of that St. shewed the necessity of providing a Cure for an evil which then existed — As to the bailiff's acting without knowledge of the decease of his principal, it does not vary the Case — he was a mere mandataire, and whether he knew that fact or not, his proceedings were invalid, from the moment the Source of his authority ceased to exist

Tuesday 19th February 1811.—

Sewell v. Cogswell

The Court were of opinion, that where the subscribing Witness was proved to be absent from the province proof of his signature and of the Defendant's signature was sufficient to support the Plaintiff's action.—

Porteous v. Vandandaigue

The Court were of opinion that the Defendant could not avail himself of the want of publication of the law in question, and therefore upon the proof adduced gave Judgment for the Plaintiff.—

Racicot v. Stansfield & M. Kay

It appearing by the evidence in the Cause that the pltff had acquiesced in the Sub-lease to the Defendant Kay, the action was dismissed, at the same time the Court held that without such acquiescence on the part of the pltff he would have been entitled to obtain the rescision of the lease made by him to the Defendant Stansfield as well as of the Sublease to Kay.—

Sanctot. v. Sanctot }

The Court were of opinion that the Plaintiff was entitled to his action agt the Defendant if the facts alledged were true, and therefore gave the parties a day for their respective proofs thereon. cc —

Wednesday 20th Febry 1811.

Griffin dux
v.
Georgen

The Court was of opinion that the Defendt was entitled to security from the pltff agt any disturbance in his possession before he could be held to pay the rent demanded – and it was adjudged that upon giving such security the Defendt should pay the sum demanded.

Jos. Brisset
Jac. v. Brisset
Frad Brisset
Oppt.

The Court were of opinion under the authorities cited by the Plaintiff, the Opposant shewed no legal capacity in which he was entitled to make an opposition in the name and behalf of the minor Joseph Brisset, and therefore dismissed it.

Leprohon vr Widow Sarault dal'.

The Court were of opinion that the late François Sarault had sufficient notice to quit the tenement in question under the protest made against him by Michel Fournier on the 1st Febry. 1810, considering that protest and the notice given by it, to be the same as if made and given by the plaintiff, inasmuchas it appeared thereby, that a copy of the lease of the said tenement made by the plaintiff to the said Fournier, had been at the same signified to, and left with the said Franc. Sarault, who was thereby bound to consider the said protest and notice as if made by the plaintiff himself. The Court therefore gave a day to the plaintiff to prove his damages.

This Judgment was afterwards confirmed in appeal.

Hart. — v. Dupré — Soliffe, & Allen —

The Court were of opinion, that the proceedings of the Sheriff's officer while ignorant of the decease of the Sheriff, ought to be — confirmed, as otherwise great inconvenience might arise, and public justice be delayed — that there was a distinction to be taken between the Sheriff's officer in this Case, and the mandataire of an individual, as the act done by that officer derived its validity not merely from the authority of the Sheriff, but from the Source of public justice and therefore while he acted in good faith, it was requisite that his acts should be confirmed — The Sale by the Sheriffs officer was therefore declared legal and valid, and the rule for a pro Sale at the folle enchere of the purchasers made absolute —

April Term 1811.

Monday 1st April 1811.

Worthington v. Barber.

The pltff moved for a Commission Rogatoire to examine witnesses not resident in the Province.

Defendant objects, that delay had been granted to Plaintiff's attorney to produce and file a power of attorney for instituting the present action until the 20th day of March last, which was not yet filed, and therefore under the rules of practice Sec. 14. p. 28, the action was liable to be dismissed, which he now moved should be done.

The plaintiff in reply observed that before the expiration of the delay allowed him for filing the power of attorney, viz. on the 12th March last, the Defendt filed a plea to the plaintiffs action, thereby waiving his right to exact the power of attorney in question.

And of this opinion was the Court, and therefore granted the pltffs motion.

Stewart. vr. Finchley.

The pltff moved to continue enquête for the examination of three witnesses duly subponad but who did not attend on the day appointed for the examination of witnesses in the last vacation, considering himself entitled to such further continuance of the enquête under rules of Prac. Sec. 27. art. 21. &

The Defendant answers that Pltff is not entitled to any further day for the examination of witnesses he having proceeded at his peril and made no reserve for such further examination until after the testimony of all the witnesses who did then attend, had been taken, when it was too late - Reg. Prac. Sec. 27. art. 14

Lacroix. vr. Paris — and Paris vr. Robitaille

The Counsel for Paris, moved that these two Causes should be joined from the connexion there is between them - the pltff prosecuting Paris in one action to obtain from him the possession of the house he now occupies, and which possession he the said Paris obtained from Robitaille the Defendant in the other Cause under an agreement to this effect - and therefore Paris has prosecuted Robitaille to save him the said Paris harmless against the suit of the

the Plaintiff Lacroix, or on default thereof that said Robitaille be held and condemned to provide for the said Paris another sufficient house to live in as by his said agreement he is bound — therefore if Lacroix — should obtain Judgment against him the said Paris before his Suit against Robitaille shall be determined he will run risk of being turned out of the possession of the house in which he now lives and be without a habitation. —

Stuart for Robitaille - says, that the Causes have no connexion, nor are of the same nature - that the parties in the two Causes are not the same, nor have they made equal progress towards a final determination - in the one there being a day fixed for the examination of witnesses, and in the other no plea has yet been filed to the action. —

Tuesday 2. April 1811.

Stewart v. Finchley. — The Court were of opinion that under the rules of Practice, the plaintiffs motion could not be granted — But from the consideration that those rules were not sufficiently known to the parties, being at the time in the hands of the printer, the Court were induced in this particular instance to give another day to the Plaintiff for the further examination of his witnesses, but without this being considered as a precedent. —

Lacroix. v. Paris and Paris. v. Robitaille — The Court considered these causes so connected that Judgment ought to be given in both at the same time, if it conveniently could, and therefore in order to do justice in both, it was directed that the Causes should proceed together to judgment, without being joined, which did not appear to the Court to be necessary. —

Colburn, & Gill. — v Adams. —

The plaintiffs attorney moved for delay to file a power of Attorney for instituting the present action under the circumstance of the person suing out the writ of Capias in this Cause being merely an agent of the plaintiffs and acting only under their letter in this respect, there not being sufficient time to procure the above power of attorney from the celerity necessary to be used in arresting the Defendant — and that owing to the other private business contained in the said letter it could not be filed. —

The Defendant objects to any delay being given the pltff= having had sufficient time to forward their power of attorney for prosecuting this action since the Defendant was arrested. —

Hagar v Lindsay

The pltff= counsel, moved that the serment suppletoire should be deferred to the pltff, there being a semi-preuve in his favor — ate Poth. Ob. No. 719

Boston for Dft= objects, — The Pltff= is a trader and the present action is for goods sold and money lent and advanced, therefore the serment suppletoire cannot be admitted. —

Hamilton vs McLaughlan

Action for breach of Covenant-

Ogden for Defendt. pleaded the following pleas upon which there was a demurrer taken by Pltff. viz 1st. Not Guilty - 2d. That there was no such Contract produced or filed as that declared on - and 3d. The loss of the timber in question by the act of God -

Stuart for Pltff. The matters above pleaded by Defendant are irregular and inadmissible - The Plea of Not guilty can never be pleaded to an action for breach of Covenant, because it raises no issue, nor is there any fact charged in the declaration to which such a plea is applicable - As to the contract declard upon not being filed, it is a matter not to be taken advantage of in a plea - he ought to have denied the existence of such a Contract if he meant to contest any thing respecting it, as it can be proved although it be not filed - The third plea, is wholly inapplicable - the Sale stated in the Declaration was not of any specific pieces of timber, but of a certain quantity of timber in general, and even supposing a loss to have happened to any part or the whole of that timber by the act of God, yet this could

be

be no discharge to the Defendant, as it was neither impossible nor impracticable to have compleatid his contract by other means. a

Ogden in answer — As the pltff had filed no Contract at the time the plea was made, he considered it right to plead not guilty to the pltffs action, and that he had not filed the Contract declared, as thereby the proof of the contract declared on was thrown on the Plaintiff — That the Defendant, by pleading the loss of the timber by the act of God, does not mean to say, that this shall operate a discharge to him, but only entitle him to a further delay to enable him to fulfill it. —

Donegani vs Desnoyers } Action of assumpsit for goods sold & delivered and for monies advanced &c by Pltff to Defdt —

The Pltff obtained a rule upon the Defendt. to shew Cause why arbitrators should not be named to regulate and settle the accounts between the parties. —

M. Vigé for Defdt — The Pltff is too late in making an application for a reference to arbitrators, he having examined the Defendant upon facts & articles with a

reservation

reserve to examine witnesses — that having commenced his evidence before the Court the Pltff must be held to proceed there and to go before arbitrators with such other evidence he may have to adduce. —

—

Beardslee vs Gillis. } Action on assigned bail-bond. —

Stuart for Defdt. There is no proof of the process and proceedings in the Original action in which the bail-bond was given — That only one of the subscribing Witnesses to the execution of the bond has been examined, the other is neither produced nor his absence accounted for — the execution of the bond being therefore proved but by one witness is insufficient. — The assignment of the bond made by the Sheriff to the Pltff has not been proved by even one Witness — the Pltffs action is therefore not supported. —

Bender for Pltff — A copy of the Judgment against the principal debtor is filed, which is sufficient proof of the regularity of the proceedings in the principal cause. The execution of the bail bond by one witness he argues

to

to be sufficient, and that the assignment of the Sheriff under his hand and Seal is of itself an authentic act and requires no proof.—

Wednesday 3d. April 1811.—

Colburn & Gill.— v Adams

The Court were of opinion to grant the plaintiffs motion, but considering that the Defendant was in gaol, who might be prejudiced by such delay, it was permitted to him to plead to the pltffs action, saving to him his right, if the power of attorney in question should not be filed within the time limited by the Court.—

Hamilton v McLaughlan

The Court were of opinion that the two first pleas pleaded by the Defendant were irregular and in respect to them gave Judgment for the Plaintiff upon his demurrer — as to the third they reserved to determine thereon upon trial of the merits

Berthelet. vs Munn. and E Contra. } Action on award of Arbitrators.—

Boston for Defdt. moved for an Inscription en faux against the award filed in the Cause.—

Rolland for Pltff- The action is founded on the award and it was filed at the return of process — the Defendt has pleaded to the action, and set up an Incidental demand, he is therefore too late to make an Inscription en faux, upon the award.—

Boston in reply- The fact of the falsity of the award came to the knowledge of the Defendant after filing his plea — that is not too late in making the inscription en faux thereon, it being by law allowed in every stage of a Cause.—

Lotbiniere vs Forbes. } Action of trespass—& for damages done to Pltff Grist mill.—

The Defendant having pleaded the general issue and concluded to the Country, the Pltff obtained a rule upon Defdt. to shew Cause why he should not alter the conclusions of his plea, by concluding to the Court.

Ross for Pltff in support of the rule, states, that under the ordinance of 1785. there can be no trial by Jury

in

in this Cause, not being for a wrong done to the plaintiffs person, but to his property – cites Case of Rousseau Lal: v. M^c Gillivray –

Papineau of Counsel for Pltff. a distinction is to be taken between what may be called personal actions and personal wrongs, and the ordinance of 1785 admits the trial by jury in the more limited distinction of personal action for injuries which are done to the person, by the description of personal wrongs –

Stuart for Defdt. all law writers who have noticed the distinction of actions, agree in establishing that by action for a personal wrong, is understood, every action of a personal nature whether it respects the person or his property – cite. 3. Bl. Com. 117. & 121. 122 Now the present action is an action of trespass on the Case being ex delicto and without force, and to be ranked among the personal wrongs to be compensated in damages and triable by a Jury under the Ordinance

Thursday 4th April 1811.

Hagar. v. Lindsay. } The Court were of opinion that according to the established rules of evidence in Commercial Cases, the serment suppletoire could not be referred to the plaintiff. -

Berthelet v. Munn and Contra } It was adjudged, that as the award in question was an act sous seing privé, there could be no inscription en faux. made against it. -

Donegani v. Desnoyers } The Court upon considering the nature of the accounts and transactions between the parties, granted the plaintiff's motion for a reference to arbitrators, and being of opinion that the examination of the Defendant did not preclude the plaintiff from obtaining the said reference, as the answers taken upon the faits & articles would be laid before the arbitrators with the other papers in the Cause. -

Lotbiniere vs Forbes } The Court were of opinion, that the evident intention and meaning of the Ordonance of 1785 by the words, "personal wrongs" in regard to trials by Jury, was, wrongs done to the person, and it had always been so considered since the Case of Duaime v Guay - and therefore granted plaintiffs motion. -

Parker & Co vs McGillObs } The Court were of opinion that the Defendants were liable to account to the pltffs for the goods furs and peltries which had come to their hands from Robert Dickson & Co, inasmuchas it appeared from the evidence, that it was under a special consent and agreement for this purpose that the said goods, furs and peltries had been delivered to the Defendants - They considered Robert Dickson as a competent witness for the plaintiffs, and that if he had any interest in the Cause it was evidently against the plaintiffs - That the obligation contracted by the Defendts could not be considered as an undertaking to pay the debt of another, but was a personal undertaking on their part in consideration of the advantage they were to derive therefrom - Judgt that Defendts do account. -

Friday 5th April. 1811.—

Beardslee. v. Gillis. — The Court were of opinion, that the execution of the bond was sufficiently proved by the testimony of one Witness, and that the assignment thereof made under the hand and Seal of the Sheriff as an Officer of this Court must be considered as authentic without any further proof being necessary. —

Drake. v. Gourdeau The Court were of opinion that the exemplification of the Record produced and filed in this Cause by the Plaintiff, certified under the hand and Seal of the Clerk of the Court of Kings Bench in Upper Canada, countersigned by the Chief Justice of that Court, was not sufficiently authentic to constitute a proof of the Judgment upon which the action was instituted. — Being however a new question, a day was given to the Pltff to procure an authentic copy of the Record.

Berthelet. vs Munn. and E Contra

Action upon an award.—

The Defendant moved that he might be permitted to withdraw and alter his plea, it having come to his knowledge since the making and filing thereof, that the award in question is null and void, having been made after the power given to the Arbitrators had expired — in support of which fact he now files his affidavit.—

Rolland for plaintiff — contends that Defendant having pleaded to the action and admitted the validity of the award, he cannot now be admitted to falsify it — It was Defendants own fault if he did not obtain all the necessary information respecting the award before he pleaded — he ought not therefore to prejudice the pltff by his negligence.—

Leroux. vs Roi.—

The service of the process in this Cause having been made on a holiday, vizt 25th. March last the Defendant obtained a rule on pltff to shew Cause why the process should not be quashed as having been irregularly served. Reg. Prac. Sec. 1.—

Stuart for Pltff — The rule does not extend to the service of process, but merely to the sitting of the Court upon holydays — nor does it apply to services made by the Sheriff —

Dom.s Rex
v.
Talon.

