February Term 1814

Wednesday 2d February 1814

Harris vs Clarke

This cause had been fixed for the examinn of witnesses in the last Vacation, when no Witnesses were produced by the Pltff who alledged that he had done all necessary diligence in this behalf.— The plaintiff now moved that another day should be given him to examine his witnesses in consequence of the diligence he had done to procure them upon the former day of enquête, and in support thereof produced a Subpona, which appeared to have been sued out on the 31st Dec. last for the appearance of the witnesses on the 11th January— but service thereof did not appear to have been made before the 10th January at

at the domicil of the witnesses distant about Sixty miles from montreal — The Defendant objected to the motion — And the Court held that as no satisfactory reason had been given nor affidavit produced in support thereof, why the subpoenas issued on the 31st. Dec. had not been served before the 10th. January, that sufficient diligence had not been done by the plaintiff to procure his witnesses, and therefore rejected the motion. — See Reg. Prac. sec. 27. §. 9.—

Thursday 3d. February 1814

Larocque vs. Gilbert. } The Defendant moved that the Pltff should be held to give security for costs he not being a resident within this Province. — In support of this motion the Defendt produced an affidavit, stating, that he was informed by public report, that at the time, and since the suing out of the process in this Cause, the plaintiff was held and detained, and is now still held and detained, as a prisoner of war in the United States of America

Rolland for Pltff, contends, that the affidavit is insufficient to countervail the allegation stated in the declaration, that the plaintiff now lives and resides in Montreal and there carries on trade as a merchant — That admitting even the fact to be true as stated in the affidavit, still the pltff would not be bound to give security for costs, such change of residence not being voluntary, nor operating a change of domicile, which alone can make a party liable to give such Security. cites Denizt. vo Domicile. —

The Court held that the momentary absence from the Province of any of His Majesty's Subjects domiciliated therein, did not render them liable to give security for Costs, as persons "not resident "within the Province" - and rejected the motion

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Friday. 4th February 1814.-

Boisvin v Robillard } On action for payment of arrears of Rente & pension viagere.-

Bourret for the Defendant moved to call in his Garant, one Franc. Boisvin, who he pretended was alone bound to pay the whole of the arrears in question.-

Rolland for the plaintiff, stated, that the Defendant and Garant were jointly and severally bound and liable to the payment of the rente & pension in question, but as the half of the Rente only for the payment of which the Defendant is personally bound was demanded, there could be no room to call in the Co-obligé as his garant.-

The

The Court however granted the motion, being of opinion that a co-obligé is entitled to his action en Garantie against his co-obligé – see N. Denizt. Vo Garantie §. 2. p. 152. – That the pretence here for calling in the Garant might be ill founded, yet it was better to give the parties an opportunity to liquidate their respective rights under the present action, than drive them to a further recourse by another suit – Id. Vo Garantie. (procedure relative à la) p. 163.

Tuesday 8th Febr. 1814.—

Sutherland
vs
Beach

This cause was returnable the 6th day of last Term, whereby the Defendant became entitled to 15 days to plead, which gave him to the 21st to file his plea.— The Defendant did not file his plea until the 23d. October last, and the Plaintiff now moved that the said plea should be rejected and taken from the files in the Cause as being too late.—

Boston for the Defendant contended, that by the late rule of practice he was entitled to 15 days to plead as the suit was not returnable the first day, that those fifteen days carried him into the vacation, and by the 19th Sec. of the said Rules an extension of time is given of 20 days in the vacation between October and February Terms, so that he was entitled at least till the 26th to file his said plea, whereas it was filed on the 23d. and therefore within the time allowed.—

But the Court held that the defendant could not take the benefit of both rules for obtaining an extension of time to plead.— that the 15 days rule was

made

made for particular Causes, and the benefit granted thereby could not be extended by the rule made for the general conduct & management of Causes —

Motion granted. —

Monday 14th Febry 1814

M.c Martin. vs Brown & al.

On the defendant's motion for a — Commission Rogatoire for the examination of witnesses in Upper Canada, and also for the examination of the Plaintiff upon faits & articles. —

O Sullivan for the plaintiff, objected that such Com. Rog. could not be granted without an affidavit stating the grounds upon which the application was made, otherwise it might be demanded in every Cause without any grounds —

Boston for the Defendts contended that the — obtaining a Commission Rogatoire was of right, and he was not bound to produce any affidavit in support

of

of his motion, — that in the present instance such affidavit could not be obtained as his — clients were now in Upper Canada — but that he acted agreeable to his instructions in this behalf.

The Court held that in every instance where a Cause was to be suspended or delayed by proceedgs to be had out of the jurisdiction of the Court, it was necessary that an affidavit containing sufficient grounds should be produced to warrant the application for such proceedings — it was the Constant practice, and could not be departed from in this Case — Motion dismissed. —

Foretier. vr St Aubin. }

On the 3. instant the defendant moved for delay until the 11th to call in his garant which was granted — The defendant however used no diligence in this behalf, whereupon the plaintiff moved on the 12th that the Cause should be set down for hearing ex parte, the defendant not having filed a plea. —

Georgeon for the Defendant contended that the time

time for pleading did not expire until three days after the day for calling in his garant had lapsed.

But the Court were of opinion, that if the defendant did not intend to call to his garant, or use diligence to this effect, he ought to have pleaded to the action in the usual course, a contrary practice would be injurious to parties prosecuting suits, as under pretence of calling in a garant an unwarrantable delay might be obtained in every cause — Motion granted. —

Allard. —
vs.
Brousseau
and
Dauphin & al.
Opp.ts

Mr Rolland of counsel for the Oppost Allard, moved that he might be permitted to make an inscription en faux against an act produced by the other opposant Dauphin in support of his Oppn

Boston for Dauphin, contends that according to the 11th Sec. of the rules of practice he was too late, having pleaded to the opposition and claim of the said Dauphin —

Mr Rolland then moved that he might be

permitted

permitted to withdraw the plea filed by him and make an inscription en faux agt. the said act — In support of this motion he produced an affidavit stating, that he had been under the necessity of making repeated applications at the ~~the~~ prothonotary's Office before he could find the papers, and when he at last did find them the delay for pleading was almost expired so that he had not sufficient time allowed him to make any inscription en faux before filing his plea.

The Court however held, that if the papers could not be had at the Office upon the first enquiry, it was a good ground to demand of this Court a delay to plead until that communication of the exhibits could be had which was allowed by the practice, but the Opposant in this case having pleaded to the demand under a view and inspection of the exhibit in question, it was not a sufficient ground, because he had made an ill-advised or hasty plea, that he should be permitted to withdraw it, in order to be admitted to take another course, that by inscription en faux

which

which was not entitled to any favor — They therefore dismissed both motions. —

Tuesday 15th Febry 1814

M.Pherson
v
Murray

On the defendants motion to reject the plea to the Incidental demand and Replicn to the demand in chief as having been filed too late, the same having been filed on the 12th instead of the 10th when they were due. —

Ross for the plaintiff answered, that at the time the Plea and replication became due the Cause was under the consideration of the Court touching the regularity of the issue taken to the Court by the Defendants plea to the demand in chief, which was not determined until the 10th, till when the Plaintiff could not regularly join any issue with the Defendant, that the Replication & plea to the Incidental demand was filed within 24 hours after that determination

The Court held that the proceedings in a Cause were necessarily suspended during the time the same was under Consideration on any point regarding the regularity of pleading or joining issue, and therefore in this Case the Plaintiff was not bound to fyle his Replication and plea until the Court had determined

on

on the regularity of the issue tendered by the plea to the demand in chief — that they considered the Replication and plea aforesd to have been filed in due time, and therefore rejected the motion. —

M.c Lean vs. Pomeroy and Contra

The plaintiff moved that the Incidental demand set up by the Defendant should be dismissed for want of proceedings therein had for two Terms. —

Ogden for the Defendant admits that no proceedings have been had in the Cause, but contends that the rule of practice in this behalf does not extend to Incidental demands. — Moves also that the demand in chief be dismissed for the same want of proceedings therein. —

The Court granted both motions, it appearing that no proceedings had been had in either of the demands as required by the rules of practice, —

Murray
vs
Kuper.

On rule Nisi obtained by the Defendt, that the plaintiff's action be dismissed for want of a power of Attorney to institute and carry on the same.-

Grant for the plaintiff, offers now to file the power of Attorney, and states, that by reason of the absence of Mr Stuart the plaintiffs Attorney, he had not been enabled sooner to produce the same- states further, that it can be made to appear that the plaintiff was personally present in Court at the return of the writ, and therefore a power of Attorney was then unnecessary to be produced or filed —

Gale for Defendt. refers to Reg: Prac sec. 13. §. 2 according to which the plaintiff's action is liable to be dismissed for want of such a power of Atty as now demanded —

The Court held, that the neglect of filing the power of Attorney did not subject the plaintiff's action to be dismissed on motion, more than in any other Case in which a plaintiff might have omitted to file in due course any essential

paper

paper or exhibit for the support of his Cause – such an omission could regularly be taken advantage of on the hearing of the Cause, only, as for a defect of evidence the rule of practice referred to, meant no more – The Defendants motion was therefore considered as premature and the rule discharged with Costs. –

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Sutherland
v.
Campbell } Execution dismissed –

Wednesday. 16th Febr. 1814

Larocque
vs
Gilbert. —

On the defendants motion to examine as well the plaintiff, as Mrs Munro who had acted as his Agent, upon faits & articles.

Boston for Defdt. in support of the motion states that as the plaintiff is absent from the Province he has no other means left to prove certain facts essential to his defence, but by examining Mrs Munro, the person acting for the pltff. during his absence, on faits & articles — and that this is the only course to be taken, as Mrs Munro being the mother of the plaintiff cannot be admitted as a witness in the Cause. —

Rolland for Pltff. — The Plaintiff by reason of his absence cannot be examined on faits & articles, neither can his agent, as her answers cannot bind the Pltff nor be taken against him — cites. Jousse on Code Civile Denizt. Vo Faits & articles — & 1 Pigeau. 234. —

The Court over-rules the motion on the authorities cited by the plaintiff. —

Thursday 17th Febv. 1814.

Priest. v. Brydee } On plaintiff's motion for the publication of the Com. Rogatoire & examinations taken thereon. —

Boston for the Defendt. The Com. Rog. has been irregularly sued out by the plaintiff, inasmuchas the Interrogatories annexed thereto have not been seen and approved by the Judges as required by the Rules of practice —

Rolland for the plaintiff — The objection comes too late, the Interrogatories, although not approved or admitted by the Judges, have been admitted by the Defendant, by his joining in the said Com. Rog. and furnishing cross-interrogatories. —

The Court held, that the Com. Rogatoire, had been irregularly sued out inasmuchas the Interrogats had not been allowed by the Court or the Judges as required by the rules of practice, a defect which could not be cured by the Defendant having joined in the Sd. Commission — they therefore rejected the motion but without Costs to the Defendant. —

Dominus Rex.
v.
Jean Bte. Paradis

On writ of Habeas Corpus sued out by one Jean Bte. Sorel, dit, Laporte agt. the Defendant to produce the body of Magdeleine Sorel his daughter and a child of seven years of age, wrongfully detained by the said Defendant—

The Defendant stated by his return to the writ, that he had the body of the said Magdeleine Sorel in Court ready to submit to the Judgment thereof— That the said Magdeleine Sorel had been committed to the charge and custody of the said Defendant by the said Jean Baptiste her father, to be by him the said Defendant supported and maintained, and to remain and live with the said Defendant as his servant until she the said Magdeleine should attain the age of eighteen years— and that the said Magdeleine had already lived with the said Defendant for and during the last twenty months under the aforesaid agreement— That he the said Defendant had refused to deliver back the said Magdeleine to the said Jean Baptiste, as the aforesaid time during which she was to remain in the service and under the care and charge of him the said Defendant had

not

not yet elapsed — of all which facts he offered to make proof by verbal testimony — this was objected to by the Counsel on the other side, and over-ruled by the Court, who held that the right and power of the parent over his child could not be set aside by such testimony, and directed the Defendant to deliver up the child to her father, which was done in Court. —

Friday 18th. February 1814.—

Allard. —
vs
Brousseau. —
and
Pre. Geo: Dauphin
& al'. — Oppts.

