February Term 1815.

Thursday 2. February 1815.

Jetté
vs
Destrautels

The defendant appeared on the return of the writ yesterday, when the plaintiff moved to examine him upon faits & articles.

Sullivan for the Defendt objected to the motion and contended, that the same was premature in asmuchas there was no contest yet raised between the parties upon which evidence of any kind could be received — That faits & articles could not be received upon any other principle than in proof of the matters in contest between the parties, and at present it was uncertain what that contest might be — That although by the Tit. 10. art. 1. of the Code Civil, faits & articles are said to be admissible en tout etat de Cause yet this according to the best Commentators is understood to

to be after a "procedure liée" - a "contestation en cause" or where the facts to be proved have been denied cites. Jousse. & Bornier on Tit. 10. art. 1. Ordre 1667 - and this has been so adjudged in this Court - Descelles v Sauvage. 2d June 1814. -

Bedard for Pliff answered, that no inconvenience could arise from admitting the faits & articles in this stage of the Cause, and as the law was general it ought not to be limited to the contestation en cause That the law has provided that a witness about to leave the province may be examined at any time before plea pleaded or issue raised in the Cause, and the faits & articles may be assimilated thereto - That some Commentators on the Ordre of 1667. Tit. 10. art. 1 are of opinion that the faits & articles ought not to be restrained to the Contestation en cause, but ought to be admitted according to the terms of the law, "en "tout etat de Cause" cites. Stile de Gamet - agreeable to which opinion the Rule of Prac. of this Court has been adopted which clearly admits the right demanded. -

The Court held, that the faits & articles could be demanded in any stage of the Cause from filing

the

the declaration to the time of closing the enquête agreeable to the rule of Prac. Sec. 29. and this was conformable to the general opinion of the Commentators on the Code Civil - Poth. Proc. Cv. Nouv. Denizt. Vo Faits & articles, 9.1. No 6 Stile de Gamet - That the Case cited by Defend. of Deselles v. Sauvage did not apply, the motion there having been rejected from want of a previous notice. - Motion granted. - Sed. vid. Serpillon. p. 101. - Bornier.

McLeod v McIntosh

During the last vacation the parties closed the enquête, reserving the right to examine each other on faits et articles. - The Dfdt. moved yesterday to set down the Cause for hearing on the merits, which the Plaintiff opposed, and moved to examine the Defend. previously on faits et articles, and for this purpose that a Commission Rogatoire should be granted to him addressed to Commissioners in Upper Canada, where the Defend. lives, returnable the first day of next Term.

Boston for the defendant opposed the motion contending that the application was too late, as the Plaintiff might have sued out his Commission Rogte in

in vacation and made the same returnable the first day of this Term - That the granting of a Commission at this day will unnecessarily retard the Cause by reason of the Defendant's residence in Up. Canada

The Court were of opinion that as there had been no laches in the plaintiff since closing the enquête, and as the delay till the first day of next Term for examining the Defendant did not unreasonably retard the Cause, nor in anywise injure the Defendant, the Plaintiff's motion was granted, and the defendants motion over-ruled. "

Taylor vs Drennan

In the last Term the plaintiff had obtained a rule for the examination of the Defendant on Faits & articles on the 2d. day of December last, which rule was served on the defendant on the 30th. Novr. but in the Certificate of Service no mention was made of the hour at which such Service was made. " On the 2d. December the Defendt was called but did not appear, and in consequence

the

the plaintiff moved yesterday that the faits & articles should be taken and considered as acknowledged and confessed. —

Stuart for Defr objected to the motion, contending that the service of the faits et articles was irregular and as the defendant resided upwards of one league from Montreal, the service was too short, there being no more than 24 hours notice prior to the return, as the Certificate of service did not shew at what hour the service was made on the 30th Nov —

The Court considering the irregularity of the Certificate of service, gave a day to the defendant until the 7th inst. to come in and answer to the faits et articles, reserving till then to determine upon the plaintiff's motion. —

Smith. vr Weare & al

The Cause having been fixed for the adduction of evidence on the 9th day of January last, the Plaintiff then stated, that he had sued out a subpona to be served on the Witnesses, but that the said Witnesses did not attend, nor had he

received

received the return of the subpona, which he attributed to the impracticable state of the roads, and offered to justify the same — He now produced the subpona by which it appeared that two of four witnesses therein named had been regularly summoned to — attend on the 9th. January, and also the affidavit of the Plaintiff, by which it appeared, that all the witnesses named in the subpona had set out to come to Montreal on the said 9th. January, but had been compelled to return home from the impassable state of the roads — Upon these facts the Plaintiff moved for a continuance of the enquête to the next vacation. —

Ogden for Defts. contended, that the motion ought not to be granted, inasmuch as the names of the witnesses subponaed have not been inscribed on the diary agreeable to the Rules of Prac. Sec. 27, §. 11. — and therefore they cannot be now examined. At all events, if the Court should be disposed to continue the enquête, it ought to be for the exam^n of those witnesses only who have been subponaed agreeable to the said Rules of practice —

The Court considering that on the day

fiscal

fixed for the enquête, the Plaintiff's counsel could not ascertain the names of the witnesses subponaed nor cause their to be inscribed on the diary, and considering also, that all the witnesses had set out to come to town, although two of them named in the Subpona did not appear to have been regularly summoned — under these Circumstances the Court were of opinion to grant the plaintiff's motion.

Friday 3d. February 1815.

Campbell v. Sutherland

On rule on defendt to shew Cause why the plea filed by him should not be taken from the record as having been filed too late –

Ross for Defd. stated, that this Cause was returned into Court on the 11th day of October last, and not being bound to plead thereto before the expiration of 15 days, this took it over to vacation, and accords to the 19th Sec. of the rules of Prac. when a plea is to be put in during the vacation after October Term, 20 days are allowed for that purpose – That the defendant filed his plea on the 9th November last which was within the 20 days after Term – And further contends that the rule now obtained by the plaintiff ought to be discharged inasmuchas the said plaintiff has served on the Defd. a copy of a Replication, taking issue on the said plea, which is a waiver of every objection to the regularity of filing the same –

Ogden

Ogden for Plff. contended, that the defendant was not entitled to the benefit of both rules of Prac. for an extension of time to plead, as was adjudged in the Case of Sutherland v. Beach. 8 Feby. 1814 — and therefore defendants plea became due on the 26th. October last That the copy of the replication was served on the Defendt. with a Special notice reserving right of objection to the filing of the plea. a

It appearing to the Court that the Copy of the Replication had been served on the Defendant without any notice of reservation of right of objection to the filing of the Plea, the same was considered as a waiver of that objection, and the rule to Shew Cause was discharged with Costs. —

Saturday 4th Febry. 1815.—

Deshaubels Cur. &c vs Trusdell

On action of assumpsit, on promissory Note, & on money counts.—

The Defendant moved, that he should not be held to plead to the plaintiffs action, but that the same should be suspended, until the plaintiff should file a statement of the sum he claims to be due to him on the present action in conformity to the rule of practice. Sec. 43.—

O'Sullivan for the ~~plaintiff~~ contends, that as his action is founded on a promissory note, he is not bound to give such statement, nor does he admit that any thing was paid on account of it by the Defendant — that the plaintiff in this cause acting as Curator to a vacant estate cannot be bound to give such statement, not having a sufficient knowledge of the transactions between the parties —

The Court held that the Plaintiff was bound to give the statement required, as no exception was admitted by the Rule.—

Monday 6th. February 1815.—

Mettote.—
vs
Racicot.—
&
Ranger opp^t.

On the Opposition of Ranger afin de Conserver.—

There was due to the Opposant a certain rente & pension viagere upon the land of the defend^t which had been sold by the Sheriff without any opposition afin de charge having been made by the said Ranger.— She now claimed by her opposition afin de conserver that the Capital of the said rente et pension should be adjudged to her on the principle of ten years value thereof, estimated according to the actual value of the articles.—

Lacroix for the plaintiff contended, that as the Opposant had allowed the land to be sold without any claim or opposition, she ought not to be allowed to sweep away the whole amount of the Sale by her present Opposition.— That the Opposant was a person advanced in years, and ought not to obtain the Capital of her rente et pension upon an

an estimation of ten years value thereof — that this principle was not to be admitted in every case as an invariable rule of estimation — the age of the donor ought to be considered, as well as the value of the property given — and further that the present value of every necessary of life was uncommonly high and ought not to be adopted as a rule of estimation — Proposed that the whole should be submitted to Experts —

The Court considered this reasonable, and by an Interlocutory Judgment directed, that the rente & pension in question should be estimated by Experts who should take into consideration as well the age and situation of the Opposant as the value of the property conveyed by the deed of donation, and to make their report thereon the first day of next Term. —

Poth. Const. Rente N°. 231. 234.