On Information against Defendt. to obtain possession of a certain lot of ground, of which the Defendant had illegally possessed himself being part of the Fortification grounds.—

Stuart for Defendt. — This Information is in the nature of an action en Complainte & Reintegrande as it complains that Defendant by voie de fait dispossessed the Crown and took possession of the lot of ground in question — now there is no such action exists in law on behalf of the Crown agt the Subject as that of Complainte, because the King is virtually in possession of all the lands of the Crown, and to deprive him thereof by force as stated in the Information, would be to commit an act of Treason agt him, for which the law does not give any Civil Remedy — Even between Seignior and vassal there can be no such action as the present, the possession of the vassal being always considered to be the possession of the Seignior — cites. — Rep. de Juris.p. vo Complainte. p. 293.— Arrets de Papon. 474. Nouv. Denizart. vo Complainte. p. 24. par. 3.—

Sol. Genl for King — A possessory action can be maintained

maintained by the King against the Subject, — although the Subject cannot maintain this action against the King — Com. Dig. v° Prerogative 64 to 67. a person entering on the Kings land shall be — considered an Intruder, and an Information lies agt him — cites also Semaitre. p. 132. 1 Gr. Cont. p. 1520. no 9. & seq. —

Stuart in reply. The King, agreeable to the laws of England, may have an action of quare claus. fregit, which is similar to our Voie de fait — But the action here brought against the Defendant, is known only under the laws of this Country, and must be determined according to those laws — the action on behalf of the Crown against an intruder as the Defendt is called should have been an action petitoire — for as the King is virtually possessor and proprietor of all the lands within the Kingdom, he requires no title to prosecute this action — But the action en Complainte must be brought within the year and day after the disturbance otherwise it cannot be maintained — now it is evident that this kind of remedy was not meant to be given to the King, as the maxim is that no prescription can run against him. —

Saraut Cur
v.
Gravel.
and
Gravel
v.
Lehenp. et al

This was an action instituted by the Pltff as Curator to one Menetrier an absentee, against the Defendt for the recovery of a certain sum of money stipulated to be paid by him to the said Menetrier in a deed of sale of a lot of land made by one Quenville to the said Defendant — The Defendant pleaded that he paid the money to one Deseve who was at the time the agent of said Menetrier — and for his greater security called in the said Lehenpe widow of the late Deseve as his Garant simple — The Garant simple pleaded as well to the action en garantie, as to the Principal action, all the papers in both actions forming one Record —

Bedard for Pltff, moved that plea of Lehenp to the Pltffs action should be rejected, as she was no party to the action by him instituted agt the Defendt Gravel

Beaubien for Lehenp — says, that having been called in as a Garant in the Cause she has a right to plead to the whole demand, being made a party in the Cause Proc. Civ. ch. 2. sec. 6. art. 2. & § 2. & 3 — Ord.ce 1667. tit. 8. art. 12.

Bedard in reply — a Garant simple cannot take the fait & cause of the person whose Garant he is — he may assist that person, but cannot plead to the demand in chief unless he join in the same plea with that person — Proc. Civ.

Vigé for Defdt moved that the Cause in Chief and that en Garantie should be joined & proceed together to Judgt — This was opposed by Mr Bedard who moved that the papers already filed should be taken out of the Record in the cause in chief.

Saturday 6th April 1811.—

Smith. vs Kay. & Smith — and McClement & McKenzie

The Court were of opinion, that at the time of the transfer and assignment made by the Defendants Kay & Smith to McClements and McKenzie, the inability of the said Kay and Smith to pay their just and lawful debts was sufficiently ascertained by the legal demand and service of process made upon them by their other Creditors, and therefore the above transfer was illegal as tending evidently to favor one part of their creditors to the prejudice of the others — Judgt. rescinding the transfer —

Leroux vs Roi. —

The Court were of opinion that the rule of practice did not extend to the service of process by the Sheriff on a holyday, therefore Defendts Rule was discharged. —

Ermatinger vs Patterson & Co.

Action of assumpsit on a bill of Exchange, and money Counts –

Gale for Defendts having pleaded in abatement to the plaintiff's action, now stated, that the Declaration was contradictory – it contained three Counts, one upon a bill of Exchange, another for money lent, and a third for money laid out & expended – but that the conclusion of the Declaration demanded only the last of the three sums stated in the said Counts – which was for money laid out and expended for the use of Defendts ~~and which~~ was not a fit subject to be tried by a Jury – That the Copy of the Declaration served on the Defendants did not correspond with the Original filed in Court, it being stated in the said copy, that the Defendants made the several assumpsits upon which the demand is founded, upon the 25th March, without stating any year, whereas in the Original it is stated, 25th March last – That the charge for interest is not made in the Copy of the Declaration in the same manner as in the original –

Ross for Pltff contends that Declaration is drawn in the usual and legal form – and that the variance complained of is not of any thing material –

Stuart

Stuart of Counsel for the Defendt. cites Case of Symes. vs. Sutherland & Robertson, where the assumpsit laid on a day not certain, was considered material, and the Plaintiff permitted to amend upon payment of Costs —

Lacasse vs Woolman Exr &c. dal.

This was an action brought by the Plaintiff against the Executor of the last will and testament of the late A. Winklefoose for an account of the Succession of the late Marguerite Deschamps, the mother of the pltff, who had been the wife of Winklefoose by a Second marriage

Sol. Genl. for Pltff. states, that the said late Marguerite Deschamps having intermarried with the late Andrew Winklefoose, a Community of property was thereby established between them agreeable to the laws of the Country — That upon the decease of the said Marguerite Deschamps, the Plaintiff as one of her heirs was entitled to her share in the moiety of the said Community, of which no account had been rendered to her during the lifetime of the said Andrew Winklefoose — Concludes that Defendt. as his Executor be held to account. —

Ross for Defendt. States, that Plaintiff as one of the heirs of the late Marguerite Deschamps, has no

nothing to claim out of the Community that subsisted between her and the late Andrew Winklefoose, because the said late Marguerite Deschamps on the day of made her last will and testament, whereby she devised & bequeathed all her estate real & personal to her husband the said A. Winklefoose - That the said Marguerite Deschamps lived after the making of her said Will until -

That by virtue of Prov. Stat. 41. Geo. Ch. 4. the disposition contained in the said last will and testament, the said A. Winklefoose, being thereby enabled to take and hold the property bequeathed to him by his said wife - That prior to the St. of 1801 there was no incapacity in the wife to make a will but only in the husband to take under it, but this incapacity having been removed, at the time the will was published and took effect, the said Pltff is thereby deprived of any right or claim in the said Community. -

The Pltff answers, that the said last will and testament is not valid in law, inasmuches at the time the same was made, the said Marguerite Deschamps could not devise her property & Estate to the said Andrew Winklefoose her husband,

it

it being as essentially requisite for the validity of a will, that there be no legal objection to thereto either at the time of the making and executing the same, as at the time when it takes effect — That there existing a legal incapacity in the husband to take under that will at the time it was made, it would have required a re-publication of the will subsequent to the Stat. of 41. G. to have toll'd that incapacity —

Dufaux vs Beaupré & al. —

Action of Covenant. —

Rolland for Defendants excepts to the Pltffs Declaration, inasmuchas the action is instituted against the Defendants as Syndics, but the conclusions thereof are taken against them personally — The Contract was made by the Defendants as Syndics and they can be accountable only as such —

Gcorgen for Pltff, the Declaration is conformable to the Contract between the parties by which the Defendants are personally bound to the Pltff. —

Saraut
vs.
Gravel
and
Gravel
vs.
Lehoup

The plaintiffs motion for rejecting the plea put in to this action by the Garant Lehoup, as a party to the Cause, was granted, the Court being of opinion that a garant simple cannot plead to the Cause in chief, nor take fait & cause for the person whose garant he is — As to the Defendant's motion for joining the Causes, the Court refused to grant it, as they saw no necessity for it — considering the demand in chief and that en garantie to be so far connected, as to form but one record, and so far united as to enable the Court to do equal justice between all the parties — And here the Court settled it as a point to be observed in practice, that when an action en garantie, whether simple or formelle was sued out, the return and proceedings thereon should be brought into the Cause in chief and form a part of it —

Monday 8th April 1811.

Ermatinger v. Patterson &c. } The Court were of opinion that the plea of exception pleaded by the Defendant, was founded only in so far as regarded the copy of the Declaration, and ordered that a true copy thereof should be served on the Defendant with permission to him to plead thereto.

Dufaux v. Beaupré & al. } The Court considering that the Defendants were personally bound for the obligations they had contracted with the Plaintiff, under their title and capacity of Syndics, dismissed their Exceptions as being altogether irrelevant.

Mc. Clement v. Pattinson } The Court were of opinion that the service of process at the last domicil of a person who had left the province, was legal & sufficient, being recognized by the ancient laws of the Country prior to the Ordinance of 1785, as a legal notification for calling a Defendant in such a Case before the Court. see Redal. Code Cv. 1 Edit. 2 Ord. p. 100. Tit. 2. art. 7. Case at Quebec Ker. v. Fraser settled in Appeal.

Dominus Rex
v.
Talon. —

The Court considered the plea of Exception pleaded by the Defendant as insufficient being of opinion that the Crown was entitled to the same benefit of the laws as the subject, and they saw no reason why a trespasser upon the property of the Crown should be considered in a more favourable light or proceeded against in any other way, than a trespasser upon the property of an Individual —

—

Carow..
v.
Rochon.

Wednesday 10th April 1811

Adam
vs
Mercile

By virtue of a certain act de partage made between Catherine Surprenant, widow of the late Pierre Adam, and her children, a certain lot of ground part of the Community property between her and her late husband, fell to her share in the division of that property – but her lot being more valuable than that which fell to her children by reason of the wood growing thereon, it was therefore stipulated between her and her said Children, that Experts should be named by them respectively, to make an equal division of the said wood and that the said widow and each of her children should hold and enjoy their part and share so divided and ascertained; and for this purpose it was agreed that her said children should have a right of passage over and upon the said land to go at all times to the said wood – Subsequent to the foregoing acte de partage, the said Cath: Surprenant sold the said lot of land to the Plaintiff, one of her said Children, who in consequence forbid the Defendt to enter upon the said lot of ground, or to cut down any of the trees or timber growing thereon, until a division thereof

thereof should be made by the Experts in manner as above stated, and respecting which the parties had now disagreed — The Defendant as the husband of Louise Adam, another of the said Children, claimed an equal right in the said wood and timber with the Plaintiff, and therefore entered upon the land and cut down several trees which he appropriated to his own use. — The Plaintiff thereupon instituted an action en complainte against the Defendt stating that he the plff had been in the quiet and peaceable possession and enjoyment of the said lot of land and of the wood and timber thereon, but that the Defendt had by trespass and voie de fait, entered upon the said lot of land and cut down several of the trees thereon growing to his damage £50. &c — On behalf of the Defendant it was argued that an action of Trespass by one Cohein against another respecting property which they hold par indivis, does not lie — cites Denizart. vo possession. No 6. — Dict. des arrets. vo Heritier. No 52 — The deed of partage filed shews the nature of the Plaintiff's possession, which was common to all the children, and until the division had actually taken place which was agreed to be made, the parties

held

held an equal possession of the premises so long as their title was par indivis - cites Poth. Suc. ch. 4. art. 1. sec. 1. Domat. liv. 3. tit. 7. sec. 3. som. 22.

The Plaintiff replied that Defend.t was trespasser as the Plaintiff was sole possessor of the lot of land in question and of every thing attached thereto - and therefore the Defendant could not under pretence of title molest the Plaintiff's possession - Code Civ. tit. 18. art. - To - entitle the Defendant to exercise any right of possession in the wood in question he ought to have obtained a division thereof by the Experts, under which alone any right of enjoyment was vested in the Defendant, or any servitude of passage established upon the land of the Plaintiff. —

Guerout ... vs Villemaire } Exers and Brennet Opposts. —

On the Opposition and claim of Robitaille and others, Executors of the late Pre Brunet.

The Sheriff having returned to the Court, that he had made and levied a certain sum of money upon and out of the lands and Tenements of the Defend.t -

the

the opposants their upon claimed that they should be paid the amount of their Opposition in preference to the plaintiff —

It appeared, that the Plaintiffs debt was founded upon an Obligation made by the Defr Villemaire, as well for himself, as stipulating for and on behalf of his wife — this Obligation was executed before a Notary on 8th June 1804 — On the 1st Augt. 1804, the said Defendant and his wife made their Obligation before a Notary to the late Pierre Brunet — On the 21st of August of the same year, the wife of Villemaire ratified the Obligation which her husband had made to the pltff — On the 29th June 1807, the Defendant having paid a part of the Obligation he owed to Brunet, the latter gave a full receipt and discharge thereon without any condition or reserve whatever, and on the same day took a new Obligation, whereby the balance was converted into a Rente Constituée to be paid by the Defendt and his wife to the said Brunet —

Under these facts it was contended on the part

of

of the Executors of Brunet, that they had a priority of Mortgage, inasmuch as the Obligation upon which their Opposition is founded, being signed by the Defendant and wife, the said Pre Brunet thereby — acquired a mortgage upon the property of the Defendt — from the date of the marriage Contract between the said Defendant and his wife, being in this respect entitled to exercise the right of the wife, his Debtor, for the indemnity which she has upon the estate of her husband for the debts she contracts jointly with him — and as the marriage Contract of the Defendant & his wife was long prior to the Obligation made by Villemaire to the Plaintiff, the Opposants therefore claim a priority of Mortgage, the ratification made by the Defendants wife of the said last mentioned obligation, being — subsequent to her Obligation to the said Brunet — cites. Poth. Comte No. 766 —

The Plaintiff answers, That the real estate sold by the Sheriff, must be considered as conquets of the Community between the Defendant and his wife, as nothing — appears to the Contrary — cites

Lebrun. Comte liv. 1. ch. 5. sec. 2. dist. 3. No. 2.
Ter. Gr. Com. tom. 2. p. 51. Glose 3. sur l'art. 220. No. 4
Poth. Comte No. 203. — Rep. de Jurisp. vo Conquet.