On the Opposition of Pierre Geo: Dauphin, à fin de conserver

The Opposant stated, that by a certain act, or Contrat de Constitution bearing date the 22. October 1808, the Defendt Brousseau, in consideration of a certain sum of money paid to him by the Opposant, in the name and on the behalf of his brother Franc. Dauphin, did constitute and create a certain life-rent of twenty bushels of wheat to be paid and delivered to the said Franc. Dauphin yearly and every year during the life time of the said Franc. Dauphin, and for the due payment of which the land, whereof the proceeds have been returned into Court for distribution was mortgaged, and the other Opposant Allard also became bound as security in this behalf to the said Opposant — That in the month of

January

January last there was due and in arrear of the said Annuity, a quantity of ninety bushels of wheat, of the value of £56. 5. which the Sr Opposant claims a right to be paid out of the proceeds of the said land and in preference to the said Allard, also a Claimant

The said Allard, pleaded to the said Opposition That the same was ill founded, inasmuchas there existed no acte or Contrat de Constitution to which the said Opposant was a party — That the acte in question, if the same could be considered as legally made, was made in favor of François Dauphin, and not in favor of the Opposant, who is therein named only as the Agent and Attorney of the said François and cannot therefore claim by virtue thereof in his own name —

The Court were of opinion that the opposition could not be supported — that no right accrued to the Opposant under the Contrat de Constitution produced by him — and if he had any interest therein in consequence of having advanced the money therein mentioned, on behalf of his brother, his right must be brought forward in a different form — Oppn dismissed with Costs. —

Castonguè.. — }
vs
Deschambault }

On action of assumpsit. —

This action was prosecuted against the Defendant as residuary legatee of the late Madame Dufy for a sum of £19. 3. for sundry articles furnished & provided to her by the Plaintiff, founded upon a promise of the Defendant to pay the same — The Defendant pleaded, non assumpsit — and further that he had never accepted the legacy made to him by the late Madame Dufy, but on the contrary had renounced thereto by act executed before notaries the 10th. April 1812. —

The Plaintiff replied, that notwithstanding his said renunciation the Defendant had intermeddled in the affairs of the succession of the said Madame Dufy so as to make him liable for the demand aforesaid

The Defendant answered, that he never intermeddled in the affairs of the said Succession as Legatee, — that having been named Executor to the last will & Testament of the said Madame Dufy, he had in that capacity managed the business of the said Succession and rendered an account thereof —

In

In support of this action, the following note was produced written by the defendant to Mr Bender the plaintiff's attorney - .

"Montreal ce 25 Mars 1813-"

"I. Bender, avocat,

"Mons^r

"Je vous remercie mille "fois de la politesse et attention que vous avez eu pour "moi, mais ne pouvant par decence faire vendre la "maison ou Mesdames Taschereau & Desauniers sont "logées presentement, je ne puis finir les affaires de "M^r. Dufy, mais si vous croyez que je suis dans "l'obligation de payer Mr Castongnay, mandez moi "la somme, et sitot que Mr Mondelet aura fini - "l'encan du pere de M^r Deschambault, je vous l'enverrai "J'ai l'honneur d'etre, Mons^r."

"Votre Obeiss^t. Servt

"J. Deschambault"

But no proof whatever was made that the said Defendant had in anywise intermedled in the affairs of the Succession of the late Mrs Dufy, except in his Capacity of Executor of her last will and Testament -

The Plaintiff contended that the above note was

a

a sufficient proof of a personal undertaking on the part of the Defendant and rested the Case thereon —

The Court considered that the note in question did not raise an obligation on the part of the Defdt to pay the plaintiff's debt — every promise presumes a consideration, without which, either express or — implied, it is nugatory — Now the consideration upon which the promise laid in the declaration is founded, is the Defendants enjoyment of the property of the Testatrix as legatee, but this has not been made out in proof — It appears on the Contrary that the Defendant was Executor of the last will and Testament of the late Madame Dufy, and as such had the management of her estate, having renounced to his right of residuary Legatee, his undertaking therefore must be presumed to have been made in the Capacity in which he acted, and not in a capacity to which he had renounced — Had the Defendant been sued as Executor this acknowledgt would have gone far to establish the plaintiff's claim against him — But this promise or

undertaking

undertaking of the Defendant, appears in any case insufficient to create obligation — It was at best but asking a friendly opinion from the Plaintiff's counsel "If you think I am bound, send for the money &c" now it does not appear that any step was taken by the Plaintiff upon this proposal of the Defendant, or any thing done in consequence to stamp responsibility upon him in any shape — Action dismissed. —

Parisaux
v.
Caron dal' } Action on Recognizance in Appeal. —

The defendants pleaded that the action was premature, that the plaintiffs had not discussed the property of Ignace Robitaille the Original debtor — Further, that the said plaintiffs had under a writ of execution sued out by them levied of the property of the said Ignace Robitaille more than sufficient to satisfy their demand, and which now remains in the hands of the Sheriff subject to the order of this Court — That the Plaintiff ought first to have discussed the property of the said Ignace Robitaille before instituting any action

agt.

against the Defendants as his cautions, — so determined in the case of Vve Baillé. v. Brunelle. 4 Oct. 1810. —

Boston for the plaintiffs — The plaintiffs were not bound to make any discussion of the property of Robitaille, but in order to exonerate the Defendants as far as conveniently could be done the Plaintiffs proceeded by execution against his property, but finding by the Oppositions made to the payment of the monies levied that there would not remain — sufficient to satisfy their debt, they instituted the present action — since which time a Judgment of distribution of the aforesaid monies levied has been filed, by which it appears that there still — remains a balance due to the plaintiffs of £36. 4 — for which he prays Judgment —

The Court held that the action was regularly brought, and that discussion in this case was not necessary, the defendants being bound by a Caution Judiciaire — had the allegation stated in the plea been founded, that the plaintiffs had under their execution levied sufficient of the property of the Original debtor to pay their demand, the action in that Case must have been dismissed, but this not being the Case, the Pltffs are entitled to Judgt. for the balance still due to them. —

Potts. Ob. No 508.

Beaugrand Cur.r
vr
Franc.s Boivin, and
Therese Robillard, widow
of Joseph Boivin —

This was an action instituted by the plaintiff in his capacity of Curator to one Antoine Beaugrand dit Champagne, interdicted pour cause de demence to obtain from the defendants the possession of a certain lot of land belonging to the said Beaugrand, which the said defendants had held and possessed since the autumn of the year 1864 —

The Defendant Robillard pleaded for exception. —

1st That the plaintiff as Curator cannot institute any real action, which may tend to destroy the rights of the interdicted person in his real estate, without being thereunto specially authorised — cite. Repre de Jurisp.ce vo Curateur. p. 174-6. —

2o. That the petition stating the necessity of the interdiction of the said Beaugrand, claimed only that a Curator should be appointed to provide for his support and maintainance, without stating any ground or necessity to prosecute the present action; the authority given to the plaintiff by the acte of Interdiction cannot be construed to extend beyond

the

the purposes for which it was demanded –

3. That the Interdiction is nulle de plein droit as no sufficient information was taken of the state of mind of the person interdicted, he not having been present nor interrogated by the Judge as required by law – cites- Lacombe. Vo Interdit – Denizart. Vo Interdiction – No 12 & 13. – Dic. de Droit, Vo Interdit – Meslé. Traité de Min. Ch. 13. p. 447. –

4d. That the said Defendant has been sued in her own private name, whereas she does not hold and possess the land in question for herself, but in the name and on the behalf of her minor children by the said late Joseph Boivin, who acquired the said land from the said Antoine Beaugrand by deed of Donation duly executed on the 3. Nov– 1804, jointly with Franc. Boivin the other defendant – therefore the action agt– her is irregular. –

The Plaintiff replied

1st. The authority of a Curator to an interdicted person is equal to that of a Tutor – Repre Vo Interdiction §. 4. p. 443. – Loix Civ. Domat. Liv. 2. tit. 2. sec. 2. – Nouv. Denizart. Vo Curatelle. §. 7. –

and

And when the Interdiction is full, the power of the Curator extends as well to the estate as to the person of the interdicted person — 1 Pigeau. p. 71. — Tr. de Minorité. ch. 13. p. 357. —

2d The grounds set forth in the petition, shewed the necessity for the appointment of a Curator to the said Beaugrand, and if it was found necessary to interdict the said Beaugrand without limitation or restriction on the Curator appointed to him, it necessarily followed that such Curator was vested with all the authority given by law in such cases. —

3d That the Interdiction of the said Beaugrand is good and sufficient, although he was not seen nor examined by the Judge prior to such Interdiction all other necessary formalities having been complied with cites. Rep. de Jur. Vo Interdiction. p. 438. §. 1 — p. 439. 440. 449. Voir: Denizart, Vo Curatelle. §. 5. No 2 —

That the Defendant cannot by her plea to the present action take advantage of any irregularity in the appointment of the Curator — the revision of that appointment must be brought before the Court upon the principle of an appeal from the decision of the Judge who made the appointment. — see autht. last cited. —

4th That the defendant possessing without sufficient

title

title is presumed to possess in her own name — nor is the plaintiff obliged to know or take notice of the persons for whom the said defendant pretends to possess.— That the deed of Donation invoqued by the Defendant is null and void in law, having been made by the said Beaugrand during that state of mental imbecillity which rendered him incapable of making such an act.— That no action en — rescision was necessary to have been brought to annul this act, as its nullity can be pleaded at any time against the person using it — cites 1 Bourjon. p. 82. art. 9. Nos — Riccard des Donations 1re part. ch. 3. sec. 8. p. 34. & p. 147. — Poth. Obl. Nº 49. 51. Des nullités absolues - Vid. Repre. Vo Nullité. §. 4. §. 7.—

It appeared to the Court, that the petition for the interdiction of the said Antoine Beaugrand had been presented by the Defendant François Boivin his nephew, stating, that the said Beaugrand had been for many years in a state of imbecillity and unable to manage his affairs or gain his livlihood — that the said Beaugrand had made a donation of his property to the said François Boivin and Joseph Boivin now —

deceased

deceased — That Therese Robillard widow of the said Joseph Boivin, refusing to furnish any thing for the maintenance of the said Beaugrand, it had become necessary that a Curator should be named and appointed to him, "pour faire valoir ses droits "et lui procurer les choses necessaires à la vie." Wherupon the avis de parens being taken, they declared that they knew the said Beaugrand to be in a state of imbecillity as stated, and that it was necessary that a Curator should be appointed to him — The said Beaugrand was thereupon interdicted and the Plaintiff was named as his Curator, with the usual powers and authority — That the Interdiction had been ordered without the presence or interrogation of the S. Beaugrand; but it appeared that the act had been made out and signed in haste and under circumstances not to be drawn into precedent. — And the Court held, that the general practice was, and ought to be, that the person interdicted for cause of mental derangement ought to be present and be interrogated by the Judge that he may be satisfied from the words and actions of the person, of the necessity of such interdiction, as otherwise the rights and liberties of His Majesty's Subjects might be abused in the grossest manner —

upon

Upon the points now before the Court, it was held,

Mesle. p. 11.
1. Depasses. p. 576. N°. 14.
= Denizt. V°. Tuteur N°. 95.
= Rep^re. V°. Tuteur. p. 343.
= 2. Prevot de la Jannes.
= p. 344.. §. 608.

1. That Tutors or Curators may institute real actions in regard of the property of their minors, or persons to whom they have been appointed Curators — without any special authority in this behalf — But such actions only ought to be maintained as are equitable and just. Otherwise the Tutor or Curator will be personally liable for the costs and expences accruing thereby — and perhaps to damages besides, if by their improvident Conduct injury has arisen to the persons committed to their charge. It is therefore most adviseable in all Cases for Tutors or Curators before undertaking such lawsuits which may affect the real estates of Minors or Interdicted persons, to obtain sufficient authority in this behalf under an assemblée de parens of such Minors or persons interdicted — That under the Interdiction of Beaugrand in this Case, the plaintiff as his Curator was legally warranted to bring the present action — That the interdiction of the said Beaugrand is not null and void in law, although made without interrogating him, nor can the defendant take advantage of any irregularity in that interdiction in a plea to this action, for the plaintiff being

Lacombe. V°. Tuteur N°. 14

Dic. de Brillon. V°. Tuteur N°. 77. —

Mesle. Minorités p. 140. N°. 16..

Rep^re de Jurisp^ce V°. Interdiction p. 438. 439. 440. & 449.

vested

vested with the authority of Curator, he is entitled to do every act which by law appertains to his office until he shall be divested thereof, to effect which, regular proceedings must be taken by complaint against his appointment — The plaintiff contends that he is not bound to have instituted his action en rescision against the deed of donation produced by the defendant, but that he can at any time oppose its nullity to the person producing it — So far the Plaintiff is right; but for what purpose is that deed produced in this case by the Defendant? not as claiming title under it, but to shew that her minor children are alone interested therein — The nullity of the act cannot therefore be enquired into until the parties interested therein be brought before the Court — The Plaintiff cannot excuse himself in this instance by pretending ignorance of the rights of those minors, as it appears by the petition under which he was appointed Curator to the said Beaugrand filed by him in this Cause, that the heirs of the late ~~Francis~~ Jos: Boivin were the only persons interested in the land in question, and not the Defendant — It was therefore the duty of the plaintiff to have made those minor children parties to this Suit, as the Cause now stands, they cannot be defended, nor their rights adjudged upon. —

Action dismissed as to Therese Robillard

Nouv: Denizt. Vo Curatelle. §. 5. No 2.

1 Mosl. p. 115 — Ferr. Jr. Jurisp. p. 125.

Saturday 19th February 1814

Pothier v Decoteau & ab.

Action for arrears of Rente Constituée.

