February Term 1812.—

Saturday 1st Febry 1812.

Mowatt vs Swan.— The plaintiff moved to be permitted to strike out a certain indorsment upon a bill of exchange filed by him in this Cause, upon which his action is instituted.—

Stuart for Defdt objected, that from the moment an exhibit is filed in the Cause it is considered as a part of the record and cannot therefore be defaced or altered, nor ought a party to be permitted to alter the nature or purport of any exhibit as it may prejudice the rights of his adversary.—

By the Court— The plaintiff is entitled to strike out any indorsment he pleases on the bill, even at the trial of the Cause— mo. granted.—

Monday 3. February 1812.—

Dumas, vue
Generay
v.
Burton.—

The Sol. Genl for the defendant objected to the sufficiency of the service of the process, as being left at the last domicile of the defendant, — contending that such service is insufficient, and therefore moved that the process should be quashed

Stuart for Pltff. Service at the last domicil of the Defendant is regular and sufficient service of the process it being warranted by the Code Civil admitted and practised upon this Country, and recognized by the Judgments of this Court. —

Sol. Genl There can be no other service of process than that directed by the Ordinance of 1785. which in this respect is a repeal of the Code Civil, and which directs that the process must be served at the actual domicil of the party or to himself personally.

By the Court— The Court do not consider the Ordinance of 1785 as repealing the Code Civil, but only as regulating the service of process in cases not provided by the Code Civil— Service of process at the last domicil of a defendt had always been recognized as sufficient in this Court — see Mc. Clement v. Patterson. 8t. Ap. 1811. —

Mure & Joliffe
v
Mears & als

Su 12 Oct. 1811.—

The Court were of opinion that although the plffs might bring their action for the penalty in case of the non-performance by the defendants of their covenants with the plaintiffs, yet they were not entitled to recover that penalty, nor any more, than what should appear to be the damages sustained by them by such non-performance — That in the present case the Defendants were in default, and had not made out any part of the justification they had pleaded, — but as no proof had been given on either side as to the nature of the damages sustained by the plaintiffs, the Court were of opinion to admit the parties to make proof of those damages before giving judgment —

I concurred in this opinion, but not upon the principle adopted by the Court — I adopt the principles laid down by M. Pothier respecting penal obligations, according to which in the strictness of law the plaintiffs were entitled to their judgment, as the parties had already gone into the proof of all such facts which they considered material — It is laid down by Pothier, that the penalty stands in lieu of damages — "cette peine est stipulée dans l'intention de dedommager "le Créancier de l'inexecution de l'obligation principale — elle est par "conseqent

"consequent compensatoire des dommages et interets qu'il souffre de —
"l'inexecution de l'obligation principale." Obl. nº 342. Agreeable
to this principle the penalty must be considered as the —
damages to which the party is entitled upon proof of
the breach or non performance of the Contract by the
Defendant — in strict law it would be so adjudged —
but again it is said, "la peine stipulée en cas d'inexecution d'une
"obligation, peut, lorsqu'elle est excessive, etre reduite est modérée par le Juge".
Ib. nº 345 — now it must be the interest of the Defendants
to shew that the penalty is excessive, and if they claim
that the penalty should be reduced to the real damage
sustained by the plaintiffs, they ought to have shewn by
their proofs they adduced what that damage was, not
having done this, the presumption must be, that the
penalty demanded does not exceed the damage — But
there are circumstances in the Case upon which I am
induced to concurr with the Court in admitting the
parties to make proof of the damages, not so much with
a view of assisting the plaintiffs to make out their case
as to give the defendants an opportunity of shewing that
the plaintiffs have not been injured to the extent they
demand — It is evident the Defendants went upon
the presumption that the action for the penalty could
not be supported — From the proof made in the

Cause

cause it appeared the defendants had sustained a very serious loss, which operated in retarding the fulfillment of their Contract, by the breaking down of their mill-dam and loss of a considerable quantity of timber — this, added to the circumstance of the action for the penalty being of the first impression, was sufficient inducements for a Court of Equity to admit the parties to a further proof of the damages sustained by the plaintiffs, in order thereby that the penalty might be moderated down to the level of the said damages —

Daly. v Walton } The plaintiff moved to examine the defendant upon faits et articles, having reserved that right on the day appointed for the enquête by witnesses during the last vacation. —

Ross for Dfdt. The plaintiff did not obtain a day to be fixed for the examination of the defendant, which is requisite under the rules of practice to entitle a party to this benefit. —

Stuart for Pltff, contended that to fix a day in vacation is nugatory, inasmuchas the Judges cannot then make any order compulsory on the defendant for his attendance and examination, it being always necessary

to

to apply to the Court in term time to obtain such order— and it is therefore evident that the rule of practice in question as to fixing a day for the examination of the party was applicable only to the sitting of the Court in Term —

The Court were of opinion with the plaintiff and therefore granted the motion. —

Colburn & Gill
v
Adams. —

The Court held the opinion that the defendant was entitled to the benefit of the law of Sett-off as passed in the State of Vermont where the note was made, but considered that the offers of compromise made by the defendant to the plaintiffs as a sufficient acknowledgment of the debt to them so as to preclude him from making proof of paymt to Meriam the payee, and therefore gave Judgment for the plaintiffs. —

I was of a different opinion, and thought that the offer of compromise made by the Defendt did not preclude him from proving payment of the debt — that no acknowledgment of the defendant ought to be taken against him so strongly as to

prevent

prevent such proof, unless he had thereby induced the plaintiffs to take the note upon the strength and faith of his owing the amount to the payee, which was not the case — The acknowledgment of the debt arising from the above offer of compromise would have been sufficient take the case out of the law of prescription had the defendant availed himself thereof, but there was a wide distinction between the plea of prescription and of payment — the one is founded merely upon a presumption of law that the debt has been paid which is destroyed by a very slight acknowledgment of the debt — the other rests upon the matter of fact to be ascertained by legal proof, and when this can be verified by receipts under the hand of the Creditor, as in the present case, all verbal acknowledgments to the Contrary must vanish, as weak and ill-founded testimony of the existence of the debt. — There may be inducements for a man to offer a compromise, but there can be no reason why he should be held to pay a second time a debt which he shews to have already satisfied. — I was also of opinion that the evidence given by the plaintiffs of the offer of compromise by the defendant, was not admissible

inasmuchas

inasmuchas there was no Count or assumpsit laid in the declaration to which it could apply — The note in question is dated the 5th Augt. 1805, and the assumpsit of the defendant thereon is laid on the same day — the indorsement to the plaintiffs is stated to be on the 10th Septr. 1810 and the consequent liability of the Defendant to pay the note to the plaintiffs under his aforesaid assumpsit — the offers of compromise by the defendant appear to have been made in August 1811 — now proof of such offers, is not only variant from the assumpsit of the defendant as laid in the declaration, but so long subsequent to it as to be wholly inapplicable to the demand — Nothing could have supported this offer of compromise, but a Count in the declaration raising an assumpsit thereon to the plaintiffs as Indorsees of the note, and so laid, as to comprehend the period at which such offer was made, but this not being the Case, the testimony adduced on this point becomes irrelevant — and the action in my opinion ought to have been dismissed

Tuesday 4th Febvz 1812

Lee. —
vs
Senter
&
Dole oppt

The Opposant had put in his opposition to the Sale of a lot of land seized at the suit of the plaintiff as belonging to the defendant — at the return of the writ of execution the plaintiff ~~obtained~~ moved that the Opposant should be held to give security for costs, he being an alien residing in a foreign Country

Mr Gale on behalf of the Opposant stated that the opposition had been made by the Opposant in person, since which time he had not seen him nor had any communication with him on the subject of the opposition, and that he now appeared on his behalf to claim delay until next term to give the security demanded being convinced of the justice of his claim, —

This was opposed by Mr. Ogden for the pltff

By the Court — The rule must be binding upon the Opposant in this Case as in every other where Security for Costs is requisite — the neglect of the Opposant to attend to his interest

in

in following up the opposition he had made can be no excuse, nor cause for granting delay to another day — Motion for the Security of Costs granted as demanded. —

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Burton. vs Phelps. & Idles & Co. — Interv.

The Plaintiff moved yesterday that the Intervening parties, Merchants in London should be held to produce and fyle a power of attorney warranting their Intervention in this Cause in default thereof that the Same Should be dismissed —

Stuart for the Intervening party objected to the motion as the rules of practice do not require such power of attorney from an Intervening party, as it would often be impracticable for an Intervening party to give such power —

The plaintiff referred to sec. 18. art. 5. by which the proceedings on Interventions are put on the same footing with original actions as to the mode and manner of prosecuting them —

The

The Court said they would not construe the rule so strictly as required by the plaintiff, as the rule referred to does not expressly require any power of attorney, without which the Court could not dismiss the Intervention — motion rejected —

Wilson et al
v
Peaslie et al's

Issue was joined in this Cause in October term last — The Defendants now moved that a day should be fixed for the enquête by witnesses during the present term — It was objected on the part of the plaintiffs that agreeable to the rules of practice, Sec. 27. par. 3. when a Cause is brought to issue during the term, the examination of witnesses must be had in vacation and not during the Term. —

Sol. Gen.l for Defend.s said the above rule was meant to apply to plaintiffs who were negligent in prosecuting their suits, but not to Defendants who wished to bring the Cause forward —

The Court considered the rule as applying equally to Defendants as to plaintiffs, as either

either of the parties might have applied last Term for fixing the enquête in the last vacation — motion rejected. —

The King v Talon. — } The Defendant obtained a rule upon the Sol. Genl to shew cause why the writ of Summons in this Cause should not be quashed by reason of its being in the French language

In support of this rule, Mr Stuart for the Defendt stated that the Ordinance of 1785 directing the writ of Summons to be in the language of the defendant had been repealed by the provincial Stat. 41 Geo. 3. ch. and as the distinction of language in this respect had been removed, every writ issuing out of this Court ought to be in english as being the language of the Sovereign. —

The Sol. Genl contended that notwithstanding the repeal of the Ordinance of 1785, the French language must be received in conducting legal proceedings, it being recognized by the law of the land, and by the practice of the Courts in this Country since the Conquest thereof has been in constant use —

By

By the Court — The French language has been used by His Majesty in his communications to His Subjects in this Province, as well in his executive as in his legislative capacity — and been recognized as the legal means of communication to His Canadian Subjects — Courts of Justice have at all times used this language in their writs & processes as in their other proceedings, as well before as since the Ordr of 1785 — It is for the benefit of the Subject that this was done, and the defendant cannot be permitted to say that he will not be sued in the language of this Country — Rule discharged —

Thursday 6th Febry. 1812

Chenet v. Cerat. —

The Defendant moved to quash the plaintiffs Writ and declaration, because, the plaintiff stated himself to reside in the parish of whereas at the time of suing out the said writ, he lived at the parish of , and because in the declaration aforesaid the plaintiff stiles himself a voyageur, whereas at the time of suing out the writ aforesaid the said plaintiff was not a voyageur, but a farmer —

Vigé for the plaintiff answered, this is no cause of exception even if true, nor can the writ and declaration of the plaintiff be quashed by reason thereof — The motion is made to gain delay, as in the Contract between the parties upon which the action is founded the plaintiff is stated to be of the parish of and a voyageur. —

The Court considered the exception of a nature altogether frivolous, and rejected it, with 20/ costs to the plaintiff. —

Campbell v Mathurin and Mathurin v Campbell

Papineau of counsel for Mathurin in these two causes, moved, that as they were both actions for defamatory words nearly of the same nature and spoken nearly at the same time, that the actions should be joined and tried by the same jury. —

Stuart for Campbell — The actions are not of a nature to be joined, being for words spoken at different and distant periods — see Tidd's prac. 532. —

The Court were of opinion, that as the words laid in the two declarations are charged to have been spoken by the respective defendants at days and times variant from each other, the actions ought not to be joined, but each party allowed to pursue his course under his separate action —

Grant v Taylor.

Monday 10th Febry. 1812

Leclaire dux
v
Desgranges

It appeared that the writ of Summons in this cause was served an hour and a half short of the time required by the rules of practice, the Court however dismissed the action being of opinion that they could not depart from the strictness of the rule in this Case. —

Blackwood
& al.
v
McLaren
& al.

One Austin Cuvillier prosecuted an action en revendication against the defendant in this Court in Term last for a certain quantity of Staves in the possession of the said Defendant McLaren and the Staves having been seized, the defendant applied to the Judges in vacation and obtained an order upon the Sheriff for the delivery of the staves to him the Sd. defendant upon his giving security that the same should be forth coming when required to abide the order of the Court — On the day of the staves in question were adjudged to be the property of the said Cuvillier and it was ordered that they should be restored to him.

This

This not having been done, the plaintiffs as assignees of the estate and effects of the said Cuvillier now bring their action against the said M'Laren and the persons who joined with him in the Security to the Sheriff, upon the bond or Security so given to the said Sheriff and assigned to the plaintiffs, for the value of the said Staves.— The plaintiffs now moved that the Cause should be tried by Jury, as being a mercantile Case — This was opposed by the Defendants — The Court were of opinion, that in no point of view could the case be considered as mercantile, as the original action against M'Laren was not of a mercantile nature, being a question merely regarding the property in the Staves, in an action of trover & Conversion — and the bond given to the Sheriff as a security under the order of the Judge was not to be considered as mercantile, nor a transaction between mercantile characters — Motion rejected —

Tuesday. 18th. Febry. 1812

Ademar
v.
Corrigal

The Defendant upon application to the Judges in vacation obtained a Commission rogatoire for the examination of witnesses in the Hudson's Bay territory, returnable the first day of October next — The plaintiff now moved to appoint a day for the trial of the cause in this term, alledging that no consideration ought to be had to the Commission rogatoire so obtained by the Defendt in the vacation, as an unnecessary delay would thereby be incurred —

Stuart for Deft — The Com. Rog. was granted to the Defendt upon due proof that he had a legal right to the testimony of the witnesses in question, and the Judges in vacation had a right to grant such commission — and it is improper to bring the question for re-consideration before the Court. —

The Court were of opinion that the Commission Rogatoire having been legally granted to the Defendant returnable in October next the plaintiff's motion to fix the Cause for trial in this term was irregular, and rejected the same —

Marié
vr
Dame.—

This was an action for the recovery of rent of a farm leased by the plaintiff to the Defendt and for securing whereof the plaintiff had sued out a Saisie Gagerie against the grain and produce of the farm which ~~was~~ were seized in the hands of the Defendant.—

The Defendant having moved to set aside the Saisie Gagerie as an illegal proceeding, he was allowed by consent of the plaintiff to bring the point before the Court by plea of exception.—

On the 8th instant, the plaintiff moved to fix the cause for hearing ex parte, as the defendant had filed no plea to the action.—

Vigé for Defendt answered, that he had pleaded to the irregularity of the Saisie Gagerie in this Cause, which plea must be previously determined before he can be held to plead to the action.—

Bedard for Pltff. the regularity of the Saisie Gagerie is but an incident in the Cause, and whether the same be admitted or rejected the plaintiffs right of action against the defendant would still subsist, and to which the defendant ought also to have pleaded

By the Court— The Defendant having been admitted to plead an exception à la forme to the writ of Saisie Gagerie sued out by the Pltff. that exception

must

must be first decided before the defendant can be held to plead to the merits, as under no rules of practice is a Defendant bound to file a double sett of pleadings in a cause at the same time— Motion rejected. —

The parties were heard yesterday upon the defendants exception to the legality of the Saisie Gagerie. — It was urged on the part of the Defendant that Saisie Gagerie can be sued out only for house rent under 161st art. of the Custom, but that the 171st art. the only one which makes mention of the droit de ferme, gives no Saisie gagerie to the proprietor, but only a droit de Suite upon the produce of the farm in case the property of the fermier be taken in execution, or conveyed off the farm — this is not pretended in the present case — That question has been decided in several cases already by this Court — cites. Jones v. Finchley. 1796 — Laurier. vs

The Plaintiff answers, that the 171st art. of the Custom gives the same privilege and preference to the proprietor upon the produce of the farm for the payment of his rent as the 161st art. gives to the proprietor upon the household furniture of the tenant for the payment of his rent — and consequently he ought to have the same means to secure that privilege in the one case as in the other. — Pothi. Louage. 228 — and 257. —

The Court were of opinion that the Saisie Gagerie had been illegally sued out by the plaintiff, as the proprietor was not entitled thereto for securing the rent of his farm in the same manner as the Saisie Gagerie for house rent — Saisie Gagerie quashed with Costs. —

Wednesday 12th. Febv. 1812

Belanger vs Desforges

Upon an exception taken by the defendant to the declaration, the plaintiff was allowed to amend upon payment of Costs. –

The plaintiff now moved that the cause should be fixed for the examination of witnesses ex parte, as the Defendant had not filed a plea conformably to the rules of practice, since the day on which he had given him notice of the amendment of the declaration. –

Sullivan for Defendt. states, that he received notice from the plaintiff, that "he had made the amendment required" – which is not sufficient, the Plaintiff ought to serve an amended copy of the declaration upon the Defendant that he may see what amendment has been made, and be enabled to plead thereto. –

The Court were of opinion that where a plaintiff is allowed to amend his declaration, he ought to serve a copy of the same when amended upon the Defendant, before the latter can be held to plead

Thursday 13th. Febry 1812

Schmidt. vs. Few, et al.

Mr Ross for the plaintiff produced to the Court a Judgment of the Court of Appeals in this Cause dated in 1803, directing that the proceedings should be by this Court transmitted to the Inferior Court where the Cause had originated, and where it was directed that all further proceedings in the Cause should be had, and condemning the Defendant to pay Costs - and moved, that the record should accordingly be transmitted to the Inferior Court, and that the plaintiff should have execution in this Court for the Costs adjudged to him by the Court of Appeals -

Bedard for the Defendant stated, that by the lapse of time since the Judgment in the Court of Appeals was given, it has become peri, there being a peremption in law acquired thereon - cites. Poth. Proc. Civ. 4th p. 84 -

The plaintiff answers, that the Judgment in question is not liable to the peremption, it being in some respects final against the Defendant, and as it besides directs something to be done by this Court no peremption can be admitted against it. But if such peremption had accrued as contended for - there must

must be a demand made by the party to that effect before it can be granted, and it is no objection to the proceedings of the plaintiff in this Cause that the Defendant was entitled to make such a demand — And of this opinion was the Court, and therefore granted the Plaintiffs motion see. 1. Pigeau. Proc. Civ. p. 355. 6.—

Pothier however lays it down, that if the Judgment in appeal was merely a Jugement d'instruction, it is equally liable to the peremption as any other instance in a Cause. see. Proc. Cw. p 88.—

Dom: Rex.— v. Dupéré.—

On petition for a Certiorari.—

The Court declared that a writ of Certiorari was not a writ of right, and that the party applying therefor, must state a sufficient ground of complaint to support the application —

see. 5. T. R. 251.— R. v Bass.—
2. T. R. 89.— R. v Eaton.—
2 Doug. 749. Tuck. v Langton.—

Monday 17th Febry. 1812

Burton vs Brisbin

The Court were of opinion that where an application was made by a defendant to submit the matters in contest to the serment decisoire of the plaintiff with a view to protract the Cause, the same ought not to be granted, and held that the serment decisoire ought to be granted upon the same principle as the faits & articles that is, sans retardation despoues & du Jugement. —

Denaud vs Beffre. — and Beffre. Oppt

The Defendant was prosecuted in an action en declaration d'hypotheque, and by judgment of the 20th of October last was adjudged to quit and abandon the land in question or in default thereof, (but without limiting any time) to pay the — amount of the plaintiffs demand — The plaintiff — signified a copy of the Judgment, and about a month afterwards, as the Defendant had made no acte de — dequerpissement, sued out execution against him for the amount of the debt and costs adjudged to the plaintiff by the said Judgment, by virtue whereof the goods and Chattels of the defendant were seized — The Defendant made an opposition à fin dannuller, and contended, that the

Judgment

Judgment was conditional and could not carry execution – and as an option was given to the Defendant to quit the land or pay the debt without specifying any time in which such option should be made, the defendant could not be held as personally bound for the payment of that debt until the Judgment had been declared executory against him – That no act done by either party in the vacation could render the Judgment executory, which at the time of rendering the same was not so – That the Judgment could be considered only as interlocutory and a day ought to be given to the defendant to give up the land and to the plaintiff to appoint a Curator to the bien degerpi. –

Lacroix for Plff – answered, that the Defendant was en demeure by the service of a copy of the Judgmt upon him, and it was his duty to have made an acte de degerpissement immediately and signified it to the plaintiff – see. Denizart. vo "Degerpissement" A month after such notification to the Defendant when according to the usual course the Plaintiff was entitled to his execution, the Defendant must be considered as having made his option to retain the land, and is now too late to be admitted to give it up.