That

That the said Real Estate so Sold being Community property, the Defendant alone had the right to mortgage it without the ratification of his wife. — cites — Cout. Paris - art. 225. —

That if the Opposants are entitled to exercise the rights of Indemnity of the Defendants wife, they ought to have claimed en Sous-ordre, whereby the said right of indemnity might have been brought in question cites Pigeau - Proc. Civile. —

But if ever the said Pierre Brunet had the priority of mortgage now claimed, it was entirely innovated and destroyed by the receipt and discharge given to the said Defendant by the said Pierre Brunet on the 29th. June 1807, and a new arrangement entered into by the Defendants to pay a rente Constituée for the balance — cites

Lw. 2. § 1. du Digeste. de pign. act. Novata autem debiti obligatio, pignus perimit, nisi convenit ut pignus repetatur —

Domat. lw. 4. tit. 1. sec. 2. art. 4. —
Ferr. Dict. vo Hypotheque. —
Poth. Obl. No 595. & 599. —
Repre de Jurisp. vo Obligation. p. 288.
Id ——— vo Hypotheque p. 666. —
Arret de Bardet 6 Mai 1663. — Lequel arret en decidant que la reserve de l'hypotheque d'une Obligation exigible, convertie en Constitution de rente, empeche la novation, fait voir que le Parlement de Paris etoit d'opinion qu'il y a novation, et que l'hypotheque est eteinte, lorsque la reserve de l'hypotheque n'est point specifiée. —

cites also – Despeisses. tit. Hypotheque. Sec. 4. № 6. 7. –
Poth. Obl. № 551. – and № 616. –
Id – Hypoth. ch. 3. § 4. 2. 5. –

The Opposants in reply, say, That in respect of Novation, it is a principle, that in settlements between Creditor and Debtor, there is no novation of the Creditors right unless he intended that it should be so – cites Poth. Obl. № 594. – and the receipt given by Brennet to the Defendant does not imply an intention to give up the right of Mortgage he had on the Defendants Estate – As to claiming en Sous ordre of the Defendants wife, it was not necessary, it being sufficient where the Opposition is founded upon the rights which the wife was entitled to exercise upon the Estate of her husband —

Parker & Co. vs. Vigneau –

The Defendt. on third day after his appearance filed a plea to the merits and therewith an exception à la forme, to the Pltffs Declaration – The Pltffs moved that this Exception should be rejected from the Record, as having been made too late, and because the sum of two guineas was not deposited therewith as required by the rules of practice –

Thursday 11th April 1811.

Parker & Co
vs
Vigneau

The Court were of opinion that the Exception filed by the Defendt. was irregularly put on the record, and ordered it to be taken from the files.

Saturday 13th April 1811.

Masson & Hall
vs
Mabbut

The Defendant moved that plffs action should be dismissed, as they had failed to put in a Replication to complete the Issue - cites Tidd's Prac.

The Court rejected the motion, the regular Course in this Case being to bring the Cause to a hearing and Judgt.

Wednesday 17th April 1811.—

Dubois. v. Laplante }

Action hypothecaire.—

Lacroix for Pltff. states, that one Christin sold a lot of land by deed of 28 Sept. 1807 to Franc. Polevin that Polevin being in arrear to said Christin for a sum of £25. part of the consideration money of the said land the said Christin by transfer of 28 Feb. 1810 made over the same to the Pltff.— That Polevin, by deed of 29 Jan. 1810, sold the said lot of land to the Defendant — That Pltff having discussed all the property of the said Polevin without having obtained satisfaction for his said debt now brings his action en declaration d'hypotheque agt. the Defendant now in the possession of the said lot of land —

Bender for the Defendt. pleads, that there were claims upon the land in question at the time Christin sold it to the said Polevin, and which he Christin was bound to satisfy — that Defendt. has paid those claims in order to avoid expence, besides certain Seigniorial rights due upon the said land at and before the sale so made by the said Christin — That Defendant ought not to be held to give up the land in question, until the aforesaid monies be paid be reimbursed to him, and

the

the claims aforesaid satisfied —

The Plaintiff replies, that Defendant cannot under pretence of claims upon the land retain the possession thereof until such claims are satisfied — That if the Defendt. has any claim or privilege upon the said land he can exercise the same by Opposition when the land is Sold, as it may prove sufficient to satisfy the rights of all parties, and therefore a discussion thereon at present could tend only to delay the plaintiff in his recourse upon the said land — This has been so adjudged in the case of Trinque. vr. Marois. 19. Febr. 1810. —

Thursday 18th. April 1811.—

Beaujeu
vs.
Jackson

Action for Lods & ventes & Seigniorial rights.—
Bedard for Pltff.— Stuart for Defdt.—

One Michel Cedilotte being tutor to the minor children of the late Paul Pilon, who were proprietors of a certain lot of land in the Plaintiff's Seigniory, was warranted under the opinion of an assemblée de parens of the said minors to sell the said lot of land at the door of the parish Church in the usual and Customary manner— and having in consequence set up the land for Sale, it was adjudged to the said Cedilotte as the last and highest bidder for a sum of 3650#— of which Sale and adjudication a proces verbal was made out in due form by Jean Baptiste D'Aout, the Officer who adjudged the said land, and delivered the same to the said Michel Cedilotte— This land Cedilotte afterwards sold to the Defendant for the above sum of 3650#— and in order to avoid the payment of Lods & ventes upon his purchase, he procured a new proces verbal of the adjudication of the said land to him at the Church door to be made, in which it was stated that the said Cedilotte purchased the said lot of land in the name, and for

and

and for and on behalf of the said Defendant, between whom and the said Cedilotte it was agreed, that over and above the said sum of 3650#. stipulated to be reimbursed by the Defendant to the said Cedilotte he should pay to the said Cedilotte a sum of fifty dollars, in order to indemnify him for his trouble, but of which no mention should be made in the deed of Sale - Under this arrangement a deed of Sale was made out by the said Cedilotte to the Defendant, who in consequence paid the said fifty dollars to the said Cedilotte, and entered upon the possession of the land in question - The Plaintiff, now brings his action against the Defendant and claims thereby lods & ventes as well upon the purchase of Cedilotte, as upon the purchase of the Defendant including therein the fifty dollars above mentioned stating, that the first proces verbal had been fraudulently suppressed by Cedilotte and another substituted in lieu thereof, in order to change the nature of the adjudication of the land and make but one Sale - and further that the payment to Cedilotte of fifty dollars more than he paid for the land is proof that he considered himself the proprietor of the land and benefited by the Sale to the Defendant -

Munger & another v. Dunning

Action by two partners against a third to render an account of the effects of the partnership. —

Ross for Pltffs. — Stuart for Defdt. —

The Defendant took exception to the declaration of the plaintiffs, that it contained in it demands of a different and incompatible nature, viz: a demand to account, and also certain money Counts, as in an action of assumpsit — that such demands cannot be joined together, because the conclusions to be taken thereon are different, to obviate which difficulty, the plaintiffs had jumbled the whole together by concluding in their declaration that the Defendant should be held to account, or pay a certain sum in money to the Plaintiffs — That the pltffs did not shew that their partnership was at an end so as to entitle them to bring this action, as during the partnership no such action can be brought — That if the partnership could be considered as terminated, in that case the plaintiffs could not join in this action, as the termination of the partnership, terminated the joint interest of the partners. —

The plaintiffs answer — That the present action can be considered only as an action of account, upon which sufficient conclusions are taken; as to the money Counts

in

in the declaration, they were to be considered merely as surplusage and vitiated nothing of the plaintiffs right. — That an action of account can be maintained by one partner against another during the partnership — vid. Repv. de Juris. vo Societé — and two or more partners can join in bringing it, after the dissolution of the partnership. vid. Poth. Cont. Soc. No 134. 5. Repv. de Juris. vo Societé p. 153 to 155. —

Martin — v Simmonds and Foretier Oppts

Friday 19th. April 1811.—

Beaujeu v. Jackson. } The Court were of opinion, that in law, the adjudication of the land in question to Cedilotte at the Church door, could be considered only as a purchase on behalf of the minor Children to whom he was tutor, as he could not under such an adjudication acquire a title to himself in the said land — There could be no lods et ventes therefore due upon this adjudication, as there was no mutation of property — Upon the same principle, the Sale made by Cedilotte to the Defendant, whatever might have been the intention of the parties, could be considered only as a Sale of the property of the minors and not that of Cedilotte upon which the plff is entitled to his lods & ventes. including therein the fifty dollars paid by the Defendant as part of the consideration — Upon this principle the Judgment of the Court was given.—

Dubois. v. Laplante } The Court were of opinion that the Defendant could not retain the possession of the land until his claims thereon should be satisfied — That whatever might be the nature of the Defendants priviledge in this respect, the plaintiff had a right to bring the land to a Sale, saving to the Defendant his — priviledge upon the money arising from that Sale. — See cases adjudged. — Sed quere - Ought not Defd. to have security that the land shall sell to amount of his priviledge? —

Munger tal. vs Dunning } The Court adjudged, that the action of the plaintiffs, as an action of account, could be maintained against the Defendant — as there was no difference whether the partnership was dissolved or not, if the joint property was in question, the partners might join, or bring their action separately against each other. —

Martin
vs
Simmonds
and
Foretier opp.t

On the 24th Sept. 1810, Joseph Simmonds, the Defendant, sold to one Eliz: Fiddamen a certain house and lot of ground in the Fief Closse, of which the Opposant is Seignior, for a sum of £333. 6. 8 on condition, expressed in the deed of Sale that the said premises should be decreté, or sold by the Sheriff, in order to clear the title — A Suit was in consequence instituted and a Judgment obtained by the pltff agt. the Defendt and the house and lot of land in question were seized and sold by the Sheriff under the writ of execution sued out for this purpose — The above deed of Sale was exhibited and shewn to the opposant and a tender made of the lods & ventes due thereon by the said Eliz: Fiddamen which he at that time refused to accept.— The Sheriff having made a return to the Court of the monies arising from the said Sale, the said Pierre Foretier thereupon filed his opposition, claiming a Sum of £27. 15. 6, as the lods & ventes upon the purchase of the s.d Fiddamen — To this it was objected, by the Defendt — that the money in the hands of the Sheriff belonged to him the Defendt — & could not be answerable for the debt of Fiddamen — That the decret & Sale were the same, & made but one mutation of the property —

The opposit.n to the decret must be considered as forcé, inasmuchas the necessary formalities had not been observed as in a Decret volontaire Poth. Proc. Cw. p. 270.— Dict. Fer. vo. Decret volontaire —

a. Opposition dismissed.—

Saturday 20th April 1811.—

Adam
v
Mercille

The Court were of opinion that until a division had been made of the wood in question, so as to ascertain the separate share of each of the parties therein, they as joint proprietors of the whole could not be guilty of any voie de fait upon the possession of one another by cutting down any part of the said wood — The plaintiff's action was therefore dismissed.—

Gueroute
v
Villemaire
& Exers Brennet
Oppos.ts

The Court were of opinion that the claim of the Executors of Brennet for a priority of Mortgage could not be supported, as the receipt and discharge given by the said Pierre Brennet upon his Obligation of 1 Augt. 1804 completely satisfies and destroyed that Obligation; the new arrangement made between Brennet and the Defendants on the same day was an entire novation of the debt — The Opposition was therefore dismissed — No opinion was opened by the Court respecting the

priority

priority of mortgage claimed by the Opposants under the rights of the Defendants wife —

Hagar vs Lindsay. } The Court considering the nature of the proofs adduced, were of opinion to admit the Plaintiffs to their serment suppletoire, upon those parts of their demand which were not of a mercantile nature, notwithstanding they had rejected the Plaintiffs motion to this effect prior to hearing on the merits, as that motion went generally to the whole matters in contest, upon the demand which purported to be for goods sold and delivered —

The papers were therefore returned, that the Counsel for the plaintiffs might make his motion to this effect. —

Hayes
v.
Fowler

June Term 1811.

Monday 10th June 1811.

Beebe vs Gilman } The Defendant in this Cause entered appearance on the and on the moved that the pltff should be held to give security for costs, he being an alien, although in his declaration stated to be resident within the province — The Court were of opinion that it was the business of the Defendant first to establish that fact considering the averment of the plaintiffs residence as stated in the declaration sufficient, until the contrary should appear, and therefore gave to the 8th inst. for making such proof — On the 8th no proof was adduced, and on the 10th the Defendant tendered a plea to the pltff which he refused as being too late and now moved that a day might be given to him to adduce testimony in support of his demand and to proceed thereon ex parte against the Defendant for want of a plea

Ross for Defendt. says, that had he filed his plea pending the discussion of his motion for security for Costs, it would have been considered as a waiver of his claim to that security

as

as was determined in the Case of Worthington v. Barber. 1 Ap. last – That a plea was tendered on the 10th which was within the three days after the above discussion was supposed to have ceased. –

Ogden for Pltff answers, that the plea came too late, the allegation that the plaintiff was an alien was frivolous, and made at the risk of the Defendt, and having failed in establishing that fact, he ought to obtain no delay in consequence of his own laches, but ought to have filed a plea in the regular course under the rules of practice – cites case Stearns. v. Racey. June 1810

The Court were of opinion that the Defendant ought not to benefit by the delay arising from a frivolous allegation of the non-residence of the Pltff within the Province, and that the plea ought to have been filed in the usual course, saving the Defendts right upon the motion for security for Costs. – The plaintiffs motion was therefore granted. –

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† and the utmost delay that could have been allowed was the day fixed for the production of the proof, as the Defendt. when failing in his proof ought to have had his plea ready, to have delivered it to Pltff.

Upham. vs Papineau.

The pltff in his declaration stated himself to be late of Windsor in the United States of America now at Quebec in the district of Quebec, labourer.

The Defendant moved that pltff should be held to give security for costs, he being a transient person who had no domicile at Quebec, and lately, perhaps of yesterday from a foreign Country.—

The pltff states, that it has been determined in the Case of Beebe v Gilman, that where pltff states himself to be resident within the province, he is presumed to be domiciliated there, and the party alledging the contrary must prove it— and of this opinion was the Court—

Daly vs Walton.

The Defendt. took off default entered against him and filed appearance on 2. default day— The Pltff being an alien and bound to file his power of attorney for bringing the suit, on the return day of the process, omitted to do so, and filed it only on the day the Defendant took off the default entered against him.— The Defendt. thereupon obtained a rule to shew Cause why action should not be dismissed as the above power of attorney had not been filed agreeable to the rules of practice—

Stuart

Stuart for Pltff. The power of attorney having been filed on the day the defendant entered his appearance he has suffered no injury and can have no right to complain — That the action is not liable to be dismissed had such power of attorney not been filed even on the day the Defendant entered his appearance, the course has been to limit a day for filing such power, and on default of so doing only, has the action been dismissed. —

Tuesday 13th June 1811.

Daly. v. Walton. } The Court were of opinion that they could not depart from the strictness of the rules of practice in any case without strong and sufficient grounds – that in this Case no ground was shewn why the power of Attorney was not filed on the day of the return of process agreeable to the said rules, and therefore the Defendants motion must be granted – Action dismissed.

Desrivieres vs Watt. } Beaubien for Pltff moved, that he might be permitted to send back the Commission Rogatoire sued out in this Cause for the purpose of examining the Defendant upon faits & articles, to the Commissioners therein named in order to perfect the proceedings had under the said Commission, by procuring the Defendants signature to the answers made by him to the several Interrogatories proposed by the Pltff.

