au Defendr. of one of the lands, à la charge de la moitié de la Rente —

20 Decr. 1803. Transport par Cath. Serrand au Demdr. —

28 Decr. 1803. Signification du transport au Defend. —

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Rep. de Jur. Vo. Convention. 10. 20. & 21.

Poth. Obl. No. 71. in fine & No. 72.

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Chief Justice Reid

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February Term 1813.

Wednesday 3d February.

Dom.s Rex
v.
Dumas
& al'.

The prisoners had sued out a writ of Hab. Cor. in the last vacation, praying thereon to be admitted to bail. Having been brought before the Judges in the vacation, it appeared that the prisoners were detained under a warrant for, "Treasonable practices", and after hearing they were remanded to gaol to be brought up into Court on the first day of this Term for further hearing and Judgment —

The Prisoners having accordingly been brought into Court, Mr Sullivan on their behalf stated that they were entitled to be admitted to bail — that the charge of "treasonable practices" can be considered only as a misdemeanor and by the St. of Westm.r in all such cases prisoners are of right entitled to bail. — In the case of King v. Despard. 7 T. R. p. 736. it appears from the cases there cited by the attorney General that several persons charged with

with "treasonable practices", were admitted to bail, which is a sufficient precedent for the Court in this case.—

Sol. Gen.l for Crown. answered — that Treasonable practices must be considered as an offence of a much higher nature than a misdemeanor, and as amounts to acts of treason, to which this Court ought not to receive bail — In the case of King v. Despard, this offence was considered of a more aggravated nature than misdemeanor, and bail was refused. —

Sullivan in reply — The question in the case of Despard was not whether "treasonable practices" were to be considered as a crime of a more aggravated nature than misdemeanor, but whether it was at all a legal accusation for which the Prisoner could have been committed or detained in Gaol, and it is clear that had not the Hab. Cor. act been suspended the prisoner in that Case from the authorities cited, would have been baild, but it having been determined that the charge agt. him was a legal one for his Commitment, the suspension of the H. Cor. act forbade his enlargement on bail. — That in the Case of Serres v. Rochfort Bl. R. — the

analogy

analogy between the Case of the pltff and the prisoners in this Case, is strong, and there it appeared that the plaintiff had been bailed although charged with treasonable practices.—

The Court were of opinion that the charge of Treasonable practices might be compared to a charge of suspicion of treason, in which the Court would look into the depositions and determine according to the circumstances how far the prisoners ought or ought not to be admitted to bail— Here the facts charged against the prisoners were of a nature to exclude them from the benefit of being admitted to bail, namely their giving intelligence to the enemy, of the State and strength of the fortifications at Isle aux Noix, their dissuading the Kings Subjects to take up arms in Defence of the Country— their open declarations that they had and would assist the Kings Enemies to invade and conquer the Country — under such a charge the prisoners might have been committed for treason, and although this Court might commit them under a new warrant to that effect, yet they considered the charge against them sufficiently strong to detain them

King v. Horner
1. Leach's Ca. 305.

them, and they were therefore remanded.

Saturday 6th Febry. 1813.

Beaudouin v. Deschamps } Rolland for Pltff moved to amend his declaration by inserting therein certain additional words descriptive of the Defendants residence, and this without payment of Costs — But the Court were of opinion that every amendment of a declaration however trivial, must be made upon payment of Costs, and granted the motion upon that principle.

Reese v. Marchand } The Defendant had obtained a rule upon the Plaintiff to shew Cause, why he, the Defendt. should not be permitted to file an exception accrued since the Commencement of the present action and since the filing of the plea in the Cause, namely that the said Plaintiff has become an Alien Enemy, as he appears to live and reside in the United States of America.

Stuart for Pltff. the plea of "alien Enemy," cannot now be received, it regards the person of the plaintiff, and cannot be admitted after a plea filed which recognizes the right of the plaintiff to bring the action. —

Ross for Defdt. This is in the nature of an exception peremptoire

peremptoire, which by law may be filed en tout etat de Cause - and the matter to be pleaded having accrued since the last proceedings in the Cause it is consistent with the practice to admit it. -

The Court admitted the Defendant to file his said plea, as being of a nature to be pleaded in any stage of the action where it occurs since the last proceedings had in the Cause. -

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Marchand vs Richards.

The Defendant was sued as residing at the town of Dorchester or St Johns, and was there personally served with the process at that place he now pleaded as an exception to the action, that at the time of suing out and serving the process he did not live at the Town of Dorchester, but "three leagues beyond it"

The Plaintiff, by a verbal motion, demanded that this plea should be rejected from the record - But the Court held that a verbal motion to reject a pleading from the record is not allowed by the rules of practice - the only case, where such verbal motion can be made, is for the hearing on the merits of any exception, "à la forme" Ord. Reg. Prac. sec. 9. §. 3. in fine. -

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Martin v Mondor } The Court admitted the plaintiff, after a plea filed by the Defendant, to amend his declaration by changing the name of a notary Public, from Dutalmé, to Gamelin Gaucher, on payment of Costs.—

Mounsey v Cogswell } The Cause had been fixed for hearing this day on the merits, when the Defendt. objected that the Plaintiff had obtained leave to amend his declaration, which amendment had not yet been notified to the Defendant by the service upon him of a copy of the declaration thus amended and therefore the Cause not in a state for hearing.— And of this opinion was the Court and refused to hear the Cause.—

Allen. v Harris. } The Court admitted the Defendant, after plea to the action, to file an exception, accrued since the last proceedings had in the Cause, that the Plaintiff had become an alien enemy, and not entitled further to maintain his action.—

Wednesday 10th Febry. 1813.—

Brien. v Namur } The Court held an issue in law sufficiently joined by the plaintiff in his answer to the exception pleaded by the Defendant although it was joined by stating that the "said "exception is insufficient in law to bar the Plff &c" and more of a nature of an exception to an exception, than of a joinder of issue thereupon, the Court considering that by the usage and practice of the Court there was no specific form of pleading or joining of issues, and that the meaning of the parties must be taken from the words used by them in the conclusions to be drawn from such pleadings.—

Charland v Morin et al } It was held in practice by the Court, where matters of law are pleaded in bar of the pltffs action, and also matters of fact, that the parties must first be heard upon the matters of law before proceeding to an enquête upon the facts.—

Hamiltons vs Johnson.

On the Defendants motion for delay to plead
The Court being of opinion that the affidavit filed by the Defendant did not state the grounds of the plea to be made, nor the nature of the papers in the hands of one M.c Laughlan to be produced in support thereof, considering also that since the service of the process in this Cause on the 24th day of December last, the Defendant had had sufficient time to procure the necessary papers for his defence, or certain information respecting the same — Motion rejected.

Marchand vs Williams.

See facts as stated in the Cause on the 6th inst.
The plaintiff now moved to reject the Defendts plea, which was opposed by the Defendant, and it was held by the Court, that as the matters pleaded by the Defendant did not regard the regularity of the service of the process, but the domicil of the defendant as wrong set forth in the declaration, the plaintiff must either join issue on the said plea, or move for a hearing thereon instanter, by admitting the facts it stated — Motion dismissed

Johnson.
v.
Billings.
Sir. I. Johnson
Intervs.

A Judgment had been rendered in this Cause whereby it was ordered, that a certain quantity of timber seized in the possession of the Defdant should be delivered up to the Intervening party upon his paying to the said Defendant therefor a certain sum of £120.— The Defendant sued out execution upon this Judgment against the Intervening party for the above sum of money— The Intervs Party put in an Oppsn afin d'annuller upon the above Execution, contending that the said Judgment was Conditional, and left it at his option to take the said timber or not— and even if he had been bound to take it, yet the Defendant in whose possession it was ought to have put him en demeure, by making a tender of the said timber — And of this opinion was the Court and quashed the writ of Execution as improvidently sued out.

Donegani
v.
Normandeau
& Dupéré, Gar.

The Garant, Dupéré, possessed a house and lot of ground in this town upon the river side, and having made encroachments upon that part of the fortification grounds which lies between the Outer and inner wall by building his out houses thereon, he purchased this space of ground from the Commissioners of the Fortification Grounds.— The aforesaid house and lot were afterwards seized and taken in execution by the Sheriff, and in the advertisement for the sale thereof, were described as bounded by the fortifications conformably to the description

found

found in the old titles — The Defendant became the purchaser thereof and entered upon the possession of the same . — The said Dupéré conceiving however, that the portion of ground included between the two walls which he had purchased from the Commissioners, did not fall within the description given by the Sheriff of his aforesaid lot and house , he afterwards sold the same to the Plaintiffs, who now prosecuted an action petitoire against the Defendant to obtain from him the possession thereof. — The Court however were of opinion that as Dupéré had possession of the aforesaid portion of ground by part of his out houses being built thereon, and as those buildings were specially mentioned in the advertisement of the Sheriff for the Sale of the said house and lot, in construction of law the whole of the lot as possessed by Dupéré was — comprehended in the Sale and adjudication made thereof by the Sheriff to the Defendant who must now be considered the proprietor thereof — and therefore the plaintiff's action was dismissed. —

Thursday 11th Febr? 1813.

Allen. v Harris } On rule to shew Cause why the Defendant should not be discharged from his arrest & imprisonment under the Ca. ad resp: sued out in this Cause.—

Ross for Defendant. stated the following grounds for suing out the rule. 1st Because Defendant had been arrested upon a former Capias at the suit of the Plaintiff and confined in gaol, from which he was discharged by reason of the plaintiffs not paying him regularly his alimentary allowance — and having been thus discharged, he was not liable to be arrested a second time for the same debt. — 2d Because the affidavit in this Case is made by Mr Stuart the plaintiffs attorney in the Cause, without sufficient authority — and 3d because the plaintiff is stated to be an alien enemy, and cannot make, nor authorise any one to make any affidavit before this Court. — cites. 4. East. R. 402. Lebret. v. Papillon
3. Bos. & Pul. — M'Connel. v Hector
6 T. Rep. 23. Brandon v. Nesbett.

Stuart. for Pltff. contended, that as the question now raised regarded as well the right of action as the right of arrest by the plaintiff, it is improperly brought before the Court by motion, but ought to have been stated by plea. —

The

The Court however held that the question respecting the validity of the arrest came regularly before the Court, and it appearing that the plaintiff was an alien enemy, they held that the affidavit taken by his attorney to hold the Defendant to bail, was illegal, and therefore the rule for the discharge of the Defendant, was made absolute. —

The attorney for the plaintiff now observed, that the Defendant ought not to be discharged from jail until the expiration of fifteen days, that the plaintiff might have the benefit of an appeal from the Judgment now given, as by discharging the Defendant now, the plaintiff's recourse for the recovery of his debt will be gone

But the Court held that the Judgment now given could not be suspended, but ought in cases of this kind to be executed immediately. —

See case. Colvert. v. Woolsey. 17 June 1811

Saturday 13th Febr. 1813.—

Park.— v Perry & al.

The Plaintiff proceeded to examine his witnesses on the 12th inst. whose depositions were taken by an assistant clerk of the Prothonotary's Office, to which the defendants objected and refused to take any part in the proceeding— The Plaintiff having examined four witnesses moved that the enquête should be continued till this day, which was granted— This day, the Cause being called the plaintiff produced another witness to be examined but to this it was objected by the Defendants, that the witness had not been subpona'd to attend yesterday, his name had not been called in Court, nor inscribed on the rôle d'enquête so as to entitle the Plaintiff to such examination— but it appearing, that the witness had been duly notified to attend the Court yesterday as a witness in this Cause, and that he actually did attend, he was permitted to be examined, although he had not been called in Court, nor his name inscribed on the rôle d'enquête.—

Monday 15th Febry. 1813.—

Sanche
vs
Nadon.
&
Quimet.
& al Interessés

On a Proces verbal of Experts for regulating a Cours d'eau, brought from the Inferior Court by evocation.—

Quimet and the other persons interested had been made parties and called into the Suit in the Inferior Court by a rule to shew Cause why the said Proces verbal should not be homologated — upon their coming into the suit, they moved to bring it into this Court by evocation, where they objected to the regularity of the proceedings, contending that they could not legally be made parties or called into the Suit, but by a Summons in the Kings name — also that the Experts named by the plaintiff and Defendant were by them — exempted from the oath of Office, which ought not to bind the Interessés, who were not then parties to the Suit.—

The Court were of opinion that the Interessés were regularly called into Court by the rules served upon them, that this was agreeable to the Course & practice in the Inferior Court, and recognized by the Judgments of this Court — That the objection of the Interessés

as

to the proceedings of the Experts without being sworn, was well founded — and therefore it was ordered that a new visit of the premises should be made by the said Experts and two others to be named on the part of the Interessés.

Charland v. Morin & Poitras.

This was an action prosecuted by the plaintiff as Surveyor of roads and bridges for the City of Montreal, for damages in consequence of the non-performance by the Defendants of certain Covenants entered into by the Defendants with the Plaintiff in his said capacity touching the paving of one of the Streets of Montreal. —

The Defendants pleaded that the pltff had no power or capacity to bring an action in his own name - that he was the mere agent of the Justices, who alone had the power and authority to regulate all matters touching sheets and bridges, and under whose directions the Contract in question had been made — That if any action could be brought against the said Defendants by reason of their said Contract, it ought to be in the name of the King or of the Justices of the Peace under whose authority it had been concluded. —

But the Court held — That the pltff, was an officer appointed by law, having certain duties attached to his office, part of which was to contract for the paving

and

and repairing the streets and lanes in the city of Montreal under the direction of the Justices – that he was bound to see all such contracts duly executed and liable for the due application of the monies expended under them, and it therefore became essential that he should be enabled by prosecutions at law to enforce those obligations which the Defendants had contracted with him, as well for his own justification, as for the due execution of that duty which was attached to his said office – He could not be considered as an agent of the Justices although acting under their directions – he was to all intents a principal, as responsibility attached upon him alone –

Judgt. that Pltff. proceed to make proof of his demand

Cusson. vr Henderson & Frost Rs: & Huskins Oppts

The plaintiff having taken in execution two certain lots of land as belonging to the Defendt, oppositions afin de distraire were put in by the Opposants who claimed the same as their property. –

It appeared that on the 14th February 1806, one Joseph Frost, by deed of lease and release executed before witnesses

Witnesses, conveyed to Richard Frost, ~~the Opposant~~, one of the said lots of land, being part of lot N° 26 in the 8th range in the township of Shefford, as having purchased the same from one Ezekiel Lewis one of the Original patentees of the said township — Afterwards on the 11th March 1807, by deed executed before Talanne public notary & witnesses, the said Richard Frost conveyed the said lot of land to the Opposant, Huskins, who afterwards entered upon the possession thereof, and at the time of the said seizure and execution, had been in the possession of the same for upwards of five years — The other lot seized was claimed by the said Richard Frost, as having purchased the same from the said Ezekiel Lewis by deed executed before the said Talanne on the 18th June 1808, under which the said R. Frost had entered upon the possession of the said lot, and at the time the same was seized, had been in the possession thereof for four years and upwards — The afores aid two lots of land had been sold to the Defendant by one John Savage, stating himself to be the leader of the said township of Shefford, by deed executed before Sukin and another public notaries on the 1st June 1804, but no act of possession appeared to have been made under that Conveyance, nor any

other

other title stated or shewn to exist in the said John Savage than that of leader of the said Township. —

The Court considered the Conveyance made by Savage to the Defendant, as of no validity, as it did not appear to have been followed by tradition and possession of the property, which was necessary to give effect to that Conveyance, and therefore the seizing the same as the property of the said Defendant in the possession of the Opposants was irregular, and must be held to be supra non domino. — That the possession of the Opposants under the titles they held was sufficient to entitle them to demand main-levée of the aforesaid seizure and execution, without examining further into the title of the persons from whom they had purchased — And main-levée was granted accordingly. —

Brien dt Derochestux
v.
Robert dt Namur —

The plaintiff had married one Geneviève Robert dt. Namur, a minor, to whom the Defendant was Tutor and had the management of all her property and it having been found necessary to call him to account for the same, one André Auclaire was named as Tutor to assist the said Geneviève in obtaining the said

account

account and in settling the same —

The Defendant pleaded that the said Auclaire as Tutor as aforesaid was improperly made a party to the Suit, as the said Plaintiff Deroches could sufficiently authorise his wife although a minor to institute the present action — Further that by the marriage contract between the said Plaintiff and his wife, in which the said Defendant was a party, it was stipulated, that the said Defendant should not be called to any account for the property and estate of the said minor until she should come of age, and therefore the action was premature.

The plaintiffs answered, that it was for the interest of the said minor as well as of her husband that she should be assisted by a tutor ad hoc in obtaining the account in question, particularly as it concerned her real property — That the stipulation in the marriage contract, exonerating the defendant from rendering any account of the property of the said minor until she should come of age, was illegal, as the said — defendant could not stipulate any thing in his own favor with the said minor, and as in the said marriage Contract there was no person legally appointed to assist the said minor in the said marriage Contract, but

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the said defendant; he cannot derive any benefit from such a stipulation —

The Court were of opinion with the plaintiffs upon both points, and therefore ordered the Defend^t to account. —

Chalifoux v. Marotte & Bedard. Pft en distrac. de frais. —

The Plaintiff having been by Judgment of this Court separated from her husband, M^r Bedard her attorney thereupon obtained an order for a distraction de frais, and having in consequence sued out execution against the Defendant for the amount of the said Costs, a lot of land belonging to him was taken in execution and sold by the Sheriff, when one Montplaisir became the purchaser, but not having paid the money, the Sheriff made his return accordingly when M^r Bedard moved that a writ of venditioni exponas should be granted to him to sell the said lot of land at the folle enchere of the said purchaser — The said Montplaisir came in and moved that he should be permitted to deposit in Court the amount of M^r Bedards Costs for which the said writ of execution had been sued out, and to give security for the

payment

payment of the remainder of the purchase money in such way as this Court should direct, inasmuch as he had a claim to make against the said plaintiff and defendant for a debt due by them to him by their joint obligation for a much larger sum than the amount of the said purchase money, and for which he has made his opposition afin de conserver. — All the parties objected to this motion, and it was thereupon disallowed by the Court, who considered that they could not compel the parties to accept such security, that the only case where a purchaser is admitted to this benefit, is where he is a plaintiff in a suit, and has a claim upon the land sold, under St. 41. Geo. III. ch. 7. s. 15. — but this statute did not extend to any other purchaser than the plaintiff suing out execution, and as the parties had objected thereto, the Court dismissed the motion of the said — Montplaisir, and granted that of Mr Bedard for a new sale at the folle enchere of the said purchaser. —

Lesperance vs McGill et al

The Defendants were sued in their capacity of Commissioners of the Walls & Fortifications, to answer the plaintiff in an action of Garantie formelle – To this action it was excepted by the Defendants that although they were named in the writ of Summons and declaration, with the addition of Commissioners, &c yet, that the conclusions of the declaration were against them personally and not as Commissioners, whereas they can be liable to the plaintiff only as Commissioners, unless it had been pretended that they had acted wrongfully or exceeded their powers, which is not alledged, and therefore the conclusions agt them taken by the Plaintiff are wrong cites. 1. Parf. Not. 682. Poth. Obl. 55. 76. 82. –

Stuart for Pltff. The action is brought against the Defts as Commissioners, and the conclusions thereby taken must refer to the Capacity in which they were sued. –

The Court, considering that the matters stated in the declaration regarded the Defendants only as Commissioners, in which capacity they had been sued, and that it was not pretended that they were personally liable for any of the acts complained of, were of opinion that the conclusions in the declaration must necessarily refer to the Defendants as acting in that capacity in which they had been sued. –

Collins. v. Georgen. } Georgen. opp.t

This cause was brought to issue on the 17.th October last, – the plaintiff now moved under the usual notice for a day in this term for the examination of his witnesses. this was objected to by the Defendant, who said that he was entitled to 15 days notice of the motion as the Cause was in a State to have been fixed for evidence during the last Vacation – And of this opinion was the Court, and rejected the application, but agreed to give the first witness day in the next ensuing vacation for this purpose. –

Courselles v. Raymond

Debt on Obligation. –

It appeared that by a Contract made between the parties on the 3.d April 1812, the plaintiff had undertaken to do all the joiner work in a certain house for the Defendant for the considerations – therein mentioned. – On the 21.st November 1812 after the work in question had been finished, the parties settled accounts respecting the same, and the Defendant executed the Obligation, upon which this action was brought, for the balance which he

he acknowledged to be due to the Plaintiff - the words, are,
"pour le residu du prix du marché fait entre eux devant Me
"Cadieux l'un des Notaires soussignés &c. tout compte reglé
"entre eux, en est content et satisfait, en consequence &c."
To this action the Defendant pleaded, nil deb.— and further that he made the above obligation and acknowledgmt through error and mistake, and from the false and erroneous statement of the plaintiff, of the accounts existing between them at the time of making the afores obligation, and therefore he was entitled to a revision of the said accounts, as error vitiates every contract. Poth. Ob. No 17. 18. a

But the Court were of opinion that the general allegation of error was not sufficient again to lay open accounts which had been settled between the parties, but that the Defendant ought to have stated certain facts in which the error complained of lay, before he could be entitled to a re-examination of those accounts -

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Wilson & Co.
McDonnell

On the 8th instant the enquête was closed, when the defendant moved to examine the plaintiffs upon faits & articles - The Plaintiff on the 11th moved to fix the Cause for hearing on the merits, to which it was objected by the Defendant that as he

paid

had reserved to himself the right of examining the Plffs upon faits & articles, and as the plaintiffs resided at Quebec, it was impossible to obtain such examination this term. — The Plaintiffs on the other hand contended that the Defendant ought to have fixed a day for such examination at the time of demanding the same, otherwise it cannot be granted under the Rules of practice — and further that the granting the application even if regularly made must prolong the Cause to — another term, which is a "retardation" of the suit, and ought not to be admitted. —

The Defendant answered, that as it became necessary to sue out a Commission Rogatoire to obtain the — examination of the plaintiffs upon faits & articles it was impossible to fix any day for such examination, and in this respect the rule of practice can be construed to apply only where the party to be examined lives within the jurisdiction of the Court — That the Defr. could not sooner than at the closing of the enquête move for the examination of the Plaintiffs upon faits & articles, and the granting the same cannot be considered as a "retardation du proces" — cites Case. Hart & Co. — v Jones 16 Oct. 1812. —

The

The Court held, that as the plaintiffs did not live within the Jurisdiction of the Court, it was not necessary that the Defendant should fix a day for their examination at the time of moving for the same, and as he appeared to have been guilty of no laches the Court granted his motion. —

Sobert. v Laing. } The Plaintiff sued the Defendant by stiling him in the Declaration, William Laing, Junr. but in the writ of Summons he was stiled by the name of William Laing, only; — The plaintiff now moved to amend the writ of Summons by adding thereto the, word Junior, after the name William Laing, to which the Defendant objected — and the Court held that the amendment could not be allowed, as a different person may have been summoned than that named in the declaration, and the amendment demanded could not cure the defect —

And the Defendant having moved at the same time, that by reason of the variance between the Declaration and writ, that the writ should be quashed — the motion was granted. —

Shaw. }
v.
Marion. }

The defendant, a Silver Smith, purchased for thirty shillings from a person unknown, a gold Seal which the Plaintiff had lost, and as it had been damaged, he made certain repairs thereto. The Plaintiff having demanded the Seal from the Defendant, he refused to deliver it up unless the Plff would reimburse to him the money he paid for it, and also thirty shillings for the repairs he had made thereon — The plaintiff in consequence sued out an action en revendication, and seized the Seal which was brought into Court — and from the evidence it appeared that the seal was the property of the Plaintiff and the Seal from the view of it appeared to be of much greater value than the sum paid for it by the Defendt.