By deed of Sale bearing date the 16th May 1810, the plaintiff sold to the Defendants a certain lot of ground, which the Defendts by the said deed acknowledged to have possessed for 29 years prior thereto without any title, for the sum of 113£. 10s. which was converted into a Rente Constituée of 5£. 10s. stipulated to be paid by the Defendants annually, and as to the arrears of rent due prior to the execution of the said deed, it was therein stipulated "et quant aux arrerages de ladite rente les dits acquereurs "s'obligent solidairement de les payer au dit Vendeur." &c.

The plaintiff brought his action on this deed, for three years rent become due since the execution thereof and also for 29 years arrears due prior thereto —

The defendants made default, and the following points were raised. 1st Whether the Plaintiff could recover more than 5 years arrears of a rente Constituée, where no objection thereto was made by the debtor; Or whether the prescription of five years, was only a fin de non-recevoir, which

could

could not be suggested or raised by the Court, when not pleaded – and 2.dly If by law the plaintiff's right were limited to 5 years, whether the special clause in the deed did not extend to the whole arrears due, and entitle the Plaintiff to claim the same? — and 3.dly whether the plaintiff was entitled to interest on the arrears demanded? —

Upon the first point the Court considered, that by law the plaintiff's right of action was limited to five years for the arrears of a Rente Constituée and that the Court could grant no more, although no plea in this behalf were made by the debtor. Upon the 2.d point, they considered the express stipulation of the deed as a waiver of the debtor's right under the law, and that by virtue thereof the Plaintiff was entitled to the 29 years arrears by him demanded, inasmuchas the Defendants could legally renounce to a right acquired by law. — and 3.dly as to Interest — the Court held that the plaintiff could not recover it, —

Potth. Constit. de Rente № 133. —
Nouv. Denizart. Vo arrerages. §. 6. —
Rep.re de Jur. Id. —

Potth. Constit. Rente from № 133 to 146. —

Ib. № 111. —

Boivin & al
v
Robillard
and
Boivin, fils.
Gart.

The plaintiff moved to proceed ex parte against the Defendant for want of a plea.

The Defendant had entered his appce on the return of process on the first inst and moved for delay till the 15th to bring his Garant in suit — this was granted, and the Garant was summoned and appeared on that day — he did not however file a plea, considering himself entitled to 15 days after the return before he was bound to plead — The Defendant had filed no plea neither — Upon this the Plaintiff insisted that the defendant was in default, as he was not entitled to a further delay than 3 days after the appearance of the Garant, although the Garant might claim 15 days to file his plea under the rules of practice, nor was the Garant in this case bound to take the fait & cause of the Defendt being only a Garant simple. — The Defendant cited the Case of Turgeon v. Villiot & Garant, of last Term, where the Court held that the Deft was entitled to the same delay as his Garant to plead to the Cause —

The Court held that the Defendant was

entitled

entitled to the same delay as his Garant to plead, otherwise the calling in a Garant would be of little service to a party in a Suit, as the party garantie is entitled to all the aid and benefit of the garant's plea, he ought to have an opportunity of seeing that plea before filing his own — Motion over-ruled. —

April Term 1814.

Monday 4th April 1814.

Raymond. vs Sullivan.

The plaintiff prosecuted an action against the Defendant for the amount of sundry goods sold and delivered to him, and also for the balance of a Judgment obtained against him by the plaintiff in this Court in June Term last.

The Defendant pleaded an exception or plea of demurrer to the plaintiff's right of action against him on a Judgment, rendered in June last, contending that the only recourse thereon, is by suing out execution.— And of this opinion was the Court and rejected so much of the plaintiff's demand as regarded the said Judgment.

Monday 11th April 1814

Fraser &c
v
Weston.

On the plaintiff's motion to reject the Defendant's plea, as no list of exhibits had been filed therewith in which such Plea ought to be mentioned according to the rules of practice. &c.

The Defendant contended that he was not bound to file any list of exhibits in which the plea ought to be mentioned, as he had filed no exhibits, and therefore could file no list thereof and that it was intended by the rule of practice to state the plea on the list of exhibits, where such list became necessary as accompanying exhibits filed in the Cause — And of this opinion was the Court, and rejected the Pltff's motion. —

Wednesday 13th April 1814

Delabrocquerie v Lacoste. — On action agt. Defendant to account to Pltff for the rents issues and profits of a certain farm held and enjoyed by the defendant, also to return and restore to the Plaintiff the Cattle, farming utensils & other articles delivered to the Defendant by the Plaintiff for carrying on the business of the said farm. —

The Plaintiff moved that the matters in dispute should be referred to arbitrators. —

Stuart for the defendant contended that Arbitrators were not competent to determine the matters in dispute, as the Defendt claimed the property of the articles demanded by the plaintiff, upon which the Court alone could determine, and that the Court could not delegate its power in this respect to arbitrators

Quesnel for the plaintiff contended, that the matters in question were proper to be submitted to arbitrators, as being one of those Cases in which Arbitrators alone can investigate the rights of the parties and do sufficient justice between

them

them, and that the Court in such a case could delegate sufficient authority either to experts or Arbitrators - cites. 1 Digeast. Proc. Cov. p. 246.-

The Court held the Case proper to be submitted to arbitrators, from the numerous objects in contest, & the length of the investigation to arise thereon, and therefore granted the motion. -

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Osborne v Finan }

On the defendant's motion to proceed ex parte against the Plaintiff, he having filed no Replication -

Stuart for Pltff, contends, that he cannot be excluded from proceeding in the Cause although he has filed no replication, particularly where such Replication may be unnecessary by the issue being complete without it. -

The Court held, that altho' the plaintiff had not filed a Replication, yet the Cause could not proceed ex parte against him, but that the Defendt might move to proceed in the Cause in the ordinary Course. -

Thursday 14th. April 1814.–

Fischeau. v. Jackson } The plaintiff moved to fix the cause for hearing on the merits.–

Stuart for Dfdt. objected to the motion, and contended that the Cause should be previously fixed for the adduction of evidence.–

The Plaintiff answered, that the action is founded on an Obligation, being an acte autentique to which the defendant has pleaded, nil debet, and therefore agreeable to the rule of practice such previous fixing for evidence is unnecessary.–

The motion was granted.–

Taylor v. Drenan } Action for rent of a farm on a deed of lease; Defendant pleaded, that various articles and provisions had been at different times furnished and provided by him to the Plaintiff in payment of the said rent – to prove this witnesses were produced by the Defendant, but rejected, as no verbal testimony could be admitted to destroy an acte autentique, or to prove payments exceeding a 100th.

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The defendants then examined the plaintiff upon faits & articles, who admitted, that a great part of the articles in question had been furnished & provided by the defendant, but that certain quantities of hay had been delivered to the defendant to a greater amount than the articles so furnished, and in payment of the same. — Upon this the Defendant moved that the matters in dispute touching the articles & provisions furnished by the defendant and the hay so alledged to have been delivered by the Plaintiff should be referred to arbitrators, to ascertain the balance of those accounts. This was objected to by the Plaintiff who contended that the parties ought to proceed before the Court — but the Court granted the motion. —

Monday 18th April 1814.

Sanctot
v
Sanctot.
&
Raymond
Opp.

On opposition of Raymond afin de conserver

The opposant had obtained Judgment agt the defendant, and had thereon sued out execution by consent against the lands and tenements of the defendant, without the previous discussion of his goods and chattels, by virtue of which execution the said opposant recovered the greatest part of his debt. The Defendants goods and chattels were afterwards seized and sold at the suit of the Plaintiff in this Cause, and the monies levied having been returned into Court, the Opposant made his opposition, claiming that he should be paid his share and dividend of the said monies upon his original debt, and not upon the balance due at the time of making the said opposition, contending that as the moveables of the Defendant had not been discussed by him before suing out his execution agt the lands and tenements, he was entitled to the same rights and priviledges upon those moveables as if he had first discussed the same, in wh case he would have been entitled to a proportionate share of the proceeds thereof upon his whole debt, in manner as

now

now claimed, — that no injury is done to the plaintiff as in case the dividend now to be adjudged to the Opposant should exceed the balance due to him, the Plaintiff will be entitled to the excess of such balance in the same manner as he would have been entitled to the residue of the monies arising from the sale of the Defendant's real estate after payment of the Opposant's mortgage — cites. Nouv: Denis. V° Faillite N° 4. a

The Court held, that by law the goods and chattels of the defendant ought to be first discussed but the Opposant having waived his right to this discussion in order to proceed to the sale of the — defendant's real estate, the Plaintiff, a third person ought not to be prejudiced thereby, nor ought the Opposant to be allowed to claim a dividend upon more than was due to him at the time of making such claim, having abandoned the right under the course he had taken. —

Daillebout
vs
Duchenois
and
Coffin Gar.

On action against the Defendant to account, as Mandataire of the pltff

The Defendant pleaded for exception that the Plaintiff had no right of action against him as his mandataire inasmuchas he the defendant had acted under a substitution from one Th. Coffin who was the Attorney of the Plaintiff — That the Defendant can be accountable to the said Coffin only, it being besides his interest to account only with the said Coffin by reason of the transactions which have taken place between them and under whose authority he acted —

Lacroix for pltff. The authority under which the Defdt acted was derived from the plaintiff under the power of attorney he gave him, — That the Defendant having had the management of the property of the pltff, is liable to account to him, had he acted without any authority from as being his negotiorum gestor — cites. Poth. Cont. Mandat. Nº 51. 87. 96.

Mandat. Nº 87. —

The Court over-ruled the exception and held the Defdt accountable, by his accepting a substitution under the power of Attorney given to Coffin, and his acting under it as the attorney himself would have done. —

Tuesday 19th April 1814.

Dow
v
Nelson et al
&
E Contra.

On the defendants motion for a peremption for want of proceedings during last two Terms — Held — That as the Cause appeared to be under the Consideration of the Court the Peremption could not take effect. —

Wednesday 20th April 1814

Marchand
v.
Skakel, Curr.

On the Plaintiffs motion that the Defendt should be ordered to render an account of the estate of the late Hugh Jameson to which he had been appointed Curator, the said motion grounded on a return of nulla bona made by the Sheriff upon the writ of execution sued out by the plaintiff in this Cause against the property and effects of the said late Hugh Jameson in the hands of the said Curator. —

Ross for the Defendant states, that this Cause was determined and out of Court by the final Judgment rendered therein, and

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no new proceedings can be grafted thereon of a nature different from the Suit which had been so determined — An action of account ought to be instituted against the Defendant. —

The plaintiff stated, that he was applying to the equitable jurisdiction of the Court to obtain the account in question by the present course, as it would be saving expence to the parties, and is besides conformable to the practice at Quebec.

The Court held that according to the practice here the motion could not be granted, — the calling the defendant to account must be done by action, because he is entitled to plead thereto and to contest the rights of the Plaintiff — this cannot be admitted in this Summary way by motion, nor can the Court admit new proceedings to be made in a Cause after final Judgment, which tend to create a new contest between the parties — Mo: over-ruled —

Lamothe
vs
Foucher
&
Bouthillier
Oppt.

The Opposant was the adjudicataire of a certain lot of ground sold by the Sheriff under the writ of execution sued out in this Cause, and in consequence of a defficiency of some feet, he made his Opposition to be reimbursed a proportionate sum of the purchase money —

Rolland for the Opposant founded his claim on the authority of D'Hericourt. p. 294. —

Bedard for the plaintiff contended, that the opposant was not entitled to any diminution of price in consequence of the defficiency complained of, that the opposant in such a Case must either give up the purchase, so that there may be a new adjudication, or if he retain it, he must pay the amount of the sum for which it was adjudged — That in the present instance the plaintiff is willing to take the lot in question and pay the adjudication money without any deduction, in case the opposant will give it up.

The Court dismissed the Opposition, being of opinion, that if the adjudicataire retained the thing adjudged to him he was not entitled to any diminution of the price under pretence of a diminution of the value or extent ~~thereof~~. —

M.c Gillivray & al.
Exers &c
vs
Limoges & ux.

Action for Lods & ventes. —

The plaintiffs state, that by deed of donation bearing date the 2.d day of March 1813, one Hypolite Viger gave and granted to Luce Viger his daughter a certain lot of ground in the Seigniory of Terrebonne, in consideration that they the Defendants should pay and discharge for him the said donor a certain annuity he owed and was bound to pay yearly to one Marie Louise Clement, of the value of £17. 10, and further that they the said Defend.t should pay and deliver to the said donor a certain annual pension of the value £25. — making in all a sum of £42. 10 of an annual rent to be paid for the said land which according to the usual estimation of annuities is equal to £400 and upwards, and on which sum the said plaintiffs as executors &c — are entitled to recover the lods & ventes, equal to £33. 6. 8 — That the said donation was made à titre onereux, and for a consideration equivalent to the value of the land, and not en avancement d'hoirie or by way of partage as a family settlement among the children or heirs of the donor, but was in reality a Sale for a valuable consideration, and by reason thereof the Defendants are liable to pay the lods & ventes aforesaid. —

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L.M. Viger for Defendants pleaded, that the donation in question should be considered as made en avancement d'hoirie, when made by a father to his child, whatever might be the charges attached thereto – cites – Prudh. Rot. liv. 3. ch. 37. p. 257. 260
Lacombe. Vo Lods & Ventes. p. 428.
Pothier. Fiefs. 2 vol. p. 58.
Ferriere Gr. Cout. 1 vol. p. 223. No 4.
Repertre Vo Lods & Ventes.
Denizart Vo Lods & Ventes. No 86. & 98.
Rolland v. Bellanger. Determ. Feby. 1808.