Hart
vs
Osborne

The defendant moved, under the reserve made by him at the closing of the enquête in vacation, that he should be permitted to examine the plaintiff upon faits et articles, and that a Commission Rogatoire should be granted to him for this purpose.—

Ogden for the pltff. contended, that this motion could not be granted, being made too late, as by the Reg. Prac. it ought to have been made the first day of Term — And of this opinion was the Court and rejected the motion.
Reg. Prac. Sec: 27. art. 21.—

Bourassa
vs
Denau.—

The enquête in this cause was appointed for the last vacation, when it was ordered, that the enquête should be continued, but without fixing a day.

The defendant now moved that the Cause should be fixed for hearing on the merits.—

Grant for the pltff. objected, that he was entitled

entitled to a day for the continuance of the enquête agreeable to the order in vacation —

Rolland for the Defendt contended, that the plaintiff's right to obtain a continuance of the enquête had lapsed, in consequence of no application having been made for that purpose on the first day of Term —

The Court were with the Defendant in opinion and granted his motion — see cases — Barlow v. Dunlop. 2d June 1812 — & Blackwood et al. v. McLaren et al. 10 June. 1812

Berthelet v. Deaves —

A Commission Rogatoire had been returned from Quebec in this Cause, in the execution of which it had been omitted to propose the cross-interrogatories to one of the witnesses —

The Plaintiff now moved that an Alias Commission Rogatoire should be granted to him, addressed to the Judges at Quebec to complete the evidence to be adduced under the former Commission

as

as that Commission had now expired, and the return thereof could not regularly be prolonged to another day for the above purpose. —

Gale for the defendt stated, that he did not object to the motion, as the plaintiff might take his own course, but observed, that as the plaintiff had sued out the Commission Rogatoire already granted, the present extra proceedings ought to be at his expence — That if the return and proceedings on that writ were not sufficient, it did not seem a regular course to rectify the same by issuing a new writ, as under such new writ all the proceedings already had must go for nothing, and be renewed. —

McLeod. vs McKenzie Curr. &c & Logan. Opt.

In this Case a priviledge was granted upon the proceeds of the moveable property of the late Mr Frobisher in the hands of the Curator to the Opposant for bread furnished by him to the said Frobisher during the last year of his life see. Rcp. de Jur. Vo Boulanger. — Privilege — 2. Bouj. p. 688. No 71. — & al. —

Dubreuil v. Lavigne

By deed of Sale of the 20th July 1792 the defendt was bound to pay to one Venne a certain rente et pension viagere, which the said Venne afterwards by deed of Donation of the 25th Oct. 1811 made over to the Pltff. — In this deed of donation, after specifying certain articles conveyed to the Pltff, it goes on to state — "Item et "enfin toutes les autres rentes viageres à elle dües par — "Antoine Lavigne, Pierre Babin &ca" and in a subsequent clause — "Pour du tout sus-donné jouir, user, faire et "disposer par les dits Donataires leurs hoirs & ayant "Causes comme de chose à eux appartenante en pleine "propriété en vertu des presentes, d'icelles rentes retirer "et percevoir annuellement des mains de tous debiteurs "d'icelles, a commencer la jouissance de ce Jour". — And lastly it is stated — "Au moyen de quoi ladte donatrice "a transporté aux dits donataires tous tels droits de "propriété generalemt quelconques qu'elle pouvoit avoir &ca"

The question here was, whether under the above donation the Donee was entitled to claim the arrears of the Rente & pension due by the Defendt prior to the date thereof

The Court held that the pltff did not take the arrears of the Rente — That the presumption is, that no man is supposed to give beyond what he has expressly declared — and as there was no special Conveyance of the arrears in the deed, the Pltff was not entitled to claim them

Tuesday 7th February 1815.—

Webster. —
v.
Mayrand

On action en Revendication. —

Bourré for the Defendant moved, that the writ & process sued out in this Cause sh^d be quashed for the following reasons. —

1. Because the writ is variant from the declaration in this, that in the declaration, the addition of the Plaintiff is mentioned, but in the writ it is not mentioned. —

2. Because the order for the writ of Saisie sued out in this Cause was not made and granted on the declaration, as stated in the Copy thereof served on the Defendant. —

3. Because no Sum was indorsed upon the ~~affidavit~~ writ or process agreeable to the forms required by the rules of practice. Sec. 8. art. 2.

The Court permitted the plaintiff on the first point to amend the writ by inserting the addition of the plaintiff, on payment of Costs — On the second

second point they held that the order of the Judge was not necessarily required to be put on the declaration by any rule of practice, and as that order in the present instance appeared at the bottom of the affidavit made by the plaintiff in the Cause at the time of suing out the writ it was sufficient — And on the third point they held that in an action of this kind no sum of money could be sworn to, nor was it necessary, as the action did not tend to any condemnation in money, but to the restoration of a particular article <u>in nature</u> the property of which was claimed by the Plff

The two last parts of the motion were therefore disallowed. —

Jackson ex dem'
vs
Robertson.

On the defendants motion to be permitted to fyle certain papers touching the matters in contest between the parties, which papers had come to the hands and possession of the Defendant, since the last term, and which he could not produce sooner — This was opposed by

by the plaintiffs, but the fact as stated in the motion being sworn to in the affidavit produced in support thereof, the Court granted the motion. See. Paris. & ux. v. Caron. 7. Febr. 1814. —

Thursday 9th Febry 1815. —

Chaput v. Mettote

The plaintiff in this Cause moved to be permitted to amend his declaration in this Cause, by inserting the word "November" in lieu and place of "September" — mentioned in the said declaration — This was granted upon payment of Costs — The Defendant now moved that as the amended declaration contained a new demand to which his Attorney could not answer without new — instructions, and as the Case now stood, it was and ought to be assimilated to an action returned into Court this day, that therefore the defend

should

showed have the same delay to plead thereto as if the action had been so returned — The Court granted the motion, and held that where material alterations were made in a demand by amendments of a declaration, as was the Case here, it was — reasonable that the Defendant should have the same delay to answer thereto as he would be entitled by the rules of Practice had the Cause been returned into Court on the day of the amendment — and this delay must be attributed to the negligence and inattention of the plaintiff in stating his demand irregularly, which the rules of practice will always be construed to repress & punish, and therefore the benefit of the rule in this case ought to extend to the Defendant. —

Bellanger vs Tassé. —

This was an action for four years wages as a Servant, up to June 1814

Vigé for the Defendant pleaded as an exception

to

to the plaintiffs action that it was prescribed in law, after the year and day, and referred to 127th art. of the Custom. –

Lacroix for the Plff. contended, that the action is not prescribed – refers to Case. Bedouin v. Bricault. Oct. Term 1802, where the Court held that the Servant or engagé was entitled to demand three years of his wages, and that for the last of the three he was entitled to a privilege on the moveable property of his master.

The Court considered the plea of prescription in this Case to be badly pleaded, as it was not correct or true, to say, that the whole of the plaintiffs demand was prescribed, as he was evidently within the year for some part of it even according to the most rigorous construction of the 127th art. of the Custom, and therefore dismissed the said plea – That if the defendr had meant to say, that the part of the plaintiffs demand which did not come within the year and day was prescribed, he ought to have stated it in such manner as to meet the opinion and Judgment of the Court upon that point, but in the manner the exception was

was pleaded, it embraced the whole demand which was irriguear, as the only Judgment the Court could give in this case was, that the whole of the Plaintiffs demand was not prescribed. —

Ker ... } v. Lacroix }

On action to recover damages for deceit used by Defendt in a certain deed of assign.t to Plaff.

The Court gave the following Interlocutory.

The Court having heard the parties by their counsel examined the proceedings on record and deliberated thereon, and inasmuchas it appears by the Judg.t made in His Majesty's Privy Council on the 11th day of June 1812 (copy whereof is produced and filed by the plaintiff in this Cause) on an appeal in a certain Cause between John Fraser Esquire, appellant, and the said plaintiff, Respondent, and also wherein, the said Plaintiff was appellant and the said John Fraser, Respondent, respecting the rights now in

question

question, which said Judgment confirms a Judgmt made in the Court of appeals in this province between the said last mentioned parties, bearing date the 12th day of November 1806, and it appearing essential for the right decision of the matters in contest between the parties, that this Court should have under its consideration as well the aforesaid Judgment of the Court of appeals as that rendered in the inferior Jurisdiction to which it relates — It is ordered, previous to further proceedings being had in this Cause, that the parties in this Suit, or either of them, do produce and file in this Court on the first day of next April Term, a certified copy of the said Judgt made and rendered in the said Court of Appeals on the 12th. day of November 1806, and also a certified copy of the Judgment made in the Court of Kings Bench to which the said Judgment in Appeal relates; for such course thereon as to Justice shall appertain

Friday 10th February 1815.