Upon this the Court held, that it was the duty of the defendant to have stopt the Seal when it was offered for Sale to him at such an undervalue, and that the purchasing thereof was a criminal act on his part — that the defendant had no right to make any repairs or improvements to the property of another without his Consent, and therefore the Court directed that the seal should be delivered up to the plff, allowing the Defendt. to take away the repairs made thereon, but without injuring it, and to pay Costs.—

Chapman
v.
Pelerin

This was an action instituted against the Defendant as drawer of a promissory note, by the plaintiff as the Indorsee. —

The note and indorsement were in these terms —

Lachine 11.th April 1811. —

I promise to pay to Mr. I. R. Wright or order, after three weeks of sight, the sum of twenty pounds Currency due to him. —

— H. Pelerin. —

(Indorsed)

Please to pay Mr Jos. Chapman or his order this note, value rec.d 15.th Aug.t 1811. —

I. R. Wright

To this action the Defendant pleaded, non assumps.t and under that plea, contended that he was entitled to set off a sum of £12. which was due to him by Wright for board and lodging, at and before the indorsement of the said note to the said plaintiff, inasmuchas the note was overdue at the time, and therefore the plaintiff ought to be in no better situation than the drawee of the note would have been had he brought the action — The parties having been heard upon this point, the Court took time to deliberate thereon —

and

and it was now held that according to the principles of both the English and French law, a person taking a note after the time had lapsed for the payment thereof, took it liable to the same objections and defense that could be raised thereto in the hands of the drawee, and therefore Judgment was given in favor of the Plaintiff, deducting from his demand the sum of twelve pounds as stated by the Defendant —

3. J. Reps. 80. Brown. v. Davis. —
Chitty on Bills. p. 98. —
3 J. Reps — 81. Banks. v Colwell.
7 — dº — 427. Bochm. v Sterling —
1 Camp. N.P. 19. Tinson v Frances.
13. East. R. 498. Crossley. v Ham.

Boucher Instit: Com. Nº 1522. — 1697. 1502. 3
Poth. Ch. Nº 184 — art. 3. §. 1

Ordº 1673. tit. 5. art. 31 — Note of Bornier. —

Bourgon v Deshautels

Debt on Obligation. —

The Defendant pleaded, that the plaintiff was not entitled to maintain her action agt. him in manner & formº — because at her own request she had been — interdicted, and a Curator appointed to assist her in the

the conducting and managing all her business and concerns, and inasmuchas the said Curator had not joined in the action the same ought to be dismissed; He further pleaded a nil deb. —

The plaintiff obtained a rule upon the Defendant to shew Cause, why the first of the said pleas should not be rejected and taken from the record, inasmuchas it was an exception à la forme, and ought to have been filed on the day after the Defendants appearance

Vigé for Defendant, contended that the plea in question was not merely à la forme, but peremptoire en droit, which may be filed and made with a plea to the merits, as it destroys the plaintiff's right of action — and of this opinion was the Court and discharged the rule — Poth. Proc. Civ. ch. 2 art. 2. p. 16. —

Desrivieres Tutor &c. vs Hatt. —

The Court after having heard the parties upon the merits, considering that the plaintiff's demand was founded upon a long series of accounts between different partnerships which had not been sufficiently stated, nor made out in evidence, so as to enable the Court to do Justice between the parties, ordered, that they should appoint Auditors to — examine and report upon the state of the said accounts, & if any, what balance should appear to be due thereon. —

Burnside
v
Chaubert
&
Sarrault opp.

The opposant had made an opposition afin d'annuller, by reason of a privilege which he claimed upon the property seized, that opposition having been dismissed he now made the present opposition afin de conserver, founded upon the same right under which he claimed his aforesaid privilege

The plaintiff moved that the opposant should be held to pay the costs upon the first opposition before he should be allowed to proceed on the present, and in default of his so doing in three days, that the present opposition should be dismissed with Costs. Which motion was granted by the Court, considering the second opposition in the nature of a second action for the same object. —

Park
v
Perry & al.

This was an action upon a promissory note, and when the Cause was called from the rôle d'enquête, as the attorney for the Defendants and the prothonotaries were engaged in other suits, the Court ordered the testimony of the

plaintiff's

plaintiff's witnesses to be reduced to writing by the plaintiffs attorney, under the eye and direction of the Court, which was done - The attorney of the Defendants objected to this proceeding and tendered an exception thereto, praying that the same might be filed in the Cause. - The Court rejected the exception, and would neither permit it to be filed, nor mention to be made on the record that such an exception had been so tendered, considering it altogether irregular that any exception should be made or offered to the mode of conducting the proceedings of the Court. -

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Leduc. -
vs
Mailloux

Upon the motion of the plaintiff this Cause had been ordered to be put upon the rôle d'enquête, to which order of the Court the Defendant tendered an exception - but the Court would not permit it to be filed, being of opinion that this was not such an order of the Court against which a party was entitled to file an exception, under the Prov. Ordce 27 Geo. IIIe. ch. 4.

Tuesday 16th Febr. 1813.—

Bedard v Archambault

This cause had been set down for trial by special Jury this day upon the plaintiff's motion on the inst.— but no diligence having been done by the plaintiff to bring the Cause to trial, the Defendant moved, that under the late rule of practice in this behalf the action should be dismissed

The attorney for the plaintiff stated, that it had been an omission on his part in not having sued out a Venire and done the necessary diligence to bring the Cause to trial, but contends, that no plaintiff can be non-suited unless where the Jury attends—

The Court held that the rule of practice was otherwise, and was made to obviate the difficulty of obtaining a non-suit against a plaintiff where the Jury did not attend through the laches of the Plaintiff and as no good Cause had been shewn to the contrary a non-suit was granted.—

Racey. v Battersby

The Defendant having become bail to the Sheriff for one Griffin, was now sued upon his bail bond in consequence of the non-appearance of the said Griffin on the return of the writ — He now moved that he should be permitted to bring up and surrender the said Griffin, and that thereupon the action against him should be staid upon payment of Costs to the present moment. —

Stuart for Plff. By the Ordinᵉ of 1785, the plaintiff is entitled to all the benefits of the bail bond, which when forfeited, no rule of this Court can divest the rights of either of the parties therein, the bond being conditional either to deliver the body of the Debtor on a certain day or pay a certain sum of money — this kind of bond must be regulated according to the principles of all other bonds or obligations under the law of the Country — and the Rule of Prac. Sec. 8. art. 5. cannot alter the general law of the land, by discharging a bond after it has become forfeited, or liberate a party from the penalty thereof merely by the payment of Costs. —

The Court held that under the Rules of Practice the Defendant was entitled to surrender the principal Debtor in this Cause, and granted an order upon the Sheriff to bring up the body of the said Debtor, for this purpose - he being in custody at the Suit of another person.

Campbell. vs. McDowall.

The Defendant moved to reject from the record the depositions of the witnesses taken in this Cause, inasmuchas the Cause was not called in rotation from the rôle d'enquête, and because the said depositions were reduced to writing by the plaintiffs attorney, and not by any of the Prothonotaries of this Court. —

The Court rejected the motion, inasmuchas it contained allegations not founded in fact, and principally because it regarded the mode of conducting the business of the Court, respecting which no motion ought to be made or heard. —

McKenzie & Co vs. Beaubien.

The Defendant moved for a new trial upon the following grounds —

1st. Because evidence was admitted of dealings and transactions between the parties beyond the sum demanded in the declaration — The debt stated by the declaration was for a sum of about £300 — for goods sold and delivered upon a certain day, with the usual money counts thereon, but by the evidence addiced, it appeared that there had been a continuation

of

of dealing and transactions between the parties for nearly ten years past, and that the sum demanded was the result of all this dealing and the balance claimed by the plaintiffs as due to them thereon — so that the declaration and the evidence were entirely at variance — or in other words, the plaintiffs had not stated their case sufficiently in their declaration to meet the evidence they had to adduce.

2ly Because the plaintiffs introduced and filed in the record certain papers and exhibits which were essential for the support of their Cause and which ought to have been filed with their declaration according to the rules of practice, and this through the medium of Mr Yeoward one of the plaintiffs at the time that he was examined upon faits et articles. —

3ly Because the Jury had allowed to the plaintiffs a sum of £218. 12. 10 for goods sold to the Defendant at 45 p cent on the Sterling Cost, without proof of what the Sterling Cost was. —

4. Because Compound interest had been allowed to the Plaintiffs upon their account, without any proof of a promise or undertaking of the Defendant to pay any interest thereon. —

5. Because the Jury ought to have been composed of Old and new Subjects, or, de medietate linguæ, the plaintiff being

being old Subjects, and the Defendant a Canadian or new Subject—

To which it was answered by the Plaintiffs —

1st That the declaration was regular, as it demanded only the sum due to the plaintiffs upon their dealings with the defendant, and the evidence adduced supported that demand, and the bringing in view the whole of the transactions between the parties was necessary to establish the balance due to the Plaintiffs. —

2. The papers produced by Mr Yeoward upon his examination upon faits & articles, were essential for explaining the transactions respecting which he had been interrogated, but which were not necessary to have been filed by the Plaintiffs with their declaration as their declaration was not founded thereon. —

3. It was in evidence that the prices marked on the goods sold to the Defendant were the Sterling prices, and were by him taken as such. —

4th. The Defendant received a copy of his account every year in which the balance with the interest thereon was stated — this mode of dealing was carried on between the parties without any objection

having

having been made thereto by the Defendant, whose silence must be considered as an admission of the demand, and so considered by the Jury. —

5th. The Defendant was not entitled to a Jury de medietate linguæ, having never demanded the same. —

The Court held, that the evidence adduced by the plaintiffs would apply to the Count of insimul comput.t in the declaration, as under it, the whole transactions between the parties might be shewn, and the balance due demanded. — but without this Count, there was nothing in the declaration which could regularly meet the evidence adduced — as the demand of a sum of money for goods sold and delivered to a small amount, could not entitle the plaintiffs to adduce evidence of a balance due upon transactions of ten years standing and amounting in value to ten times the sum demanded. —

2d. Upon the second objection the Court held that the party examined upon faits & articles was entitled to produce and file any paper or document tending to elucidate the matter or transaction respecting which he is interrogated and must be considered as making part of his answer thereto. —

3ly The matter contained in this objection was merely a point of fact which the Jury had alone a right to determine and they had evidence before them to found their opinion.

4ly It is not always necessary to prove in dealings between merchants, that there was an express undertaking to pay interest, it is sufficient, that there has been enough shewn from which such undertaking may be presumed, and this appears from the manner in which the balance of the account between the parties was annually stated.— 1 Camp. N.P. 50. Deharieland. v. Bowerbank.—

5. As to a Jury de medietate linguæ, the objection came too late, for had it been the intention of the Defendt to have demanded such Jury, it ought to have been made known at the time the Cause was fixed for trial, otherwise he was presumed to have submitted to the ordinary course of proceeding respecting Juries— without however admitting that the Defendant is entitled or can obtain a trial by Jury of the description he now claims.—

Wednesday 17th Febv. 1813.

Hungerford vs Lampman.

This was an action of complainte et reintegrande.

Mr Ross for the Defendant took exception to the declaration, as it did not state that the plaintiff had been in the quiet and peaceable possession of the premises for a year and a day preceding the trouble complained of

Stuart for Pltff. contended, that the possession of a year and day is not necessary in cases of forcible ejectment or intrusion by Strangers as in the present case, such possession is required only in cases of Saisine et nouvelleté, but not of reintegrande. — And of this opinion was the Court, and therefore dismissed the Defendant's exceptions.

see. Poth. Proc. Cw. § 2. p. 105
Cp. Cout. art. 96. No 39. p. 1528.
Poth. Possn. No 114. p. 560.

Stem. —
v
Chamberlain }

On the defendants motion for fixing the Cause to be heard on the merits. —

The Cause had been put upon the role d'enquête on the 13th. inst. on the motion of the plaintiff, but when the Cause was called in rotation on that day neither the parties nor any witnesses appeared, and an entry to that effect was made upon the Role d'Enquête — The plaintiff now objected to the motion and stated, that a witness, who resided in the district of Three Rivers had been required to attend on the 13th on the part of the plaintiff, that he had been retarded in his progress from the bad state of the roads, and thereby prevented from arriving at Montreal on the 13th inst. notwithstanding every diligence on his part. That this circumstance was not known to the Pltffs' counsel at the time to enable him to obtain another day for the examination of the said Witness, but having now come to his knowledge, according to an affidavit, now filed, he contends that he is entitled to another day for the examination of the said Witness

Vigé for the Defendant contended, that unless Cause be shewn on the day fixed for the enquête why the Pltff does not then proceed, he cannot have another day for this purpose — but in this Case the Plaintiff never meant

to

to shew any cause, as he did not attend when the Cause was called – that therefore according to the rules of practice Sec. 27. §. 9. –.

The Court were of opinion that unless the party get something entered on the Role d'enquête to entitle him to a further day for the examination of his witnesses, or for leave to apply to the Court for this purpose, he must be precluded from having any further day, and the adverse party is thereupon entitled to the benefit of the rule for bringing the Cause to a hearing – In this case the Plff did not attend the Court when his Cause was called, and is therefore entitled to no indulgence –

Defendants motion granted –

The Plaintiff now moved to examine the Defendant upon faits et articles – but as no reservation to this effect had been made on the day of the enquête, the motion was rejected –

Thursday 18th Febv. 1813.—

McArthur
v
McDonald

By Judgment of this Court of the 20th day of October last, it was ordered and adjudged that certain goods and effects mentioned and detailed in a certain Inventory of a Communauté between his late wife and one McIntire her former husband, and which effects had been left in the possession and Custody of the Defendant, should be sold by one Dubois, a public Notary, and the proceeds divided among the parties interested.

The said Notary afterwards made a special report to the Court, supported by affidavits, stating that on the day appointed he had gone to the house of the said Defendant for the purpose of selling the said effects, but that the said Defendant refused to deliver the same to him, and upon the said notary's taking some of the said effects in order to proceed to the Sale thereof the said Defendant forcibly wrested the same from him, and would not allow him to proceed to make any Sale thereof— The Plaintiff now moved that an attachment should issue against the said Defendant for a Contempt of this

this Court in resisting by violence the carrying into effect the aforesaid Judgment – And it was ordered accordingly

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Maurice
v. Lafantasie
vs.
Mouk.

This was an action on the Prov. Ordce of Geo. 3. cls. to recover from Defendt certain penalties therein mentioned for having refused to grant a writ of Hab. Corpus. –

The Defendant pleaded – Not Guilty – That he had not forfeited any sum of Money to the Pltff. – That he was not indebted, nor liable to pay damages to the Pltff.

The Plaintiff demurred to this plea and contended that it was irregular, as it raised no issue to the action – that the proper plea to any action of debt was, nil debet, – So held by the Court in the Case of the King v. Marston, where in an action of Detinue, a plea of "not guilty" was rejected by the Court as raising no issue. –

The Court held that there was sufficient in the plea to raise a regular issue to the action, and considered the other parts of it as surplusage –

Coppin. q.t. v. Carter. 1 J. Rep. 462. –

Friday 19th Febr. 1813.

Bricault v Vaillant.

On defendant's motion to quash writ of Sums because it had not been served five full days before the return. —

It appeared that the writ had been served on the afternoon of the 12th inst. to appear at nine o'clock in the forenoon of the 17th inst. —

Sacroix for the Plaintiff contended that if the return was made during the sitting of the Court on the 17th inst. it was sufficient, and as the Court on that day sat later than the hour at which the writ had been served on the 12th the service was sufficient. —

But the Court held, that according to the rule of Practice the service of the process must be made five days, that is, five times 24 hours, before the hour of the return, and as the writ was returnable at nine o'clock in the morning of the 17th the service thereof ought to have been made before that hour on the 12th. —

Birlinquet v Campeau

The Court adopted the report and opinion of One Expert, in preference to that of three others, on account of the grounds and reasons given by the said Expert in support of his opinion. —

Derrau. v Pincorneau

The plaintiff prosecuted an action en revendication against the Defendant for two Oxen which had strayed from his pasture into that of the Defendt.

The Defendant pleaded, that he did not detain the Oxen, but was willing to deliver up the same to the plaintiff provided he should prove them to be his property.

The plaintiff having in consequence of this plea ascertained by proof that the Oxen were his property, now demanded his Judgment with Costs.—

The Defendant contended that he ought not to pay Costs inasmuchas he was not in default, nor had detained the oxen in bad faith — considering that he could not be justified to deliver up the said Oxen to the plff without some proof of title in him —

The Court however held that the casual possessor of property, whether by finding or otherwise, was not warranted to contest the right of the person claiming the same, where there was a fair presumption in favor of such claimant. That the Defendant in this case having compelled the Plaintiff to prove his property without necessity, the defendant ought on that account to pay Costs.

M.Cord
vs
Langan
&
Griffin

On rule obtained by the Plaintiff upon the Defendt to shew Cause why execution should not be granted to him for his Costs as well on the Judgment rendered in this Court, as on the Judgments rendered in the Court of appeals and before the King and Councie.—

Stuart for the Defendants — It does not appear that by the Judgment before the King & Councie, or in the Court of appeals that the Case has been remitted to this Court for any further proceedings to be had thereon, without which this Court has no authority to proceed — so held in the Case of Henderson & Armour. vs Dieffenback. 16 Oct. 1809.—

But without entering into the question whether the Court had power to grant the execution demanded it held, that as no taxed bill of the Costs either on the Judgt. rendered by the King and Council or by the Court of Appeals, had been exhibited here, no execution therefor could be granted, until such costs had been previously settled and determined, as the Court could not grant an Execution for a thing done in those Courts, until proof thereof appeared — that although such execution might be granted for the Costs on the Judgments of this Court, yet as the Judges had the setting the amount of such

Costs

Costs no inconvenience could arise thereon, but as they had not this controul over the Costs in other Costs, they were not warranted to grant execution for the same until they should be duly certified — The Court therefore discharged the rule saving to the Pltff his further recourse —

Busby vs Woolman & Busby & Debartche Oppt.