The Court held upon the authorities cited, and upon the cases already determined in the Court, that no lods & ventes were due upon the donation in question, considering every act of this kind as made en avancement d'hoirie whatever the charges attached thereto were, and therefore dismissed the action.

Arnoldi v. Perrault val.

Action for recovery of an Apothecarys bill.

The Court admitted the plaintiff to his suppletory oath, on the account by him produced, considering the proof made in the Cause sufficiently strong in his favor to receive this kind of proof.

Tuibord
v.
Fullum &
Turgeon Intervs

action of debt on Obligation.

The Defendant by his obligation had agreed with the father of the plaintiff, during the minority of the said plaintiff, and as being her Tutor, a sum of £25. for certain costs and damages in consequence of a criminal connection between the plaintiff and the Defendant's Son. The father of the plaintiff being indebted to the Intervening party in a large sum of money made a transfer of the said Obligation to him in part payment of what he so owed, and the Intervening party in consequence signified the transport to the Defendant, forbidding him at the same time to pay the said money to any other person. The Defendant having in consequence refused payment of the money to the plaintiff, now of age, the present action was brought to compel the same, in which Turgeon intervened and claimed the money as his property under the above transfer.

Bender for the plaintiff contended, that the of the plaintiff in his capacity of Tutor could not make over to the said Turgeon the debt of his pupil to satisfy his own debt. That the sum of money mentioned in the Obligation was meant as a support to the plaintiff, and

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an indemnification for the injury She had sustained; that therefore the Court would not countenance the transfer by the Tutor of such a debt as if it were his own property, and without any beneficial purpose to the Minor, more especially as the Tutor in this Case was a poor man and wholly unable to satisfy the said sum of money to the Pltff

Lacroix for the Intervs Party, contended, that the Obligation was wholly under the power and controul of the Tutor, and he was entitled to dispose thereof in the same manner as he might have disposed of any moveable property belonging to the Minor — That as the Obligation in question was made payable to the father of the plaintiff, there was a stronger reason to say that he had the power to dispose thereof, inasmuchas he could have given the Defendant a discharge for the money, and thereby the Pltff would have had no other remedy except against her Tutor —

The Court, without giving any opinion upon the question, whether the Tutor could dispose

of

of any of the property of the minor to satisfy his own debt observed, that as it appeared, that the signification of the transport of the said Obligation had been made to the defendant by the Intervening party after the plaintiff came of age, the transfer could be of no avail, as the Pltff was then seized of the Debt, and the Defendant became liable to pay the amount of the Obligation to her in lieu of her Tutor, — The Intervention was therefore dismissed and Judgment given for the Pltff. —

Hunter. v. Fry. — and E Contra

Action on a Foreign Judgment. —

3. East. 221. Henry. v. Adey

4. Esp. N.P. 228.

The Court were of opinion that the exemplification of the Judgment upon which the plaintiff's action was grounded was not sufficiently proved, inasmuchas no proof of the Seal of the State of Vermont, under which the said Judgment was certified, had been adduced, and therefor dismissed the action —

This Judgment was founded on the principle adopted in the Court of appeals in the Case of Trew. v. Gilman; judged in this Court in October Term 1812, in 9th this Court held, that such proof of the Seal was not necessary, but the Judgment was reversed in Appeal, and a contrary principle established —

Sutherland
vs.
Martin.

Action of assumpsit.—

The Declaration contained a count for an undertaking by the defendant to pay on default of Col. Robertson, and the several money counts, founded on the following agreement—

"I do hereby agree to pay Mr Sutherland "the sum of thirty two pounds 16/6, provided Col. "Robertson does not pay him".— "Wm Martin".—

The Defendant pleaded non-assumpsit,— also that Defendant did not undertake as the personal debtor of the plaintiff, but as Security for Col. Robertson, whose property ought to have been first discussed.—

Sol. Genl for the plaintiff argued, that the Defendants promise to pay, if Col. Robertson did not, made him the personal debtor of the plaintiff and all the pltff had to shew to maintain his action was that Col. Robertson when required had not paid — this was proved by the protest filed in the Cause — When a person undertakes to pay on the

the default of another, he is considered as principal debtor, as soon as such default is ascertained — Cites. Poth. Ob. N°. 447. Just. Pandects by Poth. 1 Vol. lw. 12. tit. 1. art. 3. N°. 25. p. 351 — Id. lib. 14. tit. 1. art. 4. p. 401. 402. — Id. tit. 3. art. 2. N°. 5. — Id. id. lib. 13 tit. 5. art. 3. N°. 15. — Id. Id. tit. 3. art. 4. N°. 17. & 18. —

Beaubien for the Defend^t. contended, that the undertaking of the defendant, was not as the personal debtor of the Plff, but as security for another person. — That the plaintiff ought first to have established the existence of a debt due to him by Col. Robertson, and that he had taken legal course to recover such debt, by discussing the property of the said Col. Robertson before he can maintain any action ag^t. the defendant — But the plaintiff does not state nor shew that any debt was due to him by Col. Robertson, or that it was such a debt which by law he could recover — and in either case the defend^t. cannot be bound by his S^d. undertaking which raises an obligation to pay only in case Col. Robertson does not pay what he was bound by law to pay to the said Plaintiff — but as nothing has been ascertained to be due by the said Col. Robertson to the Plaintiff, he could not be considered to be in default, nor can the defend^t. as his security be so considered — To make the defend^t. the personal debtor of the Plaintiff in this Case, a value or consideration should have been stated and proved as the ground of his undertaking, without which it is not binding —

Sol.

Sol. Genl. in reply stated, that the undertaking in question of the Defdt. ought to be assimilated to a promissory note, where it is not necessary to express value — cites — Bayley on bills. p. 72. — White. v. Ludwick — Esp. N. P. p. 72. 140. — Bul. N. P. 139. 140. —

The Court held that the defendt. was not bound as the personal debtor of the Plaintiff, but only as the Security, and on the default of Col. Robertson; which implied a recourse to be had against Col. Robertson in the first instance so as to establish such default agt. him — But allowing even that the protest of the notary in this case was a sufficient demeure upon Robertson, still it became essentially necessary, that in the present action agt the Defendt. as the fidejusseur of Robertson, the Plaintiff should have stated clearly and specifically the nature of the debt Robertson owed him to shew that it was a legal & just debt, without which the Defendant cannot be bound — "Il est de l'essence de l'oblign
« des fidejusseurs, qu'il y ait une obligation d'un principal
« debiteur qui soit valable" — Poth. Ob. Nº 366 — The Plaintiff by his declaration, although he states, that Robertson was indebted to him, yet he does not state or shew upon what consideration such debt was founded — this is defective — for every promise or undertaking in law, must have a valid consideration, it being a principle, that an obligation without a cause or consideration, is void — The Plaintiff therefore not having stated or shewn a sufficient Cause of action agt Robertson, the principal debtor he is not entitled to a recovery agt the Defendt. as his Security —

(a) Poth. Ob. Nº 42. — Repᵗ vº Obligation. p. 276. 1. Despresses. p. 828 Nº 8. — Domat. liv. 1. tit. 1. sec. 1. Nº 5. — Fromental, Decisions. tit. Obligation p. 531. — Prevot de la Jannes. p. 135. 6 — Encyclop. Meth. vº Obligation sans Cause. p. 230 — A Just. Instit. by Ferr. p. 365 — Dic. de Brillon vº Obligation sans Cause. —

Fell on Guarantee. p. 1. 2. 3. &c. 2 Ev. Poth. 19.

According to the laws of England, the promise to answer the debt of another may be made either by deed or parol:— writing, sealing and delivery, are alone essential to the — validity of a deed.— these being shewn, no inquiry can be made as to the consideration, nor can any evidence be admitted to contradict or explain any thing appearing on the face of a deed, excepting upon the grounds of fraud or illegality.— A parol promise, is that which is made by agreement not under Seal, and will not be binding unless made upon adequate consideration And in any action brought upon such promise, the consideration for it must be stated and proved.— Rann. v. Hughes. 7. T. R. 350. — So Ld Ellenborough in the case of Wain & another v. Warlters. 5. E. R. 10. in referring to the words of the St. of Frauds & perjuries, says, "And indeed "it seems necessary for effectuating the object of the Statute "that the consideration should be set down in writing as well "as the promise — for otherwise the consideration might be illegal "or the promise made upon a condition precedent &c and again — "The authorities referred to &c — all shew that the word "agreement is not satisfied unless there be a consideration, which "consideration forming part of the agreement ought therefore "to have been shewn &c" Mr Pothier makes use of nearly

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the same language in his Tr. d'Ob. N° 42. in speaking of an agreement made without consideration — "Mais « lorsqu'un engagement n'a aucune cause, ou ce qui est la « même chose, lorsque la Cause pour laquelle il a été contracté « est une cause fausse, l'engagement est nul, et le Contrat « qui le renferme est nul. &c." — But for the benefit of trade, bills of exchange and promissory Notes are in England excepted out of this rule of consideration, and in some respects put upon the same footing with deeds and other specialties — The Plaintiff has laid hold of this principle, and wishes to assimilate the undertaking of the Defendant to a promissory note - but the cases are not similar and if they were, still by the laws of this Country consideration is as essential to be stated in an action on a promissory note as in any other agreement. — Action dismissed. —

Prov. St. 34. G. 3. Ch. 2. §. 5.

Monarque
v
Taylor.
&
Joh^n Taylor. Opp^t

On rule ag^t the Opposite to Shew Cause why a Contrainte par Corps should not be granted ag^t her, for having prevented the Sale of the defend^rs effects seized in this Cause

Boston for the Opposant, stated, that the Seizure in this cause was made on the 26 November 1812 that

That the Opposition made by the Opposant to the Sale of the said effects was dismissed on the 20th Febry. 1813, and on the 22d day of October last the venditioni exponas issued directing the Sale of the said goods and effects — That the Defendant having been appointed Gardien of the effects seized, such appointment was void in law. art. 13. Tit. 19. Ordre 1667 — That no proceedings having been had for the Sale of the effects seized, within two months after the said Opposition was dismissed, the said seizure became null and of none effect, and therefore the Opposant was not liable to represent the said effects had they even come to her possession. art. 172. Gr. Cout. Glose unique. Nº. 1 2. 5. 6. & 7. — And of this opinion was the Court, and discharged the Rule. —

Brown
v^r
Mure.

Action on Special assumpsit.

The Declaration stated, that the plaintiff & one John Rankine heretofore, viz^t. on the 2^d. day of May 1812, were merchants and Copartners in trade under the name or firm of Brown & Rankine on which day they dissolved their partnership, when it appeared the said Rankine was indebted to the Plaintiff in a sum of £600 for his share of the losses of the said partnership, for monies advanced by the said Plaintiff to the said Rankine, of which premises the said Defendant had notice, in consideration of which, and also in consideration that the said plaintiff at the special instance and request of the said Defendant would forbear to sue the said ~~plaintiff~~ Rankine, and give time for the payment of One third of the said sum of money for one year, of another third thereof for two years, and of the remaining third for three years, he the S^d. Defend^t afterwards on the 3^d. day of May 1812, by a certain note or letter addressed to the S^d. Plff, undertook and promised, that in case the said Rankine should

not

not pay to him the plaintiff the said sum of £600 in manner as aforesaid, that then and in such case he the said Defendant would pay the same for the said Rankine — the plaintiff averring that in consequence of the undertaking aforesaid of the said Defendant, he gave time and forbore to prosecute the said Rankine for the said sum of money, viz^t. for more than one year for the one third thereof become due, no part whereof hath been paid by the said Rankine or by any other person on his behalf to the said Pltff; of which he the said defendant had notice, and by virtue of his promise and undertaking aforesaid, became bound to pay the said instalment of £200 become due as aforesaid. &c —

The Defendant pleaded. 1st Non. assumpsit. — 2d That the Contract stated by the plaintiff in his declon aforesaid was never finally concluded and agreed upon. — 3d That the Plaintiff did not accept the proposed security but took his recourse against Rankine for the balance he owed, and obtained notes from him to the amount of £833. 17. 9. for his share of the loss in the S^d partnership, and hath taken his recourse ag^t the estate of the S^d Rankine for such part of the said notes as is now due — and 4th That the Plaintiff by prosecuting his suit ag^t the Estate of Rankine, must be considered as having waved any recourse ag^t the Defend^t. &c

By the evidence adduced it appeared, that on the 3d May 1812, the defendant wrote the follows letter to the Plaintiff — "Shoued Mr John Rankine your late "partner fail in making good his agreement to pay "you the sum of Six hundred pounds Curr. amount his "half loss on your late Concern, and of his private account "in three equal annual payments, the first whereof in "twelve months from the dissolution of your partnership "(such agreement on his part being on the Condition that "you assume the whole business and obligate yourself "to pay the debts) I will pay the same for him at the said "periods". — There appeared no acceptance by the Plaintiff, of this undertaking, nor did any answer appear to have been made thereto, untie 3. May 1813.