Stuart for Defr The motion cannot be granted - as an unnecessary delay will thereby be incurred – The Pltff ought to have attended to the due execution of the Commission sued out by him, or should have sent sufficient instructions to this effect – no indulgence ought to be given to a party where irregularity arises from his own laches. –

Wagner v. M'Kinstry & al'. —

The Defendants took off the default which had been entered against them on the day of the return of process, and now moved, that certain exhibits filed by the pltff. on the day the Defendants entered their appearance, and which ought regularly to have been filed on the day of the return of process, be rejected and taken from the files as irregularly put thereon —

Stuart for Pltff. contended, that the exhibits being filed on the day the Defendants entered their appearance was within the intent and meaning of the rules of practice — The Defendant has no right to complain of any irregularity before he comes into the Cause — and at the time he enters his appearance, all is right, and the exhibits in question files —

Wednesday 12th June 1811.

Desrivieres vs Matt. — The Court permitted the Plff to remit the Com. Rogatoire to the Commissioners to procure the Signature of the Defendant to the answers given by him upon the faits & articles. —

Wagner vs McKinstry dal. — The Court granted the Defendants motion.

Monty. — vs Goguet & Berard par reprise d'Inst.ce — The Plaintiff having obtained Judgment against the Defendant in an action of damages for seduction, sued out executions thereon as well against the lands and tenements of the Defendant, as against his goods and chattels, upon which returns of nul. ten: and nul. bon. were made — The Plff having afterwards intermarried with one Berard, he par reprise d'instance, obtained a rule on the Defendant to shew Cause, why a Ca. Sa. should not be granted agt. him, as well as an alias writ of execution against the goods and chattels of the Sd Defendt for the satisfaction of the said Judgt. —

In support of this motion the following authorities

were

were cited — 2. Bourjon, Tit. Des Exons. p. 705. art. 39. & 40. 41.
Poth. Proc. Civ: p. 5. ch. 1. par. 8. p. 31. 12°.
Ordre 1667. tit. 34. art. 13. —
Bornier on the same article —

to shew that plff was entitled to both executions at the same time, as well against the body, as against the goods of the Defendant. —

Friday 14th June 1811.—

Upham et al
v
Papineau

The defendant moved that the pltffs action should be dismissed on two grounds, 1st Because no power of attorney had been filed authorising the present action, they being aliens — and 2d Because Defendant is stated in the declaration to be of the parish of Chambly, whereas he is of the parish of Belœil —

Stuart for pltff answers, that on the day of the return of the writ of Summons, the Defendant moved that pltff as aliens, should give security for costs, which motion was granted, and all proceedings were thereby suspended until such security should be given, whereby the pltffs were precluded from moving for a delay to file a power of attorney under the particular circumstances of the Case — that having this day given that security, they now stand in the same situation they were in at the return of the process as to their right of moving for that delay, and therefore now pray that it may be — granted to them accordingly — Object to answering to the second ground of the defendants motion, as the first objection raised by him ought to be previously disposed of —

Upham et al
v
Papineau

The Defendant moved that plaintiff's action should be dismissed, as they had filed no power of attorney — authorising the institution thereof, they being aliens. —

Stuart

Stuart for Pltff.— The pltff in this Case, are stated in the declaration to be resident at Quebec in this province, and as nothing has been shewn to the contrary, they are not bound to produce any power of attorney — that their attorney in this cause is porteur de pieces, which is a sufficient authority to bring the action — That this is different from the demand for the security for costs, which must be given in all cases where the party is not resident within the province. —

Papineau for Deft.— in answer observes, that pltff in their declaration state themselves to be late of Vermont, now of Quebec, upon which, the Court has already — determined in this Cause upon the defendants application for security for costs, that unless the plaintiffs could shew that they were now resident at Quebec, they must be held to give such security — That the plaintiffs did not shew by any proof that they were resident at Quebec, and therefore gave the security required — That by giving such security they admit that they had no residence at Quebec and must therefore be considered as aliens and absentees, and bound to have filed the power of attorney in question. —

Stuart in reply, The waiving of proof upon any particular point, cannot be taken against the party — upon another and different point. —

Deshautels
v.
Leduc. —

Bender for pltff. moves, that he may be permitted to discontinue the cause without payment of costs, and as a reason, states, that part of the exhibits filed by him has been lost or mislaid, so that the parties are prevented from proceeding in the Cause. —

M. Vigé. for Defend^t. objects to the motion being granted inasmuches the papers lost or mislaid may be replaced by others — the Defendant has an interest that this should be done, and that Cause should not be discontinued — That it has been determined in case of Roi. v. Lafleur, that where the record is incomplete the plaintiff cannot discontinue his Cause, but on payment of Costs. —

Saturday 15th. June 1811.—

Hamilton & al'
v
McLaughlan

On the defendants motion for a new trial

The plaintiffs had obtained a verdict against the Defendant for a sum of Seven hundred pounds damages in consequence of his breach of contract, in not delivering certain quantities of wood and timber to the plaintiffs at Quebec.—

The defendant now moved for a new trial upon the following grounds.—

1st. Because the Court had refused to admit evidence to shew that a great part of the wood and timber had been lost and destroyed by the act of God, although by the Interlocutory order of the Court in April last, the parties had been admitted to make proof upon this point.—That the misdirection of the Court is a good ground for a new trial, or their admitting or refusing evidence contrary to law— 2. Tidd. Prac. 818.—

2. The Court ought to have admitted the testimony offered by the Defendant— it being a principle, that in every action for the recovery of damages, evidence in mitigation may be given, where it cannot be pleaded— Tr. Per pais. 241. Bul. N.P. 59. 153— 12 Vin. abr. tit. Evidence. 158. 159.— The nature

of

of which testimony was, to shew, that the Defendant meant and intended to fulfill his Contract with the plaintiffs, and had procured sufficient timber for this purpose — that he set out and made every exertion to transport the said timber to Quebec — that by accidents and misfortunes which happened in the navigating the said timber it was lost and destroyed — The good faith of the Defendant by his best endeavours to fulfill his contract — Had these facts been before the Jury, they might have given a more favorable verdict for the defendant

3d. The Jury were not competent to determine the issue as only eleven of them were qualified as such, the other, one "Proctor", being a minor, and no householder, and therefore could give no verdict, even if not objected to — Ord. 1785. sec. 15 — 4 Term Reps. 473. Stainton. vs Beadle — 1. Tid. Prac. 524. Barnes Notes. 453. 454. 456. —

Stuart for Pltffs — The Jury have no discretion to mitigate damages in cases of Contract, but in Tort only — That the evidence stated by the defendant could not be received in mitigation of damages, as all the facts alledged, even if admitted or proved, could not have mitigated or lessened the damage really sustained by the Plaintiffs in consequence of the non-delivery of the timber in question — The authorities cited are therefore not applicable —

The objection to Mr Proctor as a juror is too late after he has been sworn. 2 Tr. per Pais. 200. — The intention of striking

a

a Jury under notice, is to give the parties an opportunity of enquiring into the condition and qualification of the Jury - and to admit an objection to a Juror so struck, to be made after verdict, would render trials by Jury uncertain and dangerous - None of authorities cited by Defendant come up to this case. —

Monday 17th June 1811.—

Roi —
vs
Piccard
and
Clarke Opp.t

In the year 1805, the Sheriff made a return upon an execution sued out against the goods and chattels of the Defendant, with an opposition of one Clarke claiming the effects seized as his property — Nothing was done upon the said Opposition and return until the present term when the plff moved for and obtained a rule on the Defendant to shew cause why an alias writ of fi. fa. should not issue upon the plaintiffs Judgment against the Defendant — The defendant objected that no new or alias execution could issue until the above opposition had been discussed and its merits determined — To this the plaintiff replied, that the opposition being made six years ago, and no proceedings being had thereon since, it had become perie and lost, and the same as if never made — And of this opinion was the Court, and thereupon the rule was made absolute.—

Deshautels
vs
Leduc.—

The Court rejected the plaintiffs motion to discontinue the cause without payment of Costs.—

Upham, & al'
v.
Papineau.
In 2 Causes

By the Court — A distinction must be taken between a demand for Security for costs, and for a power of Attorney to warrant the institution of the action by aliens coming into the Province — In the first case it is necessary, for the Security of Tuitors, that persons coming into the province, who had acquired no settled residence, or domicile therein, should be held to give security for Costs on actions instituted by them, when required — but the case was different as to the right of instituting an action, which might be done by instructions given viva voce by a person coming into the province, merely for that purpose, without intention to remain, or it might be done by letter, as well as by a special power of Attorney, and proof of a power given in either way will be sufficient to maintain the action — A day was therefore given in both these Causes under the circumstances stated, to produce the power under which the actions were instituted. —

Hamilton & al
v.
McLaughlan

The Court were of opinion that the rule obtained by Defendant to shew Cause why a new trial should not be had, should be discharged with Costs. —

Colvert v Woolsey.—

The Defendant was arrested and detained in Gaol at the Suit of the plaintiff— On the 12th inst. the plaintiffs action was dismissed with Costs, but the Defendant was still detained in gaol from some difficulty being raised respecting the right of the Sheriff to discharge him without an order of the Court— The Defendant now moved for an order upon the Sheriff for his discharge.—

Stuart for Pltff.— The Court has now no power over the Case as Judgment has been rendered, and the only relief the Defendant can have is by an execution upon that judgment in the regular course. vid. Repv. de Jur. vo Jugement.— The granting an order upon that Judgment for the discharge of the Defendant at this moment would be granting an execution thereon before the time limited by law— That the plaintiff is entitled to an appeal within the fifteen days, at the expiration of which only the Defendant can be discharged, otherwise an appeal would be of no avail.—

The Court were of opinion that the Judgment which dismissed the plaintiffs action, operated a discharge to the Defendant, and that no other order was requisite to the Sheriff than a copy of that Judgment.— That no writ of execution can issue upon that judgment for the discharge of the

Defendt

Defendant, nor ought he to be detained in jail for 15 days after Judgment in order to be liberated in this way.— It has been the constant practice when an arrest has been declared illegal, or a party admitted to common bail that the person in custody has of course been discharged without any special order to that effect, and without consideration to any appeal the adverse party might wish to make from the judgment of the Court in this respect.— But as the case is new, and brought for the opinion of the Court, there can be no difficulty in granting an order for the discharge of the Defendant.—

Evans. v Clarke.— & Foretier opp^{t}.

On the opposition and claim of P^{re} Foretier for the principal of a rente Constituée.—

On the 16th day of December 1801, one Charles Piccard sold a certain lot of ground in the S^{t} Lawrence Suburbs to the Defendant, it being stipulated in the deed, that 500 livres, part of the consideration money should remain in the hands of the S^{d} Defendant on Constitut.— On the 14th day of Febry. 1802 said Piccard sold another lot of ground in the said Suburbs to the said Defendant, upon a like stipulation that another sum

of

of 500 livres, part of the consideration, should remain in the hands of the Defendant upon Constitut —

On the 19th July 1802, one André Brazeau sold a certain other lot of ground in the said Suburbs to the Defendant on condition that 1500. livres, the consideration money should remain on constitut in the hands of the purchaser

On the 22d March 1804, the Defendant by an act executed before a notary of that date, undertook and promised to pay to the Opposant the rent due to him upon the aforesaid three Constituts, making in all a sum of 130. livres. —

The Defendant afterwards divided the said three lots of ground into Six lots, and sold and disposed thereof to different persons for a certain consideration in money, without declaring them to be subject to the payment of rent of the Constitut reserved thereon, when he purchased the same, and which he had become bound to pay to the said Opposant. —

The Opposant in consequence claims the principal of the said three Constituts, being 2500 livres, by reason of the alienation by the Defendant of the said several lots of ground upon which the same were established, without declaring the said lots to be subject and bound to pay the said rent to the said Opposant. —

The

The Defendant denied generally the right of the Opposant to have or obtain the conclusions of his demand

By the return of the Sheriff upon the writ of execution sued out against the lands and tenements of the Defendant, it appeared that the lot of land which had been taken in execution and Sold, made no part of any of the aforesaid lots of land purchased by the Defendant.—

Upon hearing on the Opposition and claim of the said Pierre Foretier this day, it was contended on his part, that the Creditor of the rent can claim the principal thereof in case his Debtor become insolvent,* that the principle was the same here, the Defendant had alienated the lots without the burden of the rent, and his other property had been Sold by the Sheriff so that he was now without the means to satisfy the said rent in future — and further in case of a discussion of the aforesaid lots of ground so Sold by the Defendant it should happen that the principal of the aforesaid rent could not be secured, the Defendant was personally bound for the deficiency, and the Opposant had a mortgage upon all the other property of the Defendt from the respective dates of the purchases made by him of the aforesaid lots, and consequently upon the lot of land now Sold by the Sheriff.—

* 2. Prevot de la Jannes p. 271.

The

The defendant contended, that as the lot of land now sold formed no part of those upon which the Constituts in question were established, the Opposant had no claim for any part of the principal thereof — That the alienation of the different lots of land subject to the said Constituts made by the defendant without mention of that burden was no injury to the Opposant and gave him no right to claim the principal of the said Constituts — he had his recourse for the rent thereof either against the Defendant personally or against the persons in possession of the aforesaid lots of land — and as to a mortgage upon the other property of the Defendant, the Opposant had no right to claim any thing by virtue thereof until he had discussed the persons and property specially bound for the payment of the said rent. — cites. Poth. Con. Constit. Nº 43. & 48. — 1 Bourj.ne tit. 8. ch. 1. sec. 3. nº 22. & 24. —

Meloche. v Dezery. —

Action of trespass for cutting down trees on the Plaintiffs farm at Isle Perrot. —

The Defendant was Seignior of the Isle Perrot and the plaintiff one of the Cencitaries thereof, and in the deed of concession of his land a reserve was made in favor of the Seignior of certain wood and timber to be by him cut down and carried away for the

purpose

purpose of repairing the banal mill, & Seigniorial house of the said Seigniory & for other purposes — specified in the said deed, over and above the payment of the usual and customary rents annually to the said Seignior for lands in the said Seigniory — The Defendant in virtue of the said reserve having entered upon the defendants land and cut down certain trees growing thereon, the plaintiff thereupon brought his action to recover damages for the trespass so committed by the Defendant —

Vigé. & Papineau for Deftt The defendt had a right under the title of the pltff to cut down the wood in question — the reserve was legal — not prohibited by the Edict of 1711 — and the Edict itself can be considered only as Comminatory — Even if in force, the pltff ought to have taken a different course if he was not satisfied with the title under which he held his land, he should have brought his action to rescind it and obtain a deed of Concession in the terms of the said Edict of 1711 but so long as the pltff enjoys the said land under the title he now holds, he must hold it subject to all the reserves and conditions mentioned in that title —

That many reserves made in deeds of Concession, such as Corvées, Retrait Conventionnel, &c have been declared

legal

legal although not recognized by the aforesaid Edict and the right of cutting wood on the land in question is a reserve of the same nature and could legally be made. As to the place where the wood was cut, it was in the choice of the Defendant to take it where he found it most convenient provided he caused no special damage to the pltff. —

Bedard for Pltff, in reply, contends, that the reserve in question is illegal, it is a mode of selling the land, as it raises a consideration for the land beyond the rents recognized by the above Edict of 1711 — This Edict was not comminatory it had always been considered as forming part of the antient laws and usages of the Country enforced by the Stat. of 1774 and had been acted upon as such in favor of the Seignors claiming the reunion to their domain of lands which had been granted to tenants who had made no establishment upon the lands so granted. — That even if the Defr had a right to exercise the reserve in question, he could not enter upon the plaintiffs land without his knowledge and permission, nor had he right to cut down the wood in whatever place he chose, as he who bears a Servitude has a right to exonerate himself thereof in the manner the least burdensome to him —

Letang
vs
Quintin.—
&
Foucher, Gar.
and
Mde Panet
& Lamothe Opps.