On the 8th May 1811 the Plaintiff sued out a writ of execution against the Goods and chattels of the late Andrew Winkleforss in the hands of Woolman, Executor to his last will and testament, upon which a return of nulla bona, was made — In consequence of this return the plaintiff sued out an execution against the lands and tenements of the said Andrew winkleforss in the hands of Js. Busby, Curator to his vacant Succession, by virtue whereof the Seigniory of St François Xavier was seized and taken in execution, but the Sheriff could not proceed to the sale thereof by reason of certain oppositions of which he made a return to the Court — These oppositions having been disposed of, or converted into oppositions afin de conserver, it was ordered that a writ of venditioni exponas should issue for the Sale of the said Seigniory — In this writ of vendit: Exp: it was stated — "Whereas "we did command you that of the lands and tenements which "were of Andrew Winkleforss in the hands of Antoine Woolman "Executor of his last will and Testament &c — We therefore command "you that you proceed to the Sale of the said lands & Tenements &c"

Under this writ the Sheriff proceeded to the Sale of the said Seigniory and Sold the same to the Opposant — The Opposant now made his opposition, stating, that the Sale of the said Seigniory had been irregularly made to him, and that he could derive no sufficient title thereto by virtue of such Sale, inasmuchas the recital in the said writ of Venditioni exponas touching the seizure of lands and tenements in the hands of Woolman as Executor of Winkleloss was incorrect and not true, and inasmuchas the said Writ directed the said Lands and tenements to be Sold as having been seized upon, and in the hands of, the said Woolman as executor as aforesaid, which was also irregular and illegal, as such Seizure was not and could not have been made in the hands of the said Executor who was not possessed of any real property of the said late A. Winkleloss, nor could the same be seized as in the possession of the said Executor — and further because the said Real Estate was seized as being in the possession of Th. Busby, Curator as aforesaid, and in whose possession alone the same could have been sold so as to give a legal and sufficient title to the purchaser —

Some objection was made to the regularity of the opposition, and the right of the purchaser to raise a question of this kind by Opposition, as his remedy

ought

D'Hericourt- p. 288. & 292.

ought to be by action against the Sheriff — but this objection having been considered of no weight by the Court — it was then contended, that it was a mere matter of form in the writ which was irregular and might be amended, but that the substance, which was, the selling the real Estate of Winkelfoss, was right, and therefore the property must be considered to have passed to the purchaser under the Sale and adjudication by the Sheriff. —

The Court held the Sale and adjudication by the Sheriff to be null and void — That according to the antient laws of the Country, great regularity was necessary to be observed in the formalities required to perfect a decret, and although these had in a great measure been abrogated in consequence of the Sale and adjudication by the Sheriff introduced by the Prov. Ordce of 1785. yet there were essential parts of the antient law which must still be considered in force, touching the right of seizure or selling any real estate, although the mode of effecting that sale may have been altered — By the antient laws of the Country, it was a ground of nullity in the decret, if the estate sold did not belong to the partie saisi — Hericourt Vente d'Im. 290. — 2. Henrys. p. 63 Quest. 61. Nº 2. Here the defect was more evident, as the property in question was seized as being in the possession of one man, but

was

was sold as being in the possession of another, who by law could legally have no possession thereof — This objection is fatal, and the sale must therefore be considered irregular. —

Saturday 20th Febv. 1813.—

Wilson & al' v. Peaslie & al } Damages, on breach of Covenant.—

The defendants by a certain contract bearing date the 2d. October 1810, undertook to build a ship of about 350 tons, Register measurement, for the Plaintiffs, in the manner stipulated by the said Contract, and to launch the said ship and have her ready for delivery to the plaintiffs on or before the 1st Septr. 1811.— In consideration of which undertaking the plaintiffs agreed to pay to the Defendants at and after the rate of £9. 15. per Ton, in the manner following — viz.— £400. in cash immediately after the passing the Contract— £400— in a bill of exchange on Scotland at the current discount— £200.— on 1st Febv. 1811 — £200. on the 1st March— £200.— on 1st April, and £250.— on 1st May of the same year— these four payments to be made in bills of exchange on Scotland at 90 days sight at the Current discount— £375 in Cash in June 1811— £400— in Cash in July 1811 — £500— in Cash in Augt. 1811— and the remainder after the launch.— In consequence of this agreement the Defendants began to construct the said Ship, and continued the same until June 1811, during which time it appeared that the Plaintiffs had paid and advanced

to

to them in goods, cash and bills of exchange to the amount of £2041.— In the course of June 1811, the Defendants left the Ship without assigning any Cause and the building was stopt, and much about the same time, the above bills of exchange, to the amount of £1153.— returned from Scotland under protest for non-payment, and suits were thereupon instituted agt. the Defendants at Burlington in the State of New York, by the holders of the said bills.—

The Plaintiffs now brought their action against the said Defendants for damages, £6000.— for the non-performance of their said Contract.— The Defendants pleaded that they had always been ready and willing to fulfile their said Contract but that the Plaintiffs had failed on their part, inasmuch as the bills of exchange they had received from the said plaintiffs had returned under protest for non-payment, that therefore they the Defendants were exonerated from further continuing the building of the said Ship, as the plaintiffs had failed in furnishing what they were bound to do by the Contract, the necessary monies to carry on the work, which was a condition precedent—. On the part of the Plaintiffs it was contended that the bills of exchange having returned protested, did not warrant the Defendants to leave off the building of the ship, as they coued have had their recourse upon those bills against the plaintiffs for their damages thereon—that as no express stipulation had been made between the parties in the event of the said bills being protested, they must follow

the

recourse which the law gives them in that respect, but that they were not warranted to abandon the enterprise they had undertaken of building the ship in question.—

The Court were of opinion, that both parties were in default. That the agreement by the Defendants to take bills of Exchange from the plaintiffs, must be presumed to be, good bills — and the return of those bills under protest, as well for non-acceptance, as for non-payment, was a breach of that agreement, as the presumption arising from this was, that the plaintiffs had not effects in the hands of the Drawees at the time of drawing the said bills, which they ought to have known, and the drawing of such bills was a fraud on the Defendants — The plaintiffs therefore were not entitled to damages against the Defendants — That the Defendants by abandoning the Ship, had given up their right to continue the Contract, and must therefore pay and reimburse to the plaintiffs what had been advanced to them thereon, including therein the amount of the said bills, because it appeared that the said bills were in the hands of third persons to whom the plaintiffs were liable for the amount thereof with the damages and interest thereon, and would therefore be exposed to pay the same twice, if they did not now recover back the amount from the Defendants — But in order to secure to the Defendants their recourse against the plaintiffs for the said bills, damages and interest, it was ordered, that before suing out execution the plaintiffs should

give

give security in a sum of £1400. ~ to pay and satisfy the same to the Defendants when legally demanded. ~

Dunlop Roi. ~ & Contra

Action for goods sold &c ~

Plea - Non assumps. - and Incidental Demand upon the following grounds. - That by an agreemt made between the Defendant and Messrs Whitney & Bancroft dated 2d. May 1812, the defendant undertook to deliver to deliver to them by the 10th June last a certain large quantity of wheat - the said wheat was transferred to the plaintiff by the said Whitney and Bancroft, but the plff neglected and delayed to take away the same from the Stores of the Defendants until the beginning of the month of August last by which means an experce was incurred by the said Defendant for the Storage of the said wheat, and a loss upon the said wheat of nearly an hundred bushels by being kept piled together in large heaps during the hot weather. and further that the plaintiff had refused after delivery of the said wheat to give any receipt or discharge to the said Defendant upon his said agreement, so that he is still liable to have the same demanded of him - to the damage of the said Defendant £75 - for which he brings his Incidental demand. ~

The

The Plaintiff demurred to the Incidental demand contending that in law the same was not admissible as it was nowise connected with, nor had any reference to the principal demand. — and the parties having been heard thereon, it was held by the Court, that the Incidental demand could not be received — that according to the 106th art. of the Custom of Paris, and the practice under it, every incidental demand must have a relation to, or be connected with the principal demand — That the Incidental demand now set up, being entirely foreign to the principal, must therefore be dismissed. —

1 Pigeau. 337.

Robillard dit. — v. Pilon. —

Action for value of certain articles of Rente Viagere, on a Donation by Pltffs to their Son Chas Robillard, now represented by the Defdt.

The defendant pleaded. — 1st That the pltff ought to demand the articles en nature, and not the value of them, as Defdt is bound to pay them in kind only. — 2d That by the marriage Contract between the plaintiffs, bearing date the 26th Jany 1769. the said Robillard created a dower of three hundred livres in favor of his wife, and for the payment whereof the land given by the Plaintiffs and now the property

property of the Defendant, is bound - and therefore the Defendt. ought not to be held to pay the sum now demanded without security against the payment of the said dower. 3d. That by the said deed of donation, the plaintiffs gave to the said Chas Robillard all the goods, chattels, & effects they were then possessed of, reserving to themselves only the enjoyment of the said goods, chattels and effects during their life time, - that the clause in the said donation cannot take effect without an Inventory being made to ascertain the said goods &c — which Inventory the Plaintiffs have refused to make, and therefore the Defendant ought not to be held to pay the value of the articles now demanded until such Inventory shall have been made and compleated.

The parties having been heard upon the said plea, it was held by the Court, that although the Plaintiffs had demanded the value of the articles in question, still the Court by its Judgment might allow a delay to the Defendant to deliver the said articles in kind, or in default thereof to pay the value thereof — That the Defendant was not at present entitled to any security against the payment of the dower, as the payment thereof depended upon a condition which might never happen, and as this

was

was at present uncertain there was no room for the demand of such Security on the part of the Defendant. and lastly, that the clause in the donation respecting the gift of moveable property, was wholly null, as an Inventory of such moveable property to have been made at the time and annexed to the said Donation, but that it was now too late to demand it. —

April Term 1813.

Monday 5th April 1813.

Bricault & al' vr Vaillant } The Defendant pleaded an exception à la forme, but did not deposit with the Prothonotary at the time of filing the same, the two guineas, as required by the rules of practice — The plaintiffs now moved that for want of such deposit, the plea of exception should be rejected and taken from the files, which was granted.

Collins & al' vr Georgen & Georgen Opp.' } The opposant moved to examine one Samuel Park upon faits et articles, upon the principle that he is substantially, although not nominally the plaintiff in the Cause, the suit having been instituted at his instance, and the

monies

monies paid by the Defendant on account thereof, having been received by the said Samuel Park, who thereupon entered into the arrangement in question touching the delay now claimed by the Defendant. —

Stuart for Pltffs objected, that as the S. Park is not named as a party in the Suit, he cannot be examined upon faits et articles, but ought to have been produced as a witness. — That the Judgment rendered in this Cause — having been obtained in the name of the plaintiffs, cannot now be controverted, nor any question raised touching their interest therein. —

The Court was of opinion that the Defendant was entitled to examine the said Samuel Park upon faits & articles, provided it should be made appear that he was substantially the plaintiff in the Cause — it was therefore suspended to adjudge upon the motion until this previous fact should be ascertained. —

Mc Cord vs Langan et al

Sewell for Pltff moved to be permitted to fyle an exemplification of the Judgment rendered by the King in Councie in this Cause.

Stuart for Dfdt contends, that it is irregular to fyle any paper in any record in this Court without assigning a reason and necessity for so doing,

either

either to found further proceedings, or to support some motion requisite to be made in the Cause – but as this does not appear, the application is irregular.

Wednesday 7th April 1813.

Needham vs Burton } The plaintiff had been permitted to amend his declaration and affidavit by an order of the Court of the 17th October last, this he neglected to do, upon which the Defendant moved the third day of this term that the plaintiff's action should be dismissed, which was granted.

Blunt vs Hubbard } This was an action of Indeb: assumpsit, by which the plaintiff claimed a sum of £30 – which the Defendant had become bound to pay under his guarantee of Aaron Wheeler & Roswell Smith. – The declaration contained seven Counts,

1st

1st That Defendt on 3 July 1809 was indebted to the plaintiff in the sum of £30.— for divers goods wares and merchandises before that time at the special instance and request of the said Defendant sold and delivered to Aaron Wheeler and Roswell Smith, Junr by means whereof the defendant became bound and liable, and promised to pay &c—

2dly Quantum meruit for the same goods.—

3ly Goes on to state, that the said Wheeler and Smith not having paid the said goods, he prosecuted an action against them for the same, obtained Judgmt and sued out execution thereon, but had not been able to obtain payment of any part of the aforesaid sum of money.— upon which suit and proceedings certain expences had been incurred, amounting in all with the said debt to £32. 7. 1— which the said Defendant became liable to pay &c—

The other four Counts consisted of what is generally termed, money Counts.—

The Defendant pleaded, non assumpsit.

There was given in evidence, a recommendation in writing from the Defendant to the plaintiff, in the following words.— "Stanstead. 30 June 1809."

"Mr. Moses Blunt."

"Sir"

"You may with safety

"credit Mr Roswell Smith and Aaron Wheeler to

"the

"the amount of one hundred dollars".—

"Yours.

"Phineas Hubbard"

evidence was also produced by the plaintiff to shew, that it was upon the above recommendation alone that the plaintiff had been induced to advance the goods to Smith and Wheeler — also the writ of execution and a return of "nulla bona," thereon, which had been sued out by him on the Judgment he obtained agt. the said Smith & Wheeler. And on the part of the Defendant evidence was adduced to shew that Smith and Wheeler were considered to be worth more than the above sum of £25.— at the time of the said recommendation.—

The Sol. Genl. for the defendant, contended, that there was no undertaking by the Defendant to pay, what might be furnished by the plaintiff to Smith & Wheeler, he only stated a fact to the Plaintiff, as to the extent of the credit to be given to them, but he did not thereby become bound for them, nor in their default.— That upon the supposition that the defendant had become the guarantee of Smith and Wheeler, no sufficient proof had been made of diligence against them — the writ of execution produced, could not be taken as a proof of a Judgment rendered against Smith and Wheeler, and if it did, it went to moveables only, which was not a sufficient discussion, as they might be possessed of

Real

real property more than sufficient to pay the debt — And lastly, that the fact stated by the Defendant in the above recommendation as to the means of the said Smith and Wheeler, has been proved by him, which shews there was no fraud on the part of the Defendant, and raises the presumption that had the plaintiff done diligence he might have been paid by the said Smith and Wheeler —

Gale for the Plff contended, that the above recommendation carried in law an undertaking to pay on default of the persons therein named and the plff had been induced to part with his property under the faith and confidence of that recommendation — That Defendant cannot avail himself of the want of discussion of the said Smith and Wheeler, not having stated it in his plea, without which the Plaintiff is not bound thereto Poth. Ob. Nº 410 — 414 —

The Court held that upon the above recommendation no action of assumpsit could lie, as it did not in law nor in fact, carry a promise to pay the debt in question — That it contained no Mandat which could render the Defendant answerable, if there was

no

no fraud. — Poth. Ob. Nº 446. Id. Mandat. Nº 20. —
See also. 2. East. Haycraft. v. Creasy-
Fell on Guarantee. p. 201. ne 12. Vº.

Hosmer v. Messier et al. } The defendants pleaded by exception that since the institution of the action the plaintiff had become an alien enemy, which having been admitted by the Counsel for the plaintiff, the action was dismissed. — see. Allen. v. Harris. 11th. Feby. last.

Saturday 10th April 1813. —

Jordan vs. Boiselle & Raymond opp.t } The plaintiff under an execution sued out on a judgment obtained by him agt. the Defendt. for goods &c sold to him, seized a certain lot of land which had been given to the Defendt. by the Opposant, upon condition of paying to her a certain rente et pension viagere. — The Opposant made an Opposition afin de charge, to which it was objected by the plaintiff, that the claim for a rente et pension viagere, did not warrant the opposition, as thereby no charge was constituted upon the land, the same being

being merely a personal debt due by the Defendant for the security of which the opposant was entitled to a mortgage upon the said land, so as to be paid in preference to the plaintiff, but could not demand that the same should be sold Subject to the paymt. of the said rente & pension, which was not ranked among the claims carrying a charge upon the realty. 1. Pigeau. 731. —

Vigé for the Opposant, contended that the constituting a rente & pension viagere by deed of gift on the land was a charge thereon which entitled the Oppos.t to her claim as now made. That the plaintiff was a Stranger, had no right in the Soil, nor privileged claim thereon such as that of a Seignior &c.a and could not therefore contest with the Opposant as to her right of charge — That the plaintiffs debt was contracted long after the Donation made of the land in question, and he can claim no right in the same to the prejudice of the Opposants said claim. —

The Court, considering that the land had been given upon the express condition and intent

of

of raising a life rent to the Opposant, she was entitled to have the same sold subject to the payment of that life-rent, particularly as the land had been seized in the possession of the person who was the personal debtor of that life-rent — and they inclined to think, that had the Defendant been a tiers acquereur of the land without being personally bound to the payment of such rente viagere, it would have been doubtful if the claim of the Opposant could have been granted

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Busby
vs
Busby et al
&
Debartzhe
Opp.t

The opposant had purchased at the Sheriff's Sale, the Seigniory of St. Charles, which had been sold under an execution sued out in this Cause, as belonging to the late Andrew Winkleboss; but the possession of a certain part of that estate having been with-held from him by one Neyenstadt, as claiming under the said Winkleboss, he now moved, that a Writ of possession should be granted directing the Sheriff to put him in the quiet and peaceable possession of the said portion of the said estate. —

Stuart on behalf of the person in possession, contended that the motion was irregular, 1st because there

there was nothing before the Court to shew that the Opposant was not in the possession, or that he could not get the possession of the estate he had purchased, and 2dly That even if it did appear that Meyerstadt, or any other person, besides the Defendant, withheld the said possession, the purchaser was not on that account entitled to a Writ of possession, as the law in this Case authorised the granting of such right only where the Defendant refused or neglected to deliver up the possession of the property sold, but not in the case of third persons holding such possession, as their rights would thereby have been destroyed without a hearing —

The Court considered the motion irregular as the St. Al. Geo. C.7. S. 14 - did not warrant the grant of writs of possession where other persons besides the Defendant were in the possession of the property. —

Thursday 15th April 1813.—

Deshautels
vs
Normandin

Action of debt on Obligation.—

A day had been fixed for the enquête, when no witnesses were produced by either party — the plaintiff now moved to set down the Cause for hearing on the merits — The defendant on his part moved for a continuance of the enquête under an affidavit which stated, that his witnesses had been duly summoned but could not attend on the day of the enquête, but did not state what those witnesses could prove —

The Court, considering the plea of payment made by the Defendant, permitted him to amend his affidavit.

Monday 19th April 1813.

Robillard. vs Robillard.

Action for arrears of rente & pension viagere on a deed of donation made and executed by the plaintiff and his wife to the Defdt their son on the 7th Octr 1809.

Rolland for the Defendt. pleaded, that by an accord made between him and the plaintiff, dated 5th Novr 1811, it was stipulated and agreed that as the plff and his wife could not live together comfortably, the Defendant should receive her into his house and there keep and maintain her, in consideration whereof the Plaintiff consented and agreed to give up to the Defendant one half of the the articles constituting the said rente & pension viagere. — That in consequence of the said Accord the wife of the said plaintiff hath been supported and maintained by him the Defendant, during all the time that the articles of the said rente & pension became due and in arrear, and which the Defendt contends he is entitled to keep and retain to his

own

own use, as and for the stipulated recompence for keeping and maintaining his mother the pltff wife as aforsaid the said articles not extending to the one half of the said rente et pension viagere, the defendant alledging that as to the surplus demanded he had paid and delivered the same to the pltff before the institution of the action. —

Papineau for Pltff, contended that the accord pleaded by the Defendant was null and void in law, in as much as it stipulated an avantage in favor of the wife during coverture, to the prejudice of Pltff's creditors - and further because it would be giving effect to a voluntary separation between Pltff and his wife, which cannot be done. —

The Court held that as between the pltff and Defendant the accord was valid, but gave no opinion as to its validity between the pltff and his wife, considering this not a point before them. — a day was therefore given to the Defendant to prove the fact by him alledged. —

Church v Racey. } Action by Indorsee of two promissory Notes agt the Indorsor. —

Sullivan

Sullivan for Dfdt. pleaded, Non-assumpsit- and offered to prove, that at the time of the indorsement of the notes in question, it was agreed between the plaintiff and Defendant, that the plaintiff should first take his recourse agt. the maker of the notes before prosecuting the Defendant- cites. Chitty on Bills. 465. - 2 Str. 733. -

Stuart for Pltff objected to this proof, contending that the defendant cannot be admitted to prove such a fact under a plea of non-assumpsit - it is an exception dilatoire, which ought to have been pleaded specially: and further that verbal testimony cannot be received to invalidate a written agreement, such as the Indorsement to the Plaintiff upon the said notes. - And of this opinion was the Court and gave Judgment for the plaintiff. -

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Bricault
vs
Vaillants

Action of debt on Obligation. -

The declaration stated the Obligation, being a notarial act to have been made and executed in January, whereas in fact it appeared to have been made and executed in June - upon plea of nil deb: the Cause was set down for hearing on the

merits

merits, when the Defendant having pointed out the irregularity, the plaintiff thereupon moved to amend, and cited Case of Sutherland, Cur: &c v: Robertson, where a similar amendment had been admitted, after hearing on the merits. —

Georgen for Defendt. objected to the motion, and cited Cases of French. v. Stevens. June 1812 — and Joubert. v. Laing, Inv. last term, where amendments upon essential points had been refused upon motion, before cause was at issue. —

The Court were of opinion that no amendment ought to be permitted whereby a new Cause of action, or a new Defendant would be admitted into the Suit, which was a principle held in the authorities cited by the Defendant, and as the granting the amendment now demanded would be admitting the plaintiff to substitute a new Cause of action in lieu of that set out in the declaration, it was considered as inadmissible, and the Suit was dismissed. —

Bureau v Lalonde val: —

On action of trespass against the Defendants for cutting down certain trees &c — on the land of the plaintiff. —

Vigé

Vigé for Defts. pleaded. 1. That Defendants had been named and appointed Syndics to conduct & oversee the repairs of the Church of Isle Perrot, under an act for this purpose, by virtue whereof an act of repartition had been made and homologated in due form by which the plaintiff was held and bound to furnish and provide as his share of materials for the said repairs the wood and timber cut-down on his land. — 2d. That the plaintiff is bound by deed of Concession of his said land to furnish and provide all necessary wood and timber for making and repairing all public buildings in the parish of Isle Perrot. — 3d. That Defendants gave public notice at the Church door, that the necessary wood and timber so to be furnished would be received and taken upon the lands of each individual by them the Defendants, so that only proper and fit materials might be provided — That therefore the Defendants acting as aforesaid cannot be considered as trespassers. —

Stuart for Pltff, contended that the justification pleaded by the Defendants was insufficient, as they acquired no authority either under the acte de Repartition nor under the Plaintiffs deed of Concession, to go upon his

his land without his permission and there cut down any tree for any purpose whatever. — And of this opinion was the Court, and gave the plaintiff a day to prove his damages. —

Lyman. — v. — McGillivrays

The plaintiff moved for a Commission Rogue to examine witnesses in the United States of America. — This the Court refused, considering that they could not recognize as lawful any such act of communication with the enemies of the King, nor could they send his writ for this purpose addressed to persons at open War with him. —

Toupin v. Schoultz

Action for £108. 8. 1½ as value of certain arrears of a rente & pension viagere. —

The action was brought against the Defendant as a tiers detenteur who had purchased the property, à la charge of paying and continuing the rente & pension in question, which consisted of a variety of articles. —

The demand, as stated in the declaration, was, that the defendant by virtue of his said purchase,

"seroit

"seroit, et est encore en possession et jouissance, et comme tel,
"est tenu en loi, hypothecairement au paiement des arrerages
"dus de la dite rente, echu le premier Mai dernier, montant
"à une somme de £108. 8. 1/2 suivant l'evaluation annexée
"laquelle il refuse de lui payer, quoique souvent demandée"
Concluding, that the land in question be declared affected
and bound and defend.t as possessing the same adjudged
to pay the said sum of money &c.a—

Plea— The action cannot be maintained for money,
as by the deed constituting the said rente, it consists of
articles to be furnished in kind and nothing is said
of their value in money, nor can the defendant be
held to pay in money what he undertook to pay in
kind, until he shall have been put en demeure by
legal Course to pay in kind— That it is not shewn
by the declaration what the articles in arrear and unpaid
were, so as to enable the defendant to answer thereto, or
to make a tender thereof— Nor does it appear that
the Defendant ever refused to pay the said articles in
kind, or that he was ever put en demeure for not having
done so.—

The Court held, that when the articles of a
rente & pension viagere were not furnished in kind at the
time they became due, the Creditor of the rente was entitled

to

to the value of them in money, and could bring this action for that purpose —

Fer. Dic. Vo Fongible. —
Denizart Vo Rente. —
Id. —— Vo Arrerages. No 15. —
Nouv. Deniz. Vo Id. §. 4. No 1. 4. 5. &c —

Allen. v Harris } On exception pleaded by Defendant, under permission of the Court, that plaintiff, since the institution of the present action has become an Alien enemy, and not entitled any longer to — maintain the same. —

Stuart for plt. The plea of exception is irregular, and insufficient — 1st Because not filed in time, that is, — immediately, or as soon after as conveniently could be, after the declaration of War by the united States of America, was known, which was in June last, the subsequent proceedings had in the Cause after this period ought to be considered as a Waiver of the present exception — 2d The exception is insufficient, as it does not state, that the plt was born out of the Kings allegiance - cites. 8. T. Rep. 166. —

2. Id. 762. — Dareein Contin.

Ross for Deft — The exception, being of that kind of

exception

exception peremptoire which destroys the right of the Pltff and may be pleaded en tout etat de Cause — and further that no proceeding has been had in this Cause by the Defendant since the declaration of war was known. — That the Plea did not in this instance require that it should be stated that the Plaintiff was born out of the allegiance of the King which was not the material point before the Court, it being sufficient to alledge, agreeable to the matter of fact, that the Plaintiff had become an alien enemy of the King —

The Court considered the plea as sufficient and regular, and thereupon dismissed the plaintiffs action —

See. 1 Camp. Rep. 482. Omeally. vs Wilson val.
2 New. Rep. 97. De Luneville. vs Phillips —
4 East. Rep. 502. Lebret. v. Papillon —

Keese. — vs Marchand — Similar Case. —

Burnside vs Chaubert & Arnoldi Oppts — On opposition of Dr Arnoldi, claiming a priviledge, for medicine & attendances during the last illness of the late Franc Sarrault the

Defendt

Defendants husband, out of the proceeds of the real property of the said defendant sold by the Sheriff, and now returned into Court. —

— Boston for the pltff. contends, that the Opposant is entitled to no priviledge on the proceeds of the real estate he can claim it only on the moveables, and in this he is now too late, as the proceeds thereof have been distributed by Judgment of this Court.