Subsequent to the above letter an account appeared to have been made out by the plaintiff of the partnership transactions between him & Rankine, by which it appeared that the said partnership stood indebted to the Plaintiff in a Sum of £1571. 1. 7, one half of which as being Rankine's share, amounted to £785. 10. 9½. —

This however seemed not to be the only statement of the accounts between the parties, for by a subsequent transaction between them, it appeared that the following promissory notes were given by Rankine to the Plff as his share of the loss of their Joint Concern —

1. Note

1 Note,	payable.	1 October 1813.	for £77. 19. 3
1 dº	dº	1 March 1814	for 77. 19. 3
1 dº	dº	1. March 1815.	for 77. 19. 3
1 dº	dº	1 March 1813.	for 200. — —
1 dº	dº	1 March 1814	for 200 — —
1 dº	dº	1 March 1815	for 200. — —
			£833. 17. 9

And by his letter to the Sr. Rankine of 2d. Decr. 1812 the plaintiff says, "I have to acknowledge the "receipt of yours of yesterday's date inclosing your "promissory notes for £833. 17. 9, being amount of "your share of apparent defficiency on the unfortunate "Concern of B. & R. — notwithstanding you have "made the first note for £77. 19. 3, payable the 1st "October next instead of the 1st March, I still hope you "will retire the same at the time it should have been "made payable. — I dare say you are well aware there "is a great many debts due the Concern that will never "be paid, I therefore look to you for the payment of "your share thereof on the first March according to "agreement." —

Of all these transactions no communication appeared to have been given to the Defendant, nor did it appear that

that any thing was intimated to him on the Subject of his letter of the 5th May 1812 until the 24 April 1813, about the time Rankine died, when the plaintiff wrote to the Defendant to say that he accepted his security as offered for the £600 — In the Term of October last the plaintiff prosecuted his action against the Curator appointed to the vacant succession of Rankine, for the payment of the first of the promissory notes above mentioned and obt'd his Judgment thereon. —

Ross for the defendant argued, that he was never bound by the security tendered to the Plaintiff, that his promise was conditional, and the condition was never accepted nor complied with by the plaintiff, namely that Plaintiff should bind himself to pay all the debts of the Concern of Brown and Rankine — The Plaintiff on the Contrary proceeded against Rankin in the same manner as if the Defend's offer of Security had never been made, by taking notes from Rankin for a much larger Sum than £600. — The Plaintiff about a year after the defendants offer of Security wrote a letter to him to say that he then accepted it, but it was then too late, the condition of the parties had been changed and this by the act of the plaintiff

who

who had exacted a larger sum from Rankine as his half of loss on their joint concern, than that agreed upon to have been due at the time of the Security offered — and the Plaintiffs accepting this larger sum from Rankine without Security, and proceeding by a Suit for the payment thereof, shews clearly, that the Defendants Security was never accepted by the Plaintiff. —

Stuart for Plff in answer — Proof has been made to establish the necessary facts to support this action, namely, the existence of a debt due by Rankine to the Plaintiff, the promise of the Defendant to pay on the default of Rankine, and finally Rankine's default — The objections raised by the defendant are of no avail — the taking a Security from the said Rankine for a larger sum than that required from the Defendant, was merely a precautionary measure, and the Plaintiff had a right to exact it, as there were other matters of account between the parties besides those referred to in the security given by the defendant; nor can such proceedings interfere with the defendants Security, or increase it beyond the sum stipulated — nor does the prosecution made against the principal release the Security — It is true no proof has been made of the payment of the debts of the partnership of Brown & Rankine by the plaintiff, but this was not necessary, it was not a condition of the agreement,

or

or Security, all that was required, was, that the Plaintiff should obligate himself to the payment of those debts and this the law does, without any new undertaking on his part — but the payment of those debts has not been put in issue by the Plea. —

The Court held, that the Security offered by the Defendant was conditional, and had never been accepted by the plaintiff — it was conditional in this, — that the Plaintiff should assume the whole business and obligate himself to the payment of the debts — That although the law will compel one partner to pay the whole debts of a partnership without any express undertaking to this effect, yet in the case before us, the Obligation to be given by the Plaintiff implied something more according to the terms of the said Security, namely, that he should not only pay those debts himself, but exonerate the other Partner, Rankine, from all demands in this behalf — this we take to be understood by — the plaintiff's assuming the whole business and obligating himself to pay the debts — This was not complied with by the plaintiff — But independant of this consideration, the intermediate transactions between the Pltff and Rankine, between the time of offering the said Security, and the time when

the

the Plaintiff agreed to accept the same, had so far altered the state and condition of the parties, that they could not be considered to stand in the same situation at the time of the security offered as at the time it was accepted — for the amount of the one half loss on the concern of Brown and Rankine and of the private account of Rankine, instead of being limited to £600, the sum for which the above security was offered, was by the subsequent accounts and statements of the Pliff worked up to a sum of £833. 17. 9, and promissory notes taken by him from Rankine for this amount — the Plaintiff at this time seemed to consider Rankine as alone responsible and to look to him alone for the payment of this sum — see his letter of 2d Decr. 1812. — This transaction was contrary to the nature and intention of the security offered by the defendant, which was tendered with a view of assisting Rankine and to get him clear on as easy terms as possible — and the Defendants views and contemplation were, that for £600 to be paid by him to the Pliff the said Pliff should assume the business and pay the debts of the Concern, or in other words, give the said Rankine a discharge — The Plaintiff, by his silence for nearly 12 months after the security offered, before he accepted the same, and proceeding in the mean time to use means to realise a greater sum from Rankine than the £600 — meant either to deceive the Defendant, or to trust to his own exertions to procure a greater sum from Rankine than that offered by his security — in either Case the security

became

became ineffectual — The Court must presume, as in fact it seems to appear, that the Plaintiff meant the latter — but to hold the defendant liable upon the security he offered, would have required that a full statement & communication of all the above circumstances should have been previously made to him — to accept his offered security, and to conceal those circumstances was unfair, as in law the suppressio veri is compared to the suggestio falsi, and annuls every contract founded thereon. — action dismissed. —

Fonb. Eq. p. 113. —
Jarvis. v. Duke. 1 Vern. 20
Broderick. v. Broderick.
1 P. Wms 240. —
Kirwan. v. Blake.
13. Ves. Abt. 552.

Debartzche
v
Chaud

On action for Lods & Ventes &c.

The Court held, that on a voluntary Retrocession made by a purchaser to the vendor of the land sold, from his inability to pay the purchase money, no Lods & ventes were due

Poth. Intro d.n au Titre des Fiefs p. 102. Max. 7.

see Prudhomme ch. 66. p. 350.
Traité de Fiefs par Claude Poquet de Livonniere. liv. 3. ch. 6. p 216.
Dumoulin sur Fiefs. Tit. 2. p. 103. —
Guyot d.o — 3 vol. ch. 12. § 19. p. 489. max. 3.e —
Rep.e de Juisp.e V.o Lods & Ventes. §. 28. dist.n 7.e
1. Argou. liv. 2. ch. 4. p. 179. —
3. Hervé. p. 12. — 15. —

June Term 1814

Thursday 2. June 1814.—

Descelles. v. Sauvage } The defendant entered appearance on the return of the writ yesterday, when the Pltff moved to examine the defendant upon faits & articles but without any previous notice of the motion.—

The defendant objected to the motion for want of notice.—

The Plaintiff answered, that it was a motion of right and the defendant was not entitled to any previous notice thereof.—

The Court held that the Defendant was entitled to the notice of the motion, and therefore over-ruled the same.—

Saturday 18th. June 1814.

Sarrault, Curator &c
vs
England. vs

Louis Sarault as Curator to Jean Bte. Courcambec, and Louis Courcambec absentees from the province, prosecutes the Defendant William England —— For that by act passed before Beek and his confrere, Notaries, the 9th. June 1791, one Jean Menetrier and Marie Cath. Hobert his wife widow by a first marriage of the late Pierre Courcambec, and by him duly authorised, and also under the opinion and authority duly homologated of the friends and relations of Jean Bte. Courcambec and Louis Courcambec the minor Children of her marriage with the said late Pierre Courcambec, sold to the said Defendant a certain lot of ground, situate in the St. Lawrence Suburbs of Montreal, and which belonged to the Community that had subsisted between her and the said late Pre. Courcambec, one half of which appertained and belonged to her and the other half to the said minors, as heirs of the said late Pre. Courcambec; which said Sale was made, in consideration, amongst other things, of the payment of a Sum of Six thousand livres, on account of which sum the said Menetrier and his

his wife then received from the said Defendt. a sum of fifty pounds, the said defendant promising & undertaking in and by the said deed to pay to the said Menetrier and wife the remaining sum of £200. in the space of four years in four equal payments of £50. the first of which to become due on the 9th. June 1792, with the interest to be computed from the date of the said deed.— That the said Menetrier and wife being about to leave this province, named and appointed one Franc. Jaraet of Montreal, Merchr. their — attorney, by power of attn. dated 25 June 1791.— That in April Term 1808, the said Menetrier and wife by the said François Jaraet, their said Attorney, prosecuted an action in this Court against the said Defendant for a sum of £257. 18. 4½, the balance remaining due on the said deed of Sale with the interest thereon as aforesaid.— That the said defendant by his plea to that action, claimed, that as the said lot of ground at the time of the Sale thereof, — belonged for one half to the said Menetrier and wife, and the other half to the said Jean Baptr. and Ls. Courcambec, the said Menetrier and wife were not entitled to claim and receive from the said defendant more than the sum of £19. 15. 11½, being the balance remaining due and in arrear of the sum of £125 the moiety accruing to the said Menetrier and wife in the consideration for which the said lot of land was sold, but that the said Menetrier and wife were not entitled to claim or receive of and from the said

defendt.

defendant the other moiety of the said consideration money nor the interest thereon, which belonged to the said Jean Bte and Louis Courcambec.— That by the Judgt of this Court rendered on the 20th day of February 1809 in the said Cause, the said Defendt was adjudged to pay to the said Menetrier & wife only the aforesaid sum of £19. 15. 11½, and the said Defendant was exonerated from the payment to the said Menetrier & wife of the remaining sum of £125.— and interest thereon as aforesaid, the same being considered to belong to the said Jean Bte & Lo Courcambec.— That the said Defendant still retains in his hands and owes to the said Jean Baptte and Louis Courcambec the said sum of £125.— with the interest thereon as aforesaid, which being calculated up to the 9th June 1810 amounts to £118. 15.— That the pltff as Curator to the said Jean Bte and Louis Courcambec is entitled to recover and receive from the said Defendant the said principal sum of money and interest, amounting together to £243. 15— and therefore brings Suit. &c.

To the above action the defendant pleaded several pleas— 1st That the nomination and appointment of the said plaintiff as Curator to the said Jean Baptte and Louis Courcambec, had been obtained upon false

grounds

grounds and allegations, and the same was therefore null and void.— 2ly That the said Pliff had been a merchant and had failed in his business and was now a bankrupt, and possessed of real property, and therefore not entitled to take or receive the said monies. 3ly That Marie Françoise Chaubert, the mother of the said pliff, under pretence of being interested in the rights of the said absentees, had presented a petition to the Judges of this Court praying the appointment of the said Pliff as Curator as aforesaid, although no such interest existed in the said Marie Franse Chaubert. 4ly That the monies in question, having been directed under un avis de parens, to be secured and placed out at interest for the benefit and behoof of the said minors and the same having in consequence been left in the hands of the Defendant as purchaser of the said lot of ground, the same was thereby secured in the best manner for the said absentees, who thereby acquired a priviledge and mortgage on the said lot of ground for the security and payment of the said monies, and therefore the Pliff as Curator of the said absentees, ought not to have or receive the said monies, as the same will be less secure in his hands than in those of the Defendant— And 5ly That the said Defendant

was

was warranted to keep and retain the said monies in his hands, until the said Jean Bapte and Louis Courcambec, or some person authorised by them shall appear to claim the same. —

It appearing by the petition presented by the said Marie Cath. Hebert for the purpose of obtaining the appointment of a Tutor ad hoc, to the said Jean Bte and Louis Courcambec on the 9th May 1791, and the opinion of the friends and relations of the said minors thereon, that the intention was to secure in the best manner and as far as possible the rights and interests of the said minors in whatever property belonged to them, as heirs of their said father, and that the lot of land in question had been sold to the Defendant on condition of his retaining in his hands the share of the monies accruing to the said minors, for their interest and benefit — And as the plaintiff in this Cause who had procured himself to be appointed Curator to the said minors without any apparent interest, did not state any cause or reason why the monies so vested on the said lot of land so purchased by the said defendant should be paid over to him the said pltff, nor point out any other

or

or better security to be had by taking the same out of the hands of the defendt., nor for what purpose more advantageous to the said minors, the said monies were to be employed by the said plaintiff, The Court therefore dismissed the action with Costs.