The Court upon examination found, that the practice hitherto had been to limit a delay by the Judgment in which the tiers detenteur should be held to give up the land and in default thereof to pay the debt demanded, they therefore considered the Judgment rendered in this cause on the 20th of October last, as defective in this respect, to remedy which the Court ordered, before adjudging upon the Opposition in question, that the Defendant should be held in three days to make his option whether he will give up the land in question, failing which, he should be held and considered personally bound to the payment of the plaintiff's demand — The Defendant came into Court within the three days and made an acte de deguerpissement in the presence of the plaintiff whereupon the Court gave main levée to the Defendant upon the seizure of his effects and adjudged each party to pay his own costs, considering both in some respect in default —

Sarault
Curr. &c.
vs
England

It appearing to the Court that the persons in whose right and behalf the plaintiff prosecuted had gone to France to settle there and had been gone from Province for many years past, they

they directed that the record and proceedings should be communicated to the Sollicitor General on behalf of His Majesty, and that he should take such conclusions thereon as he should see fit by the first day of next Term.

Wednesday 19th Febry 1812

Keese &c. v Marchand &c. — A rule had been made upon the plaintiff, an alien, that he should give security for costs, this not having done the Defendant moved that the action should be dismissed, and no sufficient cause being shewn against the motion, the Court granted it.

Woolman &c. v Talon &c. — This was an action by the plaintiff in his capacity of executor to the last will and testament of the late Andrew Winkleforss, for sundry goods, wares and merchandises sold and delivered to the Defendant. The Declaration contained two Counts, One, for goods wares and merchandises sold and delivered by the late Andrew Winkleforss in his life time a merchant and trader, to the Defendant; then also a merchant — the second, for sundry goods purchased by the defendant at a Sale made by the plaintiff as Executor as aforesaid, of the goods chattels and effects of the said late Andrew Winkleforss, in order to liquidate and settle the affairs of his Succession. — The Defendant pleaded non-assumpt. to both Counts, and concluded to the Country. — The plaintiff thereupon moved that the Defendant should be held to alter the conclusions of his plea, and to conclude

to

to the Court – alledging in support of his motion, that as there was a count in the declaration which could not be tried by the Jury, and as the defendant had raised but one issue on both Counts, there ought not to be two trials thereon, and as the Court had the power to try the whole the Conclusions of the plea ought to be made accordingly For the defendant it was stated, that a plaintiff could not by joining demands of a different nature in the same declaration, some of which were triable by a Jury and others by the Court, by that means deprive the defendant of such trial by Jury where by law he was entitled thereto –

The Court were of opinion that in so far as regarded the first count in the declaration, for goods wares and merchandises sold and delivered by the late Andrew – Trinkleloss to the defendant, the plaintiff should take nothing by his motion, considering the defendant as entitled to a trial by a Jury thereon – but as to the goods effects purchased by the defendant at the Sale of the effects of the said late A. Trinkleloss, made by the pltff as Executor as aforesaid, the Court were of opinion, that the defendant was not entitled to a trial by Jury, and in so far as regarded that Count in the declaration, directed, that the defendt should conclude to a trial by the Court. —

Lacombe et al. v. Quintal et al.

This was an action instituted against the Defts as heirs of the late Quintal, for an account of the Community that subsisted between him and his late wife, whose heirs the Pltffs are.

By the marriage contract between the said late Quintal and his wife, there was a donation mutuelle giving to the survivor the enjoyment during life of all the property of the Community, upon his caution juratoire — Quintal survived, and enjoyed the property of the Community under the said donation mutuelle, but without having made any Inventory thereof. — Upon his decease, the defendants as his heirs, were prosecuted by the plaintiffs to render an account of the said Community and to pay and restore to them the one half thereof — This account having been rendered, the only question now before the Court was, whether the said late Quintal had become legally seized of the whole of the property of the said community, from and after the death of his said wife, under the said donation mutuelle in such manner as to render les fruits siens, inasmuchas he had never made any Inventory thereof, nor given his caution juratoire for the due preservation thereof — and further as he had never made any legal demand of the heirs of his said late wife to obtain delivrance of the property given under the said donation mutuelle.

Bedard for the plaintiffs contended, that without an

Inventory

Inventory and Caution Juratoire the late Quintal did not make les fruits siens - That the legal obligation imposed upon the survivor to make an Inventory of the property of the Community, had not been dispensed with by the marriage Contract, nor could it be dispensed with under any stipulation between the Contracting parties, as it was the right of the heir, where he succeeded to property to have an Inventory and account thereof from the person in whose possession it is - cites Cr. Com. de Ferriere, 3. vol. on art. 285. p. 1652. nº 2. 4 - That the obligation of giving a Caution juratoire could not be complied with, without an Inventory made of the property to which that Caution can apply cites. Dic. Ferriere. vº Caution Juratoire - and according to the principles of law laid down by Ferr. in his Comment. on 284. art. the property given to the late Quintin was sujet a delivrance. -

Beaubien for Defendts There is a wide distinction between the donation mutuelle made by the marriage Contract, and the Don mutuel made during the marriage - The first may be made in any manner and upon any conditions the parties please, as they have at that time the free disposal of their property - the second cannot be made but under the restrictions

imposed

imposed by law- Ferriere treats only of the latter in his commentary on the 284th art. of the Custom, but does not mark the distinctions between the Don mutuel, and Donation mutuelle, one of which is, that the property given by the donation mutuelle is not sujet à delivrance the donee being seized thereof de plein droit, from and after the decease of the donor - cites. Poth. Don. N° 199.- Rep.re de Jurisp. vo Donation.- The late Quintin therefore being in possession of all the property of the Community at the time of the decease of his late wife, was under no obligation to demand of the heirs of his late wife the delivery of any part of that property in order to entitle him to the fruits thereof.- That the plaintiffs as heirs of the late having permitted the late Quintal to enjoy all the property of the said Community during his life time, without having ever demanded of him an Inventory of that property or any Caution juratoire thereon, they must impute it to their own laches, if no such Inventory was made or Caution given, these not being by the stipulation of the parties made a condition precedent to that jouissance de plein droit with which the said Quintin became vested by law upon the death of his wife, the only Inventory which can be therefore demanded by the said plaintiffs is that which is now given, being the

the State of the said Community as it stood at the time of the decease of the said Quintal.—

The Court, considered the law to be as stated by the Defendts, being of opinion that the Donataire mutuel by marriage Contract was legal seized of the property given from and after the death of the Donateur, and that no demand for the delivery was necessary(a). The account rendered by the Defendants, and reported upon by the practiciens was therefore confirmed.—

(a) See. 2. Pigeau. Proc. Civ. au mot, "Successions". p. 379. & 384
Rep. de Jur. vo "Don mutuel" §. 5. p. 156. Note (2.)
Pothier. Donations. No. 199. & 205.—
=
Denizart. vo "Donation par contrat de mariage"
Seems to incline to a different opinion — §. 5. No. 7.—
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Thursday 20th Febry. 1812

Starke.. v Odell..

The Plaintiff had obtained a Judgment in this Court in June Term last against the Defendant and now prosecuted an action thereon under an allegation that the Defendant was about to leave the province, in consequence of which he had been arrested upon a Capias ad respm. — Upon the defendants motion to quash the writ from the insufficiency of the affidavit upon which it had been granted, the Court admitted the parties to proof thereon, and it now appearing that the affidavit had been made without any sufficient ground, the Court by its Judgment quashed the writ, and dismissed the plaintiffs action. and upon its being objected, that although the writ of Capias might be quashed, yet that was no ground why the plaintiffs action should be dismissed, it was held by the Court, that the sole ground of the action resting upon the allegation that the Defendant was immediately about to leave the province, whereby the plaintiff might lose her whole debt without such writ of Capias, the Court by determining that such ground

ground was without foundation, necessarily determined the merits of the Case — for as the right of the plaintiff was founded upon a Judgment of this Court, there could be no Second Judgment given thereon for the plaintiff, where the special circumstances, under which it could have been given, had failed —

Dumas. Jut. & ux. v. Burton. —

Action of debt upon an obligation granted by the Defendant to the late Lewis Generay the plaintiff's husband, the recovery whereof was now prosecuted by the plaintiff his widow, in her capacity of Tutrix to her minor child, and in her own right as legatee of her said late husband. —

The proof made by the plaintiff was sufficient in every point, except the Certificate of the marriage between her and her late husband — It was in following form —

Lewis Generay, Capitaine, Bachelor, of this parish, and Agathe Dumas, Spinster, of the same parish, were married in this place (by licence) this twelfth day of March in the year one thousand seven hundred and ninety two —

by me David Francis de Montmolin
Ministre

This marriage was solemnized between us } L. Generay
Agathe Dumas

In the presence of — } L. Dumas, Merchant à Dubu
Pierre Dumas, frere
Mich.l Cornuel - Merchant
A. Dumas, oncle —

A

A true copy from the rev^d. David Fran^s de Montmollin's register of the parish of Quebec.

Quebec 14^th. Janv. 1812

S. J. Mountain
Officiating minister

The above extract being made from a Register evidently within the provision of the Stat. 35^t. Geo. 3. ch. 4. Sec. 11. but not being authenticated in the manner required by that law, it was a question with the Court, whether ex debito justitiæ they were bound to dismiss the plaintiffs action after having been heard upon the merits, from a defect in the proof; or whether they could legally exercise a discretionary power in ordering further proof to be made: this power they considered themselves to possess and under the circumstances of the case thought proper to apply it to this Cause - by admitting the plaintiff to make further proof of her marriage. —

Quevillon
v
Quevillon

This was an action stated to be for the recovery of a sum of 800 livres due to the plaintiff upon an obligation made by the father and mother of the plaintiff, the payment of which was claimed from the Defendant as their residuary legatee. —

The

The Obligation produced by the plaintiff in support of his demand was in the following words —

"Furent présents Jean Bte Quevillon dit sa femme &c &c
"lesquels considerant la perte considerable que Jean Maurice
"Quevillon leurs fils auroit essuyé en un certain procés
"mû ci devant entre lui dit Jean Baptiste Quevillon pere,
"son dit fils, et Amable christin dit St Amour, et que ledt
"Jean Bte Quevillon pere et son epouse voulant recompenser
"ledit Jean Maurice Quevillon leurs fils d'une perte
"aussi consequente et aussi desavantageuse pour leur dit fils
"et que l'affection paternelle qu'ils lui portent, les contraindroient
"à se charger d'une telle perte, laquelle se monteroit tant
"pour frais que pour autres peines à une somme de huit
"cents francs — Ont en consequence fait la declaration —
"suivante, qu'ils entendent être executée suivant sa forme
"et teneur, c'est à savoir, que les dits Jean Bte Quevillon
"et son epouse veulent et consentent, que trois mois apres
"leur décés, il soit prélevée par ledit Jean Maurice Quevillon
"sur leur succession avant tout partage fait et dressé une
"pareille somme de huit Cent francs, sans que cela puisse
"nuire ni prejudicier à la part et portion qu'il pourra prétendre
"d'ailleurs dans ladite Succession de ses dits pere & mere." &c &c —

Papineau for Defendant pleaded an exception en droit to the plaintiffs action, and contended, 1st That the above act could not be considered as an obligation establishing a debt in favor of the plaintiff, — that all obligations

were

were founded upon Contrats or quasi-contrats, delits or quasi-delits - Poth. Obl. Nº 1. but that the above act was not founded upon any of these Causes - It was not a Contrat because it requires the consent of two or more persons to form it - Nº 4 - nor was it a quasi-contrat, as there did not appear upon the face of it any debt which by law or natural Justice was due to the plaintiff - It could therefore be considered merely as an acte de pollicitation, which is a promise without acceptation - but there is no such thing known in the law as a pollicitation obligatoire, there being but two ways by which a man can dispose of his property a titre gratuit, namely, by Donation entre vifs, and Testament see Ordce 1731. art. 3. - 2dly The above act cannot be considered as a Donation, because it is essential for the validity thereof that it should be accepted by the Donataire see. Argou. tom. 1. liv. 2. ch. 11. p. 264. nor can it be considered as a testament, not being clothed with the necessary formality to constitute such an act - It must therefore be considered without any legal effect, and not being obligatory upon the said Jean Bte Duvillon, it ought not to bind his residuary legatee - The plaintiff by his replication has advanced as a principle of law, that by the institution of the present action, he must be considered as having accepted the above act, and thereby rendered it binding upon the defendant - but such acceptation, even if valid, has been made too

late

late, as the said late Jean Bte Duevillon, subsequent to the making of the aforesaid act, had in due form made and published his last will and testament, whereby he gave to the Plaintiff and to each of his other children a sum of 25. livres, without any mention or reference to the above act, and all the rest and residue of his property he left to the Defdt— which said last will and testament must be considered as a new and different disposition by the said late Jean Baptiste Duevillon, of his property from that contained in the aforesaid act, and shewed that he had changed his intentions with regard to that act, and therefore the — acceptation of the Plaintiff by the present action was too late.—

Lacroix for Pltff. The act must be considered as an obligation contracted by the late Jean Bte Duevillon in favor of the Pltff and the legal consideration to support it was the charges, and trouble to which the pltff had been put in and about a suit in which the said late Jean Bte Duevillon appears to have been a party as well as the pltff, and therefore must have been bound for a part if not the whole of the said expences, and the obligation must therefore be presumed to have been made for what the said Jean Bte Duevillon justly owed in this respect to the plaintiff— no acceptation of such an obligation was necessary, or if it were, it was sufficiently made by the institution of the present action, as no express revocation had been made of the aforesaid obligation by the said late Jean Bte Duevillon.

The Court were of opinion that the aforesaid act, carried no legal obligation upon the face of it, which entitled the Plaintiff to an action thereon – they considered it to be an act of liberality by a father to his son, and as such ought to have been clothed in legal form to give it effect – The action was therefore dismissed. –

Bellows val
vs.
Henshaw
&
Spalding
Opt.

The goods and effects of the Defendant having been seized and taken in execution at the suit of the plaintiffs, the Opposant made an opposition to the sale thereof, and stated, that he had leased a farm to the defendant for the space of four years, of which only six months had yet elapsed, and that the goods and effects seized being upon the said farm the opposant had a privilege thereon not only for the rent become due, but for all the clauses and undertakings in the said lease for the term thereof not yet expired. – That the plaintiffs cannot be allowed to sell the said goods and effects but upon condition of their giving security to the opposant for the obligations of the Defendant during the whole term of the said lease – cites. Fer. Gr. com. art. 171. p. 1271. Nº 17. 18. 19. –
Denizart. vº Loyers. – Nº 11. –
Lacombe – vº Bail. sec. 3. Nº 1. –

That the privilege of the proprietor extends to all the terms of the

the lease, tant-echûs qu'a echoir, where there is a lease made and executes before a notary, as in the present case cites - Fer. Gr. Com. Tom. 2. art. 171. p. 1051, & 1052. Nº 33. & 34.
Denizart. vº Loyers. — Nº 9. —
Lacombe - Rep. de Jurisp. vº Bail. sec. 3. Nº 1. —
Pothier - Louage. Nº 253. —
Argou. vº Louage. ch. 27. liv. 3. —
Encyclop. de Jurisp. vert. Bail. sec. 8. —

Rolland for Pluff - The priviledge contended for by the opposant cannot apply in respect to the term of the lease not yet expired - it would be countenancing a fraud if a debtor could protect his whole property by taking a lease for a long term of years from a proprietor, either by connivance with him or otherwise. —

The Court considered that there was a distinction to be made between the priviledge of a proprietor of a house, and that of a proprietor of a farm, upon the furniture and effects of their respective tenants — The proprietor of a house generally had no other security for his rent but the priviledge which the law gave him upon the goods and furniture of his tenant, the law therefore extended this priviledge in such manner as to give the landlord the greatest security thereon for all the term of the lease — it even gave him a right to expelle his tenant when he did not furnish the house with sufficient moveables to —

answer

answer for the rent — But the privilege of the proprietor of a farm was different — it was not considered to attach so strongly on the goods and furniture of the tenant, as they were often of comparatively small value and not considered by law as giving that sufficient security which could have induced the proprietor to grant the lease — the great privilege of the proprietor in this case was upon the produce of the farm which accrued annually, and to which the proprietor had to look as his security for all the terms of the lease not yet expired, and not to the furniture or effects of his tenant — The authorities cited by the Opposant did not sufficiently distinguish between those privileges and they evidently applied to the case of house rent —

It was therefore ordered that the goods and effects seized should be sold, saving to the Opposant, upon the monies arising therefrom, such privilege as by law he might be entitled for the rent become due upon the said lease — the opposition being dismissed —

Webster — v Proctor & Frost

This was an action by the plaintiff as Indorsee of a bill of exchange against the Defendants as acceptors and stated to be partners in trade —

At the return of the process, Gale on behalf of the Defendant Proctor, moved that the return and process with regard to him should be quashed, in as much as the service thereof had not been

been legally made, it being stated to have been made at the last domicile of the said Proctor, whereas he never had any domicile or residence within the province — The parties were admitted to their proofs upon the motion, when the facts appeared to be, that the Defendants carried on trade together as Copartners at Montreal, until the 19th August 1811, when it was notified by an advertisement in one of the Montreal Papers that the partnership was dissolved — The date of the acceptance of the Defendts upon which the action was brought was on the 4th January 1811. — The business of the partnership was carried on by the Defendant Froste, who resided in Montreal, the Defendant Proctor lived at New York and never had been resident at Montreal — The copy of the process for Proctor was left at the house where the business of the partnership had been carried on; the copy for Froste had been served upon him personally. —

Gale for the Defendants contended that the service of the Process upon Proctor was insufficient — as he never had any domicile in Montreal, and therefore service at the last domicil was impossible — That the Counting house, where only the business of the partnership was carried on, did not constitute a domicil, unless the partners themselves also lived in that house, but the

Defendts

Defendant Proctor never having lived in that house, could have established no domicil there —

Stuart for Pltff. The action is founded on an acceptance of a bill of exchange made by the Defendants while they were partners — their Counting house must be considered their domicile for all the business of that partnership, and service of the process there upon Proctor was sufficient, as being his last legal domicil.

The Court held that the Defendants being sued upon a partnership transaction, and for which they were jointly & severally bound, the service of the process upon one of the Defendants was sufficient for the whole — Motion of Defendant was therefore rejected. See. Conn. de Jousse. on Ord^ce 1667. Tit. 2. art. 6. (note 1) — and Denizart. v^o "assignation" §7. N^o 13. —

Ayer. v Joy. —

The Plaintiff obtained Judgment in this Court in October Term 1809 against one Elias Babcock for £93. 14. 5 in consequence of certain stipulations contained in the lease made to him by the plaintiff of a certain farm. — Not having obtained satisfaction from the

the said Judgment the plaintiff brought an action against the Defendant as the, Caution, of the said Babcock, for the amount of the said Judgment and the subsequent Costs.— The Caution or security given by the Defendant, was a kind of subsidiary agreement upon the lease so made by the Plaintiff to Babcock and was in the following words — "We the Subscribers "promise and bind ourselves to fulfile the within "agreement or lease on the part of Elias Babcock, from "the 20th day of August last past, up to the end of the "lease — Witness our hands."