On question of priority between Mde Panet & Lamothe on their respective mortgages, on the lands of Foucher the Garant in the cause

Foucher had been tutor to the opposant Madame Panet, having been appointed by act of 23e. April 1793 and in that capacity became indebted to the Opposant for his reliquat de compte de tutelle, in a sum of £ —— which sum the Opposant now claims in preference to the other Opposant Lamothe as being prior in the date of her mortgage upon the property of the said Foucher, that is to say, from the said 23e. april 1793.—

Foucher and his wife intermarried on the 6 augt. 1787 and on 14 July 1798 jointly made their obligation to the Opposant Lamothe for a certain sum of money which he now claims in preference to the said Madame Panet, inasmuches he is entitled to exercise the right of indemnity which the wife has upon the property of her husband where she joins with him in contracting any debt during coverture — that in this case that right of indemnity remounts to the 6 augt. 1787, which is prior to the mortgage claimed by the said Madame Panet

Lacroix & Rolland for Madame Panet — When the wife

wife has a knowledge of prior mortgages granted by her husband, as she must have had in this Case, it would be fraud in her to give a preference to any subsequent creditor by joining in a mortgage with her husband to such Creditor.— That in this case it does not appear that the wife of Foucher had renounced to the Community, in which case only, those claiming her rights can exercise a right of indemnity on the estate of the husband, for if the Community has paid the debt, there can be no such indemnity — That the wife of Foucher, or her representatives ought to be parties in this Cause, she, or they, might have strong grounds of objection to the claim of the opposant, and regularly her rights cannot become a subject of discussion until she has been made a party.—

Bedard for Lamothe — The Opposant is entitled to a priority of mortgage under the right claimed by him Poth. Com.te N.o 766.— Cp. Cout. art 237. glose 1. §. 3. N.o 26. 27.— As to the right of indemnity of the wife it is certain, the opposant has only to shew the existence of a debt upon which it can attach, in order to exercise this right, it is then the duty of the adverse party to shew that this debt has been discharged in such way as to discharge the right of indemnity — The Opposant has no interest in

calling

calling in the wife of Foucher into the Cause for this purpose, as he can exercise the rights of his debtor without her participation or consent — That the Opposant, Madame Panet, must shew, that the wife of Foucher, accepted the Community, if she means to derive any benefit from that act — and even if such acceptation had been made, yet Madame Foucher would still be entitled to her indemnity for one half of the debt she had so contracted jointly with her husband — Poth. Com.te No. 760. —

Tuesday 18th June 1811.—

Auld & Lange
v.
Georgen.—

On a rule on Defendt to shew cause why an alias execution should not be granted on the Judgt rendered in this Court against him — It appearing on the return of service of the rule, that no hour was mentioned when that service was made, the rule was thereupon discharged.—

Molloy.
v.
Mettot.

This was an action for breach of Covenant and damages accrued to the plaintiff thereon.

The defendant pleaded that there were mutual Covenants in the Contract between them, and alledged a breach on the part of the plaintiff.— To this plea the Plaintiff demurred — and the parties were heard thereon this day — On the part of the plaintiff it was contended, that where there are mutual and independant Covenants in the same Contract, it is no plea to alledge a breach by the plaintiff of the Covenants to be performed by him — Coup. Rep. 56— Doug. Rep. 690.— 3 Wils. 387.— 2 Bl. Rep. 1312— and 5. Com. Dig. p. 622.—

Wednesday 19th June 1811. ~

Monty. vs Goguet – } The rule for the two executions against the Defendant was made absolute. ~

Guil: Perrault vs André Auclaire & Jn M. Cadieux Tiers Saisi and Marie M. Robert wife of A. Auclaire Intervs – } Action on Judgment, and attachment by Saisie arret in the hands of Jean Marie Cadieux thereon. ~

Cadieux, the tiers saisi, appeared and declared that he had nothing in his hands belonging to the Defendant – That in his capacity of public notary he has been employed by the heirs of the late Joseph Robert, father of Marie M. Robert the Defendt wife, to make an Inventory and Sale of the effects which belonged to the deceased, & he will have in his hands one fourth share of the monies arising from that Sale belonging to the said Marie M. Robert, she being entitled as one of the heirs of the said deceased to one fourth share of his succession. – That he has also been employed by the heirs of the said late Joseph Robert to recover certain outstanding debts due to him at the time of his decease, of which the said Marguerite Robert

is

is also entitled to one fourth share.— That not having as yet made any partition of the said Succession, he cannot ascertain the just amount of the right and share of the said Marie Margt Robert therein.—

The said Marie Marguerite Robert intervened in the Cause, and stated, that by her marriage Contract with the said André Auclaire, she had a right to renounce to the community between her and her said husband, and thereupon to take back whatever she had put into the said Community and all that had come to her by Succession or donation, free and clear of all debts.— That on the 8th Febry. 1811 she was separated from her said husband, quant aux biens, and authorised to hold and enjoy all her property and rights separate and apart from her said husband, she having renounced to the said Community by act of the 9th Feby. last, and by virtue thereof now contended that the monies and effects which then were or which might thereafter come to the hands of the said Jean Marie Cadieux arising from the estate and Succession of her said father should be adjudged to her as her property.—

The plaintiff, pleaded to the said Intervention, that the monies and effects claimed by the said Marie M

Robert

Robert, were the property of the Defendant, and belonged to the Community that subsisted between him and the said intervening party and to which she had renounced. That the said Jos. Robert died on the 14th Decr. last (1810) at which time all the moveable property belonging to the said Marie Margt Robert in the Succession of the deceased, or which she was entitled to claim therein fell into the Community then subsisting between her and the Defendant, without any actual tradition of the said monies and effects being in law necessary to vest the Defendant therewith, he had the sole right to demand them - and qui habet jus, rem ipsam habere censetur. - The Intervening party ought not therefore to receive any part of the monies or effects of the said late Jos. Robert. —

The Intervening party replied, that supposing the said monies and effects in the hands of the said Cadieux should be considered the property of the said Community, yet the Intervening party, on her renounciation to that Community, became entitled under her said marriage Contract to take back the same, as her individual property, and more especially in the present case when the said goods and effects

have

have not been intermixed with the other goods of the said Community. — Cites. Poth. Comte No. 407. —

The Court were of opinion that in consequence of the separation de biens, and the renonciation made by the Intervening party to the Community between her and the Defendt she was entitled to the proceeds of those goods and effects coming to her from the succession of her father which were en nature at the time of the dissolution of the said Community — and it was therefore ordered that the garnishee should pay to her the monies arising from her share of the said goods and effects to which she was so entitled. —

Molloy vs Mellot

The Defendants plea was held to be insufficient by the Court — but with the Consent of the plaintiff he was allowed to plead over. —

Thursday 20th June 1811.

Cartier
&
Cormier, père
& Cormier fils
&
Pre & Hyacinthe
St Germain —
— Garnishee
&
Guerout Interv.

On the 20th April last the plaintiff obtained Judgment against the defendants jointly and severally for £66. 6. 6 for monies advanced to them upon a certain joint agreement made by the Defendants — In the present term the plff sued out a writ of attachment in the hands of pierre & Hyacinthe St Germain, who declared to have in their hands belonging to the Defendts a certain sum of £82. 9. 11. — Upon this declaration being made, pierre Guerout intervened, and stated that one of the Defendants, Cormier pere, was indebted to him in a sum of £500. — with interest from 27 Feby. 1805, by a notarial obligation of that debt — that the said Cormier pere was now insolvent, and as he is entitled to one half of the monies in the hands of the Garnishees, the said Intervening party therefore claimed that he should be collocated for his proportion thereof, with the Plaintiff as in a case of deconfiture —

On the part of the plaintiff it was contended that, as the claim of the Intervening party was

against

against Cormier pere only, that claim could not be exercised against the joint property of the Defendants who were to be considered as partners in the transaction upon which the plaintiff obtained Judgment against them, and as the monies in the hands of the Garnishees were also the joint property of the Defendants - That the Intervening party could not claim the separate debt due to him by the Defendant Cormier pere out of the monies in question until the joint debt of the Defendants should be first paid. —

And of this opinion was the Court and dismissed the Intervention —

Colvert. vs. Bristin & Odell et al' Garnishees

Odell, one of the Garnishees, came in, after a second default had been obtained against him, and stated by affidavit, that at the time the writ of attachment was served upon him in this Cause, he was absent from his domicil where the said Service was made and did not return thither until it was too late to prevent a second default being rendered against him - he therefore moved that he should be permitted to take off the defaults so obtained against

against him and thereupon to make his declaration under the said attachment.—

The Court granted the motion.—

October Term 1811.—

Wednesday 2. October 1811.—

Deschambault
Ross. v. —

The Defendant was one of the attornies of the Court, and had been served with a Summons at the suit of the plaintiff.— The Defendant obtained a rule on the plaintiff to shew Cause why the writ should not be quashed, considering it the priviledge of the attorney to be sued by receiving a copy of the Declaration only and not by writ of Summons, under the rules of practice Sec: 7. art. 8. —

The Court were of opinion that the writ could not be quashed as the law warranted the institution of every suit by writ of Summons— That the priviledge of suing any of the Officers of this Court by service of a copy of the declaration only, was meant more as a priviledge to the party suing than to the person sued— Rule discharged

Thursday. 3d October 1811.

Wait. v. M'Laughlan.

The bail below appeared in Court, and moved that they should be discharged from their bail bond by a Surrender of the Defendant. – and as the Defendant was now in custody at the suit of another person such Surrender should be considered sufficiently made without producing the body of the Defendant in Court.

Rolland for the Pltff. objects, that he has had no notice of the motion – That there can be no surrender of the Defendant without bringing him into Court, which must be done under a writ of Hab. Corp. where he is in custody – cites. Tidd's prac. – That as there has been an assignment of the bail bond in this Cause, the Surrender by the bail in this instance, if it can be considered regular, can be permitted only upon payment of Costs. under Rules Prac. Sec. 8. art. 5.

The Court were of opinion that no notice of Surrender was necessary, and that it could not always be given with safety to the bail – they made it at their risk, and if irregularly done they must stand to the consequence. – That when it is certified by the Sheriff that the Defendt. is in his actual custody, the Court do not require the body to be brought into Court to perfect the Surrender – the practice, as laid down by Tidd, is not observed in this Court. – and as to the Surrender being made after assignment of the bail bond, it can in that case be allowed only upon payment of Costs.

Friday 4th October 1811.—

Smith et al
Pltfs. vs
Pell. } Gale for Defendant, moved that this action should be dismissed with costs, as Plaintiffs had not given security for costs agreeable to the rules of practice.—

Stuart for Pltffs, contends, that the Court cannot under the rules of practice dismiss the plaintiffs action for want of security for costs, the only penalty inflicted by the Statute in that Case being a suspension of all proceedings until such security shall be given, and no rule of practice can inflict a greater penalty—

The Court dismissed the action—

De Lotbiniere
Pltff. vs
Forbes. } Action of trespass for injury done to Pltffs mill-dam.

The Defendant pleaded not guilty, and under that plea adduced testimony in justification to which the plaintiff did not object— The Pltff now offered testimony to rebutt that adduced by the Defendt in justification, alledging that under the plea of not guilty, he did not come prepared to meet any testimony in justification.—

Stuart for Defdt— The Pltff cannot be admitted to make proof of new facts in reply to proof adduced by Defendt— that if the testimony offered by the Defendt had been irregular the pltff ought to have objected thereto— it is now too late to correct that oversight, and it cannot be done by his irregular mode of proceeding

The

The Court were of opinion that the testimony offered ought to be admitted.

Pomeroy v Moor. — The Defendant moved for delay to plead, under an affidavit stating, that the papers relating to the transactions between the parties upon which the action was founded, were at Burlington in the State of Vermont — That Defendant was absent from home when the process was served, being at the time on his way to Quebec, and did not return home till it was too late to procure the said papers in time to produce them before this Court in support of his defence — That he has good and sufficient grounds of defence to the said action, but cannot plead thereto without the said papers. —

For Plff it was objected that the nature of the defence to the action was not stated, nor what the papers are which the defendant stands in need of

The Court under the circumstances of the case — granted delay to plead until the first of November next. —

Johnson v Walker. — The defendant moved for delay to plead, under affidavit, that defendant was absent from home when the process was served, being at the time at

Three

Three Rivers, and as the writ was returnable on the second or third day after service, his clerks had not sufficient time to communicate with the defendant and to receive his answer before the delay for pleading would expire —

Ross for Plff. The absence of the defendt is no sufficient excuse for delay — he ought to attend at his domicil, or in case of necessary absence, have persons to attend there for him to answer all legal demands made against him — This is an action for goods sold and delivered which ought to admit of no delay. —

The Court granted delay until the 7th inst. to the defendant to plead. —

Davies v Hamilton

The Defendt moved for delay to plead under affidavit stating — that he lives at Quebec, and being on his way to Upper Canada, was arrested by the Plff at Montreal — That all his papers relative to the transactions between the parties are at Quebec, without which he cannot plead to the action. —

The Court gave delay until the first of December next. —

Allan vs Harris } The defendant this day surrendered himself in discharge of his bail.—

Mr Ross moved to enter appearance thereon for the defendant.—

Mr Stuart for Pltff objected to any appearance being entered for the defendant, as a second default has been entered against him, and he cannot now without special circumstances be permitted to take off those defaults.—

By the Court.— No second default ought regularly to be entered against a person arrested on mesne process; when a defendant surrenders himself or is surrendered in discharge of his bail, he is entitled to be represented by an attorney in Court, although he may not in all cases be entitled to plead to the action, if any unnecessary delay has been occasioned in making the Surrender.— Motion granted.—

Adhemar vs Corrigal } Action for malicious prosecution in charging pltff with a highway robbery.— The Defendt was arrested upon the affidavit of the plaintiff stating the circumstances, and swearing to a damage of £300.—

The

The Defendant obtained a rule on the pltff to shew Cause why the writ of Capias should not be quashed as having been irregularly sued out, as in law no such process can be granted in action for the recovery of damages.—

Ross for Pltff, for cause shewn states, that the pltff has complied with the requirements of the law he having made oath that the Defendant is indebted to him in the sum of £300 under the circumstances stated,— nothing more is requisite, as the law does not distinguish whether the demand be for a debt or for damages, the only requisite being the oath of the party to a Specific sum to entitle him to arrest the body of the Defendant.—

Stuart for Defdt— The law requires, that a debt shall be sworn to,— now debts arise ex contractu, but not ex delicto, and the debt here sworn to, if it can be so called, is founded upon pretended damages for a personal injury done to the plaintiff— this is too vague and uncertain for any man to establish a debt upon by his oath, and the law never had in contemplation any demand which was not clear and certain before the Defendant could be held by mesne process of arrest, to answer thereto.—

Saturday 5th October 1811.—

De Lotbiniere
v.
Forbes.—

The defendant filed an exception to the Judgment of the Court of yesterday, admitting proof offered to be made by plff, in which exception it was stated that the ground thereof was, that the parties had closed their proofs respectively, & that such further testimony had been afterwards permitted to be adduced on the part of the plaintiff — which being contrary to the Record and to the fact, the Court refused to receive the exception with such reasons — the Counsel then pressed it upon the Court, to mention upon the record that such an exception had been tendered but rejected — which the Court also refused

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Poutret.—
v.
Decouagne

On an action petitoire.—

The Defendant claimed the property in question under a Sale thereof made to him by the plaintiff, and in proof of which he offers a receipt made and signed by the plff whereby he acknowledges to have received part of the purchase money from the Defendant, & in which it is stated that the Sale had been made as alledged by the Defendant.—

The

The plaintiff objects to any proof being received of the said receipt, it being an act sous seing privé tending to affect the property in question, and by St. 48. Geo. 3. ch. 34. S. 4. the proof thereof cannot be received.—

Herse for Defendt. says, that the paper in question is no act or writing within the Statute, it being merely a receipt for the payment of money.—

Tuesday 8th. October 1811.—

Lyman vs. Newton.