Taylor vs Drennan } Action of Debt for rent, and also for damages done to the premises rented, by cutting down wood thereon.—

After proofs made by the parties and hearing on the merits, the Court ordered that Experts should be named to ascertain the damages done to the premises by a view thereof, as the just amount of those damages did not appear to be sufficiently made out by the evidence adduced, although it was evident that considerable damage had been done to the premises in question.—

Mc Pherson vs Murray.— and Contra.— } The Court finding from the evidence adduced, that the matters in dispute between

between the parties could not be sufficiently determined ordered, that they should name Arbitrators for this purpose. "

Harbec. v Meunier.

Action of Debt on Notarial Obligation.

The defendant pleaded payment, and produced a receipt signed by the plaintiff, made subsequent to the date of the Obligation, stated to be in full of all accounts (quitte de tous Comptes) between the parties, which he contended was sufficient to cover the demand now made. — The plaintiff answered that the receipt produced, applied to accounts only between the parties, and could not comprehend the obligation in question. — No accounts or transactions between the parties other than the said obligation, were produced. —

The Court ordered, that the parties, or either of them should produce and file a Statement of the accounts between them at the time the above receipt was given and to which the same applied, in order to ascertain whether the Obligation in question was included therein. —

Maranda.

Maranda. v. Cousineau.

See Interlocutor of 18th Oct. 1813.—

On action by the plaintiff as widow of the late Jacques Cousineau, to obtain from the Defendant, as his son and heir, an account of the Community which subsisted between the plaintiff and her said late husband, and which by his death had come to the hands and possession of the said Defendant.—

It appearing by the evidence adduced in this Cause that the late Jacques Cousineau seemed satisfied and contented that the said plaintiff should live separate and apart from him, and had never required her to return to his house, the Plaintiff could not therefore be considered to have lost her rights in the Community which subsisted between them, and in consequence the Defendant was ordered to account— This Case is different from that cited by Defend^t. of Ayet. v. Malo, where no such consent on the part of the husband was given.—

Selby.
vs.
M.c Gillivray
et al.
and
Sutherland
Interv.s

On the Intervention and claim of Maria Sutherland wife of James Hallowell, by him for this purpose authorised.

Stuart for Defendants pleaded in abatement to the right of the Intervening party to prosecute or support her claim in her own name without the assistance of her husband, or the authority of the Court on his default, according to the 224.th art. of the Custom. —

Gale for the Intervening party — There is no Community between the Intervening party and her husband, and as the legacy in question is the sole property of the wife, there is no interest in the husband to require his presence in the Intervention his authority to the wife in this respect is sufficient to entitle her to maintain her claim —

And of this opinion was the Court, and dismissed the plea in abatement. —

Nouv. Denizt. Vo autorisation. §.2. No 4. —
Prevot de la Jannes. p. 24. 25. —
2 Argou. p. 23. —
Regles de Droit Franc par P. De Livoniere. p. 40. 314. & suiv. Reg. 34.

Scheupe vr. Labadie, and Legnay Garn.

On action petitoire.—

The Plaintiff having by a Notarial deed purchased from one Legnay a certain house and lot of ground situate in the Quebec Suburbs, the said deed bearing date the 17th June 1811, prosecuted this action against the Defendt to recover from him the possession of the said house and lot of ground which he held.—

The Defendant by his plea stated, that long before the making and executing of the said deed of sale, viz. on the 29th day of January 1801, the said Legnay, by a certain acte sous seing privé, sold and conveyed the said premises to him the said Defendant, which acte is of the following tenor— "En presence du Notaire "soussigné, Sr Charles Guay s'oblige de vendre à Joseph "Labadie, à ce présent et acceptant, une maison Sise au "fauxbourg Ste Marie avec l'emplacement en dependant "pour trois mille livres de vingt sols, payables en cinq "années à raison de six cent livres susdites par année, et "huit cent quarante cinq livres susdit cours à constitution "de rente à cinq pour Cent par an; payable les trois

"mille

" mille francs au Pierre Dezaulels, et les huit cent quarante
" cinq livres susdites à Madame Jiasson, comme dit est,
" avec les rentes echües à la St. Michel prochaine - Fait
" à Montreal le 29 Janvier 1801. - Convenu que
" l'acquereur entrera en possession le 1er. Mai prochain
" pour le tout, mais que le Vendeur restera en possession
" de partie de la maison jusqu'au dit Jour, premier
" Mai prochain - (ainsi signé) Chas. LeGuay
Joseph Labadie
" Bte. DSLM

under and by virtue of which said Sale he the said Defendant entered upon the possession of the said premises and the same hath always hitherto had and held as the owner and proprietor thereof from and since the said 1st. day of May 1801 - hath paid and satisfied the greatest part of the consideration money stipulated in the said Sale - hath made considerable improvements on the said premises, and paid the assessment and all other burdens thereon as the true and lawful proprietor thereof, and therefore the said Seguay could not by the aforesaid Deed of Sale, transfer or convey to the said plaintiff any right or title in or to the said

premises

premises or any part thereof, as the same long before had become and then was the property of him the said Defendant in manner as above stated.—

To this plea the plaintiff replied, that by virtue of the aforesaid deed of Sale of 17 June 1811, being an acte authentique, he the said plaintiff became the true and lawful proprietor of the said premises, and that he the said Defendant never acquired any right or title therein by virtue of the aforesaid acte sous seing privé of 29 Janv. 1801, the same being null de plein droit, and not sufficient to convey to the Defendant any right therein, or to preclude the Plff from his action aforesaid — That the possession of the Defendant under a vicious title was of no avail — and that all the improvements made by the Defendant on the premises were merely depenses d'entretien —

The Plaintiff called in the said Charles Lequay as his Garant formel —

On the hearing of the Cause on the matters of law arising from the pleadings, it was contended by

by Mr Bedard of Counsel for the Garant, that the acte sous seing privé given by him to the Defendant, was null and void in law, and gave the Defendt no right or title to the premises in question, the same not having been made double, and therefore there could be no reciprocity of obligation - cites. 1 Bourj.e 470. N.o 2 471. 472. -

Bedard also for Plff. contended, that the title he derived from Leguay under the Acte autentique is good and sufficient in law and must prevail over the possession of the Defendant with an imperfect title - cites. 2 Bourj. 471. -

Papineau & Vigé for Defendt - The Garant sold by acte sous seing privé to the Defendt - and delivered possession to him upwards often years ago - this became an acte consommé, and not merely executory or a promesse de vendre, and is now therefore binding on the parties - cites. Lacombe. V.o Contrat. and Vente. That even if the acte sous seing privé could be considered not sufficient as a deed of Sale, yet it must be admitted to be a good commencement de preuve par ecrit, and the Defendant thereupon let in to prove the sale and the execution thereof. -

Bedard

Bedard in reply — The acte sous seing privé, is not perfect, nor executed by the possession obtained by the Defendant, by not having been made double. The condition of the Sale, that certain monies should be paid to third persons, would have been without effect had the house on the premises been burnt and the Defendant thereupon refused to comply with the conditions of the Sale — The Plaintiff had no means to prove those conditions, because the sous seing privé was in the possession of the Defendant — The Plaintiff must in this case have been compelled to have recourse to the oath of the Defendant, which the law reproves in cases of this kind, and on this account an acte sous seing privé is held insufficient to convey real property. —

5th. April. 1813. The Court was of opinion that if the parties had carried into effect the sale of the property in question to the Defendant, by a delivery to him of the possession, and paym.t by him of the consideration as by him alledged, it was sufficient to entitle the Defendant to claim the right of property therein, had even the acte sous seing privé been of itself insufficient to have conveyed that right to the Defendant: a day was therefore given to the Defendant to make proof of the facts by him alledged. —

Danty. Prem.s p.n Demoins p. 593 — Decisions de Fromental p. 779. Sugden's Law of Vendors &c.a p. 90.

The Defendant having compleated his enquete under the foregoing Interlocutory, the following objections were taken by the plaintiff to the evidence adduced.—

Bedard for Pltff contended, that the Defendt. had not made proof of the acte sous seing privé, upon which act hung all the other parts of his plea.— That only one witness proved the signature of Lequay, the other two witnesses adduced for the same purpose say merely, that the signature at the bottom of the sous seing privé, is that of Lequay— but there are three signatures at the bottom of the said act, and the witnesses have not specified which of the three they intend to speak as being that of Lequay— Deseve in this case ought to have been called up as a witness, he being a temoin instrumentaire; if he be dead, that fact together with his signature ought to have been proved, which has not been done— The signature of the Defendant Labadie ought also to have been proved, as the act purports to have been signed by him, and it being an acte synallagmatique, it became essentially necessary to make this proof to shew the Defendants acceptance of the terms and conditions contained in the act— If this acte is to be considered as the foundation of the Defendants plea, it ought to have been proved in toto, as far as

it

it was capable of proof, and therefore the partial evidence adduced by the Defendant ought not to be received. —

Arigé for Defendt — It is sufficient that the Defendt has made proof of the signature of Seguay, who is the person principally bound, and the only person who wishes to come against the act — it was unnecessary that the Defendt should have proved his own signature to that act, as he alledges and admits that he was a party thereto: Deseve, had he been alive, could not have been a Witness, as he acted as a public Notary in drawing up the acte sous seing privé. — That the subsidiary proof made by the Defendant in the Cause, is more than sufficient to complete the evidence as to the acte sous seing privé, namely the acknowledgment of Seguay that he had sold to the Defendant, and that he had delivered up the possession to him of the premises in question —

Bedard in reply — The sous seing privé, even if proved, could serve only as a commencement de preuve par ecrit, if not proved, no subsidiary evidence can be admitted. Deseve must be considered as a legal witness, his acte not being an acte autentique — The Defendants signature also ought to have been proved, as there can be no Sale unless there be a purchaser. —

7 June 1814

The Court were of opinion that the acte sous seing privé, had not been sufficiently proved, it being necessary that the signatures of all the parties thereto should have been ascertained — but considering from the nature of the evidence adduced, that the Justice of the case lay with the Defendant, it was ordered that the Garant should appear and be examined on oath touching the execution of the said Acte. —

And the Garant having appeared and acknowledged the due execution of the said acte sous seing privé, by all the parties thereto, Mr Bedard for the plaintiff objected to the legality of the evidence thus adduced, contending that in this case the Court had not power to defer the serment supletoire, as the defect in the evidence arose from a neglect or omission of the Defendant to adduce it, and not from that disette of proof under which such serment can be tendered. cites. 1 Pigeau 256. That the sous seing privé can have no certain date till proved, and that this proof is not yet made — and further that the admissions of Lequay the Garant ought not to bind the plaintiff —

The

The Court held, that they were entitled to submit the serment suppletoire, when a defficiency of proof appeared without taking into consideration from what cause that defficiency arose – as it would be difficuet to draw the line between the neglect and the inability of a party to adduce sufficient evidence. – Considering therefore the evidence adduced the Court were of opinion that the Defendant had made out a sufficient title to the premises in question and therefore dismissed the Plaintiff's action with Costs. –

Lacombe v. Euvillier } On action of Sp. assumpsit for Sale of Wheat

The Plaintiff by his declaration stated, that the defendant by his agreement, bearing date 24 Novr 1813, signed and subscribed by him, agreed to purchase and receive from the Plaintiff 150 minots of wheat, to be delivered on board a Schooner at St Sulpice on the first demand, for which twenty shillings & three pence Currency p minot were to be paid by the Defendant to the Plaintiff on the delivery of the said wheat – That the Defendant refused to receive the said wheat when

tendered

tendered according to agreement, to the damage of the Plaintiff. &c.—

The Defendant, by his plea, excepted to the validity of the agreement as stated, and contended, that the same was not binding in law, inasmuchas the said agreement was made sous seing privé, and not double cites. Encyclopedie de Jurisp.ce Vo. Synallagmatique.— Potts. Obl. No. 9.— Dic. de Droit. Vo. Contrat.— Denizart Vo. Double Ecrit. No. 1. 2. 3. &c.— And further, that even according to the laws of England, the said agreement is not binding, as by St. Frauds & Perjuries - it is required in all contracts for the sale of any goods wares and merchandises for the price of £10. sterl. upwards — that there shall be some note or memorandum in writing of bargain, to be made and signed by the parties to be charged by such Contract &c.— cites. Peake's Ev. 211. Now the agreement here cannot be said to have been signed by the parties, because the same was never signed by the Plaintiff, who was equally bound with the Defendant.—

Ross for the Pltff- The exception taken by the Defendant is premature, as it applies more to the evidence

evidence to be adduced in support of it, than to the sufficiency of the agreement as stated in the Declaration. But this being a mercantile transaction, the rules of evidence as received by the laws of England must prevail according to which the said agreement is sufficient although signed by the Defendant alone. —

The Court were of opinion, that this being a mercantile transaction the agreement between the parties was legal and binding, and might be proved although signed by the Defendant alone, and therefore dismissed the Defendant's exception. —

See. Egerton. v. Mathews. 6. East. 307
Allen. v. Bennet — 3. Taunton. 169
Sugdens law of Vendor &c — 64. —

Corse, Cur'
v.
Scott. — } Action by Plaintiff as Curator of the Estate of the late Louis Charland, for sundry goods and effects sold to the Defendant at the public sale of the moveable property of the said Estate. —

The Defendant pleaded in compensation of the demand, that he had furnished bread to the late Louis

charland

Charland in his life time equal to the sum now demanded and as this was a priviledged debt even in the case of deconfiture of the said estate, the said compensation ought to be allowed, —

Bender for Plff - answered, that the Estate was insolvent, and therefore the Defendant could not avail himself of his priviledge in this Cause, a discussion which could be had only with the other Creditors of the Estate who might have an equal perhaps a greater priviledge than the Defendant — That the goods of the late Louis Charland which were sold by the plaintiff as Curator to his Estate, could not be purchased by the Defendant and appropriated to the payment of his debt, such Sale being considered to be made for the general benefit of all the Creditors, and it would therefore be unjust to allow the Defdt thus to pay himself, when there were other demands equally priviledged which could not be paid —

The Court rejected the plea of Compensation and gave Judgment for the plaintiff —

Kemp. v Manson & al'.