"Elias Babcock"
"Benja: Joy."—

The plea put in by the Defendant was, that he was not the Caution of the said Babcock — "that if he ever made or gave any security to the plaintiff in respect of the lease in question, it was made and given jointly with the said Babcock, who ought to have been sued with him."—

#and on hearing of the Cause stated further in argument

The Court did not consider the Defendant as the security or caution of Babcock in so far as to make him answerable for the whole of the plaintiffs demand, as the security in question had been entered into by the said

said Defendant jointly with Babcock, he could therefore be held to indemnify the plaintiff for his proportion only of the debt and damages demanded — That the Contract on which the Plaintiff sued being joint, ~~the plaintiff~~ he ought in strictness to have joined all the parties thereto in the action; but this not having been specially pleaded as a bar to the action, but merely stated in argument, it could not avail the Defendant — That the joining of Babcock in the action was the less necessary, as he had already had an opportunity of answering to the plaintiffs demand upon the action instituted against him as principal obligé, and what had been determined thereon with regard to him was a chose jugée — All that the Court could do, was, to prevent any injury arising to the defendant by having been sued alone, and in this respect they considered, that although the Contract was joint, yet the interest of the parties thereto being several, they could adjudge the Defendant to pay his legal proportion of the pltffs demand, which was one half — For which the Court gave Judgment with Costs. a —

Foucher
vs
Lalouette

This was an action stated to be upon an Obligation executed by the Defendant before two Notaries. It run thus - "Est comparû Sieur pierre Lalouet St. Marien "de la paroisse St Roch, Cultivateur, lequel a reconnû et — "confessé devoir bien et legitimment à Therese Foucher, fille "majeure et usant de ses droits resident en lad.e paroisse, la "somme de trois cents soixante livres ancien cours, pour "dommage Causé à ladite Therese Foucher, laquelle somme "ledit comparant a promis payer à la dite Therese Foucher, "ou ordre, ou porteur du présent, le premier du mois de "Decembre prochain, a peine de.a" — —

To this action the Defendant, pleaded, 1.st That the act or Obligation in question was null and void in law, not having been accepted or signed by the Pltff. 2.d That at the time of making the said act, the Defend.t was not indebted to the said plaintiff in any sum of money whatever, nor does it appear for what value or consideration the said act had been passed - and 3.dly That the Defendant never had or received from the plaintiff any value or consideration for the said Obligation nor did he ever cause him any hurt or damages as — therein alledged —

The

The plaintiff answered generally, that the reasons alleged by the Defendant were insufficient in law to bar the plaintiff of her action. —

The Court were of opinion that as there appeared upon the face of the act, a debt, which the Defendant acknowledged to owe to the plaintiff, no acceptation on the part of the plaintiff was necessary to have been inserted in that act to render such acknowledgment binding. — That the law enjoined the payment of a just debt, and the instituting an action on the promise to make such payment, was a sufficient acceptance thereof to bar all further claim in that behalf — In a deed of donation, where all is gratuity, and no legal debt presumed to exist, acceptation by the donee is considered to be a part of the essence of the deed and must be apparent on the face of it — but in all acts and deeds where a debt is contracted or appears to exist, the promise to pay it, is a legal consequence, and requires no acceptance — As to the other parts of the Defts plea, that he had received no value from, nor had done any damage to the plaintiff, it was of no avail against his formal acknowledgment of the debt contained in the said Obligation — if he intended to have set aside the

Obligation

Obligation, as improperly granted, he ought to have pursued a different course — Judgment for Pltff —

Dunlop &c
v
Cuvillier & Co

This was an action instituted by the plaintiff, for the balance due upon two promissory notes made by the Defendants, bearing date the 26th Sept. 1805, and amounting, with the interest thereon calculated up to 30th Sept. 1811, to £1329. 2. —

The Defendants pleaded, 1st Non assumpt. and 2dly That after the making of the said Notes, to wit, on the 14th day of October 1806, they the defendants became bankrupts, and made an assignment of all their effects and property to their Creditors of whom the plaintiff was one, for the debt now demanded and a party to the said act, or deed of assignment, whereby it appeared that the said defendants were indebted to their several creditors in a sum of £14,000 Cy. and were possessed of Credits effects and estates, real and personal to the amount of £18,000 — which by the said deed they made over to their said Creditors, upon trust, to pay the Debts of Defendts as far as same should extend — that the real Estates of the Defendants should not be sold before five years from the date of the said deed — That by the said deed the said Creditors appointed certain persons as their Trustees with power to manage the affairs of the said bankrupt estate, to collect the debts and make dividends to the said Creditors upon the principal

sums

sums due to them respectively, it being agreed, that all Interest should cease from the date of the said deed of assignment - That under and by virtue of the said deed, all the goods, chattels, debts, effects, and estates real and personal of the Defendants of which they were then possessed, or had any interest, to the amount of £19,000. became vested in the said Creditors, and have since been in the hands and possession and at the disposal of the said Trustees - That a great part of the said debts, goods and effects so assigned, has not yet been recovered - and the real property of the said defendants still remains unsold - and lastly, that all and singular the goods, effects, debts and estates so assigned, have not been in anywise accounted for by the said Trustees to the said Defendants - by reason of all which premises the Plff cannot have any action ag.st the Defend.rs -

The plaintiff, by his replication, denied the facts stated in the plea, and demurred to the law.

On the 4.th inst. the Court, after hearing the parties - determined that the plea did not contain any matter in law sufficient to bar the plaintiff's action, and as to the facts therein stated, the parties were ordered to go to the Country thereon. -

On the 12.th inst. the cause came on for trial before the Jury. - The plaintiff having produced and proved the two promissory notes, closed his proof. -

The

The defendants moved for a non-suit, inasmuch as the notes declared upon and those proved, were different.— That the notes declared upon, were stated to be payable to the plaintiff only, those proved, were of a very different nature, as they appeared to be payable to the plaintiff or to his order, — the notes declared on were not negotiable, those proved were negotiable, and it was a principle in law, that the instrument or contract declared upon, must be conformable to the proof, as a variance was fatal — here the variance was striking between the instrument declared upon and that proved, both as to its nature and legal consequence — and in this case the greatest inconvenience might arise, as the plaintiff might have another action upon the notes which have been given in evidence to support the present demand. —

The Court over-ruled the objection, being of opinion that the plaintiff was not bound to set out more of the notes declared on than was sufficient to support his action — and as there was no question respecting the negotiability of the notes it was not necessary to state it. —

The Defendants then entered upon their defence, and adduced two witnesses, one of whom was a Trustee under the above ment.d deed of assignment — they proved — that the real property of the Defendants yet remained unsold — that there were in the hands of D. Davids, one of the trustees several sums

of —

of money which he had received from the estate of the Defendants being the dividends of those Creditors who had not become parties to the deed of assignment – That the plaintiff had no share in those monies, having received all the dividends to which he was entitled out of the monies which had been recovered from the said Estate. – That the Defendants have always had the possession of all their books of acct. and of all their other property since the said deed of assignment was executed, nor have they ever rendered any account thereof either to their Creditors or to the trustees as far as the Witness Davis knew. –

It was urged on the defence. 1st That by the deed of assignment the Creditors of the Defendants were vested with all their property and that the plaintiff as one of those Creditors could not institute any action against the Defendants until the property so assigned had been discussed, as till then it was impossible to ascertain whether any, or what balance would be due to the plaintiff – and 2ly That it was a principle of law, if there had been no stipulation to this effect, that the bankrupt cannot be harassed by lawsuits, nor more demanded of him than the balance that shall appear to be due after discussion of the property assigned. – and lastly – That all interest on the plaintiff's demand must cease, it being so expressly stipulated in the deed of assignment. –

The Court charged the Jury – that although the deed of assignment gave a legal title to the Creditors in the property assigned, yet as it appeared by that deed, as well as the evidence of the witnesses, that the defendants had always remained in the possession of that property under the authority given to them

to

to recover and collect their outstanding debts, and that in fact the Creditors had never been in the possession of any part of the property assigned to them — That the objection now made by the Defendants could avail them in so far only as it had been shewn, that the plaintiff, as one of their Creditors was in the possession of property belonging to them — in proof of this the Defendants had failed, it did not even appear what the nature of the property assigned was, nor that any part thereof ever came to the hands of the plaintiff beyond the dividend which he had received in common with the other Creditors, and for this he appeared to have given credit upon the notes in question — That there was one point upon which the defendants appeared to be better founded, which was regarding the Interest on the said Notes — as it was stipulated in the said deed of assignment that the interest should cease upon the debts due to the Creditors who were parties thereto, and this stipulation being unconditional, the Court were of opinion that the Defendants were entitled to the benefit thereof, but that the pltff ought to have a verdict for the rest of his demand. —

The Counsel for the defendants claimed a right to hand to the Jury for their perusal and information in forming their verdict, the deed of Cession filed by him in the Cause, as being an authentic document upon which the defence was founded — This was resisted by the Court, but upon the plaintiff's counsel agreeing thereto, the deed was allowed to be given to the Jury —

Verdict for Pltff. £100 4 18. 9 & Costs — but without interest.

On

On the 17.th inst. The defendants moved for a new trial upon various grounds, but all comprised in these two. 1st The variance between the notes declared on and those given in evidence - 2.d The assignment of the defendants property to their creditors under the deed of Cession. -

On the first point, the defendants stated, that there must be no variance between the Contract declared on and the Contract given in evidence, the proof must correspond with the title as laid in the declaration - cites. 1 Esp. N. P. p. 140. sec. 2. - 1 T. Rep. 240. Tomlin's Index. Tit. Variance. p. 374. 375. Doug. Rep. 665. Bristow. v. Wright - 1 Selwyn's N. P. p. 406. - and case in this Court, Bruce & Anderson. v. Arnoldi. 20 June 1808, where it was held, that the variance between the declaration, and the note given in evidence, of the words, "value received," was fatal to the action. -

On the 2.d point - The cession made by the Defendants to their Creditors vested them with the property of the Defendants, and no action could be brought until that property had been disposed of in the manner intended by that Cession - cites. Rep.r de Jur. v. abandonnement de biens - and. v.o Cession. - Under the deed of assignment the defend.s as well as the trustees, were the mere clerks of the Creditors who were the legal holders of the property and had the power over it. -

Ross for Pltff. Enough of the plaintiff's title was stated in the declaration to support his action, nothing more was requisite or proper - the negotiability of the notes not being

in

in question, it was unnecessary to notice the words, "or order" which regarded only the right of negotiability, not the right of action in the plaintiff.— That the cases cited by the Defendant's counsel were applicable only to the instances where more was stated in the declaration than was made out in proof — the case here was different, the whole declaration having been proved, that the objection had it been of any weight was waived by the Defendants, as by their plea in bar to the action they had admitted the notes charged in the declaration to be the same which they had made and owed to the plaintiff.— On the 2°. point - he stated, that the facts alledged in the plea in bar had not been made out in proof before the Jury — no assignment of any property was proved to have been made by the Defendants to their Creditors, the schedules referred to in the deed, containing a statement of the property, was not produced nor given in evidence, without which the deed itself was waste paper — and if it had, yet as the defendants appeared to be in possession of the whole of that property, and that the dividends which they had paid to the trustees had been accounted for, they could not complain —

Stuart in reply. The authorities cited referred as well to Cases where more, as where less, was stated in the declaration than appeares on the Contract declared on — the present case was strongly within those authorities, as the plaintiff might have another action

on

on the same notes.— That sufficient proof was made out before the Jury to support the allegations of the defendants in respect to the deed of Cession, it appearing thereby, without reference to any schedule, that the defendants were possessed of property to the amount of £18,000, which the assigned to their Creditors to pay £14,000, which they owed — this was enough to hold the plaintiff to shew what had become of that property —

The Court held the variance alledged to be immaterial, considering the notes in question to have been sufficiently stated in the declaration to entitle the plaintiff to a recovery thereon under the proof adduced — and this even agreeable to the principles held in the Courts in England — See. Aul. N. P. 170. 2 Salk. 659. Roberts. v Garnage — & cases referred to in note, Bay: on bills. p. 106. nº 10. — That in England opinions had been different at different times respecting what should be — considered a variance and what should not — see 1 Esp. N. P. 139 — and contra 2 East. R. 2. as to action on an optional agreemt — but in this Court it was a general rule, which had been always followed & which was consistent with the rights of parties, without adhering to the strictness of pleading observed in England, that every Plaintiff should state a sufficient title or right of action to enable him to recover thereon — here, the plaintiff had done so — to have gone further, and stated that the

the notes in question were negotiable, was nowise material to his right of action, and the Court knew no rule of law by which the variance alledged could be supported. — Upon the other ground they held, that as the monies paid by the Defendants into the hands of the Trustees had been accounted for, and credit given by the plaintiff for his dividend thereof the objection was without foundation — That although the Creditors had a legal title to the property conveyed by the deed of assignment, yet in fact it appeared, that the Defendants were in the actual possession thereof, and it was therefore idle to alledge, that the plaintiff, or the Creditors should be held to account for what they had never received, and this, to the very persons who held the property to be accounted for, and whose interest it was to hold it as long as they could — it was therefore a sufficient answer to this objection to say, that the Defendants were, and always had been in the possession of the property of which they demanded an account — The Defendants have said, that under the deed of assignment they are only the Servants of the Creditors, and by consequence, that the acts of the defendants under this deed are the acts of the Creditors — to admit this principle to the extent contended for, would be admitting the Defendants to take advantage from their own wrongs, as

by

by this means the creditors would become answerable for the misconduct of the Defendants as their Servants, to the Defendants as their Debtors — Such a principle cannot be supported — Rule for a new trial discharged. —

April Term 1812.

Wednesday 1st. April 1812.

M.Kenzie & al'
vs
Beaubien ... } Stuart for Defdt. moved to examine Pltffs upon faits & articles.

Ross for Pltffs objected, that a day had already been given to the Defendant for this purpose which he had allowed to lapse without using any diligence, and therefore no second day for this purpose ought to be granted, as it was irregular and incurring an unnecessary delay in the Cause. —

Stuart in reply — The day first asked by the defendant for the faits & articles, was before the time he was bound to demand the same and with a view to forward the Cause, and as he is now within the time required by the rules of practice for demanding such faits & articles, no inconvenience or delay can ensue, as the plaintiffs are resident in Montreal.

The Court granted the motion in consideration that the party to be examined lived near, and that no unnecessary delay would be incurred. —

Thursday 2d. April 1812

Scott v Decarry } On report of Experts.—

The two experts named in the rule of reference differed in opinion and called in a third under that rule — the third expert did not hear the witnesses examined, nor was he sworn, but made up his opinion from the statement of the other two experts — The report in which the third expert had joined was on this account objected to as irregular — And by the Court it was ordered that another visit and report should be made by the same Experts after the third Expert should have been sworn and the witnesses examined before him. —

Langan. v Carpentier } The defendant moved to quash the writ, as he had been summoned to answer by the name of Carpentier, whereas his name was Charpentier —

The Court considering the small difference between the two names, permitted the plaintiff to amend the writ upon payment of two shillings Costs. —

Williams v Stewart

The defendant appeared but did not file a plea — The plaintiff moved that he might be permitted to proceed by default against the defendant — This motion the Court rejected as unnecessary, the plaintiff being by law entitled to proceed against the defendant in default without any order to this effect. —

Bellair v Perrault

Stuart for the defendant moved to quash the writ inasmuchas in the copy served upon the Defendant no day is mentioned for the return thereof —

The Plaintiff contended that the motion was irregular, that the original writ which was correct could not be quashed from a defect in the Copy — That it has been determined. (Barlow v. Dunlop. 11 Febr 1812) that such motion cannot be granted, but upon the ground that a true copy of the original had not been served —

The Court were of opinion with the Plaintiff and rejected the motion. —

Friday 3. April 1812.—

M'Allum v Stevenson & al } The Plaintiff moved to discontinue, on payment of Costs, his demand against Cowie, one of the Defendants, who had made default.—

Boston for the Defendants, Stevenson, stated that he ought to have had notice of the motion and an opportunity given to him to be heard thereon, as it may affect the proceedings to be had in the Cause on the part of his clients.— But the Court were of opinion that notice of the motion was not necessary, considering it to be the right of a plaintiff to discontinue at all times his demand against all or any of the parties upon payment of Costs.—

Molloy v Mettote } Action for the recovery of damages for breach of Contract made between the parties, whereby the Defendant undertook to saw certain quantities of wood to be furnished and provided by the plaintiff, under the penalty of Fifty pounds— Plea, not guilty— No evidence was adduced on either side, except the notarial copy of the agreement filed by the plaintiff— The plaintiff contended, that although he had made no

proof

proof of damages, yet he was entitled to the amount of the penalty as stipulated damages, as the Defendant had shewn nothing to exonerate him therefrom — The Defendant on the contrary contended, that proof was necessary on the part of the plaintiff to shew that he had put the Defendant en demeure inasmuch as he, the plaintiff, was bound to furnish and deliver to the defendant the wood to be sawed, which he had never done —

And of this opinion was the Court, considering this proof as necessary to shew that the pltff had furnished the wood which was a condition precedent in the agreement, and failing which he was not entitled to damages or the penalty in lieu thereof from the Defendant — action dismissed —

—

Cole. Churchs } Gale for the defendant moved that pltff should be held to give security for costs, inasmuch as the S. plaintiff had left the province since the institution of the action — in proof of which fact he files an affidavit with his motion. —

Georgen for the plaintiff — By the rules of practice, the Defendt must apply for security for costs within four days after his appearance, and is therefore now too late — That the fact of the plaintiff's having left the province is not positively stated by the affidavit filed —

The Court were of opinion, upon the affidavit produced that

that the defendant's motion ought to be granted, as the rules of practice could not apply to this Case where the Plaintiff appeared to have left the province after the period at which security for Costs could have been demanded

—

Johnson, Lukin, & Contra

Action for Cens & rentes due to pltff as Seignior &c— Plea, nil debet - and Incidental Demand for work and labor &c - Exception taken by the plaintiff to the Incidental demand, that it was irregular and inadmissible being for an uncertain and unliquidated sum of money and could not be set up against the demand of the plaintiff which was founded upon titles and authentic acts —

The Court were of opinion that the Incidental demand was admissible, being in the nature of a new action or demand and tended to the same conclusion with that of the plaintiff, viz: the payment of money, and although from the unliquidated nature of such Incidental demand, it could not be pleaded in form of Compensation to the plaintiff's action, yet as an Incidental Demand it was admissible. —

—

Saturday 4th April 1812 —

Guy. } Georgen for the Pltff, moved for another day to
" Hawley } continue the enquête of his witnesses —

Gale for Defendt objected, that all the witnesses produced by the pltff, on the last day appointed for such enquête, were examined, and if the pltff had subponed others who did not then attend, he cannot have another day to examine them, having made no reserve to that effect.

The pltff stated that nothing was entered on the roll to preclude him from such continuance of the enquête, — cites Case, Stewart. v Finchley. Ap. Term 1811, where pltff was allowed to examine witnesses who were not present, but had been subponed to attend on the first day of the Enquête

The Court were of opinion, that as nothing had been — entered on the role d'enquête, which could preclude the pltff from obtaining another day to continue the enquête, as the examination of the witnesses attending on the day heretofore appointed must have been taken by the attornies for their mutual convenience without any intimation to the judge of their proceeding, neither party ought to benefit from any default arising thereby, and another day was therefore given to the Pltff as demanded — The Court however observed, that if the — circumstances as stated by the Defendant had been ascertained by any entry of the Judge on the day of enquête, or if the Cause had been called and any default entered thereon against the

Pltff

Plaintiff, a further day could not have been granted to him, as it would have been directly contrary to the rules of practice — As to the Case of Stewart. v Finchley, it could not be cited as a precedent, as it was founded upon particular circumstances not applicable to the present Case —

—

M.c Callum. vs. Stevenson & Co.

The Defendants were sued upon their promissory note as Copartners by the name or firm of Alex.r Stevenson & Co. —

The Defendants pleaded for exception peremptoire à la forme, that the Defendants were not partners, and that there was no such firm as that of Alex. Stevenson & Co. — To which it was answered by the plaintiff, that this was no Cause of exception peremptoire à la forme, but to the fond, or merits of the action — And of this opinion was the Court, and dismissed the exception.

—

Kees. — vr Marchand

Ross for the defend.t moved, that all proceedings in the Cause should be staid until the Costs of a former action should be paid, and exhibited a bile of Costs to the plaintiff's attorney. —

Stuart for the plaintiff objected, that no demand had ever been made of those costs until now, and that

the

the defendant was now irregular in his demand, as the bill presented was not taxed, and therefore the demand not legal.

The Court rejected the motion, being of opinion that the bill of Costs ought to have been taxed before any demand made of the money.

Bricault. } Bricault } The defendant lived at the distance of eight or nine leagues from the Court House, but was served personally with the process in the town of Montreal, returnable in two days afterwards. The Defendant moved to quash the writ, as a sufficient delay had not been allowed him between the service and the return thereof, as instead of two days, five ought to have been allowed, in consideration of his place of residence being beyond the limits of the town. It was answered by the plaintiff that such delay was not necessary where service of process was made within the town of Montreal, the domicil of the defendant in that case not being considered, but only the place of service. And of this opinion was the Court, and rejected the motion.

Thursday 9th April 1812.

McKenzie & al
v.
Deschambault

This was an action instituted on a Judgment claiming of the Defendant as legatee of the late Madame Dufy, the rights of some of the heirs of the lat Desaunier Dufy, her husband.

A copy of the Judgment upon which the action was founded, was filed by the plaintiffs – upon the day appointed for the enquête, the plaintiffs finding it necessary to prove certain facts stated in the declaration in the Cause in which a copy of the Judgment had been so filed, moved to examine the prothonotary, who had been subpoena'd under a duces tecum, requiring him to produce the Original declaration in the Cause in which the above Judgment had been given, and that they should be permitted to fyle a certified copy of the said declaration, compared by the Proths– To this the Defendants Counsel objected – and the parties were heard upon the right of a party to prove by the testimony of the Prothonotary any record, of which an authentic copy could have been filed with the exhibits in the Cause – and the Court were of opinion, that as the declaration and the Judgment must be considered as parts of the

the same record, the party who had an interest in either, or who founded any part of his demand thereon, must produce and file the same with his other exhibits under the rules of practice — and therefore rejected the copy of the declaration offered to be filed, as having been compared with the original now produced by the Prothonotary. —

Porteous & ab.
v
Moses. a

The defendant took off his default on Saturday the 4th. inst. — Monday being a holyday no pleading could be filed, and on the tuesday within office hours, he filed an exception à la forme. — The plff moved that this pleading should be rejected not having been filed within the 24 hours directed by the rules of practice — at furthest the plea ought to have been filed before the sitting of the Court. — But the Court were of opinion, that the Defendant had all the day on tuesday within office hours, to fyle his plea, of whatever nature it might be — and therefore rejected the plaintiffs motion. —

Thouin
v
Piccard
&
Archambault
Opp.ᵗ

Cause argued 17 Feb. — (536)

Dernise
—
Jewell

Friday 10th April 1812.—

Oviatt. vs Mears. } The Cause was at issue in October term last; since which time nothing had been done, the pltff now moved for hearing under the usual notice for such a motion, of 24 hours.—

Ogden for Defdt. contended that under rules of practice, Sec. 27. §. 3. he is entitled to 14 days notice of the motion, & therefore not bound to answer.—

Stuart for Pltff. The rule of practice extends only to Cases brought to issue in vacation, and cannot apply.—

The Court held, that the rule of practice extends equally to Causes brought to issue in term as in vacation, the reason of the rule being to punish the laches of a party who permits a term to elapse without proceeding in his Cause.— Mo. rejected.—

Saturday 15th April 1812.