Bell &
Fraser
&
Young &
al. Opps

On a rule obtained by the plaintiff on the Opposant, Young, to shew Cause why a certain Intervention made by him in this Cause should not be rejected and taken from the record as being an opposition afin de conserver, and as such too late to be filed according to the rules of practice.—

Rolland for the Intervs. Party, contends that he is entitled to maintain his Intervention in support of his claim on the monis belonging to the Defendant after the prior claims shall have been satisfied, which was permitted in France even after the decret had been scellé — cits. Potts. Proc. Civ. lw. 1. part. 4. cls. 2. sec. 3.— 1 Pigeau. 734. Hericourt. 9.

Ross for the plaintiff contended, that, this Intervention differed in nothing from an Opposition afin

afin de conserver, except in name, as it claimed the right of being collocated upon the monies levied in preference to the other Creditors of the Defendant by reason of a prior mortgage upon the property sold and therefore according to the rules of practice, Sec. 37. it could not be received —

It appearing to the Court that the return of the Sheriff to the writ of fer. fac. sued out in this cause had been made on the first day of the Term and that the Intervention in question, which was in effect an Opposition afin de conserver had been made only on the third inst. it was considered as inadmissible and the same was rejected. —

Lacroix. —
vs
Desjardins. —
&
Rochon. Oppt

On the Opposition afin de conserver of Rochon. —

It appeared that under the writ of execution sued out in this Cause a certain piece of meadow land belonging to the Opposants had been

seized

seized and sold as making a part of the defends land – no opposition had been made by the opposant afin de distraire, and under the present opposition he claimed as the value of the said meadow a larger sum than both the meadow and land together had sold for, alledging that the said meadow was the only valuable part of the property sold.

The Court considered, that as the opposant had allowed his meadow to be sold with the rest of the land as forming a part thereof, he was not now entitled to divide the Sale in such manner as to take out of the proceeds thereof the separate value of his meadow, but only a proportionate part thereof, that is, that the value of the said meadow should be estimated by Experts as it stood at the time of the Sale with all its advantages and improvements, and also the value of the rest of the land, and that the sum to be allowed out of the proceeds of the joint sale to the said Opposant would then be in a proportion on the whole proceeds as the meadow should be found

to

to be of greater value than the rest of the land.—
And for this purpose experts were ordered to be named
accordingly.—

Saturday 11th Febry. 1815.—

Webster.
vs
Maynard

Bourré for the defendant moved that the affidavit upon which the writ of Saisie-Revendication issued in this Cause should be rejected from the record, where it had been improperly put, several days after the filing of the plaintiffs exhibits, and without the knowledge or consent of the Defendant

Porteous for the Plff.— The affidavit must be considered as having always been before the Court, and it appears to have been filed on the day the writ of Saisie Revendication issued, and is so marked by the Prothz.

Bourré

Bourré in reply — It is not enough that the affidavit should be marked filed on the day the Saisie issues, but on the return of the writ, the same ought to be filed in the Cause with the other exhibits as essential to the support of the proceedings, otherwise a Defendant is not obliged to know that any affidavit exists, or that the Plaintiff means to rely on any for the support of his action —

The Court held that under the Rule of Practice Sec. 8. the affidavit was considered as filed of record as soon as received and so marked by the Prothonotary on issuing the writ of attachment — and that every defendant was entitled to a copy thereof on demand, at all times, as well before as after the return of the writ — and although this affidavit ought to be considered as forming a part of the proceedings in the Cause and as such ought to be filed among the other papers composing the record therein — Yet as an access had been pointed out to the Defendt by the rules of practice for communication of this affidavit he had no right to complain that he did not find it with those papers, — Mo. Dou-ruled. —

Gillespie ... vs Wadsworth and Wood. Ospt.

Boston for the Oppost. stated, that he had formed an opposition claiming a certain privilege upon part of the monies arising from the Sale of certain goods & merchandises in the possession of the defendt and as the said Opposition had not been contested by any of the parties concerned, he now moved for his Judgment thereon, and that the conclusions thereof should be granted to him, as the said opposition ought now to be taken as admitted by the said parties, under 37. Sec. of the Rules of Practice §. 8.—

The Court held, that although the parties concerned had not contested the opposition, and were thereby considered to have admitted the same, as far as persons in default can be presumed to admit the demand made against them, yet this did not warrant the Court to grant Judgment upon the claim, merely because it had not been contested, proof in this case being necessary without which the claim cannot be maintained— and that this was the interpretation already given on this rule— An order for proof.—

Monday 13th Febr. 1815.

Bougy
& vr
Savard
&
Delage
Part.

On action en declaration d'hypotheque

The declaration stated, that by a notarial act of the 12 Oct. 1803, the plaintiffs exchanged a certain lot of land with one Deloges, with a warranty that the same was free and clear from all arrears of rents and Seigniorial dues up to that time — That nevertheless an action was instituted in this Court in February Term 1808 by one Franc. Rolland as Testamentary Executor of the late Mr Dumont Seignior of the Seigniory in which the said lot of land is situated against one Franc. Jarry then proprietor of the lot of land given in exchange by the said Deloges to the said plaintiffs, who had sold the same to the said Jarry, upon which action a Judgment was given on the 7 Oct. 1809 condemning the said Jarry to pay a sum of £28. 15. 7½ for Lods & Ventes due on the said land anterior to the acquisition which the said plaintiffs had made of the said lot

of

of land from the said Deloges. — That the said Plffs and the said Deloges having intervened in the said Cause as Garants of the said Jany, it was by the said Judgment ordered, that the plaintiffs should reimburse to the said Jany the amount of the said condemnation and that the said Deloges should reimburse the same to the said plaintiffs with all interest & Costs thereon. That on the 20th day of April 1811 the said Jany caused the said Judgment to be declared executory as well against the said plaintiffs as against the said Deloges, and after discussion of their moveable property sued out execution against the real estate of the said plaintiffs for the amount of the said Judgment & Costs accrued thereon, being £45. 6. 9½ and by virtue thereof sold two lots of land belonging to the said plaintiffs That the amount of the expences in effecting the said Sale, and of the distribution of the monies thereon, was £14. 5. 1½, making with the aforsaid sum and the interest accrued thereon £70. 5. 10½ which the Sd Plffs paid on account of the said Deloges and which they are entitled to recover from him — That the Sd. Plffs

were

were further entitled to recover from the said Deloges a sum of £50, for the damages by them sustained by the sale of the aforesaid lots of land and being compelled to quit and abandon the same through the act & default of the said Deloges, but none of which said sums of money have yet been paid by him to the said Pltffs—

That the defendant is now the proprietor of a lot of land which belonged to the said Deloges at the period of the aforesaid exchange, and which was sold to the said Defendt by deed of sale of 8 Novr: 1808, which lot of land became and was bound and mortgaged to the Plaintiffs for the payt of the aforesd Judgment so rendered against the said Deloges, and for all the consequences resulting therefrom, and therefore the said Defendt as now holding & possessing the said last mentioned lot of land is become bound and liable to pay to the said plaintiffs the aforesaid sums of money making together £134. 9. 2½ with interest thereon, or that he the said Defendt do quit and abandon the said lot of land in order that the same may be sold for the payment & satisfaction of the said debt interest & Costs —

The

The Defendant pleaded nil debet — and that he was not bound to pay the amount of the monies demanded of him by the said plaintiffs, and particularly the aforsaid sum of fifty pounds for the damages alledged by the said Plaintiffs to have been by them suffered and sustained in the premises

On the hearing of the Cause, Vigé for the Defr contended, that the plaintiffs were not entitled to any part of the damages by them pretended, inasmuch, such damage, if at all it existed, arose from the fault and neglect of the plaintiffs in not paying what they had been adjudged to pay to the said Sarry, and if they allowed their lands to be sold to satisfy this debt, they were at least as much to blame for so doing as the said Deloges, who was without means to pay — That the Defendant can be considered only as the Caution of Deloges, and cannot be condemned in more than a Caution would. Obl. Nº 404. 405.—

Quesnel for the Plaintiffs contended that the Defendt is liable in all the damages claimed by the Plaintiff with the interest thereon, for qh the Pltffs have a mortgage on the land in question. Poth. Hyp. Nº

The Court held, that a distinction was to be taken according to which it must be determined whether a Vendor was bound or not to indemnify the Vendee against all damages as well extrinsic as intrinsic — Where the Vendor was in good faith and sold and warranted what he truly considered to be his own, and what he had a right to sell, there he was bound to indemnify the Vendee in case of eviction only in what he had been damnified propter ipsam rem non habitam, but no further; but where there was bad faith and the Vendor sold or warranted what he knew or must be presumed to know was not his own, and which therefore he could not sell or warrant — there he was liable, in case of the eviction of the Vendee, in all damages, as well those suffered, propter ipsam rem non habitam, as what he may have suffered or sustained in his other property. — In the present case it appears that Deloges, by the deed of exchange made with the plaintiffs, warranted the land he gave in exchange to be free and clear of all incumbrances and of all arrears of rent

Poth. Vente. N° 130. —

Id. N° 137. —

and

and Seigniorial dues, which was contrary to the fact, and of which he could not have been ignorant, as the Lods & Ventes in question arose partly from the act of the said Deloges — he therefore was in bad faith, and bound to indemnify the plaintiffs, as well in the sum of £50., as in the other damages by them demanded, as far as the same should be made out in proof —

Thursday 16th Febry. 1815.