The plaintiff moved to reject from the record a plea of exception à la forme, as coming in too late being the third day after appearance, and being besides founded on a matter altogether immaterial and insufficient, he having been sued by the addition of Surgeon, and for plea of exception, he pleaded that he is not a Surgeon, but a Physician.—

The Court granted the motion, as the plea was made too late.—

Wednesday 9th October 1811.

Adhemar v. Corrigal.

The Court were of opinion that the pltff had right to hold the Defendant to bail upon his affidavit stating the circumstances of the injury he had sustained and swearing to the damages sustained — The provincial Statute requires a plaintiff to make affidavit that the defendant is indebted to him in any sum of money, and although this may be converted to a bad purpose by obliging a Defendant to give bail for whatever sum a Plaintiff may conceive himself injured, yet in the present instance this has not been complained of, and in future the practice will be regulated to prevent that inconvenience — The best interpretation to be put upon the provincial Ordinance of 25 Geo. 3. ch. is to construe it according to Stat. 12 Geo. 1. c. 29 and the practice observed under it in cases of damages altogether uncertain — 1. Tid. Prac. 150. 151 — The Rule to quash the Capias was therefore discharged. —

Courville v. Fischiau.

On action to rescind a deed of Sale made by the Plaintiff to the Defendant, for lesion d'outre moitié. —

The plaintiff sold a certain farm or lot of land to the defendt —

defendant for livres, of which livres were paid at the time of executing the deed of Sale, the remaining sum of 1800 livres were to be paid in 18 years at the rate of one hundred livres ℔ annum without interest — It appeared in evidence that the produce of the land after paying all charges was worth upwards of two hundred livres, and that the land itself at the time of sale was worth livres. — Upon these facts the Court was of opinion that there was a lesion d'outre moitié — and ordered the deed of Sale to be rescinded. —

Terrien. v. Madame de Longueuil

The Court were of opinion that the arret of 1711 formed part of the laws of this province, agreeable to which the plaintiff was entitled to maintain his action against the Defendants — That this arret had always been considered and acted upon as part of the — antient laws of the Country, and stood upon the same basis as many other laws under which the subjects of His Majesty derived and held many valuable rights, such as banalité Dixmes, &c. — That although the present state of this Colony might now require a change of this law, yet the Court considered themselves bound to support it until such change should be made. — A day was therefore given to the pltff to adduce his proofs in support of his demand. —

Bowker
v.
Davies et al
&
Willis. Garnishee

Attachment on Judgment

The plaintiff had obtained a rule upon one Carpenter, not a party in the Cause, to shew cause why a certain note of hand given to him by the garnishee, should not be delivered up and deposited in this Court.— Boston - for Carpenter — says, he is not bound to answer to the matters demanded by the said rule, inasmuchas he cannot be made a party to the Cause by this summary method of proceeding by a rule nisi - he can be brought into Court only by the Kings writ.—

Thursday 10th. October 1811.—

Bowker v. Davies et al' & Willis Garnishee

The rule for bringing in Carpenter into the Cause was discharged, the Court being of opinion that he could not be made a party to the Suit but by the Kings writ, under which he would be entitled to plead to the demand set up against him and to a full hearing thereon — whereas by the practice of the Court the proceedings under a rule nisi were summary and no pleadings had in writing.—

Dubé v. M'Tavish & Stansfield

On an action for an assault. —
The Defendants made default —
The plaintiff moved for a trial by Jury contending that under the provincial Ordinance of 1785, in all actions for personal wrongs, the party injured was entitled to such trial.—

The Court were of opinion, that there Could be no trial by Jury where there was no issue joined between the parties. 1 Tr. Pas. 7. Motion dismissed.—

Marchand v. Mathieu. } Action for balance of money due on a deed of Sale

One Robitaille having obtained a Judgment in this Court against the plaintiff, the latter sold a certain farm to the defendant, and stipulated in the deed of sale that the defendant should pay to the said Robitaille the amount of the said Judgment, and the remaining balance to the plaintiff – The defendant not being able to procure from the said Robitaille the amount of the taxed Costs in his Suit agt. the plaintiff, the defendt notified the same to the plaintiff, and at the same time stated to him that he could not pay to the said plaintiff any sum of money whatever as the balance coming to him upon the said deed of Sale until the said plaintiff should procure the taxed bill of Costs in the said Cause. The plaintiff without waiting the event of the taxation of the said Costs, instituted his action against the Defendant† for a Sum of £92. 14, as the balance due on the said deed of sale, without making any allowance or deduction for the said Costs, pretending, that as the defendant had undertaken to pay to Robitaille the amount of his said judgment, it was his, the defendts duty to have ascertained the amount of the Costs accrued on that judgment – afterwards on 22. June last the

† in april Term last

said

said bill of Costs was taxed at the instance of Robitaille in consequence whereof it appeared that the balance due to the plaintiff was only £33. 16. 2, which sum the defendant now tendered – the only point to be now determined was respecting the costs, as each party pretended ~~the~~ was entitled to his costs upon the above facts

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Sutherland Cur. vr Ducondu & Vve Ducondu Oppt

On the opposition afin de conserver of Madame Vve Ducondu. –

A lot of land was sold at the Suit of the plaintiff as belonging to the Defendant, and which had been given to him by the Opposant on the charge of paying a certain pension, or life rente to her. – The Opposant now claimed the monies arising from the Sale of the said lot of land in lieu of her said annuity as she had been too late to make her opposition afin de charge – The plaintiff contended that the price of the land sold represented the fond, or land itself, and that the Opposant could not claim more than the interest of that money, and not the Capital, which would in that case be entirely lost to the Estate represented by the pliff – The Opposant in reply said, that the sum of money for which the land had been sold was not more than

than the value of one year of her said pension, for which she had a privileged claim on the lands, and was not by law bound to take less. —

Friday 11th October 1811.

Evans
v
Clarke
and
Foretier opp.

The Court were of opinion that the Opposant could not maintain his opposition, as the property sold formed no part of that upon which the Constituts were grounded, and for the reimbursement of which the claim of the said Opposant was made

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Worthington
v
Barber.

The plaintiff moved that he might be permitted to propose supplemental faits et articles to the Defendant in consequence of a mistake made by the plaintiff in one of the interrogatories proposed by him to the Defendant. Rejected by the Court as a practice not to be countenanced.

Cameron
v
Baker.

In consequence of a rule obtained by the plaintiff to examine the Defendant upon faits & articles, he served a copy of the rule and of the faits et Articles, at a place in or near Montreal where the defendant had lodged for ten or twelve days, his ordinary residence and domicile being in the Province of Upper Canada

Canada – at the return of the rule the plaintiff moved that the faits & articles, should be taken and considered as acknowledged and confessed by the defendant as he had not appeared to answer thereto. – But it was held that residence of a few days will not constitute a domicile, and as it did not appear that the place where the said faits & articles were served, was the actual residence of the party, the plaintiff was not entitled to derive any benefit therefrom. –

Burton.– v. Derome. & Catlin Intervs

The pltff in this Cause had sued out a Commission for the examination of witnesses in which the Intervening party had joined, and each had named their Commissioners for taking the examination of the witnesses. – when the Commission returned, it appeared that the Commissioners of the Pltff alone had acted under it, the rule being, that one at least of the Commissioners named by each party should attend for the regularity of such examination. – The pltff thereupon moved that he should have leave to sue out a new Commission, or that the Intervening party should waive all objection to the insufficient execution of the Commission returned. –

Stuart for Intervs Party – It is a new kind of objection, for party to complain of the insufficiency of his own act – when Intervs party shall make the

objection

objection alluded to, it will then be time to apply for a new Commission, until then the demand is premature. —

Spinard vs Dumont & Ferré Opp.

On the opposition afin d'annuller of Ferré. —

It appeared that the goods and effects seized belonged to the Defendant, that subsequent to the rendering of the Judgment against him at the suit of the plaintiff, the defendant made a Sale of the said goods and effects to the Opposant, and in order to continue to the Defend. the use and enjoyment thereof, the Opposant immediately thereupon made a lease thereof to the Defendant. — The plaintiff contended that the said Opposition should be dismissed, it appearing that the Sale and lease aforesaid were a mere contrivance to Screen the defendants goods and effects, and that such a Sale without delivery or deplacement of the effects sold was null and void in law —

Stuart for the Oppost. There is a constructive delivery, called brevis manus, which can be done without actual deplacement, of the effects sold, and is good in law — No fraud being alledged against the transaction the Sale and lease ought to be adjudged valid —

Allen.. vs Harris..

The Defendant in this Cause was arrested under an affidavit taken before the Ch. Justice of the Province at Quebec, upon which an order was made by one of the Judges of this district for the arrest of the defendant..—

Objected by the Defendant, that the Judge before whom the affidavit was taken had no jurisdiction in this district, and therefore the defendant could not be legally arrested under it, that the intention of the law was that the affidavit should be made before the Judge granting the order for the writ—

On the other hand it was stated to be the practice that writs of Capias were granted at Quebec upon affidavits taken before the Judges of this district.

Saturday 12th. Oct 1811

Spinard v Dumont & Ferré Oppt. } The Court were of opinion that the transactions upon which the opposition was founded were wholly illegal, and therefore dismissed the said Opposition with Costs. —

Allen. — v Harris. — } The Court were of opinion that the Defendt could be legally held to bail under an affidavit taken before any of the Judges of the other districts and therefor over-ruled the Defendts objection —

8 East Rep. 364. Omealy. v. Newell. —

Paquet & al v Vve Paquet } This was an action instituted by the pltffs as heirs at law of their late father — Paquet demanding of the defendant their mother a statement and account of the Community that subsisted between her and her said late husband — The Defendant set up an act of Don Mutuel / made between her and her said late husband by which she contends, that she

she is entitled during her life time to the possession and enjoyment of all the property of the said Community without making or rendering to the said plaintiffs any account thereof.— The plaintiffs argued that the said don mutuel was nule and void in law on two accounts. 1st because it gave to the Survivor the right of property in and to all the estate of the said Community - which is contrary to law - and 2dly by giving more than by law is allowed it is void in toto, and cannot be restricted merely to what the law does allow —

Papineau for Pltffs in support of the first point, cited the following authorities. —

Art. 282 Cout - all advantages between Conjoints prohibited, except by Don mutuel

art. 280. Don mutuel, restricted to certain property

3. Gr. Com. de Fer. p 1525 - obsev. de Mr L. — Som. 3. 5. 6

Id. ——— art. 280. glose 1. Som. 12
— 2 — 37 & 42
4 — 1 —

On the second point.

2. Ric. Don Mut: Pr. 1re ch. 5. sec. 6. & aux Som. 216. 217 & 219. —

Pothier. Don. entre mari & fem. part. 2. ch. 1. §1. Nº 135

Id. part. 2. ch. 2. §2. Nº 167. —

Id. Nº 122. 129. 168. —

The

The Sol. Genl on the part of the Defendant admitted that the don mutuel exceeded what was in the power of the parties, yet it could by law be restricted to what could be legally given by that act, and was not on that account void in toto - cites. Dict. des arrets - vo Don mutuel reduit. & art. following. -

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Gillespie. vs Yeoward Cur: - & Stuart. Garnishee

On attachment in the hands of the Garnishee under a Judgment in favor of the plff

The Garnishee declared that there had been put into his hands in his official capacity a certain note of hand for monies which were due to — Grant, one of the partnership of Grant and Glen represented by the Defendant, but made payable to a trustee for the behoof of certain minor children of the said Grant — but that he had no monies whatever belonging to the estate of the said Grant & Glen in his possession, nor did he owe them any. -

The plaintiff obtained a rule upon the Tiers Saisi to shew Cause why the said Note should not be deposited in the Prothonotary's Office for the benefit of the parties concerned. —

The Garnishee objected - that the note in question

question was given to him by a person not before this Court, - that it was payable to the use of certain minor Children, also not before this Court, who were materially interested, and who might be greatly prejudiced by any decision of this Court whereby he might be divested of the possession of the said note. — Further, as the attachment was made only for monies, the said note could not be considered in that point of view and not liable to the attachment. —

Pettier vs Monaye }

Action de bornage. —

It appeared that the pltff had the option to fix the limits of his farm adjoining that of the defendant, at half an arpent, beyond a certain coteau, or at the distance of twelve arpents from the river. — The defence was that the predecessor of the plaintiff had made his option of the line of division between their respective lands, and with the Defendant had caused boundary marks, (bornes,) to be planted thereon upwards of twenty years ago, agreeable to which the parties had respectively held and enjoyed their lands and always considered the said boundary

marks

marks as the line of division between — In support of this defence the defendant proved by two witnesses, that about twenty years ago, the predecessor of the Pltff caused the line of division to be drawn and established by one Gaudet a Sworn Surveyor, since deceased, that upon the line so drawn the parties assisted the said Gaudet to plant two stones as boundary marks, which have existed since that time, and served as the line of division between the parties. —

It was objected on the part of the Pltff, that verbal testimony ought not to be received in proof of the above facts, as in all cases where a Sworn Surveyor places land marks between the estates of neighbours, he makes out a proces verbal thereof in due form, which constitutes a legal proof of that and no other proof can be admitted of that fact.

Robitaille vs Mathieu } Action of debt on a deed of Sale between Defend^t and one marchand. —

The plaintiff having obtained Judgment against the said marchand, the latter in order to satisfy that Judgment sold a certain lot of land to the defendant, and in the deed of

of sale it was stipulated that the defendant should pay to the said Plaintiff the amount of his said Judgment, and the balance to the said Marchand

Murdal
v
Mears & al

Action for breach of Covenant – damages £3000.