Johnson
vs
Walker

Stuart for Defendt. moved to examine Pltff upon Faits & articles. on the 15th inst. being the day fixed for the trial by Special Jury.

Ross for Defdt. objected - that as venire had issued, it was too late to apply for such examination according to the rules of practice. Sec. 29. § 1. — And of this opinion was the Court, and rejected the motion.

Wednesday 15th April 1812.—

Johnson & ab.
vs
Lebert.—
and
E Contra.—

This was an action by Johnson and the Curator of his deceased partner, Lambie, for work and labor done by them as taylors &c for Defendt.

Rolland for Defdt. pleaded, non-assumpsit, and also an Incidental demand founded upon two separate accounts for butchers meat furnished to Johnson, and to Lambie for the use of their respective families — and contended, that upon the decease of a partner, the partnership is dissolved, and the rights of the parties in the partnership property is thereby changed, as the surviving partner cannot give a discharge for a partnership debt, he having right to only one half of that property, and the representatives of the deceased partner a right to the other half.

That the rights of the partners being thus determined and ascertained, as in the present Case, it is fair and equitable that the debt due by each individual partner should be set off against a partnership debt, in which each partner can claim only his moiety - cites. Poth. Soc. Nº 144. 157.— That it would be hard in the Case of a bankruptcy, as is said to be, with regard to Lambie in this Case, that the Defendant should be compelled to satisfy the debt he owes to the partnership, and come in afterwards for a dividend only for the debt due to him by Lambie.—

Ogden.

Ogden for Pltffs The question now submitted to the Court, is whether the Defendant can maintain his Incidental demand in the manner by him stated— the pltffs have demurred to this demand, and contend that the individual debt of a partner cannot be set-off against a partnership debt, they are separate and different rights.— Poth. Soc. No 101. a—

The Court were of opinion that the individual debts of the partners could not be sett off against a Partnership debt— and therefore dismissed the Incidental demand

Poth. Soc. No 101
Cowp. 469. —

Tiagouenté
vs
John. —

Action for wages. —

The plaintiff stated in his declaration that he had been employed by the Defendant in navigating certain rafts of timber from Sault St Louis to Montreal in consequence of which there had become due to him from the said Defendt a sum of £12. 5— for which he was entitled to his privilege or lien upon the rafts so navigated, and upon his prayer in

this

this behalf obtained a Saisie arret, to hold and detain the said rafts until his debt should be paid — The Plaintiff now contending that there were no other means for securing to them his right of privilege but by an attachment of the said rafts. —

Stuart for Defendt. contended that the attachment had been irregularly sued out, inasmuch as there was no affidavit filed, to shew that the Defendant was in any of the Situations pointed out by the Ordinance of 1787, to entitle the Pltff to such attachment. —

The Court declared the attachment irregular, being of opinion that the plaintiffs privilege could not warrant the suing out an attachment agt the timber in question without an affidavit as required by the Ordinance of 1787. —

Saxtab vs Lester. —

Quesnel for Defendt. moved to refer the matter in issue to the serment decisoire of the Plaintiffs. —

Gale for Pltff. — stated, that they live in the United States of America, and it would cause an unnecessary delay to

the plaintiffs to defer the decision of their Suit until they should answer upon their Serment decisoire, more especially as they had made proof of their demand by witnesses, and none had been produced, nor any diligence done for this purpose on the part of the Defendant.—

The Court rejected the motion, as tending to an unnecessary delay of the Cause.—

Cameron. v. Baker.—

Upon hearing on the merits in this Cause the defendant objected to the regularity of the execution of the Commission Rogatoire sued out by the plff, inasmuch as the witnesses had not subscribed their names to their respective depositions, nor was it stated that they could not write, and therefore — contended that the depositions ought not to be received in evidence —

Boston for Plff — The objection to the regularity of the execution of the Com. Roz. should have been made at the time, when Plff obtained an order for the publication thereof, and ought now to be received — That the rules of practice do not require that the Witnesses should

sign

sign their depositions - and if it should be considered necessary an opportunity ought to be given to the plaintiff to perfect the depositions - this has been already granted by the Court in the Case of Porter. v. Marston. Feby. Term 1809. -

The Court under the circumstances of the Case permitted the plaintiff to perfect the depositions by procuring the signature of the witnesses -

This Case ought not to be established as a precedent as it is the duty of every party to look to his proofs before he proceed to trial, the Circumstances of the ignorance of the Commissioners, and appearance of right in the plaintiff could alone have induced the Court to give another day in Court to the Plaintiff —

Friday 17th April 1812.

Gillespie
v
Wadsworth
&
Wadsworth
Oppt.

On opposition of the defendant à fin d'annuller

Mr Ross for the pltff obtained a rule on the defendant to shew Cause why his opposition should not be dismissed, as he had not filed any moyens in support thereof within the three days after notice as required by the rules of Prac:

Stuart for Defendant, states - that there is no definite time prescribed by the rules of practice for filing reasons of Opposition, but a general reference is made to the ~~other~~ rules regulating the pleadings on original suits. p. 77. §. 6. now according to those rules it is in some cases, settled that pleas must be filed in three days from the day of appearance. p. 24. §. 4. in other cases a delay of ten and twenty days is given. p. 34. §. 1. and construction of the rule ought to be in favor of the opposant and made to apply to the latter cases, according to which the Defendant has yet a day to file his said moyens d'opposition. - That where the opposition itself contains sufficient grounds upon which it can be supported the opposant may rely thereon without filing any -

moyens

moyens, and this he now declares to be the case here, and that no moyens are necessary to support his opposition, and that Plaintiff ought to take issue thereon. — The Opposant further states, that by the Judgment rendered in this Cause a stay of Execution was granted until June Term next, notwithstanding this delay, an Execution has been sued out, without any order of this Court. —

Ross. in reply, contends that the uniform practice of the Court is, that moyens d'opposition must be filed within three days after notice — that it is not enough for the defendant now to say, that he relies upon the opposition he has filed without any further moyens in support thereof, he ought to have said so before the time expired for filing such moyens — That the stay of execution was conditional, and in consequence of the condition having been broken the execution was legally sued out ag^t the Defendant —

The Opposition was dismissed — The Court being of opinion that the opposant was bound to fyle his reasons of Opposition within the three days after notice — and that after the expiration of the three days the opposant was in default, and too late to allege that he relied on the grounds stated in his opposition as a sufficient moyens in support thereof. —

Gillespie. —
v.
Wadsworth
&
Hawkes &
others. Oppts

On rule obtained by the opposants for the plaintiff to shew cause why he should not be held to give security for costs on the oppositions filed by the Opposants. —

Ross for Pltff. says, that Pltff had obtained a Judgment agt the defendant, and was proceeding in the execution thereof when the opposants in this Cause stopt his proceeding by their opposition That an opposant is not entitled to demand such security from the Plaintiff who must be considered as a defendant upon the opposition and who must plead thereto — That it would be unjust to compel the Plaintiff to give such security to 20 or 30 Opposants who might prefer claims merely for the purpose of delaying the right of the plaintiff — That the opposants are besides too late in demanding such security, four days having elapsed since they filed their moyens d'opposition. —

Gale for the Opposants — The Plaintiff not living within the jurisdiction of this Court he must be considered like any foreigner in regard of security for costs — and by St. A. Q. 3. it is expressly declared that every such person is liable and bound to give — security for costs upon all seizures, oppositions and Original actions. —

The Court were of opinion, that the plaintiff having obtained his Judgment against the Defendant was not bound to give security for costs to any Opposant, and that

he

he could have been held to give such security only upon the original action.—

Saturday 18th April 1812

Campbell vs England and Dufaut vs England and Oppost. for house rent

Executions had been sued out by the plaintiffs Campbell and Dufaut upon their respective Judgments against the defendant, under one of which the effects of the Defendant were sold, saving to the opposant his privilege for house rent — The question now before the Court was, whether both the plaintiffs should be entitled to any and what Costs upon the executions so sued out by them — and it was held by the Court, that the plaintiff at whose instance the goods and effects of the defendant had been sold, was entitled to his costs attending the seizure and sale thereof and no more, and no costs whatever could be allowed by privilege to the other plaintiff, whose execution could be considered only in the nature of an opposition —

Atkinson vs Loris. —

Action promissory Note. —

On the 27th Sept. last the plaintiffs sued out process against the Defendt. — On the 30th of the same month, the day preceding the return of the writ, the defendt made a tender to the plaintiffs of the sum demanded with

with the costs due up to that time, which the Plaintiffs did not then accept — The writ having been returned the defendant appeared and pleaded the above tender, and deposited the money in Court — The plaintiffs having by consent taken the principal sum of money deposited, moved for Judgment for their costs up to the time of the tender made and pleaded in Court, contending, that no tender could be legally made but in Court — Hume. v. Pepoe. 8. East. 168. — Gyles. v Hartis. 1 Raym. 254. — 6 Bac. Ab. 451. —

The Court were of opinion that the pltffs motion could not be granted except for the Costs which were accrued at the time of the tender on the 30th Sept — as to all subsequent costs the Plaintiffs ought to pay the same, as they were bound to accept the tender which was then made. —

Gillespie — vs — Wadsworth & Hawkes & al' Oppts

On the plaintiffs motion for security for costs from the opposants upon their respective Oppositions, they being resident out of the jurisdiction of the Court. —

Gale for the Opposants stated, that in consequence of notice received from the plaintiff he had filed his reasons of opposition upon each of the claims on the 13th. inst. and therefore the motion was too late, the plaintiff having waived his right to the security he now demands in consequence of

his

his notice to the Opposants to proceed on their respective claims by filing their moyens d'Opposition. —

Ross for the pltff — The Opposants cannot be considered as fairly before the Court until their reasons of opposition are filed, as they may abandon their opposition before any proceedings can be had thereon. —

The Court were of opinion that the plaintiff had waived his right to any security for costs by calling upon the Opposants to proceed upon their oppositions —
See. Fowler. v Elderkin & Marven Opp^{n}. 16 Oct. 1806. — Lee. v. Senter & Dole. Opp^{n}. Febv. 1812. —

Dunlop. v. Cuvillier — } On defendants motion in arrest of Judgment

During the last term the defendant had moved for a new trial, but by the judgment of the Court on the last day of that term the motion was over-ruled — he now moved on the 4th day of the present term certain matters in arrest of Judgment. —

Ross for the pltff objected to the motion as too late, as agreeable to the rules of practice the same ought to have been made on the first day of the term —

Stuart.

Stuart in reply contends, that the rule does not apply where a motion for a new trial is made and a motion in arrest of Judgment also, but only in the case where one or other of these motions is made. —

But the Court were of opinion that the rules of practice applied equally to both motions, and therefore that the present motion came too late. —

Mc Callum ... }
v
Stevenson & Co }

The plaintiff prosecuted an action against Alexander Stevenson and George Stevenson as merchants and Copartners trading — under the firm of Alexander Stevenson & Co — and one James Cowie, upon their joint and several promissory note made by them to the plaintiff — Upon the return of the writ, the plaintiff discontinued his suit against James Cowie, the other Defendants pleaded non assumpt. to the action, and by the proof made in the Cause it appeared that Alexander Stevenson had signed the promissory note for Alexander Stevenson & Co but there was nothing to shew that any partnership had ever existed between Alexander and George Stevenson — and upon this proof the Plaintiff asked for Judgment against Alexander Stevenson. —

Boston

Boston for the Defendants contended that the Plaintiffs action ought to be dismissed — that the defendants had been sued as partners upon a partnership Contract so stated, no proof being made of a partnership, one of them cannot be condemned as having signed the note. The plaintiff had a choice of action, either to sue the defendants jointly, or any of them seperately, but having made his election and sued them jointly, he must recover against them jointly or not at all — cites, Hyd on bills. p. 186. 2ᵉ Poth. by Evans. 62. —

Sullivan for Plff in reply — according to the principles laid down by Pothier a recovery can be had against all or either of the defendants in this Cause — the action being several as well as joint, all may be sued and judgment rendered against either of the Defendants — Poth. Obl. Nº 270. 271. —

The Court were of opinion, that from the nature of the Contract declared upon and the conclusions taken in the declaration of the plff, he was entitled to his Judgment against all or either of the Defendants who appeared to have been parties to that contract — That in declaring against Alexander Stevenson as a partner in trade

with

with another person did not vary the right of recovery against him individually, nor diminish in anywise the responsibility of the said defendant — and the Court saw no reason why the Plaintiff should be turned round in this action and left to seek his recourse by another suit which must tend to recover from him alone the sum now demanded, when Justice could be done between the parties in the present Suit — Judgt for Pltff as prayd for. —

Quenville vs Chartrand

The plaintiff by his declaration stated, that about 14th Janv. 1765, the defendant contracted marriage with Françoise Quenville the plaintiff's sister, by virtue whereof a Community of property took effect between them according to the laws of the land, during the continuance whereof they acquired considerable estate both real and personal — That about the 6th April 1810 the said Françoise Quenville died without issue, whereby the plaintiff, her brother, being her heir at law, became entitled to demand and obtain from the defendant who held the property of the said Community, an Inventory and account thereof, and that he the said defendant should pay and transfer to him the said plaintiff his share and moiety of

of the same as heir of the said late Fran^se Quenville. —

To this the Defendant pleaded, that he was not bound or liable to the plaintiff in manner as by him demanded, because the said late Francoise Quenville in her life time, viz^t on the 20^th day of July 1785 duly made and executed her last will and testament before Mezieres public notary and witnesses, wherein and whereby she gave and devised all her estate and effects of every kind to him the Defend^t by virtue whereof he is now intitled to hold and retain the said property and estate to his own proper use — That had the said last will and testament never been made he the said Defendant under and by virtue of the donation mutuelle stipulated in his marriage Contract with the said late Francoise Quenville, made and executed the 26^th day of January 1765, and duly enregistered, is entitled to hold, retain and enjoy during his life time all the said property and estate left by the said late Francoise Quenville at the time of her decease — And lastly, that the plaintiff alone cannot maintain the present action, because the said late Francoise Quenville at the time of her decease left several brothers and sisters, namely Marie Anne &c — who have equal right with the plaintiff, and ought to have been joined in the action. —

The Plaintiff replied, that the said last will and testament is insufficient and invalid, and ought to be

declared

declared null and void by the Court inasmuch as it was made at a time when the wife could not make any testamentary disposition in favor of her husband — That the usufruit claimed by the defendant cannot exonerate or excuse him from making and rendering the account demanded — And lastly that the pltff is alone entitled to his action aforesaid agt the Defendant without any participation or concurrence of the persons named by the defendant —

Upon the hearing of this Cause, Mr Bedard for the Defendt argued, that although the last will and testament of the late Francoise Quenville was made in 1795, yet having died subsequent to the provincial Statute of 1801, that will had the same effect as if it had been made subsequent to that Statute — By the Roman law the incapacity of the testator existed as well at the time of making the will as at the time of his decease, as the institution d'heritier took place, but by the laws of France the case is different. Instit. Fer. 3. Vol. liv. 2. tit. 20 § 32. Droit Francois — The incapacity here was not in the Testator, for by law, a woman under coverture can make a will, but it was in the legatee to take any benefit under that will, now the provincial Stat. had removed that incapacity, all that was requisite with regard to him being, that he could legally take a devise from his wife at the time of her death —

2. Bacquet Droit d'Aubaine ch. 79. nº 20.
2 Bourjon. Des Testamens. ch. 2. sec. 1. nº 4. p. 299. —
Poth. Intr. au Cout. d'Orleans. p. 492. nº 41. 42.
Domat. liv. 1r p. 358.

The

The incapacity of the husband to take, being removed the will is good.— That the plaintiff cannot alone prosecute the present action even if founded as the other heirs of the late Francoise Quenville ought to have concurred with him therein — Poth. Comte. nº 697. —

Lacroix for the Plff, replied, that by the 282ᵈ. art. of the Custom of Paris, the wife could not make a will in favor of her husband — here the incapacity of the parties was mutual, as well in the testator to give as in the legatee to receive — That the St. of 1801. does not give validity to the will of the wife made prior thereto in favor of the husband, as has been adjudged in this Court — Lacasse. v. Exrs Winkelfoss. and Lillyd Boston. v. Racine —

That the plaintiff alone has a right to his action against the Defendant even if there were other heirs of the late Françoise Quenville in existence, but this does not appear. —

Poc. de Livonniere Reg. de Droit — Rep: de Jurisp. Nº Testament p. 114. —

By the Court. A wife may make a will, although she can make no act inter vivos, without the authority and consent of the husband — But her power to make a will in favor of her husband is absolutely prohibited by the 282ᵈ art. of the Custom of paris, on the ground of its being an avantage which the law prohibits — this

prohibition

prohibition is further confirmed as well by the general principles of law, as by the 276th art. which states — Les "mineurs, et autres personnes etant en puissance d'autrui, "ne peuvent donner ou tester directement ou indirectement au "profit de leurs tuteurs &c." The question therefore before the Court is not that which has been suggested by the Defendt — as to his incapacity as legatee to take under the will of his wife, but the incapacity of the Testatrix to will in favor of her husband, and how far this incapacity has been affected or removed by the provincial Statute of 1801 — The cases put under the 276th article of the Custom, seem decisive of the point — it is there settled, that a will or donation made by a Minor in favor of his tutor during the tutelle, and which has not been revoked or altered by the minor who dies after he comes of age, is wholly void, for this reason, that being made at a time when the law presumes an undue influence to have been exercised upon the minor as being en puissance d'autrui, it is null from the beginning, — this is strongly in point — It is also a principle that the capacity of the testator to make a will, is requisite, as well at the time of making the will, as at the time of his death or when it takes effect — Now it is clear, that at the time the testatrix made the will in question, it was void in law, and the Statute of the 41st of the King cannot be construed

3. Gr. Com. p. 1286, 1287. on art. 276. Close 1er No 31

4 Gr. Com. p. 192 No 62.

2. Bourj. p. 92. No 3. A. 5.

4. Gr. Com. p. 191 No 5 A. 55. —

6. Poth. Traité des Don. Test. p. 332. §. A. a

construed to make effectual what before the making of that Statute was so void — but to remove in future an incapacity which then existed, and to enable the wife to do an act which before that time she could not do — The incapacity at the time of making the will therefore not being removed, the Court must declare the will to be void and null — As to the plaintiffs right to maintain ~~right to maintain~~ the action alone, the Court sees no proof before it of the existence of other heirs, and if there was, yet the Plaintiff would be entitled in so far as regards the rendering the account — when the question ~~might to~~ arise touching the partage of the property accounted for it would then be proper that all the heirs should be made parties — The right of Defendant to enjoy the property during his life time under his marriage Contract with his late wife stands verified, and therefore the Judgment of the Court upon the present action is that the Defendt shall make and render to the Pltff in due form of law an Inventory and account of the property belonging to his late wife, saving to the parties such further rights thereon as by law they shall be entitled —

See also. 1. Furgole, Traité des Test. p. 183. N° 9. 11. —
6 Poth. p. 132
3. Poth. p. 470. n. 45. p. 471. 2. —
2. Bourj. p. 293. n. 1. p. 299. N° 4. § 3 no 7. 10. 13. —

Mowatt vs Swan. } On action against the Defendant as Indorser of a Foreign bill of exchange.—

The process had been served upon the Defendant by leaving a copy thereof at a boarding house where the Defendant usually lodged when in Montreal, as being his dernier domicile — The defendant had no fixed residence in Montreal, but was accustomed to trade and travel between that place and the United States of America — at the time of the service of the process it appeared that he had left Montreal for several months and had gone to England, but whether to reside there or not did not appear.—

Stuart for the Defendant took exception to the regularity of the service of the process and argued that the Defendant never had any domicile in Montreal such as the law points out, to enable a suitor to bring him into Court by leaving process there in his absence — That the defendant never had more than a temporary residence in a boarding house, and no service of process upon him could be sufficient unless made to him personally.—

Ogden for the pltff — contended that by the long residence of the defendant in Montreal he had acquired a domicile there, and that service of process at the dernier domicile was sufficient.—

The

The Court were of opinion that the residence of the defendant for several months in Montreal in the same house constituted his domicile there, as he appeared to have none any where else — That the service of the process was regularly made there as being the last domicil of the defendant — and therefore dismissed the exceptions. —

Mr Justice Reid differed in opinion from the Court, and held, that the mere temporary residence of the defendant at the house in question did not constitute his domicile there — That the necessary requisites to constitute a domicile, were wanting, namely, a permanent residence, renting of a house, carrying on a trade — settling with his family, paying taxes, serving in any public capacity such as Juror, Constable, Churchwarden, or Milita man — such acts as these are in the law termed conjectures de volonté, or circumstances from which proof of the intention of a party may be collected to fix his domicile in any place. — The residing for a few weeks only in a place, and in a boarding house "hotel garni" is taken as a presumption on the contrary

That

Denizt. Vo Domicile. §. 7. No 1.

that defendant did not intend to have any domicile there — it was only a simple residence which is very different from a domicile — 1 Sousse. Jt. Des ajourn. art. 3. p. 17. Pigeau — and service of process at a residence must be made either to the person of the defendant, or knowledge of it must be brought home to him — see Denizt. vo assignation §7. No 3.
Id — vo — Domicile — §7. No 1.
1 Pigeau p. 133. on note (b)
Poth. Proc. Civ — p. 5. —
Busby vs Size. 20 Oct. 1810. —

Wilson. vs Sanford & Smith opps. and al' —

It was moved on the part of the Opposant that that the Opposition made and filed by him in this Cause should held and taken pro confessa agt. the plaintiff and parties concerned and Judgment entered thereon accordingly, inasmuchas no issue hath been taken thereon by any of the said parties within ten days since the same was filed, whereby according to the rules of practice the opposant is entitled to his Judgment as if the same stood admitted —

The Court in explaining the rule of practice were of opinion that although the Pliff was too late to raise any contest upon the Opposition, yet the opposant ought to support his claim by proof as in a case by default. —

Guy. —
v.
Hawley. —

This an action of assumpsit for goods sold and delivered to the Defendant — Upon the enquête the Plaintiff failed in his proof, and therefore had recourse to the examination of the Defendt upon faits & articles — The Defendant admitted the sale and delivery of the articles, but added that he had afterwards paid for the same by certain — quantities of wood and timber which he delivered to the plaintiff —

Gale for Defendt — argued, that as the pltff had made no other proof than by the defendants confession upon the faits & articles, this confession ought to be taken in toto, and therefore that the action ought to be dismissed, as it appeared that the goods in question had been paid for — That confession of a party cannot be divided. Poth. Obl. Nº 827 —

Georgen for Pltff. The Defendant cannot by his answers make a proof for himself — his saying that he had paid for the goods was besides answering to a question not asked of him & cannot be admitted — and besides Defendant has made no allegation nor raised any question touching the payment in question —

The Court were of opinion that in doing justice between the parties the whole of the matters in dispute between the parties should be referred

to

to arbitrators — and ordered it accordingly. —

Bellair vs Perrault Tutor &c.