On action of Trespass and driving away the Plaintiffs horse. &c

The Defendants pleaded, Not Guilty - and justification under a warrant addressed to them as a special Constables under the hand and Seal of one Jos. Powell one of His Majestys Justices of the Peace for the District, stating that one Joseph Swan was suspected of having feloniously stolen a certain grey horse in the State of Vermont, and had brought him into this Province, and commanding the said Defendants to apprehend the said Swan, and also to search for the said horse, and in case they should find him in the possession of any one within their precinct to take the said horse and convey him to the Magistrate &c That the Defendants found the said horse in the possession of the plaintiff, and with his consent took him away and conveyed him before the magistrate &c

The Plaintiff demurred to the Plea. &c

On the hearing of this Cause the Sol. Gen. for the Pltff, stated, That Defendt claimed the benefit of the St. 24. Geo. 2°. ch. 2. and St. Jac. 1. but these Stat. did not apply to any officers, but such as are appointed and obliged to serve as such for a specific term, and not

to

to special officers for the execution of particular warrants, as private persons are not compellable to execute warrants, and if they do so, they do it voluntarily, and they ought to consider well the authority under which they act. — That the warrant here was illegal, there was no felony stated to have been committed within the Province; and had a felony been clearly stated, still the warrant would be null, being a general warrant to take the horse in question wherever they should find him. — 2 Hale P.C. 114. 1 Bl. Com. 556. 2 Haw. P.C. ch. 13. Sec. 10. — Money & al. v. Leach. 3. Bur. 1742. —

Georgen for Defendts The Officers executing the warrant of a Justice of the Peace, are protected by St. 24 Geo. 2. ch. 44. whether specially appointed or not. nor are they bound to consider whether the warrant be legal or not. 4 Bl. Com. ch. 21. p. 291. — Burn's Just. tit. Justice of Peace. — That even if the action could lie against the Defendants, yet where they act as constables under a warrant, a previous demand of that warrant ought to be made before bringing the action, which was not done here — 24 Geo. 2. ch. 44. S. 6

The Court held, that the Constable or person executing a warrant addressed to him by a Justice of the Peace, was protected from prosecution for

what

what he did under the authority of that warrant, even where the Justice has exceeded his authority in the matter respecting which the warrant was given, and therefore that the Defendants were in this case justifiable — Action dismissed. —

Sed vid. 1. Bac. Abr. 689. —
3. Hawk. 177. sec. 11 —
14. East. R. 160. Burdett. v. Abbot — Bayley's Dictum.

October Term. 1814.

Saturday 1st. October. 1814.

M.c Leod.
M.c Intosh. } The Cause was set down for the examination of witnesses in Vacation on the 21st. Sept.r last on which day the Defendant ~~or~~ his attorney did not appear, when an entry was made on the Rôle d' Enquête, at the instance of the plaintiff, "Continued "generally by consent of the Plaintiff, the Defend.t not appearing".

The Defendant now moved that the Cause should be set down for hearing on the merits — but to this the plaintiff objected, contending that he was entitled to a further day for the adduction of evidence in conformity to the last entry on the Rôle d'enquête — And of this opinion was the Court and rejected the Defendant's motion. —

Monday 3d October 1814.

Jackson
v
Robertson

On plaintiff's motion to fix a day for the adduction of evidence.

The Defendant objected to the motion, that a Commission Rogatoire had issued in the Cause, which was returnable on the first day of next Term, and therefore no evidence ought to be received in the Cause until it should be ascertained in what manner that Commission has been executed, otherwise great injustice might be done to the parties, as it would then be out of their power to supply by other evidence any defficiency there might be found in the execution of that Commission.

Boston for Plff, cited Case of Campbell, v. Baker where the Court refused to continue over the enquête until the return of the Commission Rogatoire, and held that such Commission did not preclude the parties from examining their witnesses in the mean time.

By the Court. There are many reasons why a party ought not to be delayed in the examination

of

of his witnesses until the return of a Commission Rog^r^ as their death, sickness, or absence, might in the mean time make it impossible or difficult to procure their evidence — It had also been found inconvenient in practice to compel the parties to proceed in the examination of their witnesses before the Com. Rogatoire returned, the safer course therefore was, to allow either of the parties to proceed to the enquête, as necessity or convenience might urge him, without waiting for the return of the Com. Rog^r^, but that this ought not to preclude the adverse party from a day to ex. his witnesses after the return of the Commission, if he should require it — and upon this principle the plaintiff's motion was granted &c^r^

Tuesday 4th. October. 1814. —

Reg. Gen: The Judges agreed, that it should in future be observed as a rule in regard of Causes in which the evidence had not been compleated in vacation — that the completing the testimony shall not be permitted in Term time, unless by the consent of the parties; and then every such Cause shall be put down and be ranked on the Rôle d'enquete, after the other Causes of the day — but where such consent is not given, the Cause must go over to the next vacation. —

Wednesday 5th October 1814

Smith. vs Waregal.

On rule obtained by the plaintiff for the Defend^{t} to shew cause why certain parts of an Exc^{p} declinatoire filed by the Defend^{t} should not be struck out, and taken from the record, as the same regarded merely the regularity of the service of the process, which according to the rules of practice, ought to have been brought forward by motion. —

Rolland for Defend^{t} The plea does not regard the regularity of the service of the process, but is made to the jurisdiction of this Court, and therefore regular —

It appearing to the Court that the matters pleaded by the Defendant are proper as an exception to the jurisdiction, the plaintiffs rule was discharged. —

Surprenant vs Bricault. —

On plaintiffs motion to reject from the record, a plea of exceptions filed by the Defendant, the same regarding merely the regularity of the writ & process. —

Stuart

Stuart for Defend. stated, that matters regarding the regularity of the action, and not merely the service of the process, such as mis-nomer, as here pleaded, ought regularly to be set forth by plea and not by motion.— And of this opinion was the Court and rejected the plaintiff's motion.—

Trichette.— vs Brisbane.

(On the defendants motion for a continuance of the enquête to the 14th inst., on the ground that the witnesses subpoena'd to attend last vacation, did not appear — and founded on an affidavit setting forth the reasons why one Boyd, a master Carpenter in the King's service, and one Potts, could not then attend)

Stuart for Plff. The motion cannot be granted, as there cannot be a partial examination of witnesses unless done by consent, or a right of such reserve granted, on application made before the evidence entered upon — Reg. Prat. Sec. 27. art. 14. —

Sol. Gen. for Defendant, refers to 21st art. of same section of the Rules of practice, as containing a general rule, and applicable to a Case, where some of the witnesses cannot be examined, there leave may be given by the Court for the examination of such witnesses at a future day upon good Cause shewn — and further, that the parties had

proceeded

proceeded on the enquête during the last vacation by consent, and without any order to this effect, and therefore in strictness the rules of practice could not apply.—

The Court, considering that the parties had proceeded to the examination of witnesses by mutual consent and without any order to this effect, held, that ~~the~~ strict rule of practice in regard of absent witnesses could not apply, and therefore a day was given to the parties to proceed on the enquête as they should be advised.—

Murray } Duclos }

The same principle held in regard of the examination of witnesses as in the preceding Case.—

Smith. } vs. Walsworth }

On the Defendants motion to quash the writ & process from irregular service — the Defendt living at a distance of more than thirty leagues from the Court-House, and the said process having been served without obtaining the special order of one of the Judges of this Court for regulating the time and manner of such service.—

Stuart

Stuart for the Plff. — The service of the process ought to be considered as good and sufficient if made in as effectual and sufficient manner as could have been done under an order of the Judge, although such order was not obtained — the delay given to the Defendant between the service and return of process was more than sufficient being nearly two months, and more than would have been ordered by any Judge had application been made to him for this purpose —

But the Court were of opinion to adhere to the rule of practice, which requires the previous order of the Judge to regulate the service of the process upon due consideration of the season of the year and situation of the Defendants residence — and taking from a Plff all discretion of what he might think a reasonable service. — Motion granted. —

Thursday 6th October 1814

Ritchie vs Dunlop. } On plaintiffs motion to examine the Defendant on faits & articles.—

Ross for the Defendant objected, and stated that the Cause is triable by Jury, and a Venire has issued to summon a Jury for that purpose, and therefore according to the rules of practice sec. 29. the Plaintiff was too late in his application.—

Ogden for the Pltff stated that a Venire did issue in this cause for the trial thereof on the 3. of June last, but no trial was then had, and therefore the Rule of practice cannot be considered to apply, as no retardation du Jugement can arise by granting the motion — And besides there was a special circumstance in the Case, under which, even according to the strictest application of the said Rule the Plaintiff would be entitled to his motion, namely, that the agent of the Defendant, who has been examined upon a Commission Rogatoire at Quebec, had not answered sufficiently

sufficiently and precisely to a fact within his knowledge a circumstance not known to the Plaintiff until the said Commission was opened, which was after the Cause had been fixed for trial and the Venire issued.—

The Court granted the motion, upon the special circumstance stated, but were inclined to think, that when the first Venire fails from irregularity or other Cause, either party will be entitled to the oath of his adversary before the suing out of a subsequent Venire.—

Grant. v. M.c Intosh.

On defendants motion to quash the writ of Capias.—

Ross for Defendant— The plaintiff and Defendant both live in Upper Canada, and the Defendant by returning from Montreal to his domicile, cannot be considered such a leaving of the Province, upon which a Capias can be granted, because the Plaintiff cannot with truth swear, that he will thereby be deprived of his remedy against the Defendant, in asmuchas there are Courts of Law established in Upper Canada where such remedy can be had the same as

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in this Province.— The Plaintiffs affidavit is besides insufficient, and not positive, as it refers to a statement of accounts between the parties — cites. 2. T. Rep. 55. and 1 H. Bl. 10. n

Stuart for Plff. It has been decided, that every person leaving the Province, wherever his residence may be, is liable to be arrested.— In this instance however the fact of residence of the parties does not appear.— That the affidavit is sufficient — it is allowed by law to be made by an attorney and therefore can be done only from what the Plaintiff tells him, and from such documents as he may hand to the Att[y] for this purpose.— The authorities cited from the English Law do not apply, where the principal makes the affidavit. In the case before us, the attorney in his affidavit sets forth the statement of the accounts between the parties and then goes on to add, that he believes the Defendant to be indebted to the Plaintiff in the sum demanded, which is all that can be required where the attorney makes the affidavit.—

The Court dismissed the Defendants motion,— but observed that the practice in regard of attornies making affidavits ought to be altered, for as an attorney was bound to swear only to what a Plaintiff told him, no man was safe from arrest.—

Monday 10th October 1814.

Charet
v
Gamelin

On action trespass and assault.

The Defendant pleaded, first the general issue, and afterwards added a plea of justification, concluding generally to the Country

Stuart for Pltff. took exception to this mode of pleading, and moved that Defendant should be held to amend his plea, by concluding to the Country upon the general issue as well as upon the Plea of Justification —

The Court granted the plaintiffs motion considering that regularly the plea of general issue ought to conclude to the Country. —

Tuesday 11th October 1814.

Jackson &ab
v.
Robertson.

The plaintiffs moved to fix a day for the adduction of evidence in the Cause.—

Boston for the Defendant, objected, that he had made a similar motion on the first day of this Term which had been refused to him as a commission Rogatoire had issued to England, which was returnable only the first day of next February Term.—

The Court granted the Plaintiffs motion, but reserved to the Defendant a right to examine such witnesses as he should see fit after the return of the said Commission Rogatoire, and this, on the same principle that the Defendants motion was granted on the 3. instant.—

Wednesday 12th. October 1814.

Briere vs. Villiot and Villiot vs. Boucher Gar.t

On Inscription en faux, made by the Plaintiff, and his moyens de faux produced thereon.—

The Plaintiff moved to reject the pleads made by the Garant to the said moyens de faux, the same being an exception in the nature of a general demurrer, and without any causes assigned, which is contrary to the rule of practice sec 11.

The Garant contended that the plea filed by him was proper, as a general exception to the sufficiency of the moyens de faux.—

The Court without considering the reasons of objection made to the said exception by the Pltff rejected the same, holding the practice to be, that no written pleading, unless by the order of the Court under Special Circumstances, can be admitted to be made on an inscription en faux, which ought to be carried on in a Summary manner and without

delay

delay – And this opinion was notified as settling the practice on this point. –

Thursday 13th October 1814.