— Bouret for Oppos^{t}. states, that opposition is well founded, and that the Opposant is entitled to his priviledge as well upon the real estate as upon the moveables, — It is true this priviledge must be first exercised upon the moveables, but where there are no moveables, or where they have been disposed of as in the present Case, the priviledge then attaches upon the realty. — cites the following authorities —

Gr. Cout. art. 125. N^{o} 10. privilege des medecins pour leurs salaires d^{ca} pendant la derniere maladie. —

D^{o} d^{o}. art. 171. N^{o} 9. 10. 11. & 12. —

Lacombe. N^{o} preference. art. 8. Preference sur les meubles et Subsidiairement sur les Immeubles. —

— Renusson. Subrogation. ch. 3. p. 13. N^{o} 19. — p. 17. N^{o} 41. p. 18. N^{o} 51. 52 — p. 19 - N^{o} 52. 3. 4. —

Rep^{ue}

Repr de Jurisp. vo Privilege. p. 689. Priv. sur les meubles.
Do — do — do p 690. do subsid. sur les Imm.
Arrets de Louet. 1 Vol. ch. 29. p. 264 — see case. —

The Court after considering the above — authorities were of Opinion that the Opposition was well founded, as it appeared that the moveable property had been discussed and disposed of, and thereupon adjudged to the Opposant his privilege on the proceeds of the real property. —

Heath
vs
Barlow et al } It was held to be no sufficient Cause for granting a new trial, that the writ of venire facias had not been signed by the attorney suing out the same, nor had been marked and noted as filed when returned into the Court by the Sheriff. —

Berthelet &c
v
Donegani

Action on award, or avis arbitrale.

By compromis, dated 1 Oct. 1811, the parties named Jean Guillaume Delisle and Ls H. Latour, as arbitrateurs and amiables compositeurs, to settle certain objects in contest between them, with power to the said Arbitrators to name a third, in case of difference in opinion, in order to proceed jointly with them to make up their award in the premises. — The two Arbitrators having differed in opinion called in Francois Papineau as sur-arbitre, who after hearing the other two arbitrators on the points in contest, declared that he considered them of an intricate nature and declined acting any further — he however afterwards made up his opinion in conformity to that of Mr Latour, and signed an award thereon, which was presented to Mr Delisle for his concurrence, but which he refused to sign on account of the irregularity of the proceedings, as all the parties had not proceeded jointly to investigate the points submitted to their decision.

Objection was taken to the award on account of this irregularity, which the Court considered to be well founded and dismissed the action. —

Tuesday 20th April 1813.

Gillespie v. Wadsworth and Stevenson Opp.

In the year 1811 the plaintiff sold in England certain quantities of goods to the Defendant which were by him brought to Montreal and partly sold by him in the course of his trade there. In 1812 the Defendant failed in business, and judgments were obtained against him by several of his Creditors and amongst the rest by the plaintiff, who caused all the defendants effects and property to be seized and taken in execution. — The Opposant, also a merchant living in England, made his opposition claiming that certain Crates of earthen ware should be restored and delivered up to him, as being the same which he the Opposant had sold to the Defendant and which still remained unpacked in the possession of the defendant, and under the same marks of balle & corde which had been originally put upon them by the Opposant.

Gale

Gale for the Opposant, claims the articles sold by him to the Defendant, and now found in his possession, sous balle et corde – cites. art. 177. Cout. – Fer. Pet. Cout. art. 177 on note. p. 386. – Le Camus sur l'art. 161. 2 vol. Gr. Cout. p. 1052 № 24. 25. – Observ.s sur l'art. 177. p. 1344. – Poth. Pro. Cv. p. 4. ch. 2. art. 6. §. 4. p. ~~345~~ 187. –

Ross for Plff. The goods in question were sold to the Defend.t in England, and the laws of England ought to regulate the recourse the Plaintiff or opposant can exercise for their payment: and by the laws of England the only priviledge a Creditor has in cases similar to the present, is to stop the goods in transitu but when those goods have come fairly into the possession of the debtor, even this privilege cannot be exercised – cites.

1 Atk. Rep. 250. 252. Snee. v. Prescott.
2. Bos. & Pul.' 457.–461 Millar v. Ball. –
3. T. Rep. – 464. – Ellis. v. Hunt & al.' –

That every privilege ought to be strictly construed and de rigueur, even according to the laws of this Country, and where it is claimed, it ought to be within some limited time – Boucher. Ins. Com. № 2415. 2416. who limits the claim in this Case to three months from the day of sale. № 2475. – and according to Pothier, every purchaser is presumed to have become the proprietor of the thing sold after a certain delay, so as to destroy the privilege of revendication, and this is presumed against the Creditor who does not

prosecute

prosecute the recovery of his debt when due, because he is then presumed to "suivre la foi de son debiteur", that is, to take his chance of recovering his debt at a future period, and therefore his negligence ought not to injure other Creditors, who may be induced to trust the debtor from his apparent means to pay - Poth. Prop. N° 241. - 2. Bourj. p. 689. -

That the defendant has been in possession of the goods in question since the spring of the year 1811 when he purchased them in England, he has since that time been carrying on trade, and has paid several sums of money to the Opposant on account of his debt, and the Defendant, or his Creditors in case of his failure, have a right to apply the payment of those monies to the goods now seized, which must bar the privilege now claimed. - Further, the allowing this privilege to operate at any unlimited time would be allowing a debtor with a large stock of goods on hand to hold out false colours to the world, and also put it in the power of a debtor to favor one Creditor to the prejudice of another, in paying the monies arising from the Sale of the goods of one Creditor to the payment of the debt of another Creditor whose goods remained on hand unsold, and who thereby would be entitled to an unjust privilege for such goods, which ought to go

to

to the payment of all his debts alike —

Gale in reply. the thing sold is presumed in law not to become the property of the purchaser until he has paid for it, — Domat. lw. 4. tit. 5. sec. 2. De la Deconfiture. — 2. Gr. Cout. 1368. —

The Sale of the goods in question is not stated nor shewn by the Plaintiff to have been made in England, but on the contrary, is alledged by the Opposant to have been made in Montreal, where the lex loci must govern. — That even admitting the Sale to have been made in England, still the laws of the place where the debt is to be recovered must govern and not the laws where the Sale was made. —

The Court took time to consider of the Case, and now held that the Opposant was entitled to the privilege he claimed, not on the goods seized, but on the proceeds of them —

The 176th art. of the Custom, does not apply in this Case, as it supposes every sale to be conditional, only where the value of the thing bought was paid immediately, and implies a reservation of the right of property in the Seller until he receives his money — this is founded on the principles of the Roman law — venditio vero res, et "traditio non aliter emptori requiruntur, quam si is "venditori pretium solverit, vel alio modo ei satisfacerit. &c.

The

The sale in this Case appearing to have been made in England these principles do not apply, for there by sale and delivery of goods whether paid for or not they become the property of the purchaser — But the 177.th art. admits of a different construction; it supposes the property to be vested in the purchaser under the credit given to him, and therefore does not affect the nature of the Contract by being made in England — but as it gives the same priviledge to the Creditor as the 176.th art. in case the goods are found in the hands of the Insolvent debtor, the question is, whether the English Creditor be entitled to claim the priviledge under a Sale made in England? —

This article (177.) is not founded on the Roman law, but is a priviledge created by the Custom — it is even contrary to the principles of the Civil law, which says, "sed si is qui vendidit, fidem emptoris secutus "fuerit, dicendum est statim rem emptoris fieri." — Had the priviledge in question been founded upon any of those presumptions supposed to exist at the time of the Sale under the Roman law, such as the hypotheque which that law gave upon moveables, there could be no difficulty in saying that a Sale in England, made under a different law, could give no such right, as there, the delivery of —

the

the goods to the purchaser gave him the property therein.—
A distinction must therefore be made between the laws of
the Country where the Contract was made, and where it is
to receive its execution — it is by the latter only that the
present question ought to be determined, according to which
the opposant is entitled to the benefit given to the Creditors
under the 177th art. of the Custom, to recover back his property
from the Insolvent debtor — the law of the domicile of the
debtor must govern in all transitory and personal actions
the rule in such cases being, "actor sequitur forum rei", —
and the same rule is observed also in England — that the
law of the place (where a Contract is made) can never be
the rule, where the transaction is entered into with an
express view to the law of another Country, as the rule by
which it is to be governed. Sup. Vm. Abr. A Vol. p. 411 — cites
Robinson v. Bland. 2. Bur. 1078. — and 1 Black. Rep. 258. S.C.
Now the parties must necessarily have looked to the law of the
Country where the debt was to be paid, or to which they must
have had recourse, had it not been paid — for how can this
Court limit or extend the recourse which the English creditor
would have had for the recovery of his debt in England —
Can it be said that he shall have a partial remedy under
the laws of this Country? Can we prevent the Creditor
under a Commercial Contract, whether made in England
or else where, from taking the goods, the lands and the body

of

of his debtor in execution under the laws of this Country; and if he be entitled to the benefit of the laws of this Country in one instance, how can it be denied in the case now before us?— The privilege claimed, to obtain the goods en nature did not however apply, it could extend only to that of being preferred for the payt. of the balance due out of the proceeds arising from the sale of such goods, as in case there should be a surplus the other Creditors were entitled to have it— It was therefore ordered that the goods in question should be sold and the proceeds thereof returned into Court, that the Opposant might be ranked and collocated by preference to the other Creditors in the distribution thereof for his said balance & Costs.—

Arrets de Louet 2 Vol. p. 348.
1 Bacquet. p. 378 Ch. 21. Nº 408-9, Id— —498—
Dum. Conseil. 13.

An Opposition by the same person, claiming certain crates of earthen ware, seized in the possession of the Defendant, which he had re-sold to the Opposant, about the time of his insolvency, in order to be discharged from the payment of those Crates which the Defendant had originally purchased from the Opposant, was dismissed on two grounds 1st— Because the Sale had not been carried into effect by

by a removal and delivery of the goods in question — and 2ly because, at the time of the Sale the Defendt could not do any act whereby an advantage could accrue to one Creditor to the prejudice of the others —

June Term 1813.—

Wednesday 2. June 1813

Joubert
v
Farnham
val'.—

Action of debt on Recognizance in Appeal.
Plea. Nil. deb.—
The plaintiff moved to fix cause for hearing on the merits.—

Stuart for Defendant contended that a day should be first fixed for an enquête by witnesses.—
Lacroix for pltff. answered, that under the rule of practice made and published the 19th. Octr. 1811, the Defendant ought to have pleaded specially such facts or points of defence he claimed or might be entitled to prove, but under a plea of nil. deb. no proof can be admitted — And of this opinion was the Court and granted the motion.—

Hungerford
v
Lampman

On defendants motion to continue the enquête on the 7th. instant for the examination of such witnesses as attended but could not be examined during the last Vacation —

The

The Court granted the motion for the first enquête day in vacation — And declared, that in future it would be observed as a rule, not to be departed from, unless under special circumstances, that in every case, where the witnesses had not attended or could not be examined during the vacation, the enquête for the examination of such witnesses should not be had in Term time, but be continued over to the next vacation. —

Thursday 3d June 1813. —

Dogherty v Hall — } The Defendant was admitted to come in and answer to the faits & articles served upon him, although he had been in default by not attending on the day appointed for his examination — but upon payment of Costs — Poth. Proc. Civ. —

Munro v Porteous and Contra } The plaintiff moved for a day to examine one Chesser, as a witness on his behalf, under a right which he reserved to himself on the last day of the enquête. —

Stuart

Smart for Defdt. opposed the motion, contending that under the 11th Sec. of the Rules of Practice, p. 49. it is not sufficient, that the party reserve a right, such as now claimed, but a permission by the Court or Judge must be expressed on the Enquête Book, to entitle the party to the benefit of such reservation, which permission was not granted in this Case — Objects further to the right of Pliff to examine the said Chesser as he did not attend when the enquête was closed, nor did due diligence appear to have been made to that effect. —

It appeared that Chesser had been summoned as a witness and did attend on the first day of the Enquête but did not attend on the Subsequent days to which the enquête had been continued, nor did the Pliff before proceeding each day notify the absence of this witness and obtain a day for his future examination but proceeded as if all his witnesses attended. — The Court rejected the motion, as it did not appear that any diligence had been done to bring forward the witness on the last day of the enquête, when he was called upon to attend; diligence to bring forward all the witnesses being considered necessary for every day to which the enquête is continued. —

Charles vr Storrs } The Court rejected the Defendants motion for leave to alter the conclusions of his plea, by changing them from the County to the Court, although made with the consent of the plaintiff. —

Tuesday 8th June 1813.

Lafantaisie vr Monk. } Action on Penal St.

The Plaintiff and another had been committed to Gaol by a warrant signed by Mr Brenton as Secy. to His Excellency the Governor in chief, dated 8th Novr. 1812, by which the gaoler was required to keep and detain the parties until next day for examination. On the 14th Novemb. the plaintiff applied by petition to the Defendt as Ch. Justice of the Court of Kings Bench of the district for a Hab. Corpus stating that he was detained in gaol under the above warrant a copy of which was shewn to the defendant at the same time certified by the Gaoler. — The Defendt after perusing the petition and warrant, declined granting the writ of Hab: Cor: and observed, that it ought to appear that the

the plaintiff was not detained by any other warrant. and that the gaoler should date his Certificate on the Copy of the warrant. — The plaintiff considered these requisites unnecessary, and on the 16th Novr reiterated his demand for the writ of Hab. Corpus upon the same papers already presented to the Defts who thereupon refused to grant the writ, stating, that the papers aforesaid were not regular, and that what he had required must be complied with before he would grant the said writ, and wrote with a pencil on the bottom of the petition — "let the gaoler "date his certificate" — The plaintiff upon this brought his action for the penalty contained in the Statute 24. Geo. 3. cts. 1. agt the Defendant for having refused the said writ of Hab. Corpus. —

Stuart for pltff. The pltff was confined in gaol under a warrant from Mr Brenton as Secretary to His Excellency the Governor requiring the Gaoler to detain him for examination next day. — Such warrant and detainer was illegal, as neither the King nor the Governr as representing him in this Country can commit any man to prison — besides no crime is stated on the warrant — and therefore the writ of Hab. Corp. became more necessary to a person confined under such circumstances. — On the

first

first application to the defendant on the 14th November last, he stated that it did not appear that the plaintiff was detained from any other cause — this was explained by a note written to the Defendant by the plaintiff's Counsel — On the second application on the 16th of the same month, the defendant objected that the certificate of the gaoler was not dated — both reasons were ill founded — By the Hab. Corp. act of 1784, S. 10, the only requisite from a prisoner to obtain his writ of Hab. Corp. is, that his application should be in writing, which has been complied with — The requiring a certificate from the gaoler that the pliff was detained for no other cause, was requiring before, what must be certified upon the return of the writ, after it had been issued. — And as to the date being put to the Gaoler's certificate, it was wholly unnecessary. —

Ross for Defdt — The pliff is bound to conform to the course and practice in England in suing out the writ of Habeas Corpus — according to which, an affidavit of circumstances must be made by every applicant for this writ, shewing that he is entitled to the remedy he thereby requires — Hands Prac. p. 73 — & 519. This writ does not issue as a mere matter of course, but circumstances must be stated, shewing a probable Cause for it. 3. Bl. Com. 132. — 2 Bur. R. 765. — 13 East R. 195 — The paper shewn to the Chief Justice by the Plaintiff at the time he presented his petition, could not be considered as the

Copy

copy of a warrant of Commitment, it being merely a temporary order to keep the pltff till next day for examination, it was not a Commitment for a Criminal or supposed Criminal offence as contemplated by the law — for the next day the Plaintiff became entitled to his liberty as a matter of Course, unless some new detainer were lodged agt him — and the legal presumption was that the Plaintiff could not be a Prisoner under the above Commitment on the 14th. November, — The reason why affidavit of circumstances is required is to shew that the party applying for the writ of Hab. Corpus is not one of those to whom such writ cannot be granted — namely — a Prisoner of War — a Person under Judgment of death — an apprentice — an imprisonmt. under an order of parliament, and many others — 2. Bl. R. 1324 — 6 T. R. 497. — 7 T. R. 745. — 1 Str. 142. a

Sol. Genl. of Counsel for Dfdt — The plaintiff was considered in the light of a prisoner of War, and as such was committed by order of the Commander in chief of the Forces, until his examination could be had — By the Certificate of the Gaoler, it is not clear, from want of a date, but that the same might have been granted the same day the plaintiff was committed as the 8th. November 1812, is the only date to be found on the paper — if so — the presumption was that the prisoner had been enlarged or detained under

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a new Commitment, in either of which cases the granting a Writ of Habeas Corpus was improper.— According to the practice observed in this Country, it has been usual for the Sheriff of the district to grant his certificate upon a copy of the warrant of Commitment, stating all the essential facts, as to dates & nature of crime for which the prisoner was detained, which certificate accompanied the petition for the Habeas Corpus, and was equivalent to the affidavit of circumstances wanted in the present case— cites cases, King v. Smith. 1806— King v. Wait. 1801. King v. Berthelet. 1803— where also it was stated in such certificate that there was no other cause of detention against the Prisoners than that mentioned in the warrants of Commitment — and when a party applying for such a writ, cannot by his own statement shew that he is entitled to it, it will not be allowed 2. Bur. 765.— The plaintiff ought to have shewn, that he was not a prisoner of war, but one of his Majesty's Subjects, as a presumption in this case was to be taken against him he ought to have cleared it away— The Defend^s refusal of the writ of Hab. Corp. was merely conditional, and requiring a previous information upon material facts before he granted it—

Stuart in reply.— It was not in the power of the Defendant to make requirements beyond what the law points

points out — and neither a date to the gaolers certificate nor certifying other or no other causes of detention are required by the law — these things might have been considered reasonable by the Defendant, but if the bounds of the law are once slept over, other things, under pretence of their being reasonable may be demanded, in order to withhold that great remedy and security of personal liberty. which is now required — The Defendant has confounded cases of treason and felony or suspicion thereof, with cases of another description not criminal; In this last class of Cases, there is a discretion given to the Judge to require affidavits of Circumstances to shew that the party applying comes within the benefit of the Hab. Cor. act — but in all criminal Cases no such discretion is allowed, the writ being of right, must be granted on demand. — An affidavit of Circumstances has never been required in this Country, nor did the Defendant at the time the application was made to him, require it — he desired that the Certificate of the Gaoler should be dated — he might as well have required any other improper thing to be done and which the gaoler was not bound to comply with, so that the Pltff between the Defend: and Gaoler would be without relief — As to the Plaintiff being a subject, it

must

must be presumed that every man living within this Province is a subject of the King, which is sufficiently stated in the Plaintiffs Petition.—

The Court after deliberating on the Case, were of opinion that the plaintiffs action ought to be dismissed

The Kings subjects in this Province are entitled to obtain the benefit of the writ of Hab. Corp. from the Court of Kings Bench. &c— in the same manner &c— as in England, and to have all the benefits resulting therefrom —

Prov: Ordn 24. Geo. 3. Ch. 1.

In England it is held — That in the Kings Bench and C. B. it is necessary to apply for this writ by — motion to the Court, as in the case of all other Prerogative writs, (such as Certiorari, Mandamus &c—) which do not issue as of mere course without shewing some — probable Cause, why the extraordinary power of the — Crown is called in to the party's assistance. —

2. Mod. 306. 1 Ser. R. 1.

It is granted on motion, because it cannot be had of course, for the Court ought to be satisfied that the party hath a probable Cause to be delivered. — And this seems the more reasonable, because when once granted the person to whom it is directed can return no satisfactory excuse

2. Jon. 13. Cro. Jac. 543.

excuse for not bringing up the body of the prisoner — So that if it issued of mere course, without shewing to the Court or Judge, some reasonable ground for awarding it, a Traitor, or felon under sentence of death &c. might obtain a temporary enlargement by suing out a Habeas Corpus, tho' sure to be remanded. —

3. Bl. Com. 132

— Ib. — On the other hand if a probable ground be shewn, that the party is imprisoned without just cause and therefore hath a right to be delivered the writ of Hab. Cor. is then a writ of right which may not be denied. —

Probable Cause must therefore be shewn to the Court or to the Judge, according as the application is made, before this writ can be granted

What shall be considered as a probable Cause, must consist in a Statement of facts, bringing the party applying, within the benefit of the Statute, and the manner of shewing this is, according to the Course in England, by affidavit made by, or on behalf of the Prisoner —

Hands R. Prac. 72. 73.