The defendant was appointed tutor to the minor child of one Tavernier, under a petition stating, that the said Tavernier had been drowned in the river St Lawrence. — The present action was instituted to recover from the defendant, in his said capacity, the price of a certain Schooner which the plff had sold to the said Tavernier. —

Stuart for Dfdt. The defendt. is sued as tutor to the minor child of the late Tavernier the purchaser of the Schooner but no proof has been made either of the decease of Tavernier or that the child, to whom the defendant has been appointed tutor is the legitimate offspring of the said Tavernier. That there can be no recovery against the defendant upon the deed of Sale of the said Schooner, there being no mention made therein of the Certificate of registry of the vessel sold, which is required by the Stat. 26. Geo. 3. ch. 60. —

Vigé for plff in reply says, that the late Tavernier was drowned which rendered it impossible to procure any proof of his death by extrait mortuaire, but the fact is sufficiently ascertained by the joint application of all his relations praying an appointment of a tutor to his said

minor

minor child, when the defendant was named, and voluntarily accepted of that charge, and he ought not therefore to be admitted to deny those facts under which he holds his appointment.— That by the deed of Sale of the said Schooner it appears, that the vessel was then just off the Stocks and the Pltff had not had time to procure the certificate of registry in question, but the parties then agreed that the Pltff should procure it and deliver the same to Tavernier when required — That Defendt not having alledged the defect of such Certificate of Registry in his plea nor made any demand thereof till now, the Pltff had no opportunity of tendering the same to the purchaser or to the Defendt— but now produces and files the said Certificate, and prays Judgt—

The Court were of opinion that the defendant could not be admitted to contest the validity of his own appointment as tutor under the proceedings in this Cause, the act of his appointment carried with it sufficient evidence of all the facts necessary to support the same— and the Certificate of Registry of the Schooner being produced and filed, the Pltff was entitled to his Judgt— Judgt for Pltff as demanded.

Rousseau. vs Mathurin } Action on a Promissory Note. &
Plea Non-assump. infra quinque annos. —
Replication - alledged undertaking within 5 Years

On trial of the Cause one Andrew Porteous was adduced as a Witness on the part of the Pltff - and objected to by the Defendant as interested, because he with the Pltff & others took possession of the Defend.ants goods and effects and sold and disposed thereof to their own proper benefit and behoof without having rendered any account thereof to the Defend — who at the time was the debtor of the said parties and unable to satisfy what he owed them — That the Witness is interested to shew the existence of debts due by the Defend to the said plaintiff and others to exonerate himself for the application made by him of the monies proceeding from the Sale of the said effects — But the Court were of opinion that however improperly the witness might have acted in the discharge of any trust reposed in him either by the Defend or his Creditors, yet that there was no immediate interest — accruing to him in this Cause which could exclude his testimony

Monday 20th April 1812.

Blackwood
val. —
Labelle. —

This was an action instituted by the pltffs as — Trustees on behalf of the Creditors of Austin Cuvillier and assignees of his property and Estate to recover from the defendant the possession of a certain lot of ground which they claimed under the — assignment — It appeared that on the 14th October 1806 the said Cuvillier having become bankrupt, assigned over all his estate and effects generally to the Plaintiffs as Trustees as aforesaid - he was at the time proprietor of the lot of ground in question, which was considered as vested in the Plaintiffs under the general words of the assignment, it was however stipulated that Cuvillier should remain in possession of the property assigned in order to recover and get in the debts & pay over the proceeds to the Plaintiffs — afterwards on the 12th November 1808, the said Cuvillier conveyed the said lot of land by deed of Sale to the Defendant who came into the possession thereof under that Sale. —

Beaubien for the defendant pleaded, that the lot of land in question had never been conveyed to the plaintiffs under the assignment to them by Cuvillier, there being no specific description of that lot therein mentioned, — That the — Plaintiffs never had the actual possession of the said lot of ground under the said assignment, the same having

always

always remained in the said Cuvillier — That the Sale by Cuvillier to the defendant was legal and valid, and the possession of the defendant under it, gave effect to that Sale. —

The Court were of opinion that no particular description of each part or parcel of the estate and property conveyed by Cuvillier to the plaintiffs was necessary, words of general description being sufficient — that in bankrupt cases the Court was inclined to judge favorably upon the intentions of the parties and for the relief and assistance of Creditors, according to which in the present Case it was clear, that the whole of Cuvillier's property was meant and intended to be conveyed to the Plaintiffs, which ought to operate upon the whole of that property without exception. — As to the possession held by Cuvillier, it must be considered as the possession of the Plaintiffs, for the particular purposes stated in the assignment and therefore he could not legally give any title thereto nor yield up the possession thereof to the Defendant without the concurrence of the Plaintiffs —

Judgt. for the Plffs —

Lacroix
vs
You ...

This was an action instituted by the pltff as Seignior of the Seigniory of St Therese de Blainville against the defendant one of his tenants, for the recovery of certain lods & ventes upon the following grounds;

On the 24: March 1804, Charles Labelle and Marie Grenier his wife made a donation to Marie Anne Labelle their daughter of a certain lot of land therein mentioned in consideration of a certain rente & pension annuelle & viagere, and of paying to Marie angelique Labelle and victoire Labelle, each, the sum of 800 livres, and other considerations amounting to 1878 livres, upon which the lods et ventes claimed as due to the pltff was 172#. 10s.

That the said Marie anne Labelle afterwards contracted marriage with one Joseph Gauthier dit Larouche. That upon the death of the said Charles Labelle, Marie Grenier his widow intermarried with one Joseph You. On the 18. July 1811 the said Joseph Gauthier and Marie Anne Labelle his wife made a retrocession of the aforesaid piece of land, which had been so given to her, to the said Joseph You and Marie Grenier, in order to be exonerated from the payment of the aforesaid rente & pension & the other burdens imposed by the said deed of donation, and upon condition that the said Joseph You and his wife should acquit and satisfy all the several sums of money which the said Gauthier and wife had become bound to pay under the said deed of donation, which said several sums of money with the half of the aforesaid rente & pension to be paid to the said Marie Grenier the said Pltff estimated

at

at 8929 livres, the lods & ventes upon which is 744. 2 — two years rent 86 livres, which with Six bushels of wheat and 14. 8. in money, forms together a sum of 834. 10. That on the 28. day of July 1811 the said Joseph Yon and Marie Grenier his wife sold one half of the said lot of land to the Defendant for 1800. upon which the lods & ventes amount to 160 livres, and 172. for three years seigneurial rents and 4. 14 for the non-exhibition of the titles of the said land, making together a sum of 294. 6 — The amount of the aforesaid several lods & ventes forming a sum of 1210 livres 18 Sols, which the Defendant as — proprietor and possessor of the aforesaid lot of ground is bound to pay —

Bedard for the defendant pleaded that no lods & ventes are due either upon the aforesaid deed of donation or upon the retrocession afterwards made by the donees — and as to the rents &c which the defendant owes personally he had tendered the same to the Pltff before the commencement of the action. —

Upon the hearing of this Cause, the defendant argued, that there were no lods & ventes due upon a donation from a father to a child, whatever may be the burdens and charges of that donation — the only difficulty was respecting the retrocession made by the donees to the widow of the donor and her second husband — but the effect of that retrocession being to liberate the donees from the payment of the charges stipulated

in

in the donation, no lods et ventes are due thereon, whether such retro cession be made in or out of Court—

Prudhom. liv. 3. ch. 37. p. 259
" — ch. 66. p. 350—

Lacombe vo Resolution du Contrat faute de paiement p. 329. a—

Pothier — Traité des Fiefs. 1re partie — ch. 5e. p. 1re sec. 1 art. 1. coroll. 4. p. 324. 330. a—

Lacroix for the Plff, contends, that when the charges in the donation are equal to the value of the land given it beers lods & ventes, otherwise Sales might be made in this way in fraud of the Seignor. cites Prudhome. ch. 58. p. 355. a—

The Court were of opinion that no lods & ventes were due either upon the donation, or on the retro cession made thereon, and therefore rejected that part of the Plaintiffs demand. a—

Joubert v Barlow

This was an action instituted by the Plaintiff as having acquired the rights of several labourers for wages due to them by the Defendant by whom they had been severally hired and employed to raft and navigate certain quantities of wood and timber from the town of Montreal to Quebec.

Stuart for Defend. took exception to the demand of the Plaintiff inasmuch as different claims upon different Contracts were joined in the same action - which he contended was inadmissible -

The Court were of opinion, that the pltff, as holding the "transport" of the rights of the several persons in question could bring the action in his own name for the whole. -

The Ch. Justice differed in opinion from the Court and held that the assignee could have no greater or better right of action than the assignor - and as two or more of the assignors could not join in an action for their wages accrued to them upon separate Contracts, neither could the pltff as holding those separate rights join them in the same action against the Defendant.

La chaussée vs De Longueuil } This Cause had slept since 1810, and was called over by the Court in order to be dismissed for want of proceedings, under the rules of Practice,

Stuart for Pltff. contended that the Court had not the power to make any rule of practice to dismiss a party out of Court without a demand by the adverse party to that effect — But the Court were of opinion that such power was vested in them, and as there appeared great laches on the part of the Pltff. they dismissed the Cause. —

Gillespie. vs Wadsworth } The plaintiff obtained a Judgment against the defendant during the last Term, by which a stay of execution was acceded to by the Pltff until provided no proceedings at law were had agt. the defendant by any other of his Creditors. — During the vacation a writ of Capias ad resp. had been sued out agt. the defendant, which appeared to have been compromised, and in consequence of which the Pltff sued out his execution upon his Judgment as if no stay thereto had been agreed to —

Stuart for Defd. obtained a rule upon the Pltff to shew

shew cause why the writ of execution should not be superseded as having been improvidently sued out, and contrary to the terms of the Judgment. —

Ross for the plaintiff objected to the right of Mr Stuart to sue out the above rule, as he was not known in the Original Cause, nor produces any authority from the defendant for this purpose — That the defendt has lately absconded and left the Province, which renders such power the more necessary to prevent any undue interference in the Cause — That the stay of execution granted to the Defendt was conditional, but this condition being broken by process of attachment having been sued out against him the Plaintiff became entitled to his execution —

Stuart for Defr The defendant is entitled to object through the medium of his attorney to any irregularity of the proceedings against him at any stage of a Cause — a special power for this purpose is never required by this Court, nor is it requisite — As to proceedings complained of, it is manifestly irregular — the record in this Cause carried on the face of it a stay of execution until and to have sued out execution contrary to that record cannot be admitted on any principle to be right — If the Plaintiff had ground to shew that the Defendt had not complied with the Condition upon which that stay of execution was granted, he ought to have applied to this Court, who upon proof of the fact, would have given the Pltff the relief he wanted

wanted, by altering that record, or declaring the condition upon which the stay of execution was granted to be broken — but there is no such power as this in the Judges in vacation, much less in the Prothonotary who takes upon himself to grant an execution in the face of the record — Even if the fact were as stated by the Plaintiff at this moment, that the Defendt had broken the condition upon which the stay of execution was granted, yet until proof of that be made, this Court cannot upon the bare statement now made alter their record — a day must be given to shew what is so alledged — and the Defendt will have an opportunity then to shew that the Execution was improvidently sued out. —

It appearing to the Court by the entry book of Causes sued out of this Court that a writ of Ca. had been sued out agt the Defendt during the stay of execution which had been granted by the Pltff, they considered no further proof necessary to shew that the Plaintiff was entitled to his execution — and therefore discharged the rule obtd by Defendt. —

June Term 1812.

Tuesday 2. June 1812.

Barlow v. Dunlop.

During the last vacation the witnesses of the parties were examined, except two on the part of the defendant, and it was reserved to him to examine them in course.

Stuart for plff. moved this day that the Cause should be fixed for hearing,—

Ross for Dfdt. objected that he ought to have a day for the examination of his witnesses before setting down the Cause for hearing, as the same had been reserved to him and was so entered on the roll d'enquête on closing the examination of the other witnesses last vacation —

Stuart in reply observed that if the defendant meant to examine any witnesses under the reservation made and entered on the role d'enquête, he ought to have moved on the first day of the term for such further examination — and of this opinion was the Court, and therefore granted the plaintiffs motion.

Douglass vs Bisette.

On an action petitoire.—

It was moved on the part of the plaintiff, that the papers and exhibits filed by him in this Cause, which regard the title to the land in question, be taken and considered as filed in two other Causes instituted by him against two other persons respecting the same land, in order to save the trouble and expence of procuring copies of the said papers.—

The Court over-ruled the motion, being of opinion that the Plaintiff must file either the original papers upon which his action is founded or certified copies thereof as admitted by the rules of practice.—

Saturday 6th. June 1812.

Wilson &c. } v Smith &al' }

During the last term the defendants filed an affidavit stating that at the time and since the commencement of the present action the plaintiff resided in a foreign Country, and therefore demanding security for costs — upon the hearing of this motion, and upon the Plaintiffs contending that he was resident within the district, the Court ordered the parties to proceed to their proofs upon the fact of the plaintiffs residence. — Under this order no proofs were adduced by either party —

Gale for Defd.s contended, that as the plaintiff has alleged the fact of his residence to be within the Province it was incumbent upon him to prove it, more especially as by the affidavit already produced and filed by the Defendants the presumption is against him — cites Case of Cole v. Church 3. Ass. Term. 1812. where such security as now demanded was ordered without any further proof than the affidavit of the Defend.t

Ogden for Pltff. The defendant alleged a fact different from that stated in the declaration, namely, that the Plaintiff was resident at a place out of the Province, it therefore became his duty to prove that fact, on default of which the record must be taken to be correctly stated — That the affidavit

of

of the defendant cannot be considered as any proof in the Cause, it was necessary to ground his motion, as without it the Court would not have delayed the Cause nor given them a day for proof.—

The Court were of opinion that it was the duty of the plaintiff to have made proof of his residence being within this province, which was the fact in contest and the burden of that proof lay on the Plaintiff—

Mo. for Security for Costs granted.

McDougall vs Henrick.—

On a rule Nisi sued by Pltff on Defendt to shew Cause why Execution should not issue upon the Judgt rendered agt the Defendant in this Court the

Georger for Defts stated, that the writ of Summons in this Cause was not served upon the Defendant in the manner required by law, by reason whereof the Court was not ~~legally~~ authorised to render any Judgt agt the Defendant who was not legally called before them— That the writ of Summons was served at a certain place named and elected by the defendant

as

as his domicil in a certain deed made by and between the defendant and one which deed was afterwards transferred to the plaintiff who brought his action thereon — that service of process at an elected domicile is not sufficient under the Provincial Ordinance of 1785. —

Sol. Genl. Service of process at an elected domicile is valid and sufficient for every purpose relating to the act or deed in which it is stipulated, either between the parties to that deed or those standing in their rights. —

By the Court — Service of process at an elected domicile is sufficient — it is the convention of the parties which makes it so, the Prov. Ordinance does not affect it — But it is now too late for this Court to look into the nature of the service of the Process, it has by the Judgment already given considered it as sufficient, and it cannot alter that Judgment, — the Defendant had his recourse by appeal — Rule absolute —

Roi
v
Johnson.

Action for damages on breach of Contract.

Sullivan for Dfdt. pleads for exception to the plaintiffs action that two were bound by the Contract for the breach of which the pltff brings his action, in which action both ought to have been joined — that action is against the defendant alone without alledging any non-performance of the other person, one Newcomb, named in the Contract, who may have fulfilled the same.

Papineau for pltff — The defendant and Newcomb were jointly and severally bound by the Contract in question and the pltff therefore had his action against both or either of them — as to the fulfillment of the Contract by the party not sued, the defendant may alledge in defence, if it can be useful, but the Pltff was not bound to notice the non-performance of a person not before the Court, and not material to his action — And of this opinion was the Court, and therefore dismissed the exception pleaded by the defendant.

Wednesday 10th June 1812.

M^c Lean — v^r — Ermatinger et al

This was an action of trespass ag^t. Defend^ts for the illegal seizure and detention of a certain quantity of timber belonging to the Pltff.

Stuart for Pltff, moved that Cause should be tried by Sp. Jury.

Ross for Defd^ts objected — that the seizure and detention of the timber complained of was not such a personal wrong as to entitle the Pltff to a trial by Jury under the Ordinance of 1785.—

Stuart in reply — The pltff states, that the declaration states a personal wrong done to ~~him~~ his credit and character as a merchant have suffered, which are injuries to be compensated in damages by the trial and verdict of a Jury — cites cases. Fleming & Grant. v^r Blackwood. April 1807.—

The Court were of opinion that the Plaintiff was not entitled to a trial by Jury in this Cause.—

Frenchs. — v^r — Stevens

Georgen for Pltff moved to be permitted to amend his declaration by striking out the word, "four^th", and insert in lieu thereof the word, "twelfth", being the date of the obligation upon which the action is brought — This was opposed by Ogden for the Defend^ts, and the Court were of opinion that the motion ought not to be granted, as it be substituting a new Cause of action in lieu of that to which the Defendant had been called to answer.—

Thursday 11th June 1812

Douglass
vs
Momenil
and
Intervs

On an action petitoire.—

Sol. Genl moved for delay on behalf of the Intervs party to call in the heirs of the late S. Sanguinet under whom the Intervening party claims title to the land in question.—

Stuart for Plff – The intervening party is premature in his application, as no plea has yet been filed to his Intervention whereby the claim set up by him is contested and it is only in this Case that the motion could be granted.—

The Court considers that the Intervening party had a right to call in his garant at the present stage of the Cause, and therefore granted the motion.—

Joubert
vs
Jones.—

This was an action instituted against the defendant as special bail for one Barlow—

The plaintiff obtained Judgment against Barlow on the 20th April last— On the ninth May he sued out a Ca. Sa. upon that Judgment – and on same day called upon the bail

bail to surrender the defendant to the Sheriff under the Ca. Sa. On the 15th. May. the Sheriff returned a "non est inventus" upon the Ca. Sa. — On the 20th. May the writ of Summons was sued out in this Cause, and was served on the 22d. —

The Sol. Genl. pleaded for exception to the pltffs action that it was premature, having been instituted only 29 days after Judgment given in the original Cause, whereas the bail have one month after Judgment to deliver up the principal and liberate themselves. —

Lacroix for Pltff. The plaintiff having obtained a return of non est inv: upon the Ca. Sa. sued out against the principal and the bail having failed when called upon to deliver him up to the Sheriff, the Plaintiff from that moment had a right of action against the defendant as bail. —

By the Court — From the time of the return on the Ca. Sa. the plaintiff was entitled to his action against the bail. 1 Tid. Prac. 238. They might have pleaded a delay to bring in the body, if there had been any days to expire of the month allowed for the render — and such delay would have been allowed, but this was not asked for, and at the time of pleading here that time had expired, and the condition of the Recognizance broken. Exception dismissed. —

☞ Notwithstanding this opinion, there are strong grounds to say, that the action against the bail ought not to be brought, until the Condition of the Recog. were broken.

M.c Lean. vs Ermatinger & al.

Stuart for pltff moved for hearing for want of a plea.

Ross for Defendt objected to the motion, inasmuch as the plaintiff's motion for a trial by Jury was over-ruled only yesterday, and therefore the present motion is premature.