By agreement between the parties bearing date the 17 Oct 1807 it was stipulated that the Defendants should deliver to the Plffs at Quebec* at certain times and at the rates and prices therein mentioned – The Defendants then acknowledge to have received from the said Plffs in advance a sum of £1200 – and it was agreed that the party failing to fulfile their part of the said agreement should pay to the other party the full and entire penalty of £3000, which was declared not to be meant and considered as comminatory, but as an obligation alternative, and to be paid without any deduction or defalcation – The Plaintiffs charged the defendants with the non-performance of their said agreement and in consequence claimed the above penalty of £3000. –

*certain quantities masts, boards & timber

To this action the Defendants pleaded – 1st Not guilty – 2d non-performance by the plaintiffs of their agreement – 3d performance by the Defendants of their agreement – 4th Loss of the timber, prepared by the Defendants to fulfile their said Contract, by the act of God, and 5th Non-assumpsit – After some discussion respecting the above pleas, the parties were heard upon the merits, when it appeared that the Defendants did deliver of the above masts boards and timber to the amount of £1466. 17. 6 under their said Contract, they also proved the loss of a certain large quantity of other masts, boards and timber by the dam of their saw mill having given way, in consequence whereof they became unable to fulfile their said agreement. On the part of defendants it was contended, that the sum of

£3000.

£3000 could only be considered as the damages sustained by the plaintiff which were excessive, and which had not been proved - that the penalty in every contract was only comminatory and meant to secure the damages as far as proved. - Poth. Obl. no. 345. - The only damages proven by the plaintiffs amount to £1200, the money they advanced to the defend^{rs}, but this cannot be recovered by the plaintiffs, as it is proved by the Defendants that they delivered to the plaintiffs wood and timber to the amount of £1400. - In Case of Auld & Stewart v. Anderson. June 1810 - where action was for the penalty, but which was refused to be adjudged by the Court, and damages as proved only given. - That the Agreement cannot be considered as an obligation alternative, that is, to give one of two things, but to pay damages on default of performing a single Contract Poth. Obl. 337. - That Defendants have not injured the Pliffs by any fault or neglect on their part, having been prevented in completing their contract in consequence of the breaking down of their mill dam which occasioned a great damage to the defendants in the loss of their timber -

Stuart for pliffs in reply observed, The plaintiffs under their Contract were entitled to their action for damages a^{gt}. the defendants, or the penalty stipulated therein - That in consequence of the matters stated by the defendants in their plea, they ought to have claimed a reduction of the penalty, or shewn, that pliffs suffered no more damages than the sum of money they advanced to them the defend^{rs} -

That

That defendants have proved nothing that can entitle them to a diminution of the penalty – they state nothing in their plea respecting their Saw mill, of its being of a particular construction made purposely to prepare the timber in question – in point of fact the defendants have not made it out – Even if Defendrs had lost their timber by force majeure, they were bound to give immediate notice thereof to the pltffs before they could benefit thereby – Pothier Obl. Nr 149 – this notice was not given to the pltffs by the Defendants. –

Sen 3d Febry 1812.

Wednesday 16th Oct. 1811.—

Gillespie.. vs Yeoward, Cur. & Stuart Garnishee

The Court ordered the garnishee to deposit the original note in his possession in Court, in order that every person claiming right — therein might have an opportunity of being heard —

Meloche.. v Dezery..

The Court, without entering into the validity of the clause in the plaintiff's deed of Concession containing the reserve in question, declared, that the Defendant could not even under such reserve, enter upon the plaintiffs land without his knowledge and consent to exercise the right he claimed under the said reserve, and therefore the plaintiff was founded in his action for the trespass committed by the defendant in this respect, and a day was given to him to prove his damages in this behalf —

Burton. v Derome. Catlin Int.

The Court granted the plaintiff's motion for a new Com. Rogatoire for the examination of his witnesses, considering that every plaintiff must be interested in forwarding his Cause and not bound to wait the making of any objections to his proceedings by the Defendant, when he can amend them by a more diligent means. —

Rea. v Vassal

This was an action instituted by the plaintiff, a merchant, against the Defendant the owner of a Small vessel, respecting a Contract entered into between them for the chartering of the said Vessel by the plaintiff for carrying on his trade and commerce in the river St Lawrence and places adjoining. —

The plaintiff upon the return of the writ moved for a trial by Jury. —

Bedard for Defend^{t} objected — The Plaintiff was not entitled to a Jury in this Cause — as it was neither a commercial transaction, nor a cause between merchant and merchant so reputed and understood under the Ordinance of 1785. — That there was no question respecting the freight or naulage of the vessel — the action merely

brought

brought in question the obligations of the person letting the vessel or locateur to the locataire, which had no connection with the use the plaintiff meant to make of the vessel, but must be determined upon those general principles of law regulating the mutual obligations of bailor and bailee, without consideration to the use made of the thing bailed - cites. Code de la Marine. Tit. 2. art. 2 by which in France all questions respecting freight of vessels were taken from the Consular Jurisdiction and given to the admiralty Courts — The Ordre of 1673, tit. 7. art. 2°. regards only fret, not affretement - The present is not a contract concerning the Commerce de la mer, subject formerly in france to the Consular Jurisdiction.

Stuart in reply - In france all questions of present nature were cognizable by the Juge Consul under the Ordre of 1673 - See Jousse Com. tit. 12. art. 7. — It is true that this was afterwards taken from the Consular jurisdiction and given to the admiralty Courts in France, but this is no proof that the transactions of this kind were not commercial and so considered — They have been so considered by this Court and a trial by Jury granted — cites - case of Auldjo & Maitland. vs. Campbell. —

The

The Court granted the plaintiffs motion, being of opinion that the Contract in question was of a commercial nature, as being in France cognizable by the Juge Consul, and they considered it the best guide in the decision of all questions about what shall be held commercial or not, to examine whether in France it would have been subject to the Consular jurisdiction. —

Amiraut Tutor. &c
v
Riopel Curat. and M. E. amiraut wife of Gosselin

This was an action instituted by the plaintiff as tutor to the minor children of the late Joseph — Archambault by Marie Elizabeth Amiraut his wife, against the Defendants, Riopel as — Curator to one Gausselin interdicted for insanity and the said Marie Elizabeth Amiraut now wife of the said Gosselin, in order to recover from them a sum of money due to the said Minors in consequence of an act of partition of the property of the said late Jos: Archambault by the said Marie Elizabeth amiraut and the said tutor. On the part of the defendant it was objected, that the act of partition in question was made by the said Marie Elizabeth Amiraut after the interdiction of her second husband Gosselin, and the appointment of the Defend Riopel as his Curator, who ought to have been a party to

to the said act of partition, being therein interested, whereas the said act was made by the said Marie Elis. Amiraut under an autorisation by the Judge without the participation of the said Curateur — that therefore the said act in so far as regards the said Gosselin must be considered void in law and the action of the plaintiff in this behalf against him ill founded — On the part of the plaintiff it was answered that the intervention of the Curator became unnecessary, when the said Marie Elis. Amiraut was specially — authorised by the Judge to make the said act of partition, such authorisation, being equivalent to that given by the husband or his Curator. Poth. puiss.ce du mari. No. 25. 26. — That had the said Marie Elis. Amiraut been the Curatrix of her said husband she could not legally have made the said act without an autorisation from the Judge, which shews, that the power of the Curator in this respect is inefficient — Id. No. 13.

Colburn & Gill. — v Adams.

This was an action instituted by the plaintiffs as Indorsees of a promissory note made by the defendant to one Meriam and by him indorsed to the plaintiffs — The note was made at Pittsford in the State of Vermont, one of the United States of America, where by law it is provided that in every action brought by an indorsee or indorsees of a promissory note the defendant or defendants are allowed to plead and set-off all demands proper to be pleaded in set-off, which he or they may have against the original payee or payees before notice of the Indorsement against the Indorsee or Indorsees — and may also plead or give in evidence on trial of any such action any matter or thing which would equitably discharge the defendant or defendants in an action brought in the name of the original payee or payees — Under this law the defendant pleaded that before the — indorsment of the said note to the plaintiffs, and before notice of that indorsment signified to him, he fully paid and satisfied the said note to the said Meriam the payee by different sums of money paid to him at different times — pleaded further, that between the time of making the said note and indorsing the same as aforesaid the said Meriam was indebted to the said Defendant in different large sums of money, exceeding

the

the amount of the said promissory note, by promises and assumpsits stated in the usual money Counts.—

The pltffs demurred to the matter of law pleaded by Defendt contending that the law referred to by him could not be pleaded as a bar to pltffs action in this Province — at same time denying the payment of the note set up by the defendant, and the assumpsits pleaded by him.—

Under the above plea the Defendt proved sundry payments of monies by him to the said Meriam — within the time pleaded, and specified in the receipts given by Meriam to be on acct of his (Defdt) note — the said payments amounting in the whole to — $18,923.35 — the date of the note was not mentioned in the receipts, except in one of them in which it was stated to be the 4th Augt 1807 — whereas the date of the note in question was 1 Augt 1807 — He also proved the law as pleaded to be in force in the State of Vermont —

The Plaintiffs on their part proved by two wits an offer by the Defendant to compromise the Plaintiffs demand at two different periods, but nothing — appeared to shew that pltff accepted the offers made by the Defendant, or that these offers had

ever

ever been carried into effect by any tender on the part of the Defendant. —

Jarry ... vs Barber } Action of Debt on deed of Sale. —
Plea - nil debet —

Pliff moved to set down cause for hearing on the merits — Objected by Defendt — The issue between the parties is an issue of fact, and the Cause ought previously to be fixed for an enquête by Witnesses or such other proof as the parties may have to adduce as the examination of the pliff upon faits & articles. —

The pliff replies, that upon the issue before the Court no verbal testimony can be received — the Defend pleads in face of the deed filed in the Cause, and he cannot be allowed a day to prove that he has paid under a plea of Nil debet — and as to the examination of the plaintiff upon faits et articles it is the business of the Defendant to procure this proof on the day of hearing on the merits. —

Thursday 17th Oct. 1811.—

Gaspé, Vve Baillé.— vs Brunelle

This was an action instituted against the Defendant as a Caution, in consequence of his having become bound as such, upon a certain acknowledgment said to have been given by one Jean Bte Brunelle to the pliff.— On the 4th of October 1810, the Court ordered all proceedings in this Cause to be suspended until the pliff should have discussed the said Jean Bte Brunelle, the principal debtor.— The plaintiffs counsel now stated, that before the commencement of the present action the plaintiff instituted an action against the said Jean Bte Brunelle for the recovery of the same note or acknowledgment as that now sued for— that in consequence of the defendants plea in that Cause the plaintiff was under the necessity of examining the said Jean Bte Brunelle upon faits et articles to prove the making of the said note or acknowledgment, but which the said Jean Bte Brunelle by his answers to the interrogatories denied ever having made, so that the said plaintiff was under the necessity

to

to discontinue the said action — a copy of which proceedings he now files and contends that the same are equivalent to a discussion of the said Jean Bte Brunelle the principal debtor, and in consequence that the pliff should be now allowed to proceed against the said Defendt in this Cause —

The Counsel for the defendant objects — that the discontinuance of the action against the principal — debtor was not a discussion which the law required — and further that the proceedings had against the said — principal debtor before the commencement of the present action cannot be considered as a compliance with the Interlocutory order of this Court in October last. —

Poutré val vs Barré. } On an action hypothecaire —

It appeared that the plaintiffs in June 1810 obtained judgment against one Berthiaume on an action hypothecaire for the same debt as that now demanded — In consequence of that Judgment Berthiaume abandoned the land upon which the hypotheque was claimed, and the plaintiffs instead

of

of proceeding to the Sale of that land in legal course took possession thereof, and sold the same to another person as if it had been their own property — The present action is brought against the Defendant as possessor of a part of the land subject to the plaintiffs mortgage, by which they claim the balance of their debt after deducting the price of the land they had so sold —

It was contended on the part of the defendant that the plaintiffs debt must be considered as satisfied in consequence of their own act in entering upon the land which Berthiaume had abandoned and selling the same as their own property, it was abandoning all right to any future claim or discussion of any other property subject to their mortgage, as it was renouncing to the formalities requisite to obtain that discussion — At all events the plaintiffs should be held to discuss in a legal manner the land of the said Berthiaume before they can have an action at the Defendant. —

On the part of the plaintiffs it was answered, that the land of the defendant as well as that of the said Berthiaume were equally liable to the

mortgage

mortgage of the plaintiffs and he was therefore not bound to discuss the one before instituting his action against the other; the defendant as a Tiers-detenteur has no right to demand the discussion of a Co-detenteur, but only of the principal obligé, which has been done. —

Martin. qui tam. — vr Castonguié

On action to recover penalty on an usurious transaction —

The defendant pleads, that the Contract upon which the action is founded was made in the year 1805, and the taking of money under it, if usurious, was upwards of three years before the institution of the present action, which is thereby prescribed by law — inasmuchas all demands for penalties, under the laws of England, must be prosecuted by the Individual or subject within the year and day after the offence committed, and within two years from that period, when the prosecution is for the behoof of the Crown 2. Bl. Rep. 792.