In the case before us there was no affidavit, nor any probable cause shewn, beyond the copy of

of an imperfect and informal warrant which limited the detention of the party for only 24 hours, which had elapsed Six or seven days prior to his application for a Hab. Cor. —

It was argued, that no affidavit of circumstances was necessary, and if so, yet most certainly not in cases of confinement in matters Criminal, this we do not admit, as we find the practice to be general in all cases of Hab. Cor. ad subjiciendum, and it is founded in reason, in order to accelerate the relief demanded when due, and also to prevent fraud and imposition. —

King v. Wilkes 2 Wils. 151. 2

The copy of the warrant of commitment presented in the present case with the petition of the plaintiff as the ground for obtaining a Hab. Cor. was wholly — insufficient without other circumstances to warrant the granting of it, because on the face of the warrant it appeared that the plaintiff stood committed for only 24 hours, and the application for the writ of H. C. being Six days after, the presumption thereupon was, that the Plaintiff was then either not in gaol, or was — detained there by some other warrant than that shewn. The requiring a date to be put by the gaoler to his Certificate, to shew when it was made, and that

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at the time of the making thereof, the party was still a prisoner, was the smallest information the Judge could require, and had a right to obtain, to satisfy himself that he was not granting the writ of Hab. Cor. lightly, or to a person who might then be at large in the Streets —

Probable cause being the ground work of the plaintiff's right, the Judge to whom the application was made, had a discretion to exercise thereon — he was not acting ministerially but judicially, and had a right to require at least the same satisfactory evidence to be laid before him as would have been required by a Court of Justice, to entitle the party to the relief he claimed; And if in the exercise of this discretion the Defendt has done what a Court of Justice might or would have done, he ought not to be answerable to the Plaintiff by this prosecution, the law never meant to punish in such a Case, the action is rigorous, and the plaintiff must shew a wilful and tortious refusal on the part of the Defendant of the relief to which he was entitled, to enable him to maintain his action — but in this he has entirely failed, as

it

it is evident to this Court that the Defendant had not ground sufficient laid before him to support the plaintiff's application for a Hab. Cor. — On the Contrary the obstinacy of the plaintiff in withholding the information required of him, his pertinacity in claiming the writ of H. C. according to his own peculiar notions which were considered insufficient, are the reasons it was not granted — This prosecution must therefore be considered malicious and ill-founded. —

Wednesday 9th June 1813. —

Debartchsze
vs
Wentts. — }

On Plaintiff's motion to reject from the record the Defendants joinder in demurrer, as having been filed on the second day after the said — demurrer had been filed. —

Stuart for Defendt contends, that there is no rule of practice which requires the filing a pleading of this kind in 24 hours, as required for a plea of exception. — besides the pleading in question is filed only pro forma

and to form the law issue. —

The Court held that no further time could be allowed for completing the issue on an exception than for filing the exception, which must be done in 24 hours after the defendants appearance — motion granted. —

Bingham v. Thayer. —

On action of assumpsit. —

The defendant moved, that inasmuchas the plaintiff has not filed an exhibit stating the precise amount of his demand, and a written notice to the Defendant thereon, the said defendt be not bound to answer to the demand of the said Plaintiff, but that the same be dismissed with Costs.

The plaintiff, answers, that he has received nothing on account of his demand from the — defendant, and cannot therefore give him any credit for payments not made, and that he — persists in his demand as stated in his declaration.

The Court considering that, even where no — payments are made by the defendant, and the pltff means to insist upon his demand as stated

in

in his declaration, yet it is necessary by the rule of practice that the plaintiff file a notice with his exhibits to that effect — and it was therefore ordered that the Cause should be suspended until the plaintiff had complied with the rule of practice. —

Thursday 10th June 1813. —

Millar & Parlane
vs
Blanchard

On Rule nisi obtained by the Defendt for Plaintiffs to shew cause, why the writ and process sued out in this Cause should not be quashed, by reason of the irregularity of the Service thereof — the Copy served being returnable on the first of April next, whereas the original writ is returnable on the first June instant. —

The plaintiff moved to amend the writ — The Defendant objected to the motion, and said no amendment could be made of the Copy in the hands of the Defendant. —

The Court allowed the plaintiff to amend, this being

being the Case of a Capias ad resp. where the Defendt is presumed to be in Court, no inconvenience can arise by permitting the amendment. —

Neyenstadt vs Woolman

The defendant not having filed a plea, the Plaintiff moved for a day to adduce his — evidence ex parte, which was granted — On the day appointed, no evidence was adduced, nor any motion for a further day to be given to the plaintiff in this behalf. — The plaintiff now moved to examine the Defendant upon faits et articles — This was objected to by the Defendant who contended that on the day fixed for the adduction of his evidence the plaintiff ought to have reserved his right to make the present motion without which the presumption was that the enquête was closed on his part. —

But the Court were of opinion that in all Cases of default, whether by the non-appearce of the Defendant, or his not pleading, the Plaintiff was at liberty to proceed as he pleased in respect of diligence in forwarding his Cause, and therfore granted the motion. —

Monday 14th June 1813.

McKenzie & al' vs Deschambault and Sorbal' Intervs

The Intervening parties had obtained a rule on the Plaintiffs the Defendant and one Busby the adjudicataire of the real property sold by the Sheriff under the writ of execution sued out in this Cause, to shew cause why the sale and adjudication of the said real property should not be set aside as having been irregularly made, inasmuch as the said writ of execution had been sued out against the Defendant as Legataire Universel of the late Madame Dufy, and Curator to her vacant Succession, whereas the Judgment in this Cause was rendered against the said Defendant as Legataire Universel of the said Madame Dufy and Executor to her last Will and Testament.

The Plaintiffs also moved to be permitted to amend the said Writ of Execution by striking out the said words Curator &ca— and inserting the words, Executor &ca—

Rolland for the Intervs parties— The writ of Exon sued out in this Cause is illegal upon two grounds— 1st Because it has been sued out against the Defendant as legataire universel of the late Madame Dufy, and as Curator to her vacant Succession, qualities incompatible and

1 Pigeau, 631. 2, 3. &c — 725. 6. 7.
Poth. Pr. Civ. 4 part. ch. 2, sec. 5
art. 13. §. 3, &c

and which do not exist, for the Defendant was condemned not as Curator but as Executor of the late Madame Dufy.
2d. Because, real property was seized and taken in execution in the hands of the Defendant as Executor to the last will and testament of the said Madame Dufy, which was not warranted by the said Execution in which no mention was made of the Defendants capacity of Executor as aforesaid.—
3d. Because no real property could be seized or taken in execution in the hands of the Defendant as Executor as aforesaid, the same being by law null and void, and as if the said seizure had been made Supra non domino.—

cites. Nouv. Den. vo Executeur—
D'Hericourt—p. 288. & Seq.—

Ogden for Pltffs. The adjudicataire here is the only person who has a right to complain of any irregularity in the proceedings, and he approves and agrees to the sale in the present instance.— The Intervening parties if they had any interest in the property sold ought to have made their opposition prior to the Sale, they are now too late, and the rule now sued out is an attempt to cure their laches in this behalf.— Moves to amend the writ

writ of execution by striking out the words Curator &c^a and inserting the words Executor &c^a — to which motion the Defendant and purchaser consent, and the Intervening parties cannot object thereto as they have no interest in the property sold. —

Stuart for Busby, the adjudicataire, contends that not being a party to this Cause, he is not bound to answer to the present rule, nor can he be made a party or brought into Court but by the Kings writ. — That the Sale in this case was regularly notified and duly made. — The doctrine of supra non domino does not apply — the Defend^t was in the possession of the property, and the seizure was regularly made upon him accordingly, and the objection raised by the Intervening parties to the regularity of the execution arising from the distinction relied on between Curator and Executor, if material, comes too late, as no opposition can be made to the Decret, after the adjudicataire has paid his money and been put in possession by the Sheriff. — The title of a purchaser ought not to be affected by such oppositions, as the public faith has been pledged to him, and in the present instance nobody has been injured. — Contends that the amendment demanded ought to be allowed in this Case the same as it would in England — cites. 2 Jud. Prac. 43. — 2 J. Rep. 737. — Rep^re v^o amendement. —

Rolland in reply - The adjudicataire becomes a party to the Cause and interested therein from the moment of his adjudication. — That it is now too late to amend the writ of Execution, unless the plaintiffs mean to proceed to new Sale of the property, to which only the Intervens parties can acquiesce. —

The Court held that the adjudicataire was regularly before the Court to be heard in support of his title — That the adjudication and Decret in the present instance could be maintained by having been made upon the Defendant as legataire universel of the late Madame Dufy, the omission of the capacity of Executor given to the Defendant in the Judgment but not in the execution, is not material, as the seizure and Sale of the realty could not have been valid upon the Defendant acting in that Capacity — and as to the addition of the words, "Curator to her vacant succession", found in the execution but not in the Judgment, they can be regarded as surplusage which does not vitiate the writ — The Rule for quashing the writ of Execution

and

and proceedings thereon was therefore discharged and it was allowed the plaintiffs to amend as demanded. —

Bidequin vs Aubuchon } On the 19th April last, the plaintiff examined two witnesses, and reserved his right, which was granted to him, to examine a third witness then absent at Quebec — The Defendant declined entering upon the examination of his witnesses until the plaintiff should have closed — This day the plaintiff moved to set down the Cause for hearing on the merits without having waived his right to examine the said witness, or given any notice of his intention to do so, to the adverse party. —

Ross for the Defendr contended, that he was entitled to a day to examine his witnesses, if the plaintiff meant by his present motion to waive his examination of the absent witness, and to consider his testimony as closed

Bourret for Pltff. — The Defendant produced no witnesses on the day of the enquête, nor procured their names to be entered on the rôle d'enquête

The Court over-ruled the motion, as they considered the Defendant entitled to a day for the adduction of his evidence, after the Plaintiff's intention was known of abandoning

abandonning his right to the adduction of further testimony — They did not consider a party bound to bring forward his witnesses, or to have their names entered on the rôle d'enquête, before he had commenced the examination of them — a day was therefore given to the Defendant to examine his Wits.

Tuesday 15th June 1813.

Murray vs Duclos. — The Court ordered a part of the Defendants plea to be rejected and taken from the record, as improperly raising an objection to the exhibits filed by the plaintiff, and taking an issue thereon, in stead of answering to the declaration of the Plaintiff.

Debartche vs Wenth. — The plaintiff moved that he might be permitted to amend his declaration in this Cause, by striking out the name "Caty Wenth" and inserting in lieu thereof, "Eleanor Brinkman" as the name of the Defendant.

Stuart

Stuart for the Defendant objected to the amendment and Cited the Case of Joubert v. Lanz. 15 Feby. 1813 where such amendment had been refused. —

The Court rejected the motion. —

See Cases. Bricault v. Vaillant. 19th April last

Wednesday 16th June 1813. —

Mure & Soliffe
vs
Mears & al'. —

Neither of the parties having made proof under the Interlocutory order of the third of February last, and the Cause having been again heard on the merits it came now to be determined whether the action could be maintained or not. — And the Court held that the plaintiffs ought to have made proof of their damages to entitle them to maintain their action, adopting in this respect the principles laid down by the Chancery decisions in England, that the — quantum damnificatus, must be the measure of damages to be allowed, and not the penalty. —

2. Ex. Poth. p. 81. Cases there cited. —

J

I differed in opinion from the Court, and held that it was unreasonable to drive the plaintiffs to make proof of their damages in this Case. — That there was a distinction to be taken between an action claiming damages for the non-performance of an agreement, and an action for the recovery of a penalty stipulated to be paid in case of non-performance — in both Cases, the principle of quantum damnificatus ought to apply — but the mode of ascertaining this quantum damnificatus must be very different in these Cases — In the One a plaintiff can obtain no more than he proves to be due — he has alledged damages sustained — he must prove it, — and according to this proof must his damages be regulated. — In the other Case, the plaintiff, alledges the fact of the non-performance of the Covenant, as the only thing to be proved to entitle him to the penalty, because the Defendant has by his Contract agreed to pay this penalty in case of his failure, as an indemnification to the Plaintiff — "Cette "peine est stipulée dans l'intention de dedommager le Créancier "de l'inexecution de l'obligation principale. Vide Poth. Ob. N° 342

it

it is not therefore necessary to prove what the agreement of the parties admits, namely the amount of the penalty, which is admitted to be the extent of the injury, or the quantum damnificatus, where nothing has been shewn to the Contrary — elle est par consequent "Compensatoire des dommages et interets qu'il souffre de l'inexecution "de l'obligation principale — Ib. — But this principle, while it admits a plaintiff to prosecute for the penalty, has been moderated upon equitable grounds, where it can be shewn that the penalty is immoderate and much exceeds what would be deemed the just measure of damage, it may then be restricted, so as to meet the justice of the Case — but how is the excess of the penalty to be made appear? — Can we compel a plaintiff who shews a legal right to his whole demand, to make proof that this demand exceeds the measure of damage, or in other words, to make proof to destroy his own right? — It would be unreasonable and unjust, the law does not require it, but admits a Contrary principle — parcequ'elle (the penalty) est stipulée pour eviter la discussion du fait "si le Créancier a souffert effectivement, et a combien monte "ce qu'il a souffert." — The excess of the penalty ought therefore

Poth. Obl. Nº 345.

therefore to be shewn by the person who complains of it. — Equity relieves against a penalty, but it must be the duty, as well as the interest of the person claiming the benefit of that equity, to bring his Case within the reach of it by shewing the injustice of the demand —

All Contracts ought to be binding on the parties thereto, and — all clauses and stipulations in contracts ought to have their effect, as the law will not suppose that any thing has been inserted in them without some meaning and effect. — No clause however has been more relaxed or trifled with than this clause penale — by some it is considered to mean nothing. — by others it is held that it ought to be strictly pursued — and cases are not wanting, in the English Jurisprudence to favor both opinions — but it is certainly more consistent with right that the penalty should be enforced, where nothing is set up to counteract it, than to say, that the clause penale, is a mere stipulation in terrorem, but without meaning or effect —

The Defendants not having alledged

or

or shewn any thing to destroy the Plaintiffs action, it ought to be maintained against them — It does however appear in evidence that the Defendants have in part performed their Contract, by furnishing and delivering to the plaintiffs wood and timber as stipulated to the extent in value of £1466.17.6 — The Plaintiffs in this case ought not to recover the whole penalty, the principle being, "lorsque le créancier a été payé pour une "partie de l'Obligation principale il ne peut plus recevoir "la peine pour cette partie." Ib. № 350. — But as we have no proof to shew what the value of the whole wood to be delivered was, we must in law presume it equal to the penalty stipulated for securing the delivery of it — in which case the above sum of of £1466.17.6 ought to be deducted from the penalty which would leave a balance of £1533.2.6, as the legal measure of damages due to the plaintiffs by the Defendants for the non performance of the whole of their said Contract. —

Newland on Contracts, p. 332.

Stearns v Donnellan } The Defendant was in default, not having filed a plea. — He now moved to be permitted to examine the plaintiff upon faits & articles, but

but this was refused by the Court, there being no point in issue upon which the faits & articles could be supported, nor was the Defendant, by being in default, entitled to adduce evidence on his behalf

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Stearns. q.t.
vs.
22 Chests Tea
&
Dawson, Claim.t

On Information against 22 Chests of Tea, imported into this Province from the United States of America, contrary to St. 7. Geo: 1. Ch. 21. s. 9.—

Sol. Genl. for Libellant, stated, that the facts alledged had been made out, and he thereupon prayed judgment of Condemnation against the tea seized

Stuart for Claim.t denied that proof sufficient had been made of the facts alledged.— and further that His Majesty's subjects are entitled by law to import tea from the United States into this Province— By the St. 7 Geo. 1. Ch. 21. s. 9. it is provided, That from and "after the four and twentieth day of June one thousand "seven hundred and twenty one, no Commodity of "the growth, product or manufacture of the East Indies "shall be imported or carried into the Kingdom of "Ireland, the Islands of Jersey. Guernsey, Alderney, "Sark or Man, or into any land, island, plantation

"Colony

" Colony, territory, or place to His Majesty or to the Crown
" of Great Britain belonging or which shall hereafter
" belong to His Majesty, his heirs and Successors in Africa
" or America — but such only as shall be bona fide and
" without fraud loaden and shipt in Great Britain in
" Ships navigated according to the several and respective
" laws now in being, as to the several places to which
" the said goods shall be imported or carried, under the
" penalty of forfeiting &c." — by which it appears that tea might be imported into this Province if it came from Britain — this being settled we find by the Treaty of Commerce made between Gr. Britain and America in 1794. art. 3. that tea can be imported from the United States into this Province — It says, " All goods and
" Merchandise, whose importation into His Majesty's said
" territories in America shall not be entirely prohibited,
" may freely for the purposes of Commerce be carried into
" the same by the Citizens of the United States. &c." — now it is evident, that tea, being an article not entirely prohibited to be imported into His Majesty's territories in America, the same can therefore be legally brought from the United States into this Province by the above treaty. — That such importation into this Province — subsequent to the above treaty had always been permitted and the right never doubted until the administration

of

of Mr President Dunn in 1811, when he issued his proclamation intimating the future prohibition of east-India Goods into this Province unless according to the said Statute of 7 Geo. — but this proclamation could not change the existing Commercial intercourse between the two Countries formally entered into by treaty.—

Sol. Gen. Ross. for Inform^{t} Tea never could have been legally imported into this Province from the United States, as the Treaty of Commerce never could be considered to have removed the prohibition contained in the above Statute.— The proclamation of Mr President, cannot be regarded as altering the law, but as warning the Subjects of His Majesty of the existence of the Statute and the prohibition is enforced.—

The Court held, that previous to the proclam^{n} of Mr President Dunn, the importation of tea into this Province from the United States of America, was permitted under the sanction of the treaty of 1794: but as the Governor, or Person administering the Gov^{t} of this Colony were authorised by St. 36. Geo. 3. ch. 7. Continued down to the commencement of the present war with the United States, to make temporary provision

for

for the regulation of trade between this province and the United States, they considered the proclamation and order of Mr President Dunn, made by and with the advice of the Executive Councie, on the 9th day of August, 1811, declaring the regulations heretofore made not to be construed or considered as operating against the provisions of the said St. of 7. Geo. 1, to be legal and binding, as having authority to make such regulation. — The Court therefore adjudged the tea in question to be forfeited in the terms of the said Statute. —

Friday 18th June 1813.—

Charles. —
v
Storrs. —

} action by Indorsee of a promissory note agt. the maker.

The Note was stated to have been made at Boston in the State of Massachussets, one of the United States of America, on the 8th October 1806, and payable to one Seth Johnson or order for value received, four months after date, which note was afterwards indorsed to the Pleff. It was also stated that by the laws of the said State of Massachussets, interest accrues and becomes due by mere operation of law without express stipulation at the rate of Six per Cent from the time the note becomes payable, and interest in this case was demanded from the 8th Febry. 1807.—

Plea. Non-assumpsit — and want of consideration between Indorsor and indorsee — and lastly that Indorsor was indebted to the Defendant at the time of the indorsement in more than the sum demanded

Under this plea the Defendant contended, that there was a variance between the note declared on, and that given in evidence — The Note is stated in the declaration to have been made for £107. 10. Current money of this province, the note given in evidence is for 430 dollars, without alledging or shewing that 430 dollars in the State of Massachussets

is

is equal to the sum of £107. 10 Current money of this Province.— That there can be no other interest allowed upon the note than is permitted by the laws of this Province, as the note does not specify any interest.

Gale for Pluff. Contends that the laws of the Country where a Contract is made, must regulate the nature of that Contract; and having made proof of the laws of the State of Massachussets, he is entitled to the interest upon the note in question the same as if the present prosecution had been carried on in that State.— cits. 2 Bur. R. 1094. Bodily v. Bellamy— 1 Prevost de la Jannes. p. 101. 102.— Colburn & Gill. v. Adams. Febv. 1812.—

The Court considered the objections raised by the Defendant to the sufficiency of the declaration and evidence thereon as insufficient— and held that the Plaintiff was entitled to the same interest here as if the demand had been made in the place where the note was drawn.— Judt for Pluff.