Stuart in reply states, that this Cause was returned into Court on the first inst. and the rules to plead are peremptory unless something in them can be considered to extend them in case of a motion such as that made by the plaintiff for a trial by Jury, which cannot be done — the defendant ought to have obtained a delay from the Court to be entitled to file a plea at a later period than the three days after his appearance, which has not been done, and therefore now too late to offer any plea. —

The Plaintiffs motion was over-ruled, the Court being of opinion, that any motion which tended to stop or prevent the regular proceedings in the Cause, gave a delay to the parties — that as a contest had arisen touching the right of the plaintiff to a trial by Jury, the defendants could not be held to fyle their plea until it should be ascertained whether the conclusions of that plea should be made to the Court or to the Country.

Desrivieres vs Hatt. —

Stuart for Defdt. moved to suppress the Plaintiff's answers to the Interrogatories upon faits & articles, as they had been taken in private, and out of the presence and hearing of the parties, and contended that the rule of practice lately made authorising this mode of proceeding was contrary to the provisions of the Ordnce of 1785 and therefore could not legally be made. —

The Court were of opinion that the rule of practice was in nowise at Variance with the Ordnce of 1785. ch. 2. S. 11. which regarded only the examination of witnesses, and therefore over-ruled the motion. —

Tuesday 16th. June 1812.—

Goodsell
v.
Barlow

The plaintiff examined his witnesses on the 12th. inst. when he obtained an order for the examination of the Defendant upon faits & articles on the 13th— On the 13th a further day was given for the plaintiff to do diligence and procure the above examination on the 15th— On the 15th nothing was done — On the 16th the

Wednesday 17th. June 1812.

Whiteside. v. Douglass.

On the 5th. inst. the defendant took off the default which had been entered against him on the 1st. inst. and on the 8th. moved for and obtained, Security for Costs from the Plaintiff — On the 10th the defendant having filed no plea, the plaintiff moved that the Cause should be heard ex parte — The defendant objected, that he was not too late to fyle a plea, being entitled to 4 days from the day of his appearance to demand security for Costs from the plaintiff, before which time he was not bound to fyle a plea, as it would be a waiver of his right to such Security —

But the Court held that security for costs must be demanded within four days from the entry of the action — and therefore granted the plaintiff's motion.

Friday 19th June 1812.—

Perras & al.
Syndics &c.
vs.
Taylor.—

The plaintiffs by their declaration stated, that Clement Perras, one of the plaintiffs in this cause being damaged in his house and premises situated in the Recollets suburbs of Montreal by the water which flowed from the lots adjoining, instituted an action in the Inferior Court against one Fournier his neighbour in order that some means might be ascertained to carry off the said water, and in consequence of an Interlocutory order of that Court, Experts were named who visited the premises and made their report on the means of making a drain to carry off the said water — It appearing by this report, that the neighbours were interested therein, they were by order of the Court called into the Cause, — when several persons, and one Donald McKerkar as — possessing lot No. 9. in the rue du Canal, appeared, and opposed the homologation of the said report — That after hearing upon the opposition to the said report, two other experts were appointed under an order of the said Court, who together with the experts heretofore named, made a new visit of the premises and a report thereon with a plan annexed, in which the said Donald McKerkar is named as being then the proprietor and possessor of the said lot No. 9, and as such interested

in

in the proceedings in question.— The last mentioned report of the experts was by the said Court on the 19th Sept. 1806 homologated, and it was thereupon ordered that a canal should be made in conformity thereto, for draining the lots of the several parties concerned at their joint expence, & that the costs of the suit should be equally divided among them— that the work should be conducted under the direction of of three Syndics who were named by the parties and approved by the Court— these Syndics are the Plaintiffs in this Cause— That after the homologation of the said last mentioned report, and before the making of the said Canal the Defendt in this cause purchased from the said Donald M'Kerkar the lot of ground No. 9 above mentioned, and thereby became liable to do and perform what was ordered for the making of the said Canal and the payment of the Costs and charges aforesaid— That the plaintiffs as Syndics afterwards contracted with one Amable Perrault to make the said Canal as above mentioned in consideration of 45 Sols ℔ foot, in consequence of which a repartition was made by Mr Charland the road Surveyor of the charges for making the said Canal, by which the defendant was rated at the sum of £10.. 1.. 1 as his share and proportion thereof, and 10/3 for his share of the expences of the said suit— That although the said Canal hath been made and completed as required, yet the said Defendant refuses to pay his share and proportion of the said charges and expences, being £10.. 11.. 4— for which the Pltffs therefore bring Suit

To

To this action the defendant pleaded for exception, that the Plaintiffs were not entitled to their action agt. him —
1st Because the Plaintiffs, as Syndics, are not competent, nor have they any power to institute any action against the defendant, their appointment being illegal and void. —
2d Because, all the rules, orders, and proceedings had in the Inferior Court in the Cause wherein Clement Perras was plaintiff and Augustin Fournier Defendt., are wholly null and void —
3d Because the said Inferior Court in & by the said rules orders and proceedings in the said Cause made, exceeded their Jurisdiction, and determined upon matters not within their competence —
4 Because the said Court adjudged upon matters not legally before them, and upon the rights of persons not legally summoned to defend the same. —
5d Because the Defendant was not a party to, nor legally represented in the aforesaid action, and cannot therefore be bound by the aforesaid rules orders and proceedings. —
6t Because the said Donald M'Kerkar was not a party to the said action, and if he had, no recourse can thereby accrue against the Defendant —
7. Because the Judgment rendered the 19 Septr 1806 is interlocutory and doth not award the payment of any sum of money by the Defendt. nor can it give any right

of

of action to the plaintiffs against him for the same.—

8ly. Because the said Inferior Court have assumed and exercised the powers of the legislature, which is not vested in them as a Court of Judicature.—

9ly. Because by the action of the said Clement Perras agt. the said Fournier, a greater amount than £10 St. was demanded, and the Court adjudged upon claims greatly exceeding that sum, and upon which they had no Jurisdiction.—

10ly. Because the repartition in question was made without any authority, and never was approved of or confirmed by any legal Jurisdiction, and is therefore without effect.—

Issue in law was taken upon these exceptions by the Plaintiffs and the parties heard thereon, when it was argued principally by the Defendant, that by the constitution of the Court of Kings Bench under the Prov. Stat. 33 Geo. the inferior branch of that Court had no jurisdiction over any sum or matter exceeding £10 St. and that the demand of Clement Perras in his suit agt Fournier, far exceeded this sum— That by approving the appointment of Syndics, the Court had created a Corporation which was beyond their power and appertained to the Legislative power alone.—

The Court were of opinion that the Inferior Court had cognizance in all matters respecting the course and discharge of waters, the making of fences and ditches by and between neighbours, where the value of the object in question is not ascertained, nor in contest— in these and similar cases, where the value

value may be considered to be above £10 St. or where the rights of the parties in future may be bound, a power is given to a defendant to carry the Cause by evocation to the Superior Court – if this be not done, the presumption is that the defendant has acquiesced in the Juris diction of the Inferior Court. – That it has been the uniform practice of that Court, to call in by rule, or order of Court such persons as appear to have any interest in any report or Proces verbal of Experts made in any Cause there pending which is consistent with the summary and equitable jurisdiction of that Court, where the preventing of expence and delay become material objects of consideration. – That the appointment of one or more Syndics was within the power of that Court, for the execution of any matter or thing directed to be done by that Court – such appointment is made either by the Consent or after hearing all the parties concerned, and may be set aside by the same authority at any time upon good Cause shewn. – That the act of repartition made by Charland could not be considered to be binding upon the parties, not having been made either by the order of the Court, or confirmed by it, but as it appeared to contain an equitable distribution of the expence incurred in making the drain in question, the Court thought it was the duty of the defendant to have

pointed

pointed out in what it was unjust or imperfect, as they considered a fair and just repartition, even if made by the plaintiffs themselves, to be sufficient – and as no injustice or insufficiency in the act of repartition has been alledged to exist, there can be no reason why it ought not to be adopted. – That the Judgment of the Inferior Court homologating the report of the Experts must be considered as binding the property of D. McKerkar, and the defendant by purchasing that property became bound to fulfill that Judgment in so far as it regarded the said McKerkar, it required no new process or suit at law to establish this point against the Defendants before instituting the present action – These points of law being thus determined and considering the proofs made in the Cause, the Court were of opinion that the plaintiffs were entitled to their Judgment.

Lacombe.
vs
Robillard
& ux: " "

The Pltff stated, that on the 18 Febry. 1811, the late Louis Robillard and the said pltff contracted marriage together by and with the consent of the defendants, the father and mother of the said late Louis Robillard, who were parties to the marriage contract, by which it was stipulated that there should be a Communauté between the contracting parties, and in which the property of the said late Louis Robillard was said to consist of two certain lots of land in the said Marriage Contract described, which the Ss Defends therein and thereby did give and grant to him, reserving however to themselves the enjoyment of the said lots of land until the Spring of the year 1813, it being stipulated that in the mean time and until the expiration of that period the said late Louis Robillard and the said plaintiff should live with the said Defendants, who were to board and lodge them till that period. — That it was further stipulated, that on the 29 Sept. 1813, a certain rente & pension should from and after that period be paid by the said pltff and her Ss late husband to the said defendants during their life time — That in and by the said marriage Contract a dower was stipulated in favor of the said plaintiff of 300 livres, or the Customary dower at her option, to be had and granted to her as soon as dower might take effect — with power to her upon the dissolution

dissolution of the said Communauté, to renounce thereto, and take her said dower with all the other advantages stipulated in and by the said Mariage contract free and clear of any debt of the said Communauté.— That on the 12th. day of August 1811 the said Louis Robillard died without issue of his mariage with the said Plaintiff— and on the 27th. day of Sept. 1811 the Pliff having made and perfected an Inventory of the said Communauté, renounced thereto, and thereupon claims her customary dower in the aforesaid two lots of land so given to her said late husband by the said Defendants.— That the said Defendants now holding the possession of the said two lots of land as being the heirs of the said late Louis Robillard, deny the right of the Pliff to her said dower, and for which she now therefore brings suit

Ross for Defendts pleaded, that the plaintiffs action is premature, as by her own shewing it appears that the Defts are entitled to retain the two lots of land in question until the year 1813.— That the said two lots of land are not liable to the customary dower of the Pliff, because the donation made by the said Defendants to the said late Louis Robillard is null and void in law, the same not having been accepted by him, nor enregistered.— That the said late Louis Robillard was not at the time of making the said marriage contract, nor at any time during his lifetime, the proprietor of the said

two

two lots of land, inasmuch as the right of property and the possession thereof hath always remained in the said Defendants, who now hold the same in their own right, and not as heirs of the said late Ls Robillard

That the said Plff is at all events not entitled to claim her said dower without paying to the said Defendants the sum of 2500 livres, and also the rente & pension stipulated to be paid to them in & by the said Marriage Contract. —

Rolland for Plff. in reply, No acceptation of a Donation is necessary when made by Marriage contract —

Dic. droit. Vo acceptation. —
Ordonnance de 1731. art. 10 —
Nouv. Deniz. Vo Donation par contrat de Mariage

That the right of property in the two lots of land in question ~~is~~ was vested in the said late Louis Robillard, the retention d'usufruit by the donors, being equivalent to a tradition of the property —

Pothier. Cout. vente No 313. 321.
——— Propriété No 208. 9. 10 —

That the Defendants as heirs of the late Louis Robillard can have no claim in preference to the right of dower of the Plaintiff. —

Renusson. Ch. 8. No 21 —

The Defendants have claimed the Estate of the late Louis Robillard as heirs, to which they are entitled by law

law, nothing more was requisite than the declaration of their intentions in this respect —

Pothier. Tr. des Suc. ch. 3. sec. 3. art. 1er. § 1.

Duplessis. Tr. des Suc. liv. 4. ch. 3.

Nouv. Denizt. vo addition d'heredité. —

That the Defendants having become heirs of the said late Louis Robillard, can have no claim against his succession as creditors, they cannot be debtors and creditors of the same succession —

Poth. Obl. No 605. & suiv.t

The Court were of opinion that the right of property in the two lots of land in question had so far vested in the plaintiffs late husband as to entitle her to dower thereon. Poth. Douaire. No 31. & suiv. — and as it appeared that the Defendants had assumed the title & capacity of heirs of the deceased, they could not exercise any claims they might have upon the said two lots of ground in preference to the Plaintiff, whose claim for dower was open by the decease of her husband. — Judgment for the pltff. —

De Labruere vr Massé. a

Action of assumpsit on promissory note made by the Defendant to the pltff. a

It appeared from the testimony given in the cause that the promissory note in question was made by the Defendt. for a sum of 800 livres payable to the Plaintiff, as and for the consideration of a grant or Concession made by the Plaintiff as Seignior of a certain lot of land in his Seigniory to the defendant — By the deed of Concession the land in question was granted at the usual rates of rent, and no mention whatever was made therein of any improvements having been made on the land, or any consideration having been stipulated to be paid by the defendant therefor, on the contrary the lot of land was described to be "une terre à bois" —

The Defendant took exception to the validity of the consideration for which the note was given, contending that by such means, the law prohibiting the Sale, by Seignios, of lands, "en bois de bout" would be eluded, if such securities for the payment of money or other consideration separate and apart from the deed of Concession could be granted —

To this the pltff replied, that he had made improvements on the land at the time of the grant, and that the note

in

in question was given as the consideration for those improvements.

But it appearing that all the improvements made, if they could be considered as such, consisted of one quarter of an acre of a clôture d'embarras, valued at 20 Sols, and that no mention whatever was made of such improvement in the deed of Concession, nor that the subject of improvements had ever come under the view and contemplation of the parties at the time the said deed was made, or that the note had been given as the estimated value thereof, the Court were of Opinion that the note was void, and dismissed the action —

The King
vs.
Delery. —

On Certiorari - removing from the Court of Quarter Sessions of the Peace, a Judgment of Confirmation of a Proces verbal of the Grand Voyer. —

It was objected that the proceedings of the Grand Voyer had been irregular -

1st Because, there appeared no proof of any notice or publication by the Grand Voyer at the Church door of the Petition laid before him for making the bridge in question, and of his order thereon — it being merely stated by him in his

Proces

Proces verbal that he had given such notice, without annexing any proof thereof, such as the Certificate of the Officer who had made the publication, or an affidavit by some person to that effect - it being contended that such proof was necessary, as it was under such notice and publication thereof alone, that the Grand voyer was entitled to proceed - his alledging the fact of such notice and publication, was no proof thereof more especially in a case where such proof was necessary to give Jurisdiction to the Grand voyer over the rights of a great many Individuals. -

2^{dly} Because the interval between the publication of the order and petition as stated by the Grand voyer, and the day of meeting of the parties concerned at the Bridge in question in order to take their advice and opinion in the premises, was insufficient, the delay required by law not having been allowed to the said parties - the order appearing to have been published on the 21st July after the celebration of the mass, which was about eleven O'Clock in the morning, and the day of meeting fixed for the 23^{d} at nine O'Clock in the morning - whereas the law requires, that two days notice at least must be given - but here the two days were not complete under any computation - and in legal computation of time the day on which the notice was given should not be included. -

The

The Court were of opinion, that the report of a public officer must always be taken and considered as true touching all matters of fact it contains, and will be received as legal evidence thereof, where he observes the forms prescribed by law, and acts within his jurisdiction - Had the fact touching the publication of the petition and order thereon been otherwise than as alleged by the Grand Voyer in his Proces verbal, this should have been ascertained either by sufficient affidavits or other proof made thereon that might give room to presume a want of correctness in the proceedings - As to the delay of two days, this has always been construed by the Court to be twice 24 hours from the time of the notice - There is nothing to ascertain at what hour in the morning of the 21st the order was published, it might have been before as well as after nine o'Clock, without this the Court must presume all to be right under the assertion of the Grand Voyer, and that the publication was made so as to give that delay before the time of meeting which the law required - Certiorari quashed & proceedings remitted

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Collins. —
vr
Georgen.
&
Duplessis
mis en Cause

The mis en Cause had sued out an attachment against the Defendant for house rent, under which the goods and effects of the defendant were attached and held under seizure to answer the demand. —

The Plaintiff having afterwards obtained judgment against the defendant sued out execution thereon, upon which the Sheriff returned, that he had seized certain goods and effects of the defendant, which were already in his possession under the aforesaid writ of Attachment, and remained unsold — The Plff now moved for a writ of venditioni exponas, for the sale of the said goods and effects. —

Vigé for Duplessis, stated, that he has sued out a writ of execution upon the Judgment he has obtained against the defendant, under which the goods and effects heretofore attached will be sold — That the said Duplessis having a privilege upon the said goods and effects for the payment of his house rent, no other writ ought to be granted to the Plaintiff for the sale thereof, as it would occasion an unnecessary expence to the parties — and further that the said goods and effects were first seized at the Suit of the said Duplessis and still remain seized, and the Plaintiff cannot by a writ of Execution seize the same a second time in order to proceed to the Sale thereof. —

Beaubien

Beaubien for Defendt. says, that the seizure made by the Sheriff of the goods and effects of the Defendant at the time the same were held by him under the attachment sued out by the said Duplessis, was wholly illegal, and no writ of venditioni exponas can be granted to the Plaintiff for the sale of the said goods and effects under the said seizure.

Stuart for Plff, says, that the Sheriff having made a seizure of the goods and effects in question at the instance of the Plaintiff, he is now entitled to have the same Sold. — That the addition made by the Sheriff in his return upon the writ of execution sued out by the Plaintiff, of the circumstance that the goods were already in his possession under the writ of attachment sued out by Duplessis, is wholly irregular and can be considered merely as surplusage. — That whatever privilege the said Duplessis may be entitled to upon the said goods & effects, yet he ought not either by collusion with the defendant or from other cause, to delay the Plff in his progress to obtain satisfaction of his debt, for if the pretentions of the said Duplessis be admitted, he may hold those goods and effects under attachment at his pleasure and not permit the Plaintiff or any other creditor of the Defdt. to obtain the Sale thereof, even although there may be sufficient to pay the demands of all parties. —

The Court directed that the mis en Cause should do diligence upon his execution to procure the Sale of the

Defendts

Defendants goods and effects now under seizure, within fifteen days, failing which the Plaintiff was authorised to proceed to effect such sale. —

Saturday 20th. June 1812.

De Beaujeu
v.
Chatels fils
& others.

The plaintiff instituted an action agt. the Defendants, in order to reunite to the domain of his Seigniory certain lots of land which had been granted to the several defendants as his tenants.

The defendants were joined in the same declaration and called into Court by the same writ - The defendants made default - The deeds of concession appeared to have been made to them separately of the separate lots of land in question, and a Judgment of re-union to the Plaintiff's Seigniory of the said lots of land was now demanded. - It was stated, that the practice before the conquest of the Country, as well as since, in the Courts of Common pleas, was to present a requête to the Intendant, or Court, stating the demand of the Seignior and praying the re-union of the lands of all such tenants within his Seigniory who had not kept feu et lieu upon the lands granted in conformity to the terms of the grant, and praying thereon an order for calling before the said Intendant or Court, those tenants to give their reasons why their several grants should not be rescinded and the lands re-united to the domain of the Seignior.

This requête and order were published at the church door

of

of the parish where the lands lay, and on the day appointed, if no Cause was shewn, a Judgment of reunion was given upon the certificates of the Curé and Captain of Militia of the parish, as required by the arret of 1711. — Such being the practice settled and established by numerous judgments of the Intendant and Court of Common pleas, there could be no reason to depart from it now, except in so far as regards the calling the defendants into Court, which by the Ordinance of 1785 is directed to be done by the Kings writ — which has been complied with in the present instance. —

But the Court were of opinion that different Defendants upon different deeds and Contracts could not be joined in the same action — and that they saw no reason to depart from the regular course of proceeding in cases of this kind more than any other.

— Whereupon the pltff having discontinued his Suit against two of the Defendants, Judgment was given for him agt the other Defendant, as prayed. —

Burnside.
Vve Saraulet
and
Saraulet Opp.