Ross for Pltff in answer observes, that the provincial Ordinance

Ordinance of 1777 upon which this action is founded limits no time for commencing the same, which must therefore be regulated according to the laws of this Country

The Defendant in reply - the principles which in England are applicable to the penal law, must be received in this Country, and not the principles applicable to the penal laws of France, as in that case it might be said that all the penal laws of France ought be considered as in force in this province, which will not admit of any argument. -

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Hamilton
Del
v
Goodell -

Action for breach of Covenant - & for damages thereon - Trial by Special Jury -

The defendant took objection to one Wise, a witness produced by the pltffs to prove the Contract between the parties, he being the agent of the plaintiffs, and the person who made the said Contract it was also objected to the said Wise, that he was not a competent witness to prove the execution of the said Contract, as it appeared that there was another person present when the same was executed, and

who

who had signed his name thereto as a witness, who therefore was alone competent to prove the execution thereof. It was answered by the plaintiffs, that Wise was a competent witness although the agent of the plffs — cites Peake's Ev. ch. 3. § 3. (B) — and as to the subscribing witness to the contract they offered proof to shew that he could not be found after diligent search, to give evidence touching the execution of the said Contract — Upon this proof being made, the Court admitted the testimony of Wise —

It was then objected by the Defendant, that the Contract offered to be proved and exhibited to the Court and Jury was not the Contract declared on — that now offered in evidence purporting to be a contract between the said Wise in his own name, not as agent of the Plaintiffs — that the said Contract not being signed by the Plaintiffs is not obligatory on them — it is thus reduced to a mere promise on the part of the defendant without obligation on the part of the plaintiffs — or a pollicitation as stated by Poth. Obl. Nº from which either party may desist when he pleases — That the person acting as agent for another at the execution of a Contract, cannot sign his own name thereto, but must sign the name of the person for whom he acts — 6 T. Reps. 176. White, vs Cuyler. —

But

But it appearing upon the Contract, that the parties pltffs and Defendants had recognized the Contract as then act and had entered upon the execution thereof, and that the plaintiffs had in consequence paid and advanced to the defendant a sum of £125–, the Court were of opinion that neither party could take advantage of a want of formality in executing the Contract – and therefore admitted it to be given in evidence – and thereupon the pltffs had a verdict. –

Poirrier –
v.
Proctor. –

On the day of the return of the writ, it was handed to the Sheriff to amend the return, which amendment was made instanter and the writ again put into Court – The Defendant on the second day after, filed an exception à la forme & declinatoire – This exception the plaintiff moved should be rejected and taken from the files, as it had been filed too late, not having come in within the 24 hours after the return of the writ –

The Defendant contended that he was not bound to ple any pleading until the record was complete, and that the plea in question was filed within 24 hours after the amendment permitted by the Court to be made to the Sheriffs return came to the knowledge of the Defdt – that pltff ought to have given notice of this amendment

having

having been made before Defendant was bound to plead and ought not therefore to take advantage of his own neglect to give such notice —

Park. — v^r^ Crowther } Action on a promissory note dated 12^th^ Dec^r^ 1810 for £20 . 4 . 7 p^r^ made by Defendant to the plff — The action was sued out on the 4^th^ and served on 6^th^ Febry 1811. — On the 31^st^ Jan^y^ the defendant gave a draft to the plaintiff on B. Gibb for the amount of the above note, when when presented Mr Gibb offered to accept, provided the — plff would agree that the same should be in part payment of a larger sum which the plaintiff owed to him the said B. Gibb on his note — to this the plaintiffs clerk who presented the draft refused to agree. — On the 8^th^ Febry Gibb indorsed the note due to him by the plff to the Defend^r^ the amount of which was £34 . 10 . in consideration of £14 . 10 paid in Cash and the balance by the Defendants promissory note — On the 9^th^ Febr. the writ was returned into Court — the Defend^t^ appeared & pleaded want of diligence on his draft on Gibb, and an Incidental demand for £13 . 2 . 4 p^r^ on the Plaintiffs note indorsed to him by Gibb — There was no further pleadings, each party however contending for the Cost on their respective proceedings —

Brown
v.
Crowther.

Action for goods &c sold & delivered

On the 5th Febry last, two days before the commencement of the action, one Seaman at the request of the defendant called at Pliffs warehouse and offered to give the pliff a draft in the course of the ensuing week on Mr Gibb for the amount of Pliffs account, to which the plaintiffs clerk answered "very well" — but without any intimation to the defendant a suit was commenced and served on him the 7th Febry returnable the 11th — On the 12th the Defendant paid the plaintiffs account £17. 9. 2½ & took a receipt — The Defendant appeared and pleaded to the action that it was prematurely brought as the time had not expired which had been given to the Defendant for payment of the sum demanded by a draft on Mr Gibb — and further that the action was commenced without any notice given to him or demand made of the amount of the plaintiffs account — the parties both contend for their Costs under the above facts.

Kingval:
Bingham

Action for penalty of bond on breach of Covenant

The plaintiffs paid to the defendant a sum of Seven hundred dollars in consideration whereof the Defendant bound himself by his bond or obligation bearing date the 22d. March 1800, that in three years from that date, or immediately after a patent should issue for erecting and granting the Township of Milton in the province of Lower Canada, of which he the defendant was then soliciting a grant, he would convey and make over to the said Plaintiffs fourteen hundred acres of land in that township, or an equal quantity of land in some other township of equal value with the general value of the land in the township of Milton — On the 25th. day of January 1803 letters patent issued granting the said township, but in which the name of the defendant was not mentioned as one of the grantees — On the 22d. March 1809 the pltffs by the ministry of a public notary demanded of the said Defendant to transfer and convey to them the aforesaid quantity of fourteen hundred acres of land in the said township of Milton, or the same quantity of land in any other township of as good quality and value as that of the said township agreeable to the

terms

terms of his aforesaid bond and obligation, or on default thereof to pay to the plaintiffs as well the penalty of three hundred pounds stipulated in the said bond to be paid in default of performance, as ++++++ the aforesaid Sum of Seven hundred dollars paid and advanced by the said plaintiffs as aforesaid, and in consequence of the Defendants answer a protest was made against the Defendant for his non compliance with the demand aforesaid. — Afterwards on the first day of February last an action was commenced — against the defendant for the above penalty of three hundred pounds by reason of the non-performance of the Defendant as aforesaid. — The Defendant pleaded that since the time of making & executing the aforesaid bond and obligation he had paid to the plaintiffs a Sum of £180 „ 15. 6 to be applied to their use in lieu of damages in the case of his non-performance as aforesaid, which said sum of £180. 15. 6 exceeds the damages suffered by the Plaintiffs in this behalf — Under this plea, the Defendant proved that he had advanced and paid to the Plaintiffs at different times a Sum of £52. 17. 6. since the date of the said bond or Obligation, and that the value of the lands in the said township of Milton & townships adjoining

is

is from 7/2 to 2/6 ℔ acre - but that the lands in the township of Melton are considered as bad lands. —

Stanley v Poser. —

Action for breach of Covenant and damages thereon. —

The Defendant by an Indenture of apprenticeship had bound a young man as an apprentice to the Plff for a certain number of years, and became bound for the due performance of that agreement and regular service of the apprentice — Before the expiration of the Indentures the apprentice left his master's service and enlisted in His Majesty's service — Whereupon the Plaintiff brought the present action against the Defendant —

The defendant pleaded, that he lives at Montreal and Plaintiff at Quebec, and that plaintiff ought to have given him notice of the apprentice having left his service, before bringing the action — which was not done — further that plff ought to have himself used the necessary diligence to procure the discharge of the apprentice from his enlistment, as he had the power of doing it, and it would have been too late for Defendt to have procured this owing to his distant residence —

and

and therefore the defendant ought to be exonerated from the plaintiffs demand of damages.—

The plff demurred to the above plea, and prayed a day to prove his damages.—

Friday 18th Oct. 1811.—

Poirrier v. Proctor. } The Defendants exceptions were ordered to be taken from the record, the Court being of opinion that the plaintiff was not bound to give any notice to the defendant of the amendment in the return of the writ made by the order of the Court.—

Jarry v. Barber } The Court were of opinion that as the issue between the parties was an issue of fact, that Cause ought to have been fixed for the adduction of proof before a hearing on the merits.—

Stanley v. Poser } The Court were of opinion to admit the defendt to make proof of the facts by him alledged and over-ruled the demurrer raised by Plaintiff

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Martin qui tam. &c. Castonguè } The Court over-ruled the plea of prescription pleaded by the Defendant, being of opinion that the Statute

Statute of limitations respecting penal actions in England was not in force in this province — Penal actions were different from Criminal actions - Atcheson v. Everett - Cowper - This action was for the recovery of a civil right, and therefore must be regulated by the antient laws of the Country in regard to Civil rights, which did not admit the prescription pleaded by the defendant. —

Venant St Germain
v.
Jeanne Hervieux
Vve Sanguinet. —

Action for arrears of interest of Dower. —

The plaintiff stated, that on the 10 Febr. 1769, one François Careau was appointed tutor to the plaintiff and the other children of the late Bernardin Lemer St Germain, in the lieu and place of Charles Lemer St Germain their uncle - That the said tutor having discussed the property of the said Charles Lemer St Germain, a Distribution thereof was made under a Judgment of the Court of Common pleas of the 6.th Augt. 1771, by which it was ordered that the late Simon Sanguinet, husband of the defendant, who had become the purchaser of a certain lot of ground and house belonging to the said

said Charles Lemer St Germain, should keep and retain in his hands, the sum of £150.— being the amount of his, the said St Germain's wife's dower, until the same should take effect and become due, and in the mean time that the said S. Sanguinet should pay the interest upon the said sum of money yearly to the said Franc Careau as tutor as aforesaid.— That the said late Simon Sanguinet in and by his marriage contract with the said defendant, did give and grant to her the usufructuary enjoyment of the aforesaid lot of ground and house during her life time.— That the said defendt continued in the possession of the said house and lot of ground from and after the decease of the said late Simon Sanguinet which happened on the 18. March 1790, until the 1st day of May 1804, when the said defendant sold her usufructuary right aforesaid to one S. Gerrard, who then entered upon the premises, and who became bound thence forward to pay the interest of the said sum of £150. she the said Defendt promising to acquit and discharge all arrears thereof up to that period and to guarantee the said purchaser from all demands by reason thereof— That during all the

period

period aforesaid of the defendants enjoyment of the said house and lot of ground from the 18th. day of March 1790 until the first day of May 1804, she did not pay to the pltff any part of the interest of the said sum of £150, of which 1/5. was due to him under the aforesaid Judgment of distribution, and which he now claimed, amounting to £

The Defendant by her plea, stated, that as Douaire en usufruit, of the lot of ground and house in question, she is not bound to pay the arrears of the interest of the aforesaid principal sum of money personally, the payment of the said interest not being a charge réel on the premises, nor can the plaintiff have any other them an hypothecary action against for the same. — That the plaintiff can be entitled to his demand aforesaid during the life time of the said Charles Lemer St Germain only, as the principal sum of money at his deccase becomes the property of his children as representing their mother — therefore the pltff ought to shew, that during the time the said interest was demanded, the said Charles Lemer St Germain was alive. — alledging however that the

said

said Charles Lemer St Germain died in France about the year 1791 — Finally offers to pay the interest due to the pliff upon his giving security to refund the same in case of the death of the said St Germain. —

In June Term last the Court gave an Interlocutor admitting the parties to make proof on the facts by them alledged — under this Interlocutor no proof whatever was adduced by either party —

It was now contended by the Defendant, that the plaintiffs right of action rested upon a condition viz. the life of Charles St Germain, and it was therefore his duty to shew that he was alive at the time of his demand, the principle being that when a right of action depends upon a condition, that condition must be proved — Poth — Constit. Rente. N° 257. —

For the pliff it was alledged, that the said Ch. St Germain being alive when the burden was imposed, and to be continued in favor of the pliff until his death, it was the duty of the defendant to have proved the death of the said Ch. St Germain, in order to exonerate herself from the plaintiffs demand — the principle being that who ever alledges the death of a person must prove it —

This day the Court gave Judgment by which they maintained the plaintiff's action, being of opinion that the demand in question was a charge reel upon the premises and bound the person in possession to the payment thereof — And as to the death of Charles St Germain they were of opinion that the defendant who alledged it ought to have proved it, otherwise he must be presumed to be still alive —

Saturday 19th Octr 1811.—

Beaujeu v. Delisle.—

The defendants father sold a certain lot of land to him situated within the plaintiffs Seigniory in consideration of a sum of one thousand livres to be paid in certain articles of rente viagère to the defendants father, estimated at the annual value of 350 livres — The plaintiff by his action demanded lods et ventes upon the said sale, as well for the thousand livres, as upon the principal of the aforesaid rente viagere, contending that these sums formed the real consideration of the Sale — That a Sale of real property from father to son bears lods & ventes. Poth. Fiefs. p. 152. and that the real sum paid, or stipulated to be paid must regulate those lods & ventes — Prud. liv. 3. ch. 5. —

For the defendant it was contended that the act in question, was not an act of Sale, but a donation by the father to the son in consideration of a pension viagere in which case no lods & ventes were due — Prud. liv. 3. ch. 37. Lacombe. vo Lods & Ventes — p. 442. 444. — Pothier Fiefs. part. 2. ch. 1. p. 58. — Ferriere. tom. 1. p. 223. No 4. — Denizart. vo Lods & Ventes No 86. & 98 — Repertre de Jurisp. vo Lods & Ventes. §. 8. — Jugt in case Rolland Exer. v. Bellanger. Febr 1808. —

For the plaintiff it was answered that the authorities cited by the defendant were applicable to the cases of Donation only made by a father to a Son - here the deed in question was not a donation, but a deed of Sale - and the rente stipulated to be paid being larger than the 1000#, the Seignior was entitled to his lods & ventes thereon. —

The Court were of opinion that the deed in question could be considered only as a deed of Sale for one thousand livres, upon which sum the plaintiff was entitled to his lods & ventes - as to what was stipulated to be given beyond this, it could be considered only between father and Son as a pure donation and therefore subject to no lods & ventes. —

Cartier. —
vs
Cornier pere
& Cornier fils
& Guerout Intervs

Entered by mistake - the Cause having been adjudged on the 20th June last —

Poutré dal
vs
Barré

The Court were of opinion, that as the plaintiffs had obtained a Judgment against Berthiaume and entered into a transaction with him by which they gave up the land to him for a certain consideration, they could not proceed against any

other

other tiers detenteur by another action, until they had made a legal discussion of the property against which they had commenced a prosecution —— action dismissed. —

Peltier ... v. Morraye }

The Court were of opinion, that the fact of fixing and planting boundary marks by the mutual consent of the parties and the respective possession and enjoyment of the parties up to that boundary mark for the space of twenty years was sufficiently proved by the witnesses of the Defend who were competent to make proof of those facts, and therefore that the boundary marks so planted and existing ought to serve as the line of division between the lands of the parties — It was therefore ordered that the line in which those boundary marks had been planted should be verified and ascertained by a land Surveyor, who should make his report thereon, but that the plaintiffs action for settling new boundary marks should be dismissed. —

Paquet & al
vs
Viau. —

The Court were of opinion that the Don mutuel, made between the defendant and her late husband during their marriage was null and void in law by reason of its comprehending therein the property which the parties could not give, and their giving a greater estate in the property which they had a right to give by that act, than was by law allowed — That the don mutuel, was therefore wholly void. and could not be maintained in any shape, nor be reduced to what the parties had a right to give by the said act — and the Defendant was therefore adjudged to render an account to the plaintiffs of the whole of the property and estate she held under the said don mutuel. —

See. Denizart v°. Don Mutuel. §. 3. N°. 5. —
Rep°. de Jurisp. v°. Don Mutuel. p. 4. page 152. —
2. Bourjon. tit. 7. part. 2. ch. 1. p 251. —

Gaspé, vve Bailly — vs Brunelle

The court were of opinion, that the discussion offered to be proved by the plaintiff and the papers filed in support thereof, were both irregular and insufficient. — It was irregular, because, being a fact which occurred previous to the institution of this action, it ought to have been stated in the declaration so as to give the defendt the means of answering thereto — this also seemed the more necessary from the nature of the defendants plea, who objected to the right of action for want of this discussion — but this kind of discussion coming in after the Interlocutor made by the Court the defendant is precluded from any answer thereto except made ore tenus — That even if regularly made and proved, the discussion in question was insufficient, because it did not shew the existence of a debt against the person alledged to be the principal debtor, on the contrary it appeared that the pltff had no right of action against the principal debtor and consequently none against the Caution — The action was therefore dismissed. —