Leprohon vs Porlier & ux

Action on Obligation of 21st Sept. 1805.—

Plea— That subsequent to the making of the said Obligation, to wit, on the 16th Jany. 1806 the Plaintiff transferred the said Obligation to Mr Justice Panet, which transfer was then duly signified to the Defendant, by reason whereof ceased to be Creditor of the money due by the said Obligation and not entitled to maintain the present action—

The Replication admits the transfer to Mr Panet and signification thereof to the Defendt, but states, that afterwards to wit on the 15th November 1809 the said Mr Panet reconveyed the said sum of money and Obligation to the Pltff, which he now sues, by reason whereof he became entitled to the present action.—

The Court gave Judgment for the Plaintiff, but condemned him to pay Costs to the Defendant up to the time of filing the Replication, considering that the Pltff ought by his declaration to have notified to the Defendt the re-assignment of the Obligation to him by Mr Panet.—

Gosselin
v.
Seprohon
&
Stephenson
Gart

action of debt on deed of Sale. —

By deed of Sale of the 15th January 1799 the Plaintiff sold a certain house to the Defendant who agreed to pay the interest on 3000# livres part of the purchase money to one Olivier Gosselin, priest, son of the plaintiff, for his titre Clerical, and on the death of the said Olivier Gosselin to pay the Capital to the heirs of the said Plaintiff or of the said Olivier Gosselin — On the 16th day of January 1799 the Defendant sold and conveyed the said house to one John Stephenson, burdened with the payment of the said principal sum of 3000# and the interest thereon in manner as above stated. —

On the 17th day of January 1807, by a marriage Contract made and executed by and between one Pierre Gouin and Marie Louise Gosselin, the plaintiff's daughter to which Contract the said Olivier Gosselin and the said plaintiff were parties, the said Olivier Gosselin in consideration of the said marriage gave as a marriage portion to the said Marie Louise his Sister, the Sum of 3000# livres, to be paid to her at her age of majority she being then only 17 years of age, and in case of the decease of the said Olivier Gosselin before that period then

then and in that case it was stipulated and agreed by and with the consent of all the parties to the said Contract, that the said principal sum of money so secured on the said house as and for the titre clerical of the said Olivier Gosselin should appertain and belong to the said Pierre Gouin and Marie Louise Gosselin as and for her marriage portion aforesaid.—

The said Olivier Gosselin died on the 7th April 1810, before the said Marie Louise Gosselin came of age.—

After the death of the said Olivier Gosselin the said Pre Gouin, at different times demanded of the said John Stevenson the payment of the said principal sum of 3000ˢ the amount of the said titre clerical, which he did not pay, but paid the interest thereon from and after the decease of the said Olivier Gosselin to the said Plff—

The said John Stevenson intervened in the Cause as the Garant of the defendant and deposited in Court the principal sum of 3000ˢ as being the amount of the said titre Clerical, and also the arrears of interest due thereon, praying that the same might be adjudged to whom of right it appertained

and

and prayed to be discharged with his costs.—

The parties having been heard upon the Case, the Defend and Intervening party contended that the plaintiff had no right of action for the sum of money in question, inasmuch by his act and consent expressed in and by the said Marriage Contract the same had been assigned to the said Pierre Gouin and Marie Louise Gosselin his wife as her marriage portion, and which sum of money the said Pierre Gouin since the death of the said Olivier Gosselin had demanded of the said John Stevenson by virtue of the said marriage Contract.—

The Plaintiff on the Contrary contended that the said Olivier Gosselin had no right to the said principal sum of money and could not legally assign or transfer the same to the said Pre Gouin and his wife, who now claimed no right or interest therein—

The Court by its Interlocutor of the 19th. April last, ordered, that as it appeared that Pierre Gouin and Marie Louise Gosselin his wife were interested in the matters in contest between the parties, that Communication of the said Contest should be given to them at the diligence of the Defendant, that they might intervene in the Cause if they should see fit—

The said Pre Gouin and wife, in consequence of the above Interlocutor appeared by their Attorney and declared that they had nothing to allege why the Conclusions of

the

the plaintiffs declaration should not be granted to him. —

The parties were in consequence again heard, and the Court now determined, that the money deposited in Court by John Stevenson should be paid over to the plaintiff, but that the Plaintiff should pay Costs to the Defendant and the said Stevenson —. The principle of this decision was that the Pltff ought to have obtained the consent of Pierre Gouin and his wife to institute the present action in his own name and to his own use and to have made known the same to the Defendt before proceeding agt him, because the money in question was effectually transfered by the said marriage Contract to the said Gouin and wife, and although the said Olivier Gordon had no right in the principal, yet the silence and acquiescence of the Pltff to his act operated a legal transfer of the money — and until the said Gouin and wife came in and acquiesced in the claim now set up by the Pltff, he had no right of action agt the Defendant. —

Normandeau
v
Berthelet. —

Action of assumpsit on an accepted draft

The acceptance was payable in all January; On the eleventh of February, it was protested for non-paymt. on the 16th of the same month process was sued out agt the Defendant, but not served until the 16th of March. In the interval, on the 12th March, the Defendant tendered to the plaintiff, the principal and interest with the charges of protest, but refused to pay any costs, as the writ had not been served upon him — this was refused by the Plaintiff. — The Defendant by his plea reiterated the tender, with an offer to pay all costs up to 12th March. — But the Court held that the tender was insufficient as the Defendant ought to have tendered the Costs incurred by the pltff ~~as hereinafter proceeding~~ on the 12th March last — because the defendant had been put en demeure by the protest served upon him, and thereby became liable to all costs incurred by the Plaintiff for any steps he might have taken towards the recovery of his debt — Judgt was therefore entered for Pltff —

* at the time of making the same

Deshautels
v.
Leduc.

Action petitoire, to recover from the Defendt a certain house and lot of ground.

The Defendant alledged that his predecessor (auteur) one Lecompte had purchased the house and lot from the plaintiff and paid for the same but to prove these facts he was compelled to examine the plaintiff upon faits et articles. Upon his examination the Plaintiff declared, "That he "had promised to sell the house and lot in question "to Lecompte, but it was conditionally — The conditions "were — That Lecompte should pay 1300 livres for the "said house in the space of Six years, paying 200th "each year except the last which would make 300th in "order to complete the balance — that if Lecompte "could not effect these payments, then whatever he "had paid should go on account of the rent of the "house at the rate of ten shillings per month, and "whatever was made new in the house by Lecompte "should also be allowed in the rent. — That in consequence "of the said agreement the said Lecompte took — "possession of the house about Seventeen years ago — "since which time the said Lecompte and his wife "and after him, the Defendant and his wife have

"held

"held and occupied the said house and lot.— That
"he, the plaintiff, has said and acknowledged, that
"he received from the said Lecompte 1200. livres in
"rent for the said house out of the 1300 he owed him;
"but then owed and still owes the ground rent.— That
"he, the plaintiff, may have told different persons that
"there was nothing due to him by the said Lecompte,
"except a small balance for building the house in
"question".—

It appeared by other evidence in the cause that the said Lecompte had laid out considerable sums of money in finishing and fitting up the said house in making fences and doing such acts as made him be considered to be the owner and proprietor of the same, and by which it appeared that he considered himself to be such owner and proprietor under the said sale.—

The Court were of opinion, that as the plaintiff had agreed to sell the property in question under a condition, and put the purchaser in possession in order to perfect that Condition, it could not be resolved ipso facto, nor at the will of the said plaintiff— Something further was requisite, such as a sommation, or —

putting

putting the defendant en demeure - Poth. Ob. Nº 144 a and perhaps even a Judicial resiliation of the agreement would have been necessary, under the circumstances of the long possession of the Decompte and the monies he had paid, before the Plaintiff could be entitled to re-claim the property as his own. Poth. Obl. 636. a

The present action may however be considered as an action to foreclose the equitable right of the Defendant in the property, and the rights of the parties may still be settled agreeable to the Original Contract, as if such action of foreclosure had been brought thereon. a

By the original Contract it appears that the Plaintiff would be entitled to 1300ª. for the said house, besides the ground rent - Of this sum the plaintiff has received 1200ª - the plaintiff says, this was to be considered as paid for the rent of the house - this cannot be presumed, there is nothing to shew that Decompte ever acquiesced to this money being applied in this way, and we must suppose that he meant thereby to discharge the 1300ª he owed to the plaintiff, and thereby acquire the property in question, when we consider

consider the other acts done by him in and about that property.— The balance therefore of 100ˡᵗ. on the sale, with the ground rent since the 1st Sept. 1796 at 15/ per an. making in all £16. 18. 4, will be the amount of what the Defendant will now owe to the Plaintiff on account of the said Sale, and a day must be given to the Defendant to perfect his title to the property by paying the same, failing which the house and lot aforesaid to be delivered up to the plaintiff as his property — saving to Defendant his rights in regard of the improvements made by him on the property.—

Parry.— v. Normand } Action of debt on deed of Sale.—

Sullivan for Defdt. pleaded, Lesion d'outre moitié

Bender for Plff, answers, that a purchaser cannot set up the plea of lesion d'outre moitié — cites authorities.— that as a further reason why such a plea cannot be admitted in the present Case, part of the consideration is the payment of a rente et pension viagere, a thing in its nature uncertain, and cannot admit the said plea.—

Sullivan in reply, cites. Poth. Vente. No 372. as decisive on the point, and according to which Judgments have been rendered

in

rendered in this Court on the present question. —

The Court held that the Defendant was entitled to the benefit of his plea, and gave him a day for proof thereon — Referred to Cases already determined on the point.

Saturday 19th June 1813.—

Parker Gerrard & ab'
vs.
McGill & al'. —

On objections raised by the plaintiffs to the account rendered by the defendants. —

Certain parcels of furs and peltries had come to the hands of the defendants belonging to the bankrupt estate of Rob: Dickson & Co, which had been forwarded by the Defendants to their Correspondents in England to be there sold; In the account now rendered of those furs and peltries by the Defendants, it was objected by the plaintiffs that they had not accounted for the interest, credited to them, the Defendants, by their said Correspondents in the accounts by them rendered, and in which the proceeds of the said furs and peltries had been included — which interest, according to the Custom of Merchants, ought to be credited and accounted for by the Defendants three months prior to the same being credited to them in England. —

From the evidence adduced it appeared, that in the accounts of the dealings and transactions between the Defendants and Brickwood Daniel & Co their Correspondents in England, ~~interest~~ was given to the defendants upon the balances which appeared to be due to them, in one of which accounts, the proceeds of the furs and peltries in question

were

were included — It also appeared to be the general custom for the merchant in this Country to allow interest to the Trader whose furs and Commodities he forwarded in this manner to be sold in England, three months prior to the same being credited in England. —

The question now was, whether the Defendants are bound to pay interest on the proceeds of the furs and peltries they had forwarded to be sold in England, three months prior to their being credited with such interest — or what other interest ought they to pay.? —

The Court, although strongly inclined to think that the Defendants ought to pay interest from the time the same would accrue to them in the Course of their trade, yet they did not consider themselves warranted to extend the rule of law which gives interest against the debtor only from the time of his being put en demeure — and therefore allowed interest only from the date of the process served on the Defendts —

Note. — The principle of this Judgment may be liable to much objection, and upon further consideration I am inclined to differ from it. — The nature of trade and custom of merchants ought to be binding as a law upon those who follow it, for agreeable to such custom they must necessarily risk and advance their

property

property, and according thereto ought they also to be enabled to recover it— Cases also are not wanting, where the principle of Equity has been settled, that where a trustee for a Bankrupt Estate has received interest, he shall pay interest to the Creditors.—

See. 3. Br. C. C. 436.
1 Ves. Jr 170
Do 236
3 Br. C. C. 457.

and besides I think it but common Justice, that the Defendts should be held to account for whatever they received on account of the Bankrupt Estate, whether it were principal or interest.

Lorgueuil
v.
Sitis.—

The Defendant moved for a rule on the Sheriff to shew cause why an attachment should not be granted against him, for having refused to receive from the defendant an Opposition à fin d'annuller upon an execution sued out against him in this Cause.—

The Sheriff contended, that such a rule ought not to be granted, for even if he were in default, the Defendant can have no other recourse against him but by an action of damages. That a writ of attachment can issue only in cases of Contempt against any of the Officers of the Court, and he could not be considered to be in contempt for executing the Kings writ which had been addressed to him, and much less for refusing to

receive

receive a frivolous opposition to the execution of that writ — and even if the opposition were well founded, the injury done to the Defendant for not receiving it cannot be considered as a contempt of this Court —

Stuart for Defend. contended, that when an Officer under his Office deprives the party of a right to which he is entitled, the attachment is the proper remedy — 3 Hawk. 276. —

The Court refused the Rule. —

Adhemar vs Corrigal. } On the defendants motion to declare the proceedings peries, as nothing had been done in the Cause for upwards of two Terms

Ross for Pltff contends, that motion ought not to be granted, because if there are any laches in the Cause, it is owing to the Defendant — That in February Term 1812, the Defend. obtained an order for a Com. Roy. for taking the examination of witnesses at Hudsons Bay, returnable in October last, that the Defendant does not appear

to

to have done diligence under this Order, which has been the means of retarding the Cause. —

The Court granted the motion, as they considered that from the day on which the Com. Rogatoire was made returnable the Plaintiff might have proceeded in the Cause. —

October Term 1813.

Saturday 2d. October 1813.

Soupin vs Shoultz

The evidence being closed, the defendant yesterday obtained a rule for the examination of the plaintiff upon faits & articles, on the 8th. inst. The Plaintiff this day moved to fix the Cause for hearing on the merits on the 9th. inst. — this was objected to, and the Court rejected the motion as premature to fix a cause for hearing on the merits before the evidence was closed and completed. —

Monday 4th October 1813.—

Perrault
vr
Auclaire
and
Baron & al
Oppts

On the opposition of — Baron, widow of the late Jean Bte. Auclaire, & others their children, claiming the property in the land seized.—

On the 30th July 1774, the late Jean Bte. Auclaire and the said — Baron intermarried, and on the 23d Sept. 1793, they jointly acquired the property in question.— On the decease of the said Jean Baptte Auclaire, there were issue of the said Marriage, four children, viz. Pierre — André — Amable — and Jean Bte. Auclaire, who as heirs of their said father were entitled to one half of the said property, and the said — Baron, his widow, to the other half.— On the 26th May 1802, the said André Auclaire, the Defendant in this Cause, and Pierre Auclaire, for themselves, and also on behalf of their brother Amable, assigned their respective rights in the lot of ground in question, to their mother the said — Baron — and on the 27th

Decr

December 1802 this act was ratified by the said Amable Leclaire — The said act of 26 May 1802, being a family arrangement between the mother and the children, it was thereby agreed that the said Pierre Auclaire should hold and retain the said lot of land as his property upon the payment of certain debts due by the said — Baron and for this purpose, the said — Baron re-conveyed the whole of the property to the said Pierre Auclaire, to his sole and separate use.— On the 22d. March 1805, the Sd. Pierre Auclaire conveyed the property to his Sd. brother André the Defendt. who now entered upon the possession thereof and made improvements thereon.— On the 20th April 1805, the plaintiff obtained a Judgment against the said André Auclaire — and by an act of 20th June 1805, the parties to the act of 26 May 1802 rescinded the same, but it was stipulated that the Defendant should retain the possession of the property in question, to indemnify him for the improvements he had made thereon, and being so in the possession thereof, the Plaintiff caused the same to be seized as his sole property. The said Baron now claimed one half of the land seized as her property by right of the Community that had subsisted between her and her late husband, the other

half

half was claimed on the behalf of her Children. —

The Court considered the act of the 20th. June 1805 as fraudulent, having been made ~~in order~~ to transfer the property back to the originae owners with a view of depriving the plaintiff of his recourse against it — and also that the Conveyance thereby made had not been carried into effect, as the possession had not been altered but remained in the person of the Defend. who had become the proprietor of the whole under the act of the 22d. March. 1805, — Opp. dismissed

Polh. Prop. No 245. — Vente. No 220. 1.

Bergeron fils
vs
Bergeron, pere
Val' —

Action to rescind an act of Retrocession made by the Plaintiff on 13th. March. 1811. —

The Declaration states. — That by deed of donation made and executed on the 24th. May 1809, the Defendant Antoine Bergeron, pere, and Marie Marcotte his wife conveyed to the plaintiff a certain lot of land therein mentioned for and in consideration amongst other things of paying a certain annual rente & pension viagere to the said donors — which said lot of land and property given were worth a sum of 9000 livres

at

at the time of the said donation – and the value of the said rente viagere and other burdens imposed by the said donation, was worth 2154 livres yearly, besides certain articles to be furnished only once, and estimated at 1974 livres, whereby the plaintiff contends, that the said deed, instead of being a deed of donation, ought to be considered as a deed of Sale of the property thereby conveyed, inasmuchess the said rente viagere alone, upon the usual estimation is equal to thirty per Cent on the value of the land. That on the 5th. June 1809, the said Marie Marcotte died leaving for her heirs seven children, among whom were Marie, and Marie Louise Bergeron, two of the Defendants. – That on the 13th. March 1811, Mr. Cadieu, a public notary in Montreal, came to the house of the plaintiff at St. Martin, at the instance and request of Pierre Dufour and Joseph Leblanc, two of the Defendants with an intention to obtain the resiliation of the said deed of donation, and thereby to obtain a part and share in the said land so given to the plff, as heirs of the said Marie Marcotte, by having intermarried with the said Marie, and Marie Louise Bergeron – That the said Cadieu after reading something from a book which he said was the law of the Country, and with the

the intention to accomplish the said object, did state and declare to the said plaintiff and to the s^r Bergeron the Defendant, in the presence of the said Dufour and Leblanc, that the said deed of donation was null and void, by reason of the death of the said Marie Marcotte from the same illness by which she was attacked at the time of making the said donation. — That the said plaintiff from this belief alone, and from no other Cause or consideration, consented to an act of retrocession, bearing date the 13^th. March 1811, drawn up by the said Cadieu, whereby he reconveyed the land and property given to him by the said donation, to the said Defendant Antoine Bergeron pere. — That the said deed of donation of the 24 May 1809, considered either as a Donation or Sale, was not on the said 13^th. March 1811, nor at any other time null and void by reason of the death of the said Marie Marcotte happened by the illness under which she laboured at the time of the making the said deed, as is erroneously stated in the said act of retrocession, but the same was, and still is, good and valid in law, as the land thereby given and granted to the pltff, was a Conquet of the Community that subsisted between the said Antoine Bergeron pere and the said late Marie

Marcotte

Marcotte, which the said Antoine Bergeron, pere, as head of that community was entitled to dispose of alone, even during the last illness of the said Marie Marcotte, without her consent or participation, her presence and consent thereto being essential only to clear the mortgages, she or her heirs might have or claim thereon, by becoming bound to guarantee the said deed.— That as the said act of retrocession was made agreed to by the said plaintiff, by ignorance and error on his part, and without any cause or consideration, he therefore prays that the same may be rescinded, and that he be re-instated in the possession and enjoyment of the property and estate given to him by the said deed of the 24.th May 1809 —

Antoine Bergeron pere, pleads, not guilty of any of the facts alledged — nor did he solicit or engage the Plaintiff to make the act of retrocession in question, which was voluntarily done by the said Plaintiff in regard of him the Sr. Defendt.

Pierre Dufour and Marie Bergeron his wife, Joseph Leblanc and Marie Louise Bergeron his wife, plead, Not guilty — Further, that the deed of the 24.th May 1809, is clearly a deed of donation and not a deed of Sale — That by the death of the said Marie Marcotte by the illness under which she laboured at the time of executing the said deed of donation, the same was void in regard of her

rights

rights therein, and the said Defendants founded to demand and obtain, as her heirs, the rescision of the said donation — That in order to settle and determine all difficulties between the parties touching the Succession of the said Marie Marcotte, a certain accord, or — arrangement was made between the parties by act of the 13th March 1811, whereby the said Antoine Bergeron pere, agreed to make an Inventory and render an — account to the said defendants of all the Succession of the said Marie Marcotte, to which the said plaintiff acquiesced by consenting to a resiliation of the said deed of Donation, which accord is good and valid in law, and was immediately after the execution thereof carried into effect by all the parties. — That the error alledged by the said plaintiff, supposing it to be true was not sufficient to destroy the said Act of accord and retrocession. — That there were sufficient grounds and causes for making the said retrocession, and if there were not, it can in nowise affect the rights of the Defendants, but the injury, if any, must fall on the Plaintiff alone — That if the said deed of donation could be considered as a Sale, yet this would in no manner affect the validity of the said act of retrocession, which was — voluntary on the part of the Plaintiff. — —

The

The Plaintiff in reply to Antoine Bergeron pere, states, that his action is founded in law and fact, and that he, the plaintiff is entitled to the conclusions thereof, notwithstanding any thing alledged by the s^d Defend^t.— And for reply to the other Defendants, the said plaintiff stated, that the aforesaid deed of the 25^th May 1809, is verily a deed of Sale, and not a Donation — and even if it were a donation, it was void and null in any part by reason of the death of the said Marie Marcotte in manner as alledged — Contending for the nullity of the said act of Retrocession and persisting in the conclusions of this declaration —

Upon the hearing of this Cause on the 2^d. April last, it was contended by M^r Bedard for the plaintiff, — That the deed in question ought to be considered as a deed of Sale and not a donation from the value of the articles and rente & pension to be paid to the Defendant Bergeron Poth. Cout. Vente. N^o 612. — Cout. Rente. N^o 215. 239. 240. 241. — where the value of the rente is above 10 ℔ Cent it must be considered as a Sale. — That it was no cause for the resiliation of the said deed, that the wife of the Defendant Bergeron died of the illness with which she was attacked at the time of executing the said deed, inasmuches the husband alone without the consent or participation of the wife, as head of the Community was enabled to make the said deed, the property

property given, being a conquet of that Community Poth. Com.te Nº 471. — 3 Fer. Gr. Com. art. 225. glose 1. Nº 1. — That an error de droit, where it is the only ground of an act, may be come against by any of the parties thereto — Domat. liv. 1. tit. 18. sec. 1. Nº 14. 15. & 17. p. 166 Rep.re de Juris.p. V.o erreur. — The error here, is a cause fausse. —

Lacroix for Bergeron pere — submitted the Case to the Court. —

Vigé for Dufour & Leblanc, the other Defendants, contends, that ~~the~~ acts of donation between father and Child, have never been considered in the light of a Sale, but under whatever burdens or conditions have been viewed as made en avancement d'hoirie and so held by this Court in the Case of Rolland Exer. V.s Belanger. Febv.y 1809. — cits also — Prudhom: liv. 3. ch. 37. p. 257. — Lacombe. V.o Lods & Ventes. — Poth. Trefs. part. 2. ch. 1. 2 Vol. 12.o p. 58. — Denizart. V.o Lods & Ventes Nº 86. & 98. — Rep.re de Juris.p. V.o Lods & Ventes. —

Where error is not the only Cause, the parties cannot come against the act — Domat. liv. 1. tit. 18. sec. 1. art. 17. p. 141. — Ignorantia juris nil prodest. — The retro cession made by the plaintiff, must be presumed to be made upon just grounds, even if no cause had been assigned for it — Dic. Droit. V.o Obligation — ou — Promesse Causée Id — V.o Contrat

By.

By the 225th art. of the Custom, the husband may dispose of the property of the Community, but it must be "sans fraude" — now a donation made by the husband jointly with his wife at the time she is on her death bed is a fraud in the eye of the law upon the heirs of the wife, who are thereby deprived of all right in her Succession Poth. Comte No 480- where he cites the opinion of Lebrun — see also. glose 3. No 30, on 225th art. of the Custom — The Donation is at all events null for one half — Denizt. — vo Donation — No 86. 91. a —

Ross in reply. — No fraud is alledged in the declaration as the cause of rescision of the retrocession, the only cause is the erreur de droit — now erreur de droit may be relieved against in some instances, as well as the erreur de fait particularly when it proceeds from a Cause fausse — Repse de Jur. vo erreur. p. 69. dca — Poth. Obl. No 42. — Id. Constit. de Rente No 215. dca 239. 240. 241. — Id. — Vente. No 612. a —

The making of the retrocession by the plaintiff, presumes that he had been vested with the property, and was so considered by the parties, and the acceptance of that retrocession by Bergeron pere alone, shews, that he alone had the right to have made the deed of donation. —

The Court held that the act of retrocession made by the plaintiff, and of which the rescision is now demanded

demanded, was founded upon a just and legal ground, the nullity of the deed of donation, which deed the Court held to be void in consequence of the death of the wife during the illness with which she was attacked at the time of making the said donation. — Action dismissed. —

See authorities. —

Art. 225. Cr. Com. gl. 3. Nº 3. —

Art. 277. —

——— glose 1re Nº 14. glose 2. Nº 9.

Journal du Palais. 2. Vol. p. 200.