Bissonet vs St. Michel and Degen, Curr. and The said St. Michel Opp.t

On opposition of the said St. Michel afin d'annuller.-

This was an action en declaration d'hypotheque against St. Michel, who abandoned the premises mortgaged and Degen was thereupon appointed as Curator thereto - The Plaintiff having obtained his Judgt against the Curator, sued out execution thereon, but irregularly, as it was therein stated that the said Plaintiff had obtained Judgment against the - Defendant, and stating the said premises as the property of the Defendant - The Sheriff in consequence of the said execution proceeded to the Sale of the said premises, but refused the bid or enchere of the said St. Michel, as it appeared by the said writ that he was the personal debtor of the said plaintiff, and therefore such enchere could not be received, and in consequence adjudged the said premises to another

person

person.— The said St. Michel now made his opposition afin d'annuller, and in order to prevent the Sheriff from giving a title to the person to whom the said premises had been adjudged.—

The Court after hearing the parties was of opinion that the Sale and adjudication of the said premises had been irregularly made, and that the execution sued out by the plaintiff and all the proceedings had thereon ought to be set aside, as the said St. Michel was not the personal debtor of the Plaintiff and by abandoning the premises in question, the said St. Michel was free to become the purchaser thereof.— The whole proceedings were therefore quashed, and the Plaintiff condemned to pay Costs, for having improperly sued out the said execution.—

Monday 17th October 1814.

Bourassa
v
Derau.

On action for specific performance and to compel Defendant to execute a deed of Sale and conveyance of a certain lot of ground sold by him to the Plaintiff by verbal or parole agreemt.

Rolland for Defendant, contends, that on a verbal convention or Contract of sale, no action can be maintained for a specific performance. 1 Henrys. 452. In the case of a verbal convention as here stated, earnest is the only damage the party is entitled to where either recede from their agreement - There can be no specific performance on an agreement to sell unless the same be expressed in writing and signed by the parties. 1 Bourjon. p. 409. lv. 3. tit. 4. ch. 1. - Sale without tatte in writing conveys no right to the premises sold. Just. Instit. lv. 3. tit. 24. vol. 5. De empt. & ven. - and Pigeau, shews the danger of obliging the party to give his

his oath in a case of this kind. — Even when the promise to sell is reduced into writing, yet if not made double, it is not binding on the parties. Denizt. verbo. Promesse de vendre. — And by the lapse of time which intervened between the Sale and the present demand the Plaintiff was presumed to have abandoned his right, having made no prior demand, or put the Defendant en demeure at the time — Potts. Vente. N.480.

Stuart for Plff — The exception taken by the Defendt to the plaintiff's action is premature, as it admits the validity of the Sale but objects to the sufficiency of a certain species of proof — now it has not yet been ascertained whether a sufficient title may not be produced in evidence against the Defendant, if it should not, then only would his present objections apply — But the Defendants objections in any stage of the Cause are without foundation, and the authorities by him cited cannot be received as the law governing this Case — All verbal Conventions of Sale are valid, when they comprehend the three essential requisites of a Sale, namely, consent, price, and the thing sold — and while the thing sold remains in the possession of the Seller, he can

be

be held to a Specific performance. Poth. Con. Vente. Nº 68.— This principle has been settled in the cases of the Township lands, as well in this Court as in the Court of Appeals.— The party is entitled to his action on a bare promesse de vendre, Poth. Vente. Nº 479.— and here that promise was complete.

Rolland in reply— The objection taken by the Defendant here is, that the action cannot be supported as no title is alledged by the Plaintiff to exist whereby the premises in question were conveyed to him — That Pothier is at variance with all the other authors on the Subject of a promesse de vendre, being liable to be carried into execution, and his opinion therefore ought not to prevail.—

The Court held, that a promesse de vendre where it contained all the requisites of a Sale, although not in writing, yet was valid, and a specific performance thereof could be decreed where the Seller was in possession — That the Plaintiff ought therefore to have a day to make proof of the facts by him alledged —

Rep. de Jurisp^ce. V^o Vente. Nº 484. Sec. 6.
Dauty. p. 593.—
Decisions de Fromental V^o Vente. p. 780.—
Dic. Des Arrets. V^o Vente. p. 839. Nº 49.
2. Henrys, liv. 4. ch. 6. quest. 40.—
Lacombe. V^o Promesse.
Dic. de Droit. V. Promesse Verbale Promesse de Vendre ou louer.

Lacouture vr Dubois.—

On plaintiffs motion to reject from the files, a plea of exceptions filed by the Defendt— as the 2 guineas had not been deposited therewitte.—

Lacroix for Defendt—, states, that the Prothonotary is presumed to have received the money by filing the Plea, and therefore the Plaintiffs motion is irregular, this has been so adjudged in Several Cases.—

Sullivan for Pluff— contends that the rule of practice ought to be complied with, and it ought not to be left to the Prothonotary to say in what cases the two guineas ought to be paid, and it has been settled in several cases that pleas of this description after having been filed have been rejected for want of the necessary deposit of money— cites— Hagar. v. Lindsay. 1812. Grant. v. Rollot.—

The Court granted the motion.—

Wilson vr Manson

On action of assumpsit on a promissory Note and on different money Counts.—

Boston for Defendt. pleaded non-assumpsit, No demand made before bringing the action and tender of the amount— under these pleas, he stated that at the

the time the action was instituted the said promissory Note was not then due, and therefore the Plff had no right of action for the same — That the Defendant was however willing to pay the amount of the said promissory Note to the said plaintiff upon his paying the Costs on this action, and now made a tender of the money — cites. Ward. v. Honeymoon.

Grant for the plff. admitted, that the promissory Note was not payable to the time the process was sued out, yet contends that the Defendt ought to have pleaded this by exception dilatoire, Pig. Proc. Civ. 87. — That the Defendant was about to leave the Province without paying the said note, and was thereupon arrested by the Plaintiff, who considered such conduct in the Defendant as fraudulent, or similar to a deconfiture where a Creditor can claim his debt immediately, altho' the day of payment be not arrived, Poth. Obl. No 232.—

The Court held the action premature as to the promissory Note, and dismissed it in so far as the demand regarded that Note; leaving the parties to proceed upon the other Counts in the declaration.

Bricault
v
Bricault
and
Macé, Intervs

On action for rescision of a deed of Donation made by the Plaintiff to the Defendant his Son, and on the Intervention of Macé the Defendant's wife.—

Bedard for the Intervening party states, that she has certain claims on the Estate of her husband for the rights accruing to her by her marriage Contract with him — That she is now entitled to claim to those rights she having obtained a separation ~~de corps~~ de biens with the said Defendant.— That the property given by the Plaintiff to the Defendant by the Donation now in question, is the only property now possessed by the Defendant, and upon which she can exercise her right of mortgage for the satisfaction and payment of her said rights, and therefore she is interested in the present cause that the Plaintiff should not succeed therein, whereby her said right of mortgage might be destroyed — cits Potts. Proc. Civ. 80.

Stuart for the Pltff, contended, that the grounds stated by the Intervening party were not sufficient to warrant the same being made, as the contest between the plaintiff and Defendant depends upon

facts

facts to be ascertained by evidence, and in which she can have no interest, as she does not alledge that there exists any Collusion between the plaintiff & Defendant to deprive her of any of her rights. —

But the Court was of opinion that there was apparently a sufficient interest in the Intervening party to admit the Intervention, and the more so as it was for the benefit of all parties that the right of the Intervenant, should be now discussed and ascertained, rather than leave them open to another day, which must be the Case should the present Intervention be disallowed. —

Mower v. Powell } On trial by Special Jury, on action agt the Defendant as a Justice of the peace for false imprisonment. —

The Plaintiff on the trial produced a notice sent by him to the Defendant one month before the Commencement of the action as req. by St. 24 Geo. 2. ch. 44. with the Certificate of the service thereof by one of the Bailiffs of the Court, which he

be offered as evidence in the Cause. —

The Defendant objected to the sufficiency of such evidence, as the bailiffs certificate is not enough, the Statute requiring that the service of the notice should be sworn to. —

Stuart for Plff in reply, the bailiff is a sworn officer of this Court, and all official acts done by him are in the eye of the law considered as made on oath, and it is the Constant practice of the Court to admit the acts of the bailiff as sufficient evidence of the facts they contain — This is not a Cause where the rules of evidence as laid down by the laws of England can be received, the antient laws of the Country must govern in this instance according to which the Certificat of the Huissier was always received as an authentic act without affidavit or other evidence to support it. —

The Court held, that as the office of Justice of the peace had been established in this Country, as essential to the due execution of the Criminal law, the person holding that office was entitled to the same protection in the execution of his duty in this Country as he would be in England, and according to St. 24 Geo. 2. ch. 44, the Justice of peace when charged with an action for a breach

of

of his duty, is entitled to one months previous notice thereof duly served upon him, and that service sworn to by the person making it — and this we must consider as being the law in Canada, and in this respect that the antient laws of the Country have been altered — The notice was therefore not allowed to be read —

Wednesday 19th October 1814

Dillon. — v Ermatinger. } On action agt the Defendant as Sheriff for a false return. —

The declaration stated, that on the 10th day of April 1812, the plaintiff sued out a certain writ of attachment or Saisie-arret, directed to the Defendt as Sheriff, commanding him to attach and seize the goods, chattels and effects of one Rheuben Ball to the extent of twelve pounds for a debt due to the said plaintiff — That the said Defendant did certify and return upon that writ that he had attached and seized the goods chattels & effects of the said Rheuben Ball to the amount aforesaid which he had ready to abide the order of the Court — That afterwards on the 20th day of October of the year aforesaid the said pltff obtained Judgt in this Court agt the said R. Ball for a sum of £12. for a debt, with interest thereon from the 11th day of April 1812, and Costs of Suit taxed at £6. 13. — and by the said Judgment it was ordered, that the aforesaid goods, chattels and effects so attached as aforesaid should be sold in due course of law for and towards the payment of the said debt, Interest and Costs. — That afterwards

on

on the 19th day of November 1812, the said plaintiff sued out a certain writ of Fieri facias, directed to the said Sheriff, by which said writ, the Defendant was commanded to make and levy of the goods and chattels of the said R. Ball the aforesaid debt, interest and costs, and to have the same before the Court on the first day of February then next to render to the said Plaintiff — That the said Defendt so negligently kept the said goods, chattels and effects by him attached and seized under the said writ of attachment or Saisie-arret, that the same were entirely lost, and the said Plaintiff was thereby wholly unable to recover any part of his aforesaid debt, interest and Costs — By means whereof &c —

The Defendant pleaded, Not Guilty — and Nul tiel Record. —

On the hearing of this Cause, the Defendant after noticing some irregularities in the proceedings, contended, that when the Sheriff appointed a gardien to effects seized by him, he was not responsible for the loss of those effects by the negligence of that gardien. — That the Plaintiff, instead of suing out a writ of Venditioni exponas, for the Sale of the effects already seized under writ of attachment, sued out a writ of Fieri facias,

upon

upon which the Defendant made a return of "Nulla bona", as he could not under that writ, seize again what he had already seized under the writ of attachment.— The present action is founded on this return as being false, but the return is regular and none other could be made, unless the Plaintiff had shewn that there were other goods belonging to the said R. Ball which the Defendt had refused to seize.

Stuart for Pltff — The gardien is the agent of the Sheriff and he is responsible for him.— It is not the practice of the Court to sue out a venditioni exponas, but a fieri facias, where goods have been seized by the Sheriff on attachment, and under the fi. fa. the goods being already in the hands of the Sheriff, he proceeds to the sale thereof, without any new seizure being necessary.—

The Court were of opinion that the Defendant was bound to have sold the goods and effects he held under the writ of attachment, upon the writ of fi. fa sued out by the Plaintiff, which was a writ equally efficient for this purpose as a writ of venditioni exponas, and besides enabled the Defendant to seize any other goods or effects he might find, should not those already seized have been sufficient, to satisfy the Plaintiffs debt Interest & Cost — Judgment for the Pltff.—

Thursday 20th October 1814.

Perrault & ux
vs
Jeannot.

On action for arrears of a Rente & pension viagere.

The Defendant pleaded a lesion d'outre moitié to the acte de Constitution de rente, and contended that an acte de Constitution de Rente, was considered in law as real property, and in the seizure and sale thereof was always treated as such - cites, 1 Bourj.n tit. 8. ch. 2. sec. 2. art. 8. p. 336. - Journal des audiences - arret du 29 Avril 1661 - That being thus considered as real property, the plea of Lesion d'outre moitié ought to be received, and thereupon prayed that a day should be granted to him to make proof of the facts by him alledged.

L.M. Vigé for Pltff, refers to the Case of Dorions, vs Allard, determined in this Court, where it was held that no lezion can be admitted against an act of Constitution de rente, which determines with the life of the person in whose favor it is made, cites. Pothi. Constit. de Rente. Nos 215. & 218.

The Court were of opinion that the plea was insufficient and gave Judgment for the Pltffs.