Farribault
v
Farribault

Action on Obligation & promissory Note. —

The Defendant nil deb: &c and set up an Incidental demand for work & labor done and sundry articles furnished by the Defendt to the plaintiff — To this demand the plaintiff pleaded an exception or fin de non recevoir, that as it was not liquidated, it could not be admitted to be set up as an Incidental demand, unless it could have been proposed as a defence to the demand in chief, which it could not — cits. Nouv. Denist. vo Demande Incidente. 1 Pigeau. 331. —

Lacroix in answer, contends, that any demand may be set up by Reconvention or demande Incidente, which tends to the same conclusion and Judgment with the demand in chief — Here both demands conclude for a payment of money, and therefore the Incidental demand is admissible, the practice of this Court being to terminate any litigated point in this shape rather than drive the party to another action —

By

By the Court. The 106th art. of the Coutume de Paris
Fer. Gr. Cout. Art. 106.— was meant to preclude a conflict of Jurisdictions, and to prevent a Suitor by means of an Incidental demand from withdrawing himself from his proper Jurisdiction where such Incidental demand was regularly cognizable — In practice however this article was never strictly followed and the contrary doctrine even obtained in the Courts in France, whereby every Incidental demand was admitted, provided it tended to the same conclusion with the demand in chief.— In that Country as well as in this, it is a principle
Fer. Dic. Vo. Reconvention of public economy that all litigation should be abridged as much as possible: "expedit reipublicæ ut sit finis litium", and therefore the expedient of admitting every Incidental demand of a similar tendency with the demand in Chief was readily adopted and found better to answer the ends of Justice where the matters litigated were within the Jurisdiction of the Court, than to adjudge upon the claim of one party, and drive the other to his Suit — Consonant to this principle, warranted by the practice of the Courts in France, has this Court admitted all Incidental demands although not equally clear and liquidated as the demand in chief, provided they tend to the same conclusion and Judgment — The only inconvenience to arise from this may be the delaying the progress of the principal demand,

but

but this is sufficiently provided for by the 13th Sec. of the Rules of practice. — The Exceptions to the Incidental demand dismissed. —

Lacombe vs Cuvillier & Co

Action of special assumpsit, on the following agreement. —

"We hereby agree to take from Jacques "Lacombe one hundred and fifty minots good and "merchantable wheat delivrable on board a Schooner "at St. Sulpice, on the first demand, for which, twenty "shillings and three pence per minot will be paid "on delivery" —

M. C. Cuvillier & Co.

October 1812.

The plaintiff by his declaration states, that by the aforesaid agreement the Defendt. did purchase and agree to take from the pltff 150 minots of wheat to be delivered on board a Schooner at St. Sulpice in this district, on the first demand, that is to say, "in the course of the last fall (1813) when the navigation "of the River St Lawrence should be still open at St. "Sulpice aforesaid". — That the plaintiff sold and

promised

promised to deliver the said wheat at the price stipulated: That after the making of the said agreement, he the Plaintiff was always ready and willing to deliver the said wheat, in conformity to and in fulfillment of the said agreement. — That the defendant not having made any demand of the said wheat, he the plaintiff, on the 29 Dec. 1813, gave a notice to the Defendant that the said wheat had ever since the making of the said agreement, been retained by the said plaintiff to be — delivered according to the said agreement, and was then ready to be delivered at St Sulpice aforesaid — That the Defendant neglected and refused &c — to the damage of the Pltff £46. 17. 6. —

The plea consists of a general denegation of the plaintiff's right of action, and a particular exception to the form of the agreement between the parties, as being insufficient in law to bind them. —

The latter part of this plea having been disposed of by the Judge of this Court in October last, we have now to look at this Cause as it stands on its merits —

The contract between the parties here is executory, and the execution of it might have been demanded by

by the one party or by the other — it differs materially from a contract executed, or so far executed, that the thing sold could have been considered the property and been at the risk of the Defendant — but being executory, and in the execution of it something being requisite to be done on the one side and on the other, it becomes a question, whether the party who now claims a benefit therefrom, has brought himself within the terms of the Contract, so as to be entitled to reap that benefit —

In all executory Contracts where something is to be done on one side and on the other to perfect the execution thereof, the acts thus to be done are termed Concurrent or simultaneous, of which description is the agreement between the parties, for the instant the wheat was delivered the money was to be paid for it — Such being the nature of the Contract here, it was the duty of the Plaintiff who wishes to derive a benefit from it, to bring himself within the terms of it, that is, by tendering the wheat to the defendt or by shewing that he was ready and willing to deliver it, within the time limited, and thus throw the breach

on

on the defendant — The cases decided on this head, which are numerous, have settled in principle, "That if one "party covenant to do one thing in consideration of "another party's doing another, each must be ready to "perform his part of the Contract at the time he charges "the other with non-performance." — So that the defendant could not be considered here to be in Default or demeure more than the plaintiff by not demanding the execution of this agreement — from the silence of the defendant in this respect no action accrued to the Pliff; it then remains to be considered what diligence the Pliff has done on his part to support his present action: Now by his own shewing the plff has not brought himself within the Contract, according to the meaning and explanation of that Contract, such as he has chosen to affix thereto — he says, that the wheat was to be delivered in the fall of the year 1813, on board of a Schooner at St Sulpice, before the close of the navigation, but he has not shewn, nor does he allege that he tendered the wheat within that time — And this he was bound to do to support his action — The rule in general being, that where it is a single act that is to

be

7. T. Rep. 130. Morton v. Lamb, 1 Saund. 320. Pordage v. Cole on Notes. I. Grose.

2 Ev. Potts. Obl. p. 43.

"be performed upon each side, the rule that one party
"can only claim a performance of the other's engagement
"by offering to perform his own, manifestly applies —
"such are all executory Contracts of sale, without special
"provision to the contrary" — Now although the pltff
alledges in his declaration that he was always ready
to deliver the wheat, yet this readiness should have been
communicated by legal notice to the Defendant, without
which he could derive no benefit from it — He says,
that finding the Defendant did not come forward to
demand the wheat, he did on the 29th. Dec. 1813 intimate
to the Defendant that the wheat was ready — but it is
not alledged, nor meant to be a tender in the terms of the
agreement, that is, "before the close of the navigation",
and if it were, there is no proof of the fact — a paper
called a protest has been produced, but it is a dead
letter, and makes no proof in the Cause — nor is there
any proof of a demand on the defendant to ~~deliver~~ accept this
wheat until the 29th. day of March last when the
action was instituted — This was evidently too late,
according to the plaintiffs own statement of the —
agreement, for the time of performance had then
lapsed, and with it, the obligation of the parties —
Potts. Obl. N° 209. "Lorsque la condition renferme

"un

"un tems prefix — et lorsque le tems est expiré sans que
"la chose soit arrivée, la condition est censée defaillie,
"et l'obligation est entierement evanouïe." — This —
principle will be more evident, by reversing the case
and supposing that Cuvillier & Co. had been the Pltff
and on the 29th. March 1814 had under this agreement
demanded the delivery of the wheat — the Defendant
there would be well founded to say, that the demand
was too late, and as the pltff had not demanded
the execution of the agreement within the time limited
he was not entitled to it at all — and so we must say
to the pltff here, and dismiss his action. —

Forrest
vr
Camane

This was an action instituted by the pltff
as Indorsee of a promissory Note, against
the Defendant as maker. — The Pltff was
stated in the declaration to be a gentleman, and
the Defendant a Carpenter, and the Indorsement
to the plaintiff was in these words, "pay the contents
to Henry Forrest." — It was objected on the part of
the Defendant, that the indorsement on the note

was

was incomplete, and not sufficient to transfer it to the pltff, as it had neither a date, nor was said to be for value received, the parties not being merchants traders or bankers who can negotiate notes by blank indorsments, under St. 34. Geo. 3. c. 2. — And of this opinion was the Court, and dismissed so much of the plaintiffs demand as was founded on the said Note. — Se Farrar. v. Tanner & Beach. Apl. Term 1808.