Denizt. Vo Donation. Nº 86. —

2. Bourj. p. 77. 78.

Le Maitre. Des Donations. p. 394. —

Poth. Cout. d'Orleans, Introd. au Tit. 15. p. 430. §. 7. —

——— p. 573. note on art. 297

Nadon. — vs Morisseau } Action for £16. — for double arrhes on a promise to sell made by the Defendant to to the Plaintiff. —

The Defendant pleaded that he did not promise and undertake to sell. &c.

The Court after having heard the parties and examined the evidence adduced, gave judgment for £8. — the sum paid by the Plaintiff to the Defendant on the faith of the Sale, inasmuchas it appeared that the Sale was made upon a condition which had not happened, and therefore the Defendant was not bound to pay double les arrhes demanded — with Costs to the plaintiff as in the Inferior Court — The Court did not allow to the defendant his — costs of defending the action, as he made no tender of the sum he owed to the plaintiff —

A question occured in this case, whether under the general plea put in by the Defendant, he was entitled to make proof that the Sale in question was a Conditional Sale — The Judges were of opinion that he could not, that he was entitled to take advantage of any matter arising out of the evidence adduced by the plaintiff but that the Defendant ought to have pleaded any special matter upon which he relied, otherwise he could not

be

be admitted to make proof of it —

Tuesday 5th October 1813.—

Trusdell vr McGouth } The Court granted the plaintiff's motion to amend the declaration and writ, by changing the name of the Defendant from McGouth to McGeoah.—

Dumas vr Burton and Potts oppt } The opposant moved for delay to fyle his reasons of opposition, as the defendant has assigned his property to Trustees for the payment of his debts by virtue whereof the present opposition has been made under certain letters addressed to the Opposant from the said Trustees, to which letters the opposant refers as being now filed.—

Stuart for the Plff, objected to any day being given to the Opposant, as the delay allowed for filing his reasons of opposition had expired during the last vacation, and the opposant ought to have obtained an extension of the time to fyle his reasons of Opposition from the Judges in vacation before the ordinary rule had expired— That the opposant has no right to stand with any claim in the name of the trustees before this Court— he is not warranted by them to

do

do so under the letters referred to, which mention a conveyance to the persons therein named as Trustees, but this is noticed merely as matter of information without power or authority to the opposant to take any steps or make any opposition or claim on their behalf, and even if such power had been given to the Opposant the opposition must in that case have been made in the name of the Trustees and not in the name of their agent and attorney — Further, there is nothing to shew that the Assignment to Trustees was made by the Defendant prior to the Judgment obtained by the Plaintiff and to the suing out execution thereon, without which it would be no effect — nor does it appear that there has been any tradition of the property under such Conveyance and assignment but that the same hath remained in the possession of the Defendant, and was in his possession at the time of the seizure and execution made in this Cause The Plaintiff therefore moves, that the aforesaid Opposition be dismissed as irregular, and that a Venditioni exponas do issue to sell the Estate & property of the Defendant now under Seizure —

The

The Court granted the plaintiff's motion upon the principle that the Opposition was irregularly made and therefore the Opposant was not entitled to any delay for filing reasons of Opposition.—

Wilson & al'. —
vs
Sanford, Cur'
and
Sanford. Opp't

On the Opposant's motion to file an Opposition, or Requête with new conclusions in consequence of the decease of Pierre François Careau the Opposant's husband since the last proceedings in the Cause.— This was objected to by the plaintiffs, as the Cause was now ready for a final Judgment— The Court granted the motion.—

Wednesday 6th October 1813.—

Hall. — vs. Smith. —

Action on a promissory Note. —

The Defendant, maker of the note, pleaded non-age — to which plea the Plaintiff demurred contending that the plea of non-age is not sufficient in this case, unless the defendant had denied being a trader. —

Sol. Genl. for Dfdt. said, that the plaintiff in his declaration had not stated, that the note in question was given in the course of trade used and carried on by the Defendant, and therefore the plea of non-age was well pleaded, it not being necessary to negative what had not been alledged against him — The demurrer pleaded by the plaintiff to the defendts plea admits the fact of non-age, yet does not allege that the note was given by the Defendant as a trader. —

Dic. Droit. Vo. Billet à ordre.

The plea of non-age over-ruled, the Court considering that the making of the promissory note payable to order, was a commercial transaction in which this plea could not avail. —

Osborne vs Finan. } The Defendant had given bail to the Sheriff for his appearance the first day of this term — he did not appear until the fourth inst. when his Counsel appeared for him and offered special bail.— To this Mr Stuart for the pltff objected, contending that the defendant was too late as the bail bond had been assigned to the pltff, and an action instituted thereon.— The Court however admitted the defendant to give special bail, considers that even if the bail bond were assigned, the permitting the special bail to be given would in nowise affect the cause said to have been instituted against the bail, nor delay the proceedings thereon.—

Friday 8th October 1813.—

Hunter.
vs
Ivy.—
and
& Contra.—

When the cause was called for evidence from the rôle d'enquête, the defendant's counsel moved, that the rule for the examination of witnesses should be discharg inasmuch as the exhibits filed with the plaintiffs declaration have been withdrawn from the record by the plaintiffs attorney, and are not now to be found— This appearing to be the fact, the Court granted the motion.—

Monday 11th October 1813.—

Ex parte. Campbell on Petition

The petitioner with his Reply to Mr Sutherland's answer to his petition filed certain letters he had received from Mr Sutherland in the course of the correspondence on the subject in question, upon which letters the petitioner had written certain remarks and observations inculpating the Conduct of Mr Sutherland.—

Ross on behalf of Sutherland moved, that certain parts of the said remarks and observations should be taken from the files and rejected from the proceedings as containing defamatory and libellous matter of the said Sutherland.—

The Court granted the motion, upon the principle, that written remarks and observations ought not to be received on the exhibits filed by any party, which should be confined to the pleadings in the Cause, but without determining whether the matter complained of was libellous and defamatory, or not.—

Tuesday 12th October 1813.—

Turgeon. vs. Villiot. and Bouc. Gar.t

On the plaintiffs motion for the examination of witnesses ex parte, as the Defendant had not filed a plea.—

Georgen for the Defendant stated that delay had been allowed him till the 9th inst. to call in his garant — that garant appeared on the 9th and on this day obtained delay till the first day of next term to call in an arriere-garant.—

Lacroix for pltff, cites case of Gauthier, vs. Leduc and Huneau, Gar.t in Febv.y Term last, where it was refused to suspend the plaintiff's right of proceeding by reason of the Defend.r being allowed to call in a Garant as is the case here.—

Vigé. as amicus Curiæ, states, that in the case cited of Gauthier v. Leduc, he was counsel for the pltff, but did not exact a plea from the Defend.t until after the garant had been called in.—

The Court rejected the plaintiff's motion for proceeding ex parte, as a day had been given

to

to the garant until the first day of next Term to call in his arriere-garant, and intimated that the rule would be observed in future, where a delay has been given to call in a Garant into a Cause, it necessarily suspends all proceedings until such delay shall have elapsed. —

Friday 15th October 1813.—

Ex parté. Campbell on Petition.

On the petition of The Hon. William Campbell, praying that the appointment of Daniel Sutherland as Tutor to E. Robertson, the grand daughter of the petitioner, should be set aside, and a new election had.—

Stuart for the petr.—

1. The Grand father, here, being the nearest of kin to the minor, is alone entitled to the appointment of tutor, and no election for this purpose ought to have been had without his participation— cites. Repse de Jur. vo Tutelle. p. 312— the doctrine there laid down, applying to the grand father and grand mother— see also— p. 316. 318— and 319

Poth. tr. des pers. tit. 6. sec. 2

Prac. Franc de Couchot. 1 Vol. p. 350

Mesle, Tutelle. p. 257— 279.— 281.—

Domat. p. 173.—

2. That the non-residence of the petitioner in this province, is not a sufficient objection to his appointment, as is now contended by the present tutor— Cujas. lv. 4. p. 596.—

the

the distant residence of the nearest relation, may be an excuse for declining the appointment, but is not sufficient to exclude him — cites, Mesle. tr. Jut. p. 95 — and 267. — Domat liv. 1, tit. 1. sec. 7. art. 31. p. 189. —

3. That Mr Sutherland has thrown unnecessary obstacles in the way of the petitioner's right, and appears to be actuated by motives of personal resentment against him — refers to the correspondence filed — that such a character is by law excluded from the tutelle, cites. Mesle. p. 251. — Domat. p. 186. — Charges Sutherland with duplicity of Conduct in obtaining the appointment under the pretences he used —

Ross for Sutherland

Contends, that all the letters written by him to the petitioner, shew nothing of design in regard of his appointment, but on the contrary evince a strong attachment to the welfare and interest of the Robertson family. — That Mr Sutherland having been regularly and legally appointed, he cannot, nor ought not, to resign that appointment upon the request of the grand father, who cannot deprive him of it. —

1. Because, the Tutor is dative — and relationship although it may have a preferable claim, may still be set aside, where the judge sees fit to prefer a Stranger.

2.

2. That every tutor should be named and appointed by the Judge of the domicile of the parent of the minor, and should be resident within the jurisdiction of that judge, so as to be amenable there for his conduct. cites. 1 Domat. tit 1. Sec. 2. № 3.

3. That the petitioner residing in another province, out of the jurisdiction of this Court, is therefore an improper person to be appointed tutor, as there would be no controul over him, either in respect of the person or property of the minor by this Court to whom alone that controul belongs. That the laws of this Country make provision for the appointment of tutors to minors, whose nearest relations are in distant Countries - cites

Dec. du Roi. 15 Decr 1721. 1 Edits & Dec. p. 399.
——— 1 Octr 1741. maniere d'elire des Tuteurs. Id. p. 512. art. 1. 2. 3.
——— 1 Fevr. 1743. - Touch 3. the appoint of Tutors to minors havg property in this Country and in France.

4. That it was necessary for the Executors of the late N. Robertson. the father of the minor to proceed without delay in making an Inventory of the estate and effects left by the deceased, previous to which an appointment of Tutor to the minor became necessary that she might have a legitime contradicteur to

represent

represent-her at that Inventory – cites. Repv de Jur. Vo Executeur Testamentaire. p. 160. –

Bedard – on same side. –

As tutelles are dative in this Country, the Judge had a right to appoint a stranger where there was no relation within the jurisdiction. – That Mr Sutherland having been regularly appointed, the Petitioner cannot divest himself of his appointment. – That the distant residence of the petitioner, living in another Province excludes him from the tutelle – cites. Mesle. p. 336. – Jacombe. Vo Tuteur. –

Stuart in reply. The petitioner being nearest of kin to the minor, although resident in the adjoining province, was entitled to have been notified and called to the election of a tutor to the said minor, his grand child. – Repv de Jur. Vo Tutelle. p. 318. – and Denizt. Vo Tuteur. No 6. – An election of a tutor, had, without the participation of the petitioner was therefore irregular and this circumstance alone, without taking into consideration the preferable claim of the petitioner, entitles him to demand a new election – his claim will then be considered by the relations and friends of the minor. and if approved of by them, will be confirmed

by

by the Judge. — The declarations of the French King touching the appointment of Tutors in the Colonies, cited, do not apply in this Case — they took effect only in the instances where the Minor had property in the distant Colonies, and the communication was rare and difficult —

Concludes for a new election. —

The Court held, that the Petitioner as grand father and nearest of kin to the minor, had a preferable right to the appointment of tutor thereto notwithstanding his residence in the Province of Upper Canada — that as the appointment of D. Sutherland had been effected without the participation or consent of the Petitioner he was therefore entitled to demand a new election, and to be himself appointed Tutor, if no sufficient cause appear why he should not hold that trust — The appointment therefore of the said D. Sutherland as Tutor as aforesaid, and of R. McKenzie, as Sub. tutor was set aside and a new election ordered. —

Saturday 16th October 1813. ~

Bull v. Simmons } On the defendants motion to reject the Replication as having been filed too late — The Court granted the motion, but intimated at the same time, that had the Cause been set down for the examination of witnesses, or any other proceeding had in the Cause after the filing of the replication, the present motion would not have been granted, as such proceeding would have been considered as a waiver of any objection to the regular filing of the replication. ~

Laberge v. Sellier and Parisien Gard.n } On rule obtained by the plaintiff against the Defendant and one Parisien, as gardien of the effects seized belonging to the said Defendt — why an attachment should not issue against them for not representing the said effects to the Sheriff's Officer charged to make Sale thereof. ~

Stuart for Dfdt. says, that the effects in question were not committed to his charge, and he cannot therefore be liable to any Contrainte for not representing them, such

such recourse can be had only against the person who was appointed Gardien of the said effects, who thereby became answerable as having the legal custody thereof. —

Ross for Parisien, the Gardien, says, that he is ready to deliver up the effects to the bailiff, and that the Defr in whose hands they had been left, was the person who wrongfully with-held the same when demanded.

Whereupon it was ordered by the Court that the Sheriff should be authorised to demand and receive the said effects from the hands of the gardien, and to make his report thereon to the Court. —

In consequence of the said order, the Sheriff reported, that a part of the said effects had not been delivered up to him by the gardien, which was occasioned by resistance and violence of the Defendant — whereupon the Plaintiff prayed that the Rule for the Contrainte against the Defendant and Gardien should be made absolute —

Stuart for Defr. again stated, that he was not liable to the Contrainte, as he was not the keeper or gardien of the effects seized, — that there was no law which makes a defendant liable to the contrainte

for

for not representing the effects seized, when a gardien has been appointed for that purpose. —

The rule was made absolute against the Gardien but discharged as to the Defendant — the Court considering that in regard of the Defendant the law has pointed out a course to be taken under the Provl Ordinance of 1785 in cases where a Defendant resists the seizure or sale of his effects under execution. —

Monday 18th October 1813.

Maranda vs Cousineau

On action of account.—

The action was instituted by the pltff as widow of the late Jacques Cousineau, against the Defendant as son and heir of the said Jacques, to render an account of the property and estate left by the said Jacques Cousineau and of which the defendant had possessed himself, in order that out thereof the Plaintiff might be paid certain rights accrued to her under her marriage Contract with the said Jacques Cousineau, such as her half of the Community, douaire, precipit &ca

Bedard for Defendant, pleaded as exception to the action, that the Plaintiff had abandoned and left her husband in his life time without Cause, and was therefore not entitled to her action for an account of the Community that subsisted between her and her said husband, of which by law she was rendered unworthy and deprived by such Conduct. cites, the following authorities.—

Dict. Fer. Vo Femme mariée.
Comm.re sur l'art. 229. p. 269. No 10.

Journal

Journal des Aud. tom. 3. arret. 20 Janv. 1672
Lebrun. Comte. liv. 3. ch. 2. Sec. 4. p. 530. Nº 31. 32. 33.
Journal du Palais. tom. 1. p. 1re arret. 1672

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As to Dower.

Fer. Gr. Comme art. 229. p. 269. Nº 11. Nº 12

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Dons faits à la femme
Lebrun Comte p. 529.
Fer. Comte art. 247. §. 2 Nº 15.
Dic. Droit. Vº Douaire.
Bourjon. tom. 1. tit. 10. ch. 4. art. 5. p 515. 516.
Ayet / Pelit } Judt. of this Court 11 Oct 1805.

Stuart for Plff contends, that the wife does not lose her rights in the Community by having left and lived apart from her husband, but only her rights in those acts of liberality made to her by her husband — that the Community not being a liberality of the husband but a common law right the plaintiff could not be deprived of it on this account — That if such principle of law did exist, yet the plaintiff could shew, that she had been compelled to abandon her husband from his ill-treatment

The Court were of opinion under the authorities cited that the Plaintiff would not be entitled to her rights in the Community, by having abandoned her husband, unless she could shew a sufficient cause for having done so — for which purpose a day for proof was given.

Loedel & al.
Exrs Blake
v
Poitras & ux.

Action on promissory Note. —

The Declaration stated, that the Defendants being indebted to the late Charles Blake in a sum of £30 &c made their certain promissory note, which they then and there delivered to the said late Chs. Blake and thereby promised to pay the said sum of £30 &c whereby &c —

It was pleaded by the Defendants, that the declaration was insufficient as to the wife, as it was not stated, that she made and delivered the promissory note in question by authority from her husband, and therefore the note was void as to her, and she ought not to be bound to answer further to the Plaintiffs demand — That the Declaration was also insufficient as to the other Defendt inasmuchas it was not therein stated, to whom the Defendants promised to pay, whether to the late Charles Blake, or to the plaintiffs as his Executors — this from uncertainty is insufficient, as the Defendt cannot answer thereto. —

Laroix for the Plffs contended that it was not necessary in the making of a promissory note that there should appear an express authority from the husband to the wife to join in making it, it was sufficient where they joined in the act, the authority of the husband was thereby presumed — That the note was besides sufficiently set out in the declaration to bind the Defendants —

The

The Court held, that the Defendants wife could not legally bind herself by making the note in question without an express authority from the husband appearing on the face of the instrument - and therefore discharged her from the action - but held the note sufficiently set forth in the declaration to compel the Defendant to answer thereto —

Tuesday 19th October 1813.—

Douglass. v. Renaud } The plaintiff moved to amend his declaration and writ, by altering the name of the Defendant from "Louis Renaud", to "Toussaint Raymond", cites Tidds prac. p. 632 & seq. — Repv de Jurisp. Vo Demande. — 7 T. Rep. 698. Owens. v. Dubois.

This was objected to by the Defendant, and over-ruled by the Court

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Larocque v. Gilbert. — } On the defendant's motion to examine the Plaintiff on faits et articles. —

Rolland for Pltff, stated that the plaintiff was absent in the Upper Province upon the public service, and his return was uncertain — therefore it would be granting an unnecessary delay in the cause to continue the same for such examination.

Boston for Defendt cites case of Hall. v. Cheeseman where a similar application was granted, and as this Cause was instituted in the present term, no—

unnecessary

unnecessary delay will arise by granting the motion. &c

The Court granted the motion upon the principle that the cause had been instituted in the present term and no delays had been sought for by the Defendant in forwarding the Cause, and also, because it was uncertain at what time the Plaintiff might return. &c

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Rolland
v^r^
Jeremie. &c

Action for fees as an Attorney &c^a^

In this Case the Court held that no part of the plaintiffs demand for fees for business done in the Criminal and in the Inferior Courts, as no rule or tariff existed for the allowance of fees in those Courts. &c

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Neyenstadt
v^r^
Woolman. &c
and
Woolman opp^t^.

On opposition made and filed by the defendant a fin d'annuller, in consequence of the plaintiff having sued out a writ of execution in this Cause without notice to the defendant of the taxation of Costs. &c

Ross

Ross for Opp.t Contends, that he was entitled to notice of the taxation of Costs, notwithstanding the proceedings in the Cause were had ex parte by his not having filed a plea, it being the Constant practice to give such notice.—

Stuart for Pltff. From the moment the Defendant was in default by not filing his plea, the plaintiff was not bound to give any notice to him of any proceedings in the Cause, and it would be unreasonable to exact a notice in the particular instance of the taxation of Costs, when all other proceedings are had and allowed without such notice— The Pltff considers that he was not bound to give any notice to the Defts of the taxation of Costs in this instance, and knows of no practice to that effect.—

The Court finding the uniform practice to have been, to give notice to a Defendant of the taxation of Costs when he appears in a Cause but does not fyle a plea, quashed the writ of Execution sued out in this Cause as having issued irregularly

Dominus Rex
v.
Demers. —

On Certiorari, on Conviction before Mr Raymond, Justice of the Peace,

Rolland on behalf of the Justice, obtained a rule on the prosecutors of the Certiorari, to shew cause, why the same should not be quashed as having issued improvidently. —

1st. Because no cause or grounds were shewn to the Judge at the time of granting the writ. —

2d. Because no sufficient notice was given to the Justice of the application for the said writ —

3. Because the said writ issued in vacation without authority, the same not having been signed by the Judge who granted the said writ, but only a fiat for that purpose, and further because the names of the person or persons at whose instance the said writ was sued out, were not indorsed thereon — Williams' Just. Peace. Vo. Certiorari. No. 3. —

4th. Because the person prosecuting the said writ of Certiorari hath not joined in the Recognizance entered into with the two securities for the Costs in the said prosecution — 4. T. Rep. King. v. Boughey. — King. v. Hervieux. Febry. Term 1810 — and King. v. Dun. 8 T. Rep. 217. —

The Sol. Genl. on behalf of the prosecution, shewed Cause, contending that the writ of Certiorari and the proceedings thereon were regular. —

1st

1st Sufficient cause and grounds were laid before the Judges in vacation for granting the writ, as appears by the affidavits of the Circumstances of the Case now filed with the other proceedings. —

2d Sufficient notice was given to the Justice of the application for the writ of Certiorari, as appears by the affidavit of the service thereof at the domicile of Mr Raymond Six days prior to that application

3d It is not necessary that in this case the writ of Certiorari should be signed by the Judge, this is requisite only in cases of Certiorari on Indictments, the signing of the fiat was in this Case sufficient — 1 Salk. 150. Reg. v. White.

4 The Security given by two persons having — entered into Recognizance is sufficient, it has not been rigorously exacted that the prosecutor should join in such Recognizance. —

The Court held that the notice to the Justice of the application for the Certiorari ought to have been given to him personally, and not left at his domicile, as appeared to have been done by the affidavit of service of the said notice — Also that it was necessary that the Prosecutor should have

joined

joined in the Recognizance for the Security required by the Statute — The writ of Certiorari was therefore quashed. —

M.Pherson
vs
Murray. —

On rule to shew Cause why the Capias sued out in this Cause should not be quashed from the insufficiency of the affidavit. —

Stuart for Defendt. contends, that the affidavit is insufficient as it does not negative the requisite of the Statute in respect of an offer to pay the debt demanded in army bills, it says only, that Defendant had not made a tender of the debt in army bills — now the St. 52. Geo. 3. s. 8. requires only an offer, not a tender to be made and negatived by the person making the affidavit. —

Ross for Plff contends that offer and tender must be considered as synominous terms under the Statute, and of this opinion was the Court, and discharged the rule.