The plaintiff having seized certain real property belonging to the Defendant and her late husband, the Opposant as Curator to one Jean Meretrier, and to Jean Bapte and Louis Courcambec, all absentees, opposed the sale of the said property, unless the plaintiff should give security that the sale thereof should amount so high as to cover the amount of a debt of £2000 due thereon to the Opposant in his said Capacity under a mortgage of 25th June 1791, which gave him a preferable right to the plaintiff upon the said property. — In support of this doctrine the opposant relied on what is laid down by Poth. Proc. Civ. p. 238. —

Boston for Pltff. — said, that if the principle contended for by the opposant were admitted, it would be destructive of all transactions and trade, as no debt contracted after a mortgage could be paid out of a debtors property — whereas a debtors property ought at all times to be free and liable to discussion, so that every claim thereon may be satisfied as far as such property will extend. —

The Court were of opinion that the jurisprudence contended for by the opposant did not hold in this Country, that no prior claim or privilege could exempt the property of

of a debtor from being sold, as under the laws of the Country such property was liable to be discussed for the purpose of satisfying his debts, and taking recourse against his person, when allowed, where no other satisfaction could be obtained. —

Tuttle & ab'
vs
Berry. —

The plaintiffs had obtained a Judgment in the Inferior Court of Kings Bench against the Defendant for a debt of £9. 10. 6 and £7. 10 Costs, upon which Judgment execution was sued out and a seizure and sale made of the defendants goods and chattels, after which there still remained a balance due to the plaintiffs of £13. 12 for which an action was instituted in this Court, in order as alledged to obtain a judgment whereby the defendants lands and tenements might be sold. — The process was served upon the defendant by attaching a copy thereof to the door of the house where he usually resided, as no person was at the time living therein — The Defendt did not appear at the return of the process, and upon the 20th June 1811 Judgment was rendered against him for the above sum of £13. 12 and Costs of Suit — Under this Judgment a certain lot of land belonging

to

to the defendant was seized and advertised for Sale, to supersede which, the defendant presented a petition to the Judges, stating amongst other things, that as the writ of Summons had not been served upon him personally, nor at his domicil, nor at his usual or actual place of residence, he was entitled to a rehearing of the Cause, and thereupon prayed a Surcis to the above writ of execution, which was granted to him — upon the re-hearing it was urged by the defendant, that no action could be had in this Court upon a Judgment in the Inferior Court, nor any other remedy had upon that Judgment than under the process of that Court — that upon a Judgment in the Inferior court no execution can be had against the lands and tenements of a Defendant, and this Court cannot assume a jurisdiction over the proceedings of that Court so as to give a greater remedy here, than by law is given in the Inferior Court — To this it was answered by the plaintiffs, that they had done all diligence to obtain Satisfaction of their debt upon the execution sued out of the Inferior Court but the defendant having left the province, and there being no other property to be found therein belonging to him except the lot of land now seized, the plaintiffs must be without remedy if they cannot obtain a Judgment of this Court — that the sum in contest being within the competence of this Court the Cause of action, whether founded upon a Judgment or

on

on other consideration is immaterial —

The Court were of opinion, that as the plaintiff had done diligence to obtain satisfaction of his Judgt obtained in the Inferior Court without effect, ~~that~~ he was entitled to the aid and assistance of this Court for such Judgment as would affect the real property of the Defendant; inasmuchas the sum in contest was within the competence of the Court — The Judgt. therefore already given was confirmed by the Court — The Ch. Just. declared himself to be of a different opinion and thought that the Court had no jurisdiction in this case. —

Demers. v. D. & W. Forbes } Action on deed of Sale by the Pltff and his wife of a certain lot of land to the Defendants — for the recovery of certain sums of money due thereon.

The Defendants pleaded, that the action was irregularly brought in the name of the Plaintiff alone, as the Contract had been made by him and his wife, and therefore she ought to have joined in the action — Further, that by the deed of Sale the Pltff and his wife had stipulated to deliver to the defendants all the deeds and titles respecting the lot of land sold, and particularly a certain deed of Sale thereof by one Wait to Archd. McDonald, which the Pltff has

not

not done although thereunto required by a notarial demand and protest made for this purpose before the institution of the present action —

The Plaintiff contended that as chef of the Communauté he was entitled to maintain the present action in his own name without joining that of his wife — and further that he was always ready to deliver to the Defendants the deed of Sale in question, and has filed the same with his replication.

The Defendants in answer, stated, that there is nothing to shew that there is any Communauté between the Plff and his wife, and that the regular course is, for the parties who make the Contract, to demand the execution of it — That the Plaintiff was in default in not having delivered to the Defendants the deed of Sale in question when demanded, at least he ought to have tendered it to the Defendts before bringing the present action, so that they would not have been reduced to the necessity of making any plea or defence in respect thereof — that on this account the Plaintiff ought to pay Costs, which have been occasioned by his own laches to the Defendants. —

The Court were of opinion that as no tender had been made by the Defendants to the Plff of the debt for which they were prosecuted they were not entitled to Costs on the action — That the Plff alone had the right of action agt. the Defendants

on

the Contract made by him and his wife with the Defend^{t} whether there any Communauté or not between them where the real estate or sole property of the wife was not in question —

Stanley
vs
Poser . a

Action of damages for breach of Covenant. —

One Benjamin Andress a minor, had been bound as an apprentice to the plaintiff, a boot & shoe maker for the space of three, with the usual stipulations of faithful service on the part of the apprentice and not to absent himself without the leave of his master — And for the due performance of all which Covenants the Defd. became personally bound as a security to the Plaintiff on behalf of the said Benjamin — The Plaintiff now complains that during the said apprenticeship, viz^{t}. on 9 May 1811, the said Benjamin without leave or permission withdrew and absented himself from the service of the said Pltff and hath not since returned, to his damage £100. — for which sum he brings suit ag^{t} Defend^{t} as security as aforesaid —

The Defendant pleaded that at the time the said Benjamin left the service of the s^{d} Pltff. he enlisted in the Corps of Canadian Fencibles and became a Soldier in His

Majesty's

Majesty's service, — That the pltff ought to have given notice to the Defendant of the said Benjamin's having withdrawn from his service, so as to have enabled the Defendant to use the proper means to find him and bring him back to his duty, but not having done so, the Plaintiff himself ought to have used the necessary diligence in this behalf, particularly as he was entitled as the master of the said Benjamin to obtain his release and discharge from his enlistment in the said Corps, provided he had applied in time, as articled apprentices are protected in this respect — but not having done and not having given timely notice to the Defendt so as to enable him to do so, the Pltff ought to recover no damages from him —

The plaintiff replied, that he was not bound to give any notice to the Defendant at the time the said Benjamin absented himself, as it was the business of the Defendant to see that the Contract was duly fulfilled by the person for whom he had become security —

The Court held that no notice was necessary to be given by the plaintiff to the defendant at the time the apprentice absented himself and enlisted into the Kings Service, because he was not such an apprentice as is protected by the Statute agt such enlistment, not having been bound for Seven years — The Court

however

however inclined to think, that the Indentures of apprenticeship been for seven years, it would have been the duty of the plaintiff immediately upon his being informed that the apprentice had enlisted to claim him as his master, or give timely notice thereof to the Defendant to take the necessary steps in this behalf. — Judgt. for Pltff. —

M'Millan v Finckley.

The Defendant moved to be discharged from his confinement in gaol, where he was held at the suit of the plaintiff, for want of payment of his weekly allowance at twelve o'Clock on Monday conformable to the rules of practice It appeared that the money had been left with the gaoler before twelve O'Clock, and that it had been tendered by him to the Defendant about or a little after that hour. —

It was contended on the part of the Pltff. that the tender of the defendants allowance had been made even in conformity to the rules of practice limiting that tender at or before twelve o'clock — but inasmuchas as the Ordinance of 1785 gave the whole day to pay such allowance, the Court had not the power to

alter

alter or limit that time to any particular hour of that day, as had been done by a late rule of practice.—

The Court held that as they were vested with the power of making rules of practice for conducting the business before the Court, they were warranted to settle and determine the precise time at which allowance to debtors in confinement ought to be paid, it was for the ease and convenience of all parties that this should be done, and by limiting this payment to twelve o'Clock on every monday did not alter the law, or deprive any party of a right he held under that law— That as there did not appear to have been any laches on the part of the plaintiff in this Cause the Court rejected the Defendants motion.—

Blackwood & al'
vs
M'Laren & al'.

Action for penalty of a bond

On the 29th. day of August 1810, one austin Cuvillier sued out a writ of attachment or entiercement against a certain quantity of 8000 white oak Staves then in the hands and possession of M'Laren one of the Defendants in this Cause, by virtue whereof the said Staves were attached and seized by the Sheriff.

On

On the 26th. day of September following. M.Laren obtained an order directing the Sheriff to deliver back the said Staves to him upon his giving Security that the same should be forthcoming when required — whereupon the said Sheriff did deliver back the said Staves as directed, upon the said M.Laren and the other Defendants in this Cause giving him jointly & severally a bond for £900 —, conditioned, that they the said Defendants should have forthcoming to await the future order of the Court the aforesaid Staves, or pay the value thereof — afterwards on the 20th. October 1810 the said Court adjudged the said Staves to be delivered up to the said Cuvillier as belonging to him failing which that he should have his recourse agt. the (Defendants) persons who had become Security as aforesaid — The Sheriff having assigned the afores. bond to the said Cuvillier he afterwards assigned the same with the said Judgment to the plaintiffs in this Cause — after the said assignments so made M.Laren was called upon by the pltffs. to deliver up the said Staves, and upon his non-compliance a protest was made thereon the 28 May 1811 and an action in consequence commenced against the Defendants for the penalty of their bond —

To this action the defendants pleaded —

1st —

1st. The general issue, that they were not indebted in manner and form &c — and contended that under this plea they were entitled to alledge that the bond in question was alternative, either to deliver the Staves, or pay the value of them, and therefore the action ought to have been in the terms of the bond and not for the penalty — Poth. Obl. N. 248. That there is a variance between the bond produced in Court, and that stated in the Declaration, the bond produced stating the process under which the Staves had been seized to be returnable into Court on the 2d day of October, that states in the declaration is said to be returnable on the 20th of October — this is a fatal variance, the bonds are not the same, and the defendants may be liable to another suit upon the same bond. —

2d. The Defendants have never been put en demeure, or called upon prior to the institution of the present action to deliver the Staves — this was necessary to entitle the Pltffs to demand even the value of those Staves

3d. That the Defendants are bound to return the Staves only, which they are ready and willing to do — it is the thing seized by the Sheriff, and by him delivered back to — Mc Laren, which ought to have been demanded, and not money in lieu thereof —

Rep. de Jur. vo Revendication. p. 620. 622. —
Poth. Oblig. N. 532. 533. also. N. 243. 4. 5. 6. 7.
Rep. de Jur. vo Obligation. —

That

That even if the pltffs were entitled to recover the value of the Staves, they have not made proof of that value, the penalty of the bond cannot be considered as the value thereof as by the record it appears to be double the value of those Staves as estimated by Cuvillier himself in his action against the said McLaren.—

Stuart for Pltffs in reply.— The action for the penalty is regular, and is the only one which will could have been brought owing to the nature of the security given, which is a bond in the english form for the payment of a sum of money to be void on the performance of a condition; that therefore money being the principal thing due, and the condition for avoiding the payment of it not having been performed, the right to demand the money, which here is the penalty of the bond is unquestionable.—

That a formal protest was made in May 1811, agt. the Defendant McLaren, who was the person bound to deliver up the Staves, requiring him to do so, his neglect has given right to the plaintiffs to demand the penalty of the bond from all the parties, as the other Defrs. undertook for his due performance of that obligation and are jointly and severally bound with him—

That the penalty is the legal measure of damages in this Case— to have avoided it, the Defendants

ought

ought to have pleaded and shewn that the Staves in question were of much less value than the sum demanded and that this value only should be the measure of damages to which the equity of the Court should have been called to moderate the penalty, but as nothing of this kind has been pleaded or shewn, the Court must take the legal presumption that the penalty does not exceed the true value of those Staves

20th April. The Court were of opinion that the Defendants had been put en demeure under the demand and protest of the 28th May 1811, and therefore that the plaintiffs were by law entitled to their action for the penalty of the bond — that it therefore was the duty and interest of the defendants to have shewn that the penalty demanded was beyond the value of the Staves so as to enable the Court to moderate it to what might have been considered the just measure of damages — But the Court in exercising its equity in this Case was of opinion to admit the parties to their proofs to shew what the value of the Staves was on the 20th day of October 1810, the day on which the said McLaren was adjudged to deliver them up to the said Cuvillier considering this value to be the quantum of damages to which the Plaintiffs were entitled, but of which there appeared no proof before the Court —

afterwards

Afterwards on the motion of the plaintiffs, it was ordered that the proofs to be adduced under the foregoing Interlocutory should be made on the 13th. May following, And on the 13th. May no proof was adduced, and it was agreed that the Cause should stand over to another day.

On the 8th. June, the plaintiffs moved that another day should be fixed for the adduction of evidence under the above Interlocutory - this was objected to by the Defts who contended that the Pltffs ought to have made their motion to this effect on the first day of the Term, as being the first day of the Sitting of the Court since the appointment in vacation for the examination of witnesses, - and therefore the motion was too late - Reg. Prac. sec. 27. p. 54. - And the Court being of opinion with the Defendants, rejected the motion -

The plaintiffs then moved to set down the Cause for final hearing, which was granted, when it was argued by the Defendants, that as the value of the Slaves had not been proven the Plaintiffs ought to be dismissed - On the part of the Plaintiffs it was contended, that the same legal presumption still existed as did at the time of rendering the -

Interlocutory

Interlocutory as to the penalty being considered as the value of the Slaves, it being the duty of the Defendant to have shewn the contrary, if he meant to take the benefit of the Interlocutory, and therefore the Plaintiffs demanded their judgment for the above penalty —

The Court before giving final Judgment directed that the value of the slaves should be ascertained by experts to be named by the parties — The Cause was afterwards settled —

October Term 1812.

Monday 5th. October 1812

Roi. }
v. }
Johnson }

The plaintiff moved for hearing on the merits on the 10th. inst.—

The Defendt. opposed the motion, and stated that the return to the Commission rogatoire sued out by him in this Cause had been delivered by the Clerk of the Commissioners to the person who brought it to this Court whereas by the rules of practice sec. 28. §. 5. such return ought to have been delivered by one of the Commissioners to the person who carries the same — that as this inattention could not be imputed to the Defendant, he therefore moved for an extension of the rule directing the return of the said Commission, to be made at a future day, that the above irregularity might be corrected —

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The plaintiff objected to the motion, as the Defendant had he used due diligence might have procured a return in due form to the Commission before this day — cites case of Stanley v. Poser last term, where a further day for the return to a Com. Rog. was refused owing to the laches of the Defendant in suing out that Commission. —

The Defendant cites case of Cameron v. Baker - Ap. Term last, where Court gave a day to the plaintiff to perfect the proceedings on the Com. Rog. after the Cause had been set-down for hearing on the merits.

By the Court. — The Court have distinguished in the Cases cited, where the delay or irregularity proceeded from the act of one of the parties, or from that of the Commissioners — in the later case indulgence has been granted by the Court to permit the Commissioners to supply any defect or omission on their part, where no prejudice could thereby arise to the parties in the Suit — the circumstances of the Case must always influence the opinion of the Court, so as to attain the great objects of Justice — here from what appears on the Defendants affidavit, it seems reasonable that

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a further day in this term should be granted to him to obtain a regular return to the Commission so that the Cause may be heard in the term if the Plaintiff shall require it. —

Dunlop v. Roi — The defendant moved to quash the writ of summons from the irregularity of its being partly in french partly in English, and not in the one or other language entirely as required by law — the writ being all in french, except the addition of the Defendant, which is in english, in these words, "of Montreal in the said district, merchant." —

The Court permitted the plaintiff to amend the writ, without payment of Costs. —

Hart & Co. v. Delagrave — Vigé for Defendant moved that the writ of Summons issued in this Cause be quashed by reason of the variance between it and the Declaration — the Defend^t in the declaration being stated to reside at St. Mathias, and in the writ of summons, he is stated to be of the parish of St. Mathieu. —

The Court granted leave to amend, upon payment of Costs. —

Tuesday 6th Oct. 1812

Dufresne. vs Logie. —

The defendant moved to quash the writ of Summons sued out in this Cause, because the hour of appearance in Court on the day of the return was not specified in it.

The Court rejected the motion. —

Oldham qui tam &c. vs Dumont

On an action populaire. —

Rolland for Defendant, pleaded an exception à la forme, to the action, inasmuchas, the plaintiff had concluded in his declaration not only for the removal of the nuisance complained of but also for damages, which is inadmissible in an action populaire. —

Ogden for Pltff, contended, that the conclusions were right and conformable to precedent — cites case Chesser. v. Féré. and. 1 Fremainville. p. 726. —

The Court were of opinion that the conclusions

in

in the declaration were regularly taken, and considered this action of a nature similar to the action de complainte in which conclusions for damages were always taken. ~~~

Wednesday 7th. October 1812

Campbell. v. Mathurin

The Defendant moved for security for costs from the plaintiff, as not residing within the province. —

The parties agreed upon the following state of facts — That the plaintiff is a merchant carrying on business in Montreal, that on the last he leased a house to the Defendant, the rent of which is demanded by the present action — that in October last the plaintiff left Montreal and went to England, that his affairs still detain him there so that he did not return to this Country last spring as he was accustomed to do in the carrying on of his business. —

Georgen for Defdt. cites cases, Cole. v. Church. and Cole. v. Lalanne, where security for costs was ordered after the Cause was at issue and ready for trial, because the plaintiff had after the entry of the actions in Court left the province. —

The

The Court were of opinion that it did not appear that the plaintiff had changed his domicil by residing out of the Province – that residence could be considered only as temporary – and not within the Cases cited by the Defendant – Motion rejected –

Wilson et al' v. M'Donnel

The Defendant moved to quash the writ of Ca. ad resp. sued out against him in this cause inasmuchas the affidavit upon which the same was granted, is insufficient – the Cause of action is therein stated to be for two separate objects, viz^t^ money advanced on a Contract – and damages for the non-performance of that Contract, without stating how much was due for money so advanced, and how much for damages – for should the money advanced be under ten pounds St. no Capias could have issued, the same not being grantable for damages, which cannot be considered to be a "debt" such as required by law. – That the affidavit is besides defective as to the remedy required, it states, merely, that "without the benefit of a Capias" the plaintiff will lose his debt &c^a^ this is not sufficient,

the

the words of the Ordinance require that the Pltff should state, that "without the benefit of a Capias "ad respondendum, or attachment against the body of "the Defendant" &c

Boston for Pltff. contended that the affidavit was sufficient as it stated a debt to be due by the Defendant of ten pounds & upwards arising from a breach of Contract, and monies advanced on that Contract — That had the demand been for damages only, the Judge by ordering the Capias to issue for the sum sworn to, has legalised the proceeding —

The Court considered the affidavit as sufficient as the grounds of the action were for the breach of the Contract, and the stating, the monies advanced, and damages for non performance of the Contract, could be considered as making but one Cause of action, and depended entirely upon the fact whether there had been a breach or not of the Contract — Mo. rejected —

Davis. —
v
Gt W. Hamilton } action of special assumpsit on a Contract respecting the sale of timber. —

The Contract was made by the plaintiff and one Mears of the one part, and the Defendants of the other part, and the action was now instituted by the plaintiff alone, under pretence that Mears had been satisfied and refused to join in the action. —

Stuart for the Defendants took exception to the form of the action, and contended that all the parties to the Contract must be parties to the suit, and that the plaintiff alone cannot maintain his suit under any pretence of settlement with Mears — cites 1. Chitty on pleads. 5. 7. —

Ogden for Pltff. The Defendants have divided the Contract, by paying to Mears his proportion of the monies due thereon, — That Pltff is by law entitled to his action for his separate right on the Contract. —

It was determined by the Court, that although several persons may join in a Contract, yet in law each was presumed to contract for his individual share and proportion, and consequently a right of action was given to and against each individual for his particular interest in that Contract Poth. Obl. № 265. and therefore dismissed the exceptions. —

Thursday 8th Octr 1812.

Hart & Co. v Delagrave

The defendant pleaded, that he did not live at St Mathias as stated in the declaration and writ as amended, but at the parish of St Jean Baptiste, and that the writ and process in this Cause had been served upon the Defendt at his domicil in the said parish.—

The Plaintiff moved for a hearing instanter upon the said exception, which was granted, when he contended, that the matter now pleaded by the Defendt was the same as had already been determined upon motion, as regarding the residence of the Defendt— and further that the matter now pleaded respecting the Defendants residence at St Jean Baptiste ought to have been contained in the motion heretofore made by him touching his said residence.—

Vigé for Defendt— The matters now pleaded are different from that decided upon the motion— The Defdt now states that he does not live at St. Mathias, but at another place, which is good matter of exception à la forme— The matters determined by the motion regarded merely the variance between the Declaration and the writ.—

By the Court — as it appears by the plea of exception filed, that the Defendant who was personally served with the process at St Jean Baptiste, is the same person who is named in the declaration as living at St. Mathias — the Defendant is regularly before the Court, whether he lived at the one place or the other, as personal service of the process will cure the defect of domicil — Had the Defendant pleaded that he was not the person named in the Declaration, the plea might have merited consideration, but as it now stands before the Court, it is wholly immaterial and must be dismissed. —

Trew v. Gilman

The Defendant moved for an extension of the time to plead, and in support of the application filed an affidavit, in which he stated that the action was instituted upon a Judgment rendered at Burlington in the State of Vermont, at which place he alleged that he had sundry papers and accounts to rebutt the plaintiffs demand. —

Ogden for pltff. objected to the motion, inasmuch as the affidavit does not state what the nature of the papers to be produced is, as he might admit them. —

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The Court rejected the motion, considering the affidavit as too general, and not containing either the nature of the defence to be made, or the papers to be produced in support of it.—

Stem. — v. Chamberlain. }

Action of assumpsit for goods sold

The plaintiff had omitted to fill up the day in the declaration on which the goods were sold and the assumpsit made, and now moved to be permitted to amend by inserting the date thereof — and this without payment of costs. —

Vrigé for Defendant — The copy of the declaration served upon the defendant is variant from the original there being no day or date of the delivery of the articles nor of the assumpsit of the defendant in the Copy, which is stated in the Original — That is material, and no material amendment can be made but upon payment of Costs. —

Stuart for Plff. This is an action of assumpsit in which the day is not material, and the amendment is mere matter of form — the defect of mentioning the day in the copy of the declaration cannot prejudice the Defendant, as he must plead to the Original and not to the copy served on him. —

The

The Court permitted the amendment, but upon payment of Costs. —

Monday 12th Oct. 1812. —

Trew. —
vs.
Gilman

The Plaintiff moved on the eleventh inst. to fix the cause for an enquête by witnesses inasmuchas the defendant was in default and had not filed a plea. — The Defendant appeared by his attorney on the first inst. — on the 3d. he moved for and obtained a rule upon the pltff to shew cause on the 5th why he should not have an extension of the rule for pleading — and on the 8th this rule was discharged —

Ogden for pltff contended, that at the time the Court gave judgment discharging the rule on the 8th the defendant was too late to file his plea according to the rules of practice. —

Ross for Defdt. contended that he had three days from the time the Court discharged the rule on the 8th to fyle his plea — that he was not bound to plead while the matters in contest respecting an extension of the rule to that effect, were undetermined, and therefore the pltffs motion to proceed ex parte was premature. —

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The Court were of opinion, that the days which had elapsed before the Defendants application for an extension of the time to plead, ought to be reckoned against him, and he ought to have no further time after the decision of the Court than would be sufficient to complete the time of three full days to which the defendant is entitled to file his plea — That according to this principle the defendant having allowed two days to elapse before he moved for his rule nisi on the Plaintiff, was entitled to only one day more after the decision of the Court on the 8th to fyle his plea — but this not having been done, the Plaintiff was entitled to have his motion — granted. —

Clarke. — vs M.c Dowall. —

Stuart for plff moved to fix Cause for trial.