Panet. v. Porteous

This was an action instituted against the defendant for illegally maintaining a ferry across a branch of the River Outawais to the prejudice of the plaintiff an established and licenced ferryman. —

The defendant pleaded, that by St. 45. Geo. 3. c. 14 he was authorised to build a bridge over the said branch of the river Outawais, by which also it was provided that in case the said bridge should fall into decay or become impassable, he should be allowed eighteen months to repair the same, from and after a notice

to

to that effect to be given to him by the Court of Quarter Sessions of the peace for the district, and in the mean time it was allowed to the said defendant to keep and use Canoes, boats and <u>bacs</u> for ferrying across the said river.. That by a subsequent stat. 48. Geo. 3. ch. 24. in consequence of the aforesaid bridge having been carried away by the ice the above delay of 18 months was extended to Six years for rebuilding the said bridge — That not having rec.d any notice to rebuild the said bridge from the said Court of Quarter Sessions, the said period of Six years are yet complete and wholly unexpired, and therefore he is entitled to keep up and maintain the said Ferry until the same shall be so expired and determined —

The Plaintiff answered, that by the said last mentioned St. 48. Geo. 3. ch. 24. the delay allowed to the said Defendt for repairing the said bridge was Six years, to be computed from and after the passing of that act, without any such notice from the Quarter Sessions of the Peace being necessary or requisite — which said Six years have elapsed since the making of the said act, and therefore the plea aforesaid pleaded by the Defendant is insufficient in law &c —

The

The Court considered the Stat. 48. Geo. 3. ch. 24. to be clear and positive, that the delay granted to the defendant for re-building the bridge in question was Six years to be reckoned and computed from and after the passing of that act, without reference to any such notice as that pleaded by the Defendt— and as the said Six years had expired that therefore his said plea must be over-ruled.

Laperriere vs Duplessis and Tremblay Garts.

This was an action instituted against the defendant for the recovery of lods et ventes due to the plaintiff, upon a certain deed of Sale made by the Garant to the Defendant, in which the Garant had warranted the property sold to be free and clear of all Seigniorial rights and dues as well for the time past as in future.— The Defendant having called in his Garant, he took issue with the Defendt and denied that he had ever sold the property in question to him free and clear of all Seigniorial rights as aforesaid, but this having been found against him

he

he was adjudged to take the fait et Cause of the defendant, and now pleaded to the plaintiff's action, that he was not entitled to maintain the same against the defendant 1st Because the charge or burden imposed on the said Garant by the said Sale, viz. that of indemnifying the said defendant against all demands of Lods & Ventes and other Seigniorial rights that might become due on the said lot of land, was so extravagant, as to be of greater value than the sum of 5000 livres, for which the said lot of land was sold to the Defendant, therefore there could be nothing due to the plaintiff for lods & Ventes upon such a Sale, the same being in law considered as fraud the Seller, as gratuitous and without consideration cites. Poth. Fief. p. 156. — Lacombe. Vo Lods & Ventes — and 2dly Because, the said Garant, by the interpretation put upon the said deed of Sale by this Court, suffering a lesion d'outre moitié de juste prise, there can be no lods & Ventes due upon such a deed, and even if the same had been paid to the Seignior he would be liable to refund such lods & Ventes upon a rescision being had of the said deed. —

The

The Plaintiff answered, that the Garant did not, according to his own shewing, sell the land in question subject to the charge or burden set up by his plea, and therefore it did not enter into the consideration of the value of the land — That the plaintiffs right to demand the lods & ventes in question being open from the moment the deed of sale is complete, cannot be delayed or put off, by any action of rescision the Garant may be entitled to institute against the said Defendant in regard of the said deed. — cites. Prudhom. Droits Seigr. p. 348 — 351. — 352 — & 359. —

The Court were of opinion that as the value of the lot of land in question did not appear to have been affected by the stipulations of garantie contained in the deed of sale, and as the Garant denied having sold the land subject to that clause, of which he now wishes to take advantage, he could not avail himself thereof to bar the plaintiff of his right, nor could he delay the plaintiffs right under pretence of an action en rescision against the deed in question — Judgment was therefore given for the Pltff agt the Defendant, and for the Defendant against the Garant

Scott
vs
Corse,
curator &c.

This was an action for bread furnished by the plaintiff, a baker, to the late Mr. Charland, for the use of his family — The demand was proved by one witness only, and it was thereupon objected that the proof was insufficient, as this was not a mercantile transaction, inasmuch as it would not have been within the Jurisdiction Consulaire in France, the criterion by which the mercantility of the Case must be determined cites. Prac: des Consuls. p. 281. Pyke's Rep. 11. Poser. v. Mecklejohn.

The Court held, that they did not consider it necessary to have recourse to the laws of France to determine what should or should not be deemed a Commercial transaction and although it might be safe, so far to say, that what was Commercial in France must be so considered here, yet they were not prepared to admit the converse of the proposition, and to say, that what was not Commercial in France, cannot be considered Commercial here, as this would lead to a very narrow construction of that law under which this Case must be determined, and according to which the practice of the Court has been invariably regulated*. —

The

* See cases Prior v. Lukin. 12 Oct. 1801.
Stevenson. v. Carswell.

The Provincial Ordinance of 1785, which introduces the rule of evidence according to the law of England in Commercial cases, ought to receive a liberal construction, as it is a beneficial law, made for the convenience of trade, and giving it, as to legal recourse, the same protection and relief as obtains in England — Now if this rule of evidence is to be restricted to such cases only as were considered Commercial by the laws of France, the remedy is incomplete, and the benefit & relief intended by the Ordre will not be found adequate to the necessity of the Case, or agreeable to the intention of the Legislature. — It seems but a just interpretation of the 10te Sec. of this Ordre to say, that the fact to be enquired of, as to its being commercial or not, must be determined by that law which is introduced to verify the ~~issue~~, and if we consider this section according to the evident intent and meaning of it, we shall find it carries this interpretation on the face of it — This is also agreeable to the subsequent provisions of this Ordinance — Let us admit for a moment that the Case before us

were

were not commercial upon the principle of the authorities cited by the Defendant, it must follow, that in every case where a merchant or trader sells goods & merchandises to an individual for his own use and consumption,+ the recourse of the merchant must be according to the laws of France, and the contrainte par corps agt. his debtor would not be granted to him — But we find by the 38th art. of this Ordce, the Legislature had such a case in view, and to make their intentions of considering it commercial, it is there provided, that in satisfaction of all Judgmts given in Commercial matters, between merchants or Traders, and for debts due to Merchants or Traders for goods sold by them, execution shall issue not only agt the goods & c. of the Defendt but in case of their insufficiency, then against his person &c — Considering therefore this Case as Commercial under the laws of England the evidence adduced is sufficient to support it, and Judgment must be given for the Plff. —

+ this would not be a commercial transaction and

Friday 17th Febr. 1815.

Beauchamps
vs
Verner. —
and
Verner. —
vs
Cheeseman.

The defendant Cheeseman sold a horse to Verner for £22.10, which was afterwards claimed in the possession of Verner by Beauchamps as having been stolen from him — To avoid difficulty Verner sent the horse with a note and accompanied by Beauchamps to Cheeseman acquainting him of the above circumstance and requesting Cheeseman to return him his money and settle with Beauchamps about the horse — this Cheeseman refused to do — Beauchamps in consequence instituted an action against Verner for his horse, and Verner instituted his action against Cheeseman to recover back the money he had paid for him, and also damages for the injury accruing to him in the premises — Beauchamps having proved his property, and Cheeseman not having justified in what manner nor from whom he obtained the horse in question, the Court in their Judgment directed that Verner should deliver up the horse to Beauchamps and that he should recover £30 — for his damages

from

from Cheeseman, the Court thus allowing to the said Verner over and above the Sum of £22.10 which he paid for the said horse, a Sum of £7.10- for damages accruing to him by vexatious conduct of the Defendt- although no particular proof of damage in this behalf was made, the Court considering itself competent under the Circumstances of the Case to give this sum as a dommage extrinsique, besides the Costs-

Vide Poth. Obl. Nº 168 - in fine.-

Monday 20th Febr. 1815.

Seprohon v Cabanac

On action for arrears of a Rente Constituée

The Court allowed on this action Six years arrears of interest on a Constitut – The Defendant was in default, not having appeared, and the Court considered that as the plea of prescription allowed by law for more than 5 years arrears of a rente constituée had not been pleaded, the plaintiff was entitled to his whole demand, – Voy. Potth. Cons. Rente Nº 132. 133. –

Jackson & al. v Robertson. –

On action of assumpsit for goods sold and delivered in England to a House in Glasgow of which the Defendant was a Partner. –

By the affidavit of one of the plaintiffs, and also of their clerk and book-keeper taken in due course before the Lord Mayor of Liverpool it appeared that goods

wares

wares and merchandises to the amount of the sum demanded had been sold and delivered by the Plaintiffs to the said House at Glasgow in which the Defendant was a partner. The account annexed to this affidavit consisted in three Items of charge for goods, without any detailed account of those goods — and at the hearing of the Cause it was contended by the Defendant that the plaintiffs could not recover without shewing such detailed account, as without this, neither the article sold, nor its value or quality could be ascertained — But the Court held, that as the Defendant saw the nature of the charge made against him, it was his duty, if he was not satisfied with the account filed by the plaintiffs, to have demanded a particular statement and detail of that amount, which he was enabled to do under the rules of practice of this Court before being bound to plead to the action, but that it was too late to make that demand upon the hearing of the Cause — that as the plaintiffs had substantiated by proof that goods wares and merchandises to the amount of the sum demanded had been sold and

delivered

delivered by them to the Defendant and his partners
Judgment must be given for them accordingly

Archambault
vs
Brouillet. } This was an action for the paymt
of the arrears of an alimentary
pension stipulated by a deed of donation
made by the plaintiff to the Defendant, part of
which arrears consisted of a sum of twenty five pounds.

In answer to this part of the demand, the Defte
pleaded that he ought not to be held to pay the same
without obtaining from the plaintiff security against
the payment of a larger sum owing by him to one
— — — — for which sum the said plaintiff had
made his obligation, payable in one year hence and
carrying a mortgage on the land given to the Defendt
by the above deed of donation, which Obligation the
Defendant now produced. —

The plaintiff contended that as the land
given by him had not been warranted quitte

de

de toutes dettes &c., the defendant was not entitled to any security until he should be troubled for the payment of the money, as no clause or stipulation in the deed of donation in regard of the money so due and owing by the Pltff had been infringed, more especially as the money in question was not yet due — citd - 1 Bourg. 478. Nº 15. & 17. — 2e Bourg. 544 Nº 6. — Denizt. Vº Frane & quitte. Nº 1. & 2. —

The Court were of opinion with the Plaintiff and adjudged the defendant to pay the sum demanded without obtaining security. —

See also Hurtean. v. Robillard. 20th. Febr. 1817. —

April Term. 1815.

Monday 3d. April 1815.

Charret dit
v
Gamelin

The defendant moved for a Commission Rogatoire to examine a Witness at Quebec who had left the district since the last Term, and whereby the defendt would be deprived of the benefit of his evidence at the trial of the Cause unless such Comn. Rog. should be granted to him — In support of the motion the Defendant filed an affidavit in which he stated that the Witness had gone to Quebec about the beginning of the last month, and was not expected to return before the trial.

Stuart for the pltff. objected to the motion, and contended that the Defendant was too late under the rules of practice to obtain such a Commission, as he

he ought to have applied for the same within four days after the Issue joined, or at least as soon ~~after~~ as it conveniently could be done after the departure of the Witness for Quebec –

The Court were of opinion that the Defend^t ought to have applied to the Judges in vacation as soon as it came to his knowledge that the witness had gone to Quebec, in order to obtain a Commission Rogatoire for his examination so as to come as near to the requisites of the Rules of practice as Circumstances would permit, but not having done so the application was now too late – Motion over-ruled). —

Tuesday 4th. April 1815.

Bell. —
v.
Fraser. —
and
Young. Intervs

On the plaintiffs motion to reject from the fyles the Intervention filed by the said Jn°. Young, on the ground that a similar Intervention had been already filed and rejected by this Court, the same being in the nature of an opposition afin de conserver. —

Rolland for the Intervs Party, — The question determined by this Court on the 10th Febry. last, was, that an opposition could not be made under the title of an Intervention, after the time for making such Opposition had lapsed, and as the party there claimed all the same rights & privilidges to which he would have been entitled had the Opposition been made in due course, the Court rejected the same; — but in this Case the Intervention does not claim those benefits and advantages to which the party would have been entitled by his Opposition, but merely the surplus of the monies which may remain after all the other Creditors, having mortgages shall have been collocated

and

and paid, the question therefore already decided and that now before the Court, is not the same, nor is the plaintiff interested in contesting the claim of the Intervening party, as he admits that the Plaintiff and the other mortgage creditors shall be first paid —

Ross for the Plff. contended, that the claim now made and that heretofore rejected by this Court is the same, although somewhat different in the conclusions — That the delay for making oppositions afin de conserver is limited by the Rules of Practice to 24 hours after the return of the writ of Execution and the Intervention now made being in effect an opposition afin de conserver. cannot be admitted under the title of an Intervention. —

The Court held, that although the conclusions of the present Intervention were different from that already made, yet it was irregular to reiterate the demand of the party even with this modification as the main object of both was to obtain for the Opposant a certain share of the monies levied by the Sheriff, under the shape and title of an

Intervention

Intervention, and thereby cover the laches he had committed by not making his opposition afin de conserver in time — That there could be no such proceeding had as an Intervention, in this Stage of a Cause, the law having pointed out the mode by opposition, to prefer rights and claims upon monies levied by the Sheriff upon a writ of Execution — The Pltff motion was therefore granted. —

Bunker. vs Stebb. — } This was an action for wages claimed by the Plaintiff as housekeeper & Servant of the Defendant. — to 9ch. Dfd. pleaded non-assumpt.

The Plaintiff having proceeded to examine her witnesses in support of her demand, the Defendant proposed the following question upon his cross-examn of one of the said Witnesses — "If he had not a knowledge "that the Pltff was the kept mistress of the Defendt during "all the time she lived in the Defendt house?" This question was objected to by the Pltff on the ground that there was no such point in issue, and all proof touching the same ought to be disallowed —

Vigé

Vigé for Plff contended – That this being an action for wages, to which the defendant had plead the general issue of Non-assumpt – no proof of any fact can be admitted which has not been expressly pleaded. That by the laws of the Country, the facts upon which a party means to rest his defence, must be clearly articulés, pleaded, before proof thereof can be admitted which is consistent with Justice and reason, as otherwise the parties would be constantly liable to be surprised by the adduction of evidence which had no connexion with the issue raised between them – Cths. Poth. Proc. Civ. p. 102. ed. 12°. – Jcr. Dic. Droit. Vo appointement. – 1. Pigeau p. 267. – 269 – and Ordce 1667. tit. 20. art. 1. –

Stuart for Dfts. – The authorities cited by the Plff do not apply to the present practice of the Courts in this Country – By the Ordce of 1785, it is regulated, that all witnesses shall be examined in open Court in the presence of the party or his attorney, – the necessity of alledging specific facts of defence was to enable the Judge or Commissary appointed for taking the – examination of the witnesses, to direct their attention to those facts, as the witnesses were examined in private

and

and the party had not an opportunity of establishing those facts by a viva voce examination of the Witnesses That by the said Ordinance the pleadings in every Suit are directed to consist of a Declaration, plea, & Replication to the exclusion of all the lengthy and tedious forms of the French practice — That the plff in this case has adopted a course of proceeding agreeable to the English form, by a Declaration consisting of several Counts in the form of an action in assumpsit, and to meet this form and raise a regular issue the defendt was bound to plead a non-assumpsit, under which he is entitled to proceed in the defence of his action, and to prove whatever under such a plea he would have been entitled to prove in the Courts in England, from which this mode of pleading and proceeding is taken, otherwise the Plaintiff will have been holding out false colours to the Defendt under this declaration in the english dress, and — notwithstanding the defendt has preferred a plea in the same dress, yet he is told when he comes to make proof, that he must assume a french Costume which is a contradiction in terms and inconsistent with Justice — That the question proposed to

the

the witness by the defendant is intended to shew that the Plff is not the honest and industrious character she pretends to be, and never did acquire a right of recompense for any services rendered by her to the Defdt— which question under the present issue would be pertinent and proper and admitted in the Courts in England and ought to be admitted here —

Vigé in reply— The question proposed by the Defdt tends to prove a fact which ought to have been pleaded as it would be a bar or exception to the Plffs action, by this means the Plff would have come prepared to answer thereto, otherwise, the greatest injustice would be done to her. —

By the Court— The inconvenience and injustice which could arise to pleaders under the mode of pleading adopted by the defendant and the proofs to be adduced thereon had been frequently felt in this Court, when a rule of practice was adopted (See. 43.) by which it is directed, that every point of defence upon which a party means to adduce evidence shall be stated in pleading, that the adverse party

may

may be prepared to meet the same — it is therefore unnecessary to enter into the discussion whether the mode of proceeding under the action of assumpsit ought to be observed in this Court, as that course of proceeding has been differently regulated by the above rule, according to which the question put by the Defendant to the witness cannot be admitted, as having no reference to the issue between the parties. —

Taylor vs Drennan } On evocation from the Inferior Court —

Boston for the plff — The proceedings in this Cause are not before this Court, nor can it take cognizance thereof — That the defend.t after excepting to the Jurisdiction of the Inferior Court, neglected to do diligence in obtaining the Judgment of this Court thereon, or in removing from the Inferior Court the proceedings there had, whereby according to the practice of that Court, the Defendant was supposed to have abandoned his right of evocation, and further proceedings were thereupon had in the Inferior Court, which must now be considered as seized of the Cause, and in which Court therefore

the

the Plaintiff has given notice to the defendant that he means to discontinue the demand. —

Stuart for Defts From the moment the exception was made and admitted in the Inferior Court, that Court could not take any further cognizance of the Cause until the validity of the exception had been determined in the Superior Court, and it was the duty of the Inferior Court, or its Officer, to have transmitted the proceedings to this Court for such determination — The Cause must therefore be now considered as before this Court, as no rule of practice in the Inferior Court could affect the Cause after the evocation therein made —

The Court considered, that from the moment the right of evocation was claimed and admitted in the Inferior Court, all power over the Cause ceased, and no further proceedings could be had therein unless before this Court — That it was the duty of the Officer to transmit the proceedings into this Court for its determination, and therefore as the Cause is now before the Court, the question touching the right of evocation comes regularly before it, and this not having been contested on the ground of the matters litigated between the parties — The evocation was admitted. —

Wednesday 5th. April 1815.

Cumming v. Williams.

The defendant moved for a Rule on the plaintiff to shew Cause why the order of this Court of the 1st. inst. fixing this Cause for the examination of witnesses on the 8th. inst. should not be set aside, as the same had been made without any notice to the Defendants Attorney and without his knowledge.—

The Court were of opinion that the rule ought not to be granted without an affidavit to shew the truth of the allegation upon which the motion was made, the presumption being that the order for fixing the Cause was regularly made and ought not to be suspended upon the bare allegation of the party.—

Sutherland v. Campbell.—

On action for defamation.—

The Plaintiff moved to join this action with another instituted by the Defendt against the plaintiff for false imprisonmt— as both originated from the same cause, and being

actions

actions of the same kind, tending to a compensation in damages.—

Stuart for Defdt The grounds of the two actions are totally different, and proceed from different causes which took place at different periods of time, and cannot therefore upon any principle be joined - cites 1 Tidd. Prac. 556. — That the consolidating of actions according to the rules which obtain in the Courts in England, is founded upon the same principle as the jonction of actions under the French laws according to which the present application could not be granted.—

The Court over ruled the motion

Friday 7th April 1815.

M.Leod. vr M.Intosh

The plaintiff had obtained an order for the examination of the Defendant upon faits et articles under a Commission Rogatoire, but not having done any diligence thereon, the defendant now moved to fix the Cause for hearing on the merits in a day in Term, and the pltff moved that the matters in contest should be referred to the Serment decisoire of the Defdt. on a day in vacation, so as to give time to serve the notice on the Defendant who resides in the Upper Province

The Court granted the plaintiff's motion, considering that there would be no unreasonable delay in the progress of the Cause till next Vacation, and that the Plaintiff by this means put an end to the Contest by making the defendant a judge in the Cause.

Charretoux vr Gamelin

The Court allowed the Defendant to amend his affidavit for putting off the trial, by adding, what the absent witness was expected to prove.

Algie
vs
Lamb.

The plaintiff instituted an action of assumpsit containing one special Count for the non-delivery of a certain quantity of Oysters which the Defendant had undertaken to deliver to the plaintiff and several other money Counts, but not having filed any bill of particulars or statement as required by the rules of practice, the defendant did not plead thereto — The usual delay for pleading having elapsed the plaintiff moved for a Commission Rogatoire to examine his witnesses in sup. Canada — to which it was objected by the defendant that such Commission ought not to be granted until after issue joined, and that he was not bound to plead to the action until a bill of particulars, as required, had been filed — The Plaintiff contended that his action was for a specific sum in damages for the non-delivery of articles sold to him by the Defendant, and therefore no bill of particulars was necessary beyond what was stated in the declaration —

The Court held, that as the plff had adopted the form of proceeding by action of assumpsit, he must conform to all the rules made for regulating

regulating the proceedings in such action — That the Plaintiff ought therefore to have filed the Statement req^d by the rules of practice before he could demand any plea from the Defendant, who could not be considered in default until such Statement were filed, and therefore the present motion grounded upon a presumption of such default cannot be granted —

Monday 10th April 1815.—

Brosseau.— vs Lemoine de Longueuil & al.—

On the pertinency of certain faits & articles proposed by the Plaintiff to the Defendants.—

This was an action instituted against the Defendants as the representatives of the late David Alex. Grant Esq. to rescind a certain deed of Concession made by him to one Joubert, and a deed of Sale by Joubert to the Plaintiff of a certain lot of land in the barony of Longueuil, upon the ground that the same had been made with a view to elude the provisions of the arrêt of the French King of 6 July 1711.—

The objection taken to certain Interrogatories proposed to Joubert, one of the Defendants, was, 1st That they tended to prove what the general custom of the late D. A. Grant was, as to the mode of conceding lands in the said barony of Longueuil and to shew that by the intervention of the said

Joubert

Joubert, the said D. A. Grant did elude the provisions of the said Arret of 1711, which general practice although proved could not be admitted or received as making any proof in this Cause. —

2dly That the answers of the said Joubert could not be admitted or received as making any proof against the other Defendants in the Cause. —

3dly That the fact charged against the Defendants as representatives of the late D. A. Grant, would attach discredit and dishonor upon them, if admitted, because it accused him of fraud and collusion, and therefore neither the said Joubert, nor the other Defendants in the Cause ought to be held to answer thereto. —

cites case of Usmy. Brown v. Lukin. 1795 – when Defendt was not held to answer to Interrogatories proposed to him. —

The Court held that where fraud or collusion was alledged against a deed, ~~xxxxx~~ proof of every circumstance was admitted upon which a presumption could be built of the simulation therein contained, and they considered that the general

Repert. de Jur. Vo Conjecture. " Indices. = Danty. Preuve - ch. 7. No 50 to 61. - = Dic. de Brillon Vo Conjectures = 2. H. Bl. 288. Gibson. v. Hunter

general practice of the late Mr. Grant in other cases in regard of the mode followed by him in granting his lands, was a circumstance proper to be received in evidence in this Cause.

That the answers of Joubert, ought to be received as making proof against his own act in so far as he was concerned — and lastly that the facts charged did not imply any thing criminal in the Conduct of the parties, which could attach dishonor or disgrace to their character — and it was therefore ordered that the Defendants should answer to the faits & articles proposed to them

Richards vs Weston

The Court were of opinion that where the affidavit, upon which a writ of attachment was granted, was indorsed upon the writ, the further indorsements required by the rules of Practice sec. 8. art. 2. were not necessary. —

Hallowell &c.
v.
Mc Gillivrays
Val.

On action pro Socio, for an account and partage of partnership effects. —

The Court held, upon the exception pleaded by the defendants, praying that the action should be dismissed as all the partners had not been joined in the action, that the action was maintainable against any individual partner, for an account of partnership effects but where a demand was made, as in this case, for a partage of those effects, all the partners ought to be joined in the action — That the action however was not liable to be dismissed, but only suspended until the other partners should be brought into the Cause, which was ordered accordingly. —

Tuesday 11th April 1815.—

Bates
v.
Chase

The defendant appeared and pleaded to the action, and after filing his plea, moved that all proceedings in the Cause should be staid until the Costs of a former action should be paid, to which it was objected by the plaintiff that the filing of a plea was a waiver of the Defendants right to demand such Stay of proceedgs And of this opinion was the Court, considering the motion in the light of an exception dilatoire which ought to be proposed before any plea to the merits, and therefore rejected the motion.—

Wednesday 12th April 1815.

Charles. v Baynes

The defendant having obtained an order for a Commission Rogatoire to examine witnesses at Quebec, served a copy of the Interrogatories on the plaintiffs attorney and gave notice that he would attend on a certain day at the office to sue out the said Commission and requiring him to attend and join therein if he should see fit; The Plaintiff did not attend, whereupon the Defendt sued out his Commission, but without having had the Interrogatories allowed by the Judge as required by the Rules of Practice — The Commission being now returned executed, it was moved by the Plaintiff that the Interrogatories and answers thereto should be suppressed owing to the above irregularity, — And the motion was granted, —

Sutherland v Campbell

On trial of action for a libel, before a Special Jury.—

The Plaintiff had filed copies of two letters upon which the action was founded, the originals of which were afterwards filed by the Defendant on a plea of Justification— On the trial the plaintiff was proceeding to prove the Originals, to which an objection was taken by the defendant, that the said originals could not be allowed to be proved without a notice had been served on the defendant to produce the same,— and then the Copies might be allowed to be proved and read in evidence— That the course of proceeding in Jury trials must be regulated by what is observed in England, where it is not the practice, as in this Court to file the papers and exhibits upon which the parties found their rights— that the filing such papers is meant only as a notice to the adverse party of the point on which the party producing the same means to rely, that there may be no surprise— but although such notice be thereby given, it was never

never meant or intended that such papers should be under the power or controul of the adverse party, or that he should be permitted without the leave and consent of the party producing such papers to use the same for any purpose whatever — as to the adverse party such papers must be considered as sealed up and not to be looked into, till the party filing the same shall see fit to expose them to examination. In the Country from which we take the trial by Jury, every man keeps his papers in his pocket, until he finds it necessary to produce them before the Jury, and it can no more be known what such papers contain than it can be known what a witness will say until he is produced and examined; upon the same principle therefore, although the letters in question are physically within the power of the Court under their rules of practice, yet morally they ought not to be so considered, as they are the right and property of the party filing them, and to be considered to be in legal custody for his sole use and benefit,

and

and therefore they cannot be violated or exposed in evidence to serve the purposes of the adverse party but under those formalities which similar testimony could be come at by the course of practice in England

The Court considered that as those letters were filed in the Cause, it became unnecessary to give any notice to the Defendant to produce them, as this would be proceeding upon a fiction contrary to Justice and to common Sense, as from the moment any papers were filed in the record, they became equally accessible to both parties and could be used by either for any purpose relative to the objects in contest the objection was therefor over-ruled. —

Friday.

Friday 14th. April 1815.—

Desrautels.—
v.
Henderson
Widow Logie.—
and
Platt. Oppt.

On opposition afin de conserver of Geo. Platt.—

The opposition was founded on an Obligation made by the late Alexr. Logie to one Larochelle, and by him transferred to the Oppost. by an acte sous seing privé upon the back of the said Obligation subscribed with the mark or cross of the said Larochelle in the presence of two witnesses, the said Larochelle declaring that he could not write.—

Sullivan for Pltff. objected to the right of the Opposant to claim under the said transfer, as the same was not sufficient in law, as no acte sous seing privé, where the sum in contest exceeds an hundr. livres can be proved by witness unless the parties thereto can write — the proving of a mark or cross, is not proof of a signature, and can amount only to a verbal acknowledgment of the party, which cannot be received.

But

But the Court held, on the authority of Cases already decided*, that evidence could be received to prove the transfer of the obligation although made sous seing privé, and under the mark or cross of the transferer and therefore admitted the Opposition.

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* Castonguè vs Laberge 19 June 1810
Pangman vs Beaudoin 5 Oct. 1810.

Monday 17th April 1815.

Kilborne v. Silton. —

The defendant had been arrested and was now detained in Gaol on mesne process at the instance of the plaintiff, in an action for the recovery of the defendant's promissory Note — At the return of the writ Mr Gale appeared in Court for the defendant, but not having pleaded within the time limited by the rules of practice, the Plaintiff moved that he should be permitted to proceed ex parte against the Defendant. —

Gale for the defendt, objected, that according to the rules of practice every Defendant who is in Custody is entitled to a notice to plead before he can be considered to be in default, and that no such notice was given in this Case. — And further, that the present being an action of assumpsit, and no Statement of the precise sum demanded having been filed, the Defendant was not bound to plead to the action until such Statement should be filed. —

Stuart in reply, observed, that the rule of practice requiring the service of notice on debtors in gaol to plead does not apply where an appearance has been entered in Court for

for such debtor, as in the present case — That the action is more an action of debt than assumpsit, being a demand for a specific sum of money due upon a certain written instrument made by the Defendant, a case in which no statement of the demand is requisite beyond what is contained in the declaration. —

The Court held that the Defendant was not entitled to a notice to plead where an appearance in Court had been entered for him, and that the action not being in the form of an action of assumpsit no statement of the demand was requisite — and therefore granted the plaintiffs motion. —

Tuesday 18th April 1815.

Cartier. —
vs
Carpentier

No. 385. —

On action of assumpt. &c —

On the 18th August 1814 the plaintiff seized and impounded two hogs trespassing on his grounds and caused notice thereof to be given at the Church door — The Defendant claimed the hogs as his property and they were delivered to him by the plaintiff on paying the necessary expences — Soon after one Hudon prosecuted the plaintiff in the Inferior Court for the said hogs as being his property, when the plaintiff appeared and pleaded that he had delivered them to the Defendant upon his claiming them as belonging to him, and thereupon prayed to put the Defendant into the Suit as his garant, which was granted to him but the Plaintiff not having done the necessary diligence in this respect, he was condemned to deliver up the said hogs to Hudon or pay their value estimated at nine pounds and Costs of Suit taxed at £6. 15. — both which the Plaintiff paid, and now prosecuted the Defendt for the recovery as well of the £9. as of the £6. 15. the amount

amount of the Costs and damages by reason of having wrongfully claimed the said hogs and taken as his property, when he knew them to belong to another person. —

The Defendant stated that he had lost two hogs, and conceived those in the possession of the plaintiff to belong to him — but when he found that they belonged to the said Hudon, he offered to reimburse to the plaintiff the said sum of nine pounds and even tendered him the money, but contended that he was not bound to pay the Costs of the Suit in the Inferior Court, as they were — occasioned by a useless Contest on the part of the Plff and which the Defendant had no share. —

The Plaintiff on the other hand contended that he was entitled to recover the Costs as well as the — principal adjudged in the Inferior Court, as it was by the wilful misrepresentation of the Defendant in claiming the said hogs when he knew that they belonged to another, whereby the Plaintiff was led into an error; and although the Defendant had not been regularly called into the Suit, yet as he now shews no good Cause against the principal

demand

demand, the Costs ought to follow as a consequence thereof. —

The Court were however of opinion that the Defendant could not be held to pay any part of the Costs of the suit in which he was not a party, and the Plaintiff must blame himself in not having done the necessary diligence in this behalf — They therefore gave Judgment for the nine pounds, but without any Costs. —

Robineaux Cur. v Provost. —

This was an action instituted by the Plff as Curator to the vacant succession of the late Joseph Thibaut, to recover from the Defendant certain arrears of an annuity due by the Defendant to the said Thibaut —

The Defendant pleaded for exception to the action that the Plaintiff had been irregularly appointed Curator to the succession of the said Thibaut, and upon a false representation made to the Judge in this respect — inasmuchas there were still living several children of the said Thibaut who had not —

not renounced to his Succession, and without whose participation the said appointment had been effected, and therefore contended that the said appointment was ipso facto void, and that the Plaintiff could not maintain any action thereon -

The Plaintiff answered, that his appointment aforesaid was regularly made, and that the Defdt could not in this action contest the validity of that appointment, the said Plaintiff being by virtue thereof warranted to bring the present action, and to give the Defendant a legal discharge for the debt he owed to the said late Jos. Thibaut - That if the appointment of the Plaintiff as Curator as - aforesaid was irregular, that irregularity must be brought before the Court by a revision of that appointment. - So held in Case. Beaugrand, Cur'. Vs. Boivin dat. 18 Febv. 1814. - See also. Nouv. Denizt Vo Curatelle - S. 5. No 2. a -

The Court were of opinion with the Defendant and dismissed the exceptions. -

Bellows
val. vs
Warner

Action on promissory Note indorsed to the Pltffs —

The Plaintiffs were stated in the Declaration to be, Abel Bellows of Boston, Horatio Gates of Montreal, John Bellows of