See Bank acts. — referred to 1. Tid. P. 161. —

Sutherland
vs
Campbell -

Action of damages for defamation. —

On rule obtained by the Defendant for Plaintiff to shew Cause why writ of Capias sued out in this Cause should not be quashed as having issued irregularly. —

Stuart for Defendt - The plaintiff is not entitled to a writ of Capias agt the Defendant in this action which sounds merely in unliquidated damages - By the Ordnce of 1785, a plaintiff is intitled to this writ only in the Case where the affidavit shews that the Defendant is indebted to the Plaintiff - now a debt can arise only upon a Contrat or quasi-Contrat, but there can arise no debt upon a delit, or injury for which a right is given to obtain a compensation in damages, and until these damages are liquidated there can be no debt - The laws of England and of Canada are different in regard of the proceeding by Capias. It was the Common law proceeding in England to bring a party into Court, but having been abused it became necessary to restrain the unlimited use made of it to the injury of individuals, and therefore by

by St. 12. Geo. 1. ch. 29. an affidavit was required of the Cause of action where the demand was above ten pounds and even after this Statute where the action was merely in damages and no specific sum could be sworn to, a Capias did not issue in the first instance. 1 Sell. Prac. 42.— But by the laws of Canada, a Capias could not issue for bringing a Defendant into Court upon any demand whether of debt or damages, until the Prov. Ordr of 1785, which first introduces this writ, and permits it to issue where a Plaintiff can swear that the Defendant is indebted to him in a Sum exceeding ten pounds Now now this word indebted must be construed under the laws of the Country to have reference to such act, or Contract upon which a debt could arise, but never had in contemplation the Case of imaginary damages where no such affidavit could be made until the damages were liquidated.— The rule of practice of this Court has been made upon the supposition that a Capias could legally issue to hold a defendant to bail in an action for damages as in England, and the practice of that Country has been adopted for the Judge to regulate the quantum of the bail upon a disclosure

disclosure of circumstances by the affidavit, but such a rule could not legally be made, nor ought a defendant to be held to bail for any sum whatever on such an action. — But supposing a Capias could legally have issued under the rule of practice the Plaintiff has not brought himself within that rule to entitle him to the Capias in this Case, as he has not by his affidavit disclosed such facts and circumstances as could enable the Judge to limit the bail to any specific sum — And further, the Capias is irregular, as the affidavit does not state that any offer or tender of satisfaction in army bills had been made by the Defendant. —

Ross for Pleff. states, that the affidavit made by the Plaintiff meets the rule of practice, and states sufficient circumstances of the nature of the injury sustained by the plaintiff to entitle him to the benefit of that rule — that no offer or tender of satisfaction in army bills could be stated in this Case, from the nature of the circumstances, at least until after the making of the affidavit, when the quantum of the bail was settled. —

The

The Court held that the capias had issued irregularly as the affidavit did not mention the tender of satisfaction in army bills, a requisite with which the Court could not dispense under the prov: Statute, and therefore admitted the Defendant to enter a common appearance. — As to the practice settled by the Court in the mode of granting a Capias in actions of damages, it was considered to be legal and just, and any argument in the face of the rule was improper. —

Coutelée & al'
vs
Lafleur. —

action for arrears of rente constituée. —

The Plaintiffs by their declaration stated — That by act passed before Panet, public notary bearing date the 15th March 1768, the plaintiffs sold to one Amable Meunier dit Lafleur a certain lot of land for the price and sum of 2500 livres, which sum of money, it was agreed that the said Amable Meunier should keep in his hands on Constitut at 5 per Cent, making 750 livres of an annual rent — the declaration then goes on to state — Que le dit defendeur etant devenu le proprietaire et detenteur de ladite terre, de laquelle il jouiroit depuis plusieurs années, seroit tenu de payer chaque année la rente Constituée en vertu de l'acte ci-dessus mentionné, et l'auroit en effet payé jusqu'en Fevrier

1810.

1810_ que depuis ce tems la le dit defendeur refuseroit de payer &c.a

The Defendant pleaded in abatement, that the plaintiffs did not shew in what manner the Defendant was liable or bound to pay the arrears in question, no act or agreement being stated or shewn whereby the defendant had become personally bound – nor were there any conclusions taken as in a hypothecary action, against the defendant as holding and possessing the land in question as bound, affected and mortgaged for the payment of the said rent, upon which the Defendt could have made his option, either to quit & abandon the land, or to pay the said rent. –

The Court were of opinion that the declaration was insufficient, as the Plaintiffs did not clearly set out any right or title under which the Defendant was bound either personally, or hypothecairement; to the payment of the arrears of the Constitut in question the action was therefore dismissed.

Dussault vs Lefevre. & Contra.

Action on deed of Sale. —

The defendant pleaded nil deb: and payment — and set up an Incidental demand founded on a clause in the deed, whereby the plaintiff sold to the defendant, with the lot of land in question — les droits d'isles et Communes qui pourroient appartenir à ladite terre, stating, that certain droits d'Isles, did formerly belong to the said land and were held as pertaining thereto, but which the Plff with held from the Defendant, to his damage &c — The Plaintiff answered that by the Sale of droits d'isles to the defendant, he did not warrant to the said defendant any other or greater right than he, the Plaintiff, himself might be entitled to in this respect — Contending that as the defendt. did not shew that the plff held and enjoyed such droit d'isles at the time of the Sale aforesaid, the Incidental demand aforesaid ought to be dismissed. —

By the evidence adduced in the Cause it appeared, that certain droits d'isle had formerly belonged to this land but had been sold and disposed of by the father of the plaintiff, long before the Plaintiff became the proprietor thereof. —

The Court held that the words in the deed of Sale, les droits d'Isles et Communes qui pourroient appartenir à la dite terre, could extend only to such rights as the Vendor held

held and possessed at the time of the Sale, and that the Vendor was held to no further guarantee than not to hinder or prevent the Vendee from using and enjoying the rights sold in such way as he lawfully might — That as it appeared in the present Case that there existed no droit d'isle in the pleff at the time of the Sale of the land in question to the Defendant, he could claim no other or greater right than was held by the said plaintiff — The Incidental demand was therefore dismissed. —

Dumas. —
vs
Burton. —
&
Junstall & ux
Opp^t.

On the Opposition afin de charge of Junstall and wife. —

The Opposition stated — That the late General Christie by his last will and testament made and published on the 13^th May 1789, did amongst other things give and bequeath in trust to William Christie Alexander Adair and Andrew Dickie, Esquires, the sum of five thousand pounds Sterling to be laid out on real Security, the interest thereof to be paid to Sarah, the wife of the testator during her life time — and after the death of the said Sarah, the interest of one half of the said sum of money to be paid to the wife of the Opposant, Sarah Junstall during her life time, and upon her

decease

decease of the said Sarah Tunstall the said half of the said sum of money to be divided equally among her children. That the said testator did further give and bequeath to the said Sarah Tunstall a sum of two thousand five hundred pounds like Sterling money to be paid to her on her coming of age, or on the day of her marriage. That the said testator did in and by his said last will and testament institute and appoint the Defendant as his residuary legatee charging him with the payment of the several legacies mentioned and contained in the said last will and testament as the same should become due under the aforesaid Substitutions and restrictions.- That the said Sarah, wife of the said testator, the said Alexander Adair and Andrew Dickie, the Executors named and appointed by the said last will and testament, refused to act as such, William Christie, the other executor having died during the life time of the said Testator - That by a deed of agreement made and executed before Papineau & his brother notaries at Montreal on the 8th. August 1800, the said Sarah Christie then widow of the said Testator, the said Defendt and the said Sarah Tunstall by and with the authority and consent of her husband, stipulated and agreed as follows namely - That the said Sarah Christie willing and intending in all things to conform and comply with the said last will

and

and testament of the deceased General Christie her husband renounced all her rights and pretentions to any other or further claims upon the estate and succession of her said husband save and except as to the legacy bequeathed to her by the said last will and testament, and thereupon yielded up, abandoned and made over to the said Defendant all the goods, chattels, effects, property and estate real and personal of the said late General Christie in her hands, — possession or power, to the said Defendant, and as to the said sum of £5000 Sterling whereof the interest was bequeathed to the said Sarah Christie during her life time it was agreed that the same should be secured upon the real estates left by the said General Christie now vested in the said Defendant, the interest whereof should be paid to the said Sarah Christie every Six months — during her life time and to commence on the 20 July 1800, and from and after her decease, one half of the said interest to be paid to the said Sarah Tunstall, as before mentioned — the said Sarah Tunstall further consenting and agreeing that the sum of £2500. bequeathed to her by the said testator, should be assigned and secured upon all the real estates lying within this Province and which belonged to the Succession of the said late

General

General Christie, the interest accruing thereon to be paid every Six months to the said Sarah Tunstall during her life time, and after her decease to be divided in equal Shares among her children.— That on 26 Oct. 1803 the said Sarah Christie died — That the real estate seized and taken in execution by the Sheriff under the writ of execution sued out by the plff in this Cause, belonged to the Succession of the said late General Christie and became vested in the said Defendant under and by virtue of the aforesaid last will and testament and thereby and by the agreement aforesaid, charged and bound to the payment of the aforesaid legacies to her the said Sarah Tunstall and her said Children, and by reason whereof the said Opposts. are founded in demanding, that the aforesaid real estate so seized and taken in execution as aforesaid, be declared bound, mortgaged and charged with the payment of the aforesaid legacies to the said Sarah Tunstall and her said children, and therefore that the said real estate be sold subject to the charge of paying by the purchaser the aforesaid legacies and interest thereon as above limited and directed in favor of the said Sarah Tunstall and her said Children. —

The Plaintiff demurred to the said Opposition, and for

grounds thereof stated.

1st That the allegations matters and things in the said Opposition contained, do not afford grounds for an opposition afin de charge.—

2. Because it was not alledged, shewn or made appear that William Christie, Alexander Adair and Andrew Dickie, the Trustees, or Fiduciary legatees in the S. opposition named, have not accepted the legacy and executed the trusts therein mentioned — and because the S. Opposants for and in respect of the fidei-commissary bequests to the said Sarah Tunstall, ought to exercise their recourse against the said fiduciary legatees. —

The parties having been heard by the Court, it was determined that the Opposition was insufficient, as an Oppn. afin de charge, inasmuch as the rights claimed by the Opposants were merely hypothecary, and not of a nature to constitute a charge upon the realty —

Repr. de Jurisp.ce V.o Opposition.
2 Pigeau. p. 731. —
A. Gr. Coutumier. p 1390. —
Dic. de Droit. V.o Opposition afin de charge
Denizart — V.o Opposition. Nos 15. 16. 28. 29. —

Wednesday 20th. October. 1813.

Vigé & ux. vs St. George.

On action for deliverance of a legacy - instituted by Jacques Vigé and Marie Marguerite St Luc de la Corne his wife, as tutrix duly named and appointed to Marie-anne, Marguerite-Elizabeth and Charlotte Lennox issue of her marriage with the late John Lennox her former husband, against the Defendant as executor of the last will and testament of Dame Marie Anne St Luc de la Corne, widow Campbell - The declaration stated, that on the 29th. July 1807, the late Mrs Campbell made her last will and testament by which amongst other things she bequeathed and devised the usufructuary enjoyment of all her effects and estate to Elizabeth St Luc de la Corne wife of Mr De Lanaudiere and to the said Marie Marguerite St Luc de la Corne, the plaintiff, during their lives, and from and after their decease, one half of the said effects and estate was bequeathed and devised to Marie Anne Tardieu de Lanaudiere, and the other half to the said Marie-anne, Marguerite-Elizabeth and Charlotte Lennox. That the said defendant as executor as aforesaid with-held and detained from the said plaintiffs the part and share of the moveable property so bequeathed to the said Marie Anne, Marguerite-Elizabeth, and Charlotte Lennox, which, as their tutrix, the said Marie Marguerite St Luc de la Corne has

has a right to demand and obtain. —

The Defendant pleaded, 1st. – That the said Marie Marguerite St Luc de la Corne by her marriage with the Plaintiff, Jacques Vigé, had lost the right of tutelle to the children of the late John Lennox her former husband and was not entitled to hold or maintain any action in their name or behalf – 2d. That the plaintiffs have no right of action in the name and behalf of the said minors, inasmuchas the usufruit of the moveables in question was by the said last will and testament given to the said Marie Marguerite St Luc de la Corne during her life time, and after her decease, the said moveables were bequeathed to the said minors to be equally divided amongst them, but inasmuchas the said usufruit of the said Marie Marguerite St Luc de la Corne had not yet been expended, nor the right thereto waived by the said Plaintiffs, the right of the said minors was not yet open, and an action for the same was premature and could not be maintained by the Plaintiffs. – 3d. That the Defendant had been always ready to deliver up to the said plaintiffs their usufruit in the said moveables upon their giving security to restore the same at the expiration thereof for the benefit of the said minors. –

The Plaintiffs replied that they were entitled to their action in the name and behalf aforesaid in manner & form &c. And further that they ought not to be held to give any

Security

security to entitle them to obtain the possession of the said moveables,— that the defendant as executor as aforesaid had no right or interest to demand such Security — That the said Marie Marguerite St Luc de la Corne as tutrix to her said Children and heir at law to the said late Mrs Campbell was not bound to give such security.—

On the hearing of the Cause Mr Bedard for the Defendant urged — That the said Marie Marguerite St Luc de la Corne by intermarrying with the plaintiff Vigé, had lost her tutelle ~~to~~ the minor children of the late Mr Lennox her former husband, and therefore could maintain no action in their name or behalf — cites.

Ferr. Gr. Comr. art. 268. glose unique. Nº 4
——————— art. 269. glose 1. §. 2. 34
Lacombe. Vº Tuteur, Curatr. sec. 10. Nº 13.—
1, Bourjon. tit. 4. ch. 2. dis. 3. p. 48. — p. 29. & auth. there referred to
Meslé, traité de Tutelle. p. 287.—
Dic. de Jurisp. Vº Tutelle. p. 311. Col. 1. — & p. 322. Col. 2.
? Pigeau. p. 27.—

That the minors Lennox, in the present case were entitled to the property only after the usufruit of their mother was expended — the delivrance therefore of the moveables in question ought to have been asked for by their mother in her own name and behalf, and not on behalf of the minors who have no claim until the decease of their mother or until she renounce her right in their favor, which she

has

has not done, and therefore the action is premature.

Vigé for Plffs. The second husband by his marriage with a widow having the tutelle of minor children, becomes protuteur to those children and liable to them as such, and is therefore entitled to all the benefits as well as bound to all the burdens of a tutor. 1 Bourj.ne p. 42. Denizt. Vo. Tuteur. No. 56. 57.

That the Defendant is a Stranger who has no interest in demanding security from the Plaintiffs as he can be legally discharged without it. That the Plaintiff St Luc is the heritier presomptif of the testatrix and tutrix to her children, and therefore ought not to be bound to give security as if she were a Stranger.

L. M. Vigé, on the same side, stated, That the widow did not lose her right to the tutelle of her children by a former husband in consequence of her second marriage only where she had neglected to apply for her being appointed tutrix until after her second marriage, and this is the reason why a second husband is called a protuteur.

Bedard in reply. The qualité of protuteur is founded only in the Roman law but not in the law of the Customs where the tutelle is dative. That the plaintiff holding two different capacities, incompatible in law

of

of heir and legatee, was therefore interested to obtain possession of the legacy without giving security — cites

2. Bourjon. p. 33. Nº 1. 2. 3.
Domat. liv. 1. sec. 4. Nº 2. p. 132
——— liv. 4. tit. 2. sec. 5. Nº 1. p. 518.
Lacombe. Vº Usufruit. sec. 2. Nº 1. 3.
Papon. liv. 14. tit. 2. art. 11. 12
——— liv. 15. tit. 6. arret. 1er

The Court held, that as the tutelle was dative, and the Plaintiff Marie Marguerite St Luc de la Corne had been named and appointed tutrix to her minor children by her former husband, she could not be considered as having lost that tutelle, or being absolutely deprived thereof by her second marriage, until her former appointment should have been set aside and annulled, untill which time she was entitled to all legal demands on the behalf of those minors — But that in the present case the action was premature as the right of the minors was not open at the time the same was instituted —

Bertrand
Tutor &c. —
vs
Voyer —

Action of damages for seduction of Pltff. daughter
The declaration concluded for two objects. 1st. Five
hundred pounds for the damages sustained &c —
and 2d. £24 — as an annual allowance to be paid for the
support and maintainance of the child until it should
be able to gain its livlihood. —

On plea of "not guilty", a trial was had by a
Jury, whose verdict was — that they found the Defendt
the father of the child, of which the said M. Arcange
Bertrand was delivered, and that the said Defendant
must support and maintain the said child from this
day at the rate to be decided by the Court, and further
they found a verdict for the plaintiff for £30. damages

The defendant moved in arrest of Judgment — that
the verdict was irregular and illegal, inasmuch as the
Jury had thereby determined upon matters over which
they had no jurisdiction — and because the said
verdict was not final and Conclusive — and lastly,
because the Court had no power to award Judgment upon
and according to the said verdict. —

It was argued by Mr Stuart for the Defendant,
that there were two objects of demand — one for damages
said to have been sustained by the Plaintiff, the other,
for filiation and maintainance of the child — the Jury

read

had power to decide only on the first - the other can be determined only by the Court - yet the Jury have decided on both objects, and therefore their verdict is wrong. - The demand for the maintainance of the child is a separate right from that for damages to the mother - the maintenance of the Child must be the subject of another action and instituted by a tutor specially appointed to the Child for this purpose - That the Court has no evidence before it whereupon it can establish any allowance for the maintain.ce of the Child - recourse cannot be had to the testimony given before the Jury to establish this point, as it was given upon another issue, and has no existence before the Court whereon to rest a Judgment upon the facts not found by the Jury). -

The Court considered the verdict as correctly given upon all the points in contest, namely the finding the Defendant to be the father of the Child, and awarding to the Plaintiff her damages thereon - as to the future maintainance of the Child, it was a point to be settled by the Court, but as no evidence had been adduced on this point, there could be no judgment given, but it was reserved to the parties to proceed as they should be advised thereon. -

The

The plaintiff afterwards proceeded by examining witnesses to shew the quantum of allowance necessary for the maintainance of the child, and thereupon moved for a Judgment — The Defendant contended that there could be no further proceedings had or evidence adduced in the Cause subsequent to the Verdict, it was making two trials in the Cause — and further that the plaintiff was not the proper person to discuss this question — it was the interest of the Child which was now to be adjudged upon, and the Pliff had no legal capacity to bring that before the Court — That a new action ought to have been brought by a tutor ad hoc named to the child to ascertain the quantum of alimentary allowance to be settled on it —

The Court considered, that this was one of those Cases where two different trials could be had, one by a Jury and the other by the Court, where the whole could not come under the power of one of those modes of trial — That a new action in this case, for the purpose of settling the maintainance of the child was not necessary,

as

as the plaintiff had an interest in this maintainance during the time she had supported the Child, and so long as she should continue to support it, as the Court considered the mother to be the fittest person to have the charge of the child until the father should take that charge on himself and find other means of providing for it — Judgment was therefore given for an alimentary allowance to be paid to the pltff so long as the Child should remain under her charge

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Racey vs Battersby } Action on bail bond —

On the 13th February last Mr Ross appeared for the Defendant and moved that he might be permitted to surrender William Griffin the principal debtor, in discharge of his, the defendants bail — and as the said Griffin was then confined in gaol, he moved for a rule on the Sheriff to bring up his body for the purpose of the said surrender —

On

On the 15th Febr. the parties were heard upon the motion, when it was objected by the plaintiff, that the surrender of the principal could not legally be made after the day of the return of the process sued out agt. him, as the condition of the bail bond was to represent the body of the debtor on that day or to pay the debt - That by the non-appearance of the defendant at the return of the writ, the bail bond became forfeited, and the Plaintiff entitled to recover the penalty - and when such forfeiture was incurred no rule of practice of the Court could divest the party of his right thereon - That a bail bond must be governed according to the principles of all other bonds or Obligations under the law of the land - That the Rule of Practice. Sec. 8. art. 5. cannot alter the general law of the land by discharging the bail bond after it has become forfeited. - On the 16th of February, the Court held, that the taking of bail on mesne process must be regulated according to the forms of proceeding in England, and the practice in this Court had been made conformable thereto in all essential points so as to give effect the intent and meaning of the Ordinance of 1785 - According to the rule in England the bail could at any time surrender the debtor even after the money levied by execution upon a judgment against the bail -

The

The Court held the rule of practice respecting the Surrender of a debtor by his bail to be essential and necessary for the regular administration of Justice, and such as the Court was competent to make — They therefore made the rule for the Surrender absolute. —

On the 18th. February the Sheriff brought the body of the said Griffin into Court, whereupon the Counsel for the Defendant moved to surrender him in discharge of his bail bond — which was granted —

On the 1st. March the Defendant pleaded in bar to the action the Surrender of the principal debtor — to which plea the plaintiff demurred. —

On the 5th. June 1813, the parties were heard on the above demurrer, when the Counsel for the plaintiff again contended that the rule of practice permitting the Surrender of a debtor was illegal and ought so to be declared by the Court — That the Surrender of Griffin ~~in this Case~~ was irregularly made in this Cause, — it ought to have been made in the Cause wherein the said Griffin was the Defendant, as in that Case the Plaintiff could proceed to his execution against him, but in this Cause he could obtain no such process and the ~~Said~~ Griffin might thereby

thereby claim his discharge from his confinement in gaol – and further, that it was agreeable to the condition of the bail bond, that the Defendant should surrender the body of the said Griffin in the Suit in which he had been attached, and not in any other Cause –

Ross for Defend.t argued, that the Defendant was no party to the Suit instituted against the said Griffin, and was not bound to take notice thereof that when called upon to pay the debt of Griffin for not having surrendered him at the return of the process against him, he brings the said Griffin into Court and surrenders him to the plaintiff to take such proceedings against him as he shall see fit, – which by the practice of the Court he is entitled to do.

On the 16.th June the Court, adhering to the principles already laid down in regard of the rule of practice touching the Surrender of Debtors by their bail, and noticing the improper pertinacity of the Plaintiff's counsel in again bringing into contest a point decided in the Cause, held the demurrer

pleaded

pleaded by the Plaintiff to be insufficient in law, and therefore dismissed the same —

I was of opinion that the Surrender was irregular and ought to have been made in the Cause instituted by the Plaintiff against the principal debtor — and a certificate of this fact only, produced and filed in this Cause, so as to stop proceedings —

Afterwards on the 20th October 1813, the Plaintiffs action was dismissed, on the Defendant's paying costs to the plaintiff up to the 18th February last, the date of the Surrender of Giffin —