Ross for Defendt. stated, that he had pleaded an Incidental demand, and was entitled to reply to the Plaintiffs plea thereto, in order to complete the issue — that as the time for filing this replication was not yet expired, the plaintiffs motion was premature. —

The plff answered — that the issue upon the

Incidental

Incidental demand is complete by the plea thereto, which is non-assumpsit — that the object of the Defendt was to avoid a trial, and to gain delay, which would be in some measure effected if further time should be given to him to fyle a replication which was not necessary —

The Court were of opinion that as the issue upon the Incidental demand was complete by the plea of the Plaintiff thereto, no further delay ought to be granted to file a replication, or similiter, which was mere matter of form, particularly under the rule of practice respecting Incidental demands, which is meant to prevent delay. —

Stem. —
vs
Chamberlain

On action of assumpsit for goods sold
In the copy of the declaration served on the Defendant the plaintiff had omitted to insert the day on which the goods were sold & delivered and also that of the undertaking of the Defendant — The Defendant filed a plea of exception to the irregularity of the service of the Copy, as it was not conformable to the Original. — The pltff thereupon obtained a rule upon the Defendant to shew cause why his said plea should not be rejected from the record, inasmuch as the irregularity complained of ought to have been stated by

by motion and not by plea, under the rules of practice Sec. 26. p. 43. —

Vigé for Defendt. contended that the above rule regarded merely the sufficiency or regularity of any — summons, writ, or process, which does not comprehend the declaration, nor copy thereof, —

The Court were of opinion that the copy of the — declaration ought to be considered as within the rule as it made part of the process which was served upon the defendant, and was besides within the meaning of the rule — rule absolute. —

Berry. v Robertson.

On rule nisi on Defendt. to shew cause why his plea should not be rejected from the record as irregular and inconsistent. —

Stuart for Pltff. The action is in assumpsit, to which the Defendant has filed inconsistent and contradictory pleadings — 1. Non assumpsit — & 2d. The he does owe the the Pltff, but that he has a set-off to make to the extent of what he so owes — These pleas are contradictory, yet the defendant has taken the same conclusions upon both, namely that the plaintiffs action be dismissed — this conclusion would be proper upon the plea of non-assumpsit — but the

plea

plea of sett-off has a particular conclusion adapted thereto, and to demand that upon this plea the action should be dismissed is wholly irregular — and therefore the plea ought to be rejected in toto. —

Boston for Defend.ᵗ contends that the plff is too late to object to the plea, as it has been filed upwards of three days within which time the plff ought to have objected thereto — that the plea is regular and the conclusions thereof consistent with the matters pleaded, which in substance tend to destroy the Plaintiffs action, and more formal conclusions are not requisite than those taken by the Defendant —

The Court considered the conclusions of the plea sufficiently consistent with ~~consistent with support~~ the matters pleaded so as to enable the Court to give Judgment thereon —

Monarque vs Lewis I. Rogers

Bender for the plaintiff moved to amend his declon by changing the name of the Defendant from "Lewis I. Rogers" as it now stood to, "Rogers I. Lewis"

Boston for Defend.ᵗ objected to the motion, as it was putting the name of another person in the suit instead of the person now sued, which could not be allowed by way of amendment, cites cases. Marchand v. Albert + and Hagar vs Lindsay — where similar motions had been rejected —

The Court rejected the motion. —

Tuesday 13th Oct. 1812.—

Hart & Co. vs Delagrave.—

Ross for Pltffs moved that the plea to the merits filed by the defendant should be rejected from the record as having been filed too late.— On the fifth inst. the plaintiffs were allowed to amend their declaration — on the 6th. the defendant filed an exception à la forme, which was argued instanter, and rejected on the 8th— On the 12th. the plea in question was filed.—

Vigé for Defendt. The Pltffs were admitted to amend on the 5th. inst. that amendment has not yet been made, or if made has not been notified to the defendt.— that the plea is therefore always in time until notice of such amendment shall have been made.—

Ross in reply— The Defendant waived his right to notice of the amendment by proceeding as if such amendment had been notified to him, to wit, by filing a plea of exception the day after such amendment had been permitted to be made, which superceded the necessity of a notice thereof— and besides the amendment having been made by the prothonotary in the face of the Court and under its direction, the notice thereof was unnecessary—

The Court granted the Pltff. motion,— considering that the

the defendant was bound to have filed his plea on the 15th he having waived his right to notice of the amendment by filing his exception à la forme.—

Friday 16th Octr. 1812.—

Hart.— vr Jones.—

The Defendant upon the closing of the testimony moved to examine the plaintiff upon faits & articles This was objected to on the part of the plaintiff, as a retardation de proces, as such examination could not be had this term, the pliff living at Three Rivers, and as the cause was now ready for hearing, it ought not to be delayed upon the motion for such examination.— But the Court were of opinion, that as there appeared to be no laches on the part of the Defendant, the distance of the plaintiff's residence was not so great as to consider the granting the motion to be a retardation de proces— Mo. granted.—

Saturday 17th Oct. 1812.—

Needham.— v Burton.— } On the defendants motion to quash the writ of Capias ~~as~~ irregularly sued out in this Cause. and on the plaintiff's motion to amend the irregularities complained of.—

In The writ of Capias the name of the pltff was stated to be "Weedham" instead of Needham— The sum sworn to was £250.— the sum indorsed on the writ was £600.—

The objections taken by the Defendt. were — 1st Because the writ is to answer to one "Weedham" and is variant from the declaration, the name of the pltff, being there stated to be "Needham".— 2° Because the sum indorsed upon the writ as sworn to by the pltff is £600— whereas the sum sworn to is £250.— whereby the Defendant has been unjustly detained not having been able to procure bail for the said sum of £600.—

Stuart for the pltff. The only error complained of has been committed by the Clerk of the Court by writing the plaintiff's name "Weedham" instead of Needham in the writ,— such error is amendable 1. Tid. prac. 291— and has been amended in a similar case this term— Hart & Co v. Delagrave. 5. Oct.—

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The variance between the sum sworn to and that indorsed upon the writ does not vitiate the writ which is intrinsically good and sufficient to bring the defendant before the Court—

~~and~~

The Court permitted the plaintiff to amend upon payment of Costs. —

Deshautels
v.
Davelui. —

The plaintiff in his replication advanced some new matter to which the Defendant answered by a dupliques. — Afterwards the plaintiff moved that this pleading should be rejected as not allowed by law, nor filed with the leave of the Court — The Defendt on his part moved that the new matter alledged by the Plff in his replication should be struck out —

The Court rejected both motions, being of opinion that the plff cannot be allowed to demand a rejection of the dupliaue, in consequence of his having given room thereto by the new matter pleaded by him in his Replication — And that the Defendant could not, after answering to the new matter so pleaded, demand that the same should be taken from the record. —

Monday 19th. October 1812. —

Delorme. } Action on promissory Note. —
vs
Marston. }

Georgen for Defendt. pleaded in compensation that the Plaintiff was indebted to him in a certain sum of money for boards which had been by him furnished and delivered to the plff. —

Beaubien for Plff objected to the sufficiency of the plea, contending that a debt of an unliquidated nature cannot be compensated or sett-off against the plaintiffs demand which is liquidated and certain — and of this opinion was the Court and rejected the plea in compensation. —

Boutin ux. } Action on deed of Sale. —
vs
Bissonnet }

The Sale in question was made to Jean Baptiste Bissonnet fils, and so expressed in the Deed — The Plaintiffs instituted their action against Jean Baptiste Bissonnet, but without the addition of fils, or any words to distinguish him from any other person of that name — The process was

served

served at the house where Jean Baptiste Bissonnet, père, and Jean Baptiste Bissonnet, fils, lived — Jean Baptiste Bissonnet père, appeared to the action, and contended that the pltffs had no right of action against him, and that he never made the deed in question — That the person said to have made the said deed was Jean Bte Bissonnet fils, but that he the Defendant is not Jean Bissonnet fils, but Jean Bte Bissonnet, the elder —

Rigé for the Pltffs — says — That Jean Bte Bissonnet père comes improperly to defend the action, as nothing is demanded of him, but that the present demand is agt Jean Bte Bissonnet fils, at whose domicile the process was served and who alone has a right to appear & answer thereto — that the addition of fils was not necessary to the name of the Defendant as the process was served upon him alone —

The Court were of opinion that the plaintiffs ought to have designated the defendant in the manner he was designated by the deed of Sale — and that if there were two persons of the same name and living in the same house, as father and son, a summons served upon them as in the present case, in the name of —

Jean

Jean Bapte Bissonnet the elder, as being the person known by that name before Jean Bte Bissonnet fils. — action dismissed. —

Clarke. —
vs
Macdowell

The defendant moved to discharge the rule for trial by Jury inasmuchas he had not received sufficient notice to attend and strike the Jury. —

The case was, that the Plaintiffs counsel gave notice in Court about halfpast eleven o'clock in the forenoon to the defendants attorney to attend next morning at ten o'clock at the prothonotary's office to strike the Jury —

The Plaintiffs counsel contended that this notice was sufficient and ought to be assimilated to a notice of a motion, which is sufficient if made during the sitting of the Court on the day preceding the hearing thereof — Reg. Prac. Ac. 41. —

But the Court were of opinion, that they could not depart from the letter of the rule which required that, "not less than 24 hours" notice should be given and therefore granted the Defendant's motion.

Leduc. v. Lalonde

Action on arbitration bond and award

Joseph Lalonde the Defendant, with Joseph D'Aout, Joseph Heneau and Augustin Lefevre had been named Syndics, for building a Steeple and making certain repairs to the parish church of Isle Perrot— A certain devis & marché was made and executed by and between the said Defendant and the said other Syndics on the 26th. Janv. 1812, whereby the Defendant undertook and became bound to do all the work and repairs in question for the considerations therein mentioned: afterwards on the 18th Augt. 1812, the work being then finished, but not to the satisfaction of the parishoners a certain act or Compromis was made and entered into by and between Pre Amable Dezery, the Seignior of Isle Perrot, Antoine Leduc, the Plaintiff, and Antoine Michel Leduc, stipulating as well for themselves as for and on behalf of certain other persons stated to be parishioners of the said parish of Isle Perrot, of the one part,— and the said Defendant and other Syndics above named, of the other part, whereby it was agreed to submit the work done by the Defendant to certain experts to examine

and

and report thereon — which said experts after having visited and examined the work in question, reported a great part of it to be badly executed, and directed that such parts of it should be reconstructed at the costs and charges of the Defendant, and condemned him to pay the expences of the arbitration, amounting to £26. 18. 9. — Of these monies the plaintiff alledged to have paid £14. 8. — of which by the present action the payment and reimbursement was claimed by the Plaintiff. — There was also a Count in the declaration for monies paid and advanced to and for the use of the Defendant. —

To this action the Defend^{t} pleaded for exception. 1st. That the defendant did not covenant or contract with the said plaintiff alone, but with divers other persons in the submission named, which said persons are not parties to this action. — 2^{dly} That the said submission and compromis is illegal and void, inasmuchas the said Amable Dezery, Antoine Leduc and Antoine Michel Leduc therein named as parties thereto, and stipulating for themselves and other proprietors of Isle Perrot, had individually no interest in the subject matter

of

of the said compromis, and could not enter into such submission and compromis either for themselves or others:. 3ly That the said plaintiff was not a party to the said devis & marché, and had no interest therein to enable him to enter into any submission or compromis on the subject.

The plaintiff joined issue in law on the above plea and the parties having been heard thereon, the Court were of opinion, that the plaintiff could not maintain his action against the Defendant upon the compromis and report of the experts, as he was not properly a party thereto and could have no separate and individual interest in the objects in contest, which regarded the parish at large as a Communauté, and not any individual thereof who may assume a right in the said objects in contest — The defendants exception was therefore allowed — But as there was a Count in the declaration for monies laid out and expended to aid for the use of the Defendant, the Court gave the plaintiff a day in Court to proceed to his proofs thereon, but intimated to the parties, that no proofs connected with, or arising out of, the aforesaid Compromis and award, could be admitted to support the said Count.

Tuesday 20th October 1812.

Poudret
v.
Decouaigne

This was an action petitoire instituted by the plaintiff to recover from the Defendant a certain lot of land of which he held the possession.

The Defendant pleaded that the plaintiff had sold the lot of land in question to him and had received part of the Consideration, and in proof thereof produced and filed a certain paper, or acte sous seing privé, signed by the plaintiff by which he acknowledged to have received a certain sum of money from the Defendant as part of the Consideration of the Sale of the said lot of land — The plaintiff denied the Sale, and the parties having been admitted to their proofs thereon, the Defendant offered in evidence the said Acte sous seing privé — but the Pltff objected thereto, and stated, that by St. 48. Geo. 3. cls. 34. Sec. 4. no such acte could be given in evidence as it tended to bind the realty — The Court (diss: Mr J. Reid) permitted the proof of the act to be made as a receipt for money paid to the plaintiff, which is not prohibited by the Statute, without taking into present consideration the effect of that act as a Sale of the property in question — The evidence being

being closed the Cause was fixed for trial and was heard on the 2d. instant, when the Defendant contended that since the time at which the evidence was closed the St. of 52 Geo. had been made, which gave the same force and effect to all actes sous seing privé as if the afores. St. 48 Geo. ch. 34 had never been made and therefore the above act, must now be received and considered, not merely as a receipt for the payment of money but in the fullest extent thereof as a Sale of the premises to the Defendant— The plaintiff on the other hand contended, that the St. 52 Geo. could be construed to extend only to acts made in future and not to such as at the time of passing that act were then in existence— and that at all events, the proof of the act in question having been made at a time when such proof was prohibited during the operation of the said act of the 58th. of the King, the defendant could not avail himself of the purport or contents of that act.—

The Court, were however of opinion (diss: Mr. J. Reid) that the proof which was admitted to be made of the act in question as a receipt for the payment of money was at the time legal, and that the Stat. 52 Geo. 3. having revived all acts

sous

sous seing privé, and given them the same force and effect and admitted proof thereof in the same manner as if the afores.d Stat. 48 of the King had not been made, no further proof of the act in question was necessary than what had been so made — and upon considering the Contents of that act, the Court were of opinion to dismiss the plaintiffs action. —

Allan vs Harris } The defendant was discharged from Gaol where he was detained under a Ca: Sa: at the suit of the plaintiff, because the plaintiff had not at or before 12 Oclock on monday paid the defendant his weekly allowance under the Order to this effect. —

Trew. v Gilman } The Court admitted the exemplification of a foreign Judgment, under the Seal of One of the States of America as sufficiently authentic without proof of the Seal. —

Sed. vid. Peake's Ev. 75. & note — A distinction may be taken between the Seal of a Foreign Court, and the Seal of a Foreign State, the latter being of more public notoriety and may be received between nations living in amity and contiguous to each other, as authentic —

Young. v Stansfield.

This cause was tried by special Jury on the 17th inst. — the defendant now moved for a judgment on the verdict

The pltff opposed the motion, and stated that it was premature and contrary to the rule of practice sec. 23 S. A. and had been so determined in the Case of Stevenson v. Guy.

The defendt. answered, that as there were no more days in this term, the four days required by the rule, should be considered as not required in this case. — But the Court were of opinion, as in the Case cited, that four days — must elapse, in term, before a Judgment could be moved for — and therefore rejected the motion. —

Cotterell. v Storrow & al's.

The Defendants moved to be discharged from their arrest under the Ca: ad resp. sued out by the plaintiff, upon the ground that they were not about to leave the province, as stated by the said plaintiff in his affidavit. —

The plaintiff contended, that as the affidavit was positive, it was contrary to practice to enter into —

into a discussion of the fact therein stated. — And of this opinion was the Court and rejected the defendant's motion. —

Busby
v
Woolman
et
Ross Tiers Saisi. —

The defendant as executor of the last Will and testament of the late And.ᵛ Winklefoss, had been prosecuted in another action at the suit of one Lacasse, widow Proudfoot, to render an account of the Community that subsisted between the mother of the said Lacasse and the said Winklefoss — this account was rendered, containing therein a statement of all the property left by the said Winklefoss, and subsequent proceedings were had thereon. — After the rendering of the said account the Defendant deposited in the hands of the tiers Saisi, his attorney, a sum of five hundred pounds part of the monies belonging to the estate of the said A. Winklefoss, and a Saisie arret having been sued out by the plaintiff in this cause against these monies, the Tiers Saisi came in and declared that he had in his hands the said sum of money belonging to the said Estate. The defendant pleaded to the attachment that the monies seized were part of the estate of the said late A. Winklefoss of which he had already rendered an account at the suit of the said Lacasse, and which he was bound and liable to pay in such manner as the Court should direct — that the present attachment was

irregular

irregular as the defendant would be bound to pay the same monies twice should the Plaintiff succeed in his demand — That as there was another suit now pending before this Court in which the aforesaid account had been rendered, and also, as there were other persons interested in the distribution of the property of the said late A. Winkleloss besides the plaintiff, to allow the said Plff to carry off £500. from the said estate, under the present attachment, would be unjust, and injurious to the other Creditors of the said A. Winkleloss. — The Court gave an Interlocutor, directing public notice to be given to all persons having an interest in the estate of the said A. Winkleloss and more especially in the monies so seized, to appear in Court on the first day of this term and make their claim thereon — On the day so given no person appeared to claim the said monies — whereupon the plaintiff contended that he was entitled to have the delivery thereof made to him — But the Court was of a different opinion and gave the following Judgment —

The Court having heard the parties by their counsel, examined the proceedings and deliberated thereon and it appearing that the monies attached in the

hands

hands of the garnishee, are part of the monies belonging to the Community which subsisted between the late Andrew winkleFoss and Margaret Richard his wife, of which the Defendant as executor as aforesaid, hath, and before the suing out of the attachment or Saisie arret in the hands of the said garnishee, had, rendered an account, under the order of this Court in a suit instituted against the said Defendant by one Mary Anne Lacasse, and which monies he the said Defendant then, and still holds liable to such order as shall be made by this Court touching the payment thereof, he the said plaintiff was not therefore warranted in suing out the said attachment against monies already under the power and controul of this Court, nor ought the same to be adjudged to the said plaintiff in this Cause as thereby injury would arise as well to the said Defendt as to the said Mary Anne Lacasse at whose instance the said account hath been so rendered — It is therefore considered that the plaintiffs action be dismissed, and that the Defendant do recover his Costs from and after the filing of his plea in this Cause. —

Denaud
v
Wallace
et
Hart et al. Opp^s

On Judgment of distribution of the monies arising from the sale of the goods and Chattles of the Defendant.—

Gale for Opp^ts contended that the plaintiff was entitled only to his Costs on his execution under which the goods in question were sold, but not to the Costs in obtaining his Judgment, as he had no privilege in this respect over the other Creditors of the Defendant. cites. 1 Pigeau. Proc. Civ. 687. Rep. de Jur. v^o Contribution et and. Poth. Proc. Civ. 1 vol. 12°. p. 353. a—

Rolland for the pl^ff, relied upon the Constant practice of the Court by which the Creditor prosecuting the sale under an execution of the goods and chattels of a common debtor, is entitled to and allowed the costs of obtaining his Judgment as without such Judgment no execution could be obtained.—

The Court was of opinion that the Plaintiff was not entitled to the Costs of obtaining his Judgment, and that no preference in this respect could be allowed to him, that no practice respecting Judgments of distribution had been settled by the Court upon this point, the Judgments referred to having been given by the Consent of the parties interested.—

Practice. It was settled in practice by the opinion of the Court this day, that when a defendant is in default by not filing a plea, the plaintiff may proceed against him without notice, and may send the record to chambers for a Judgment without any motion in Court in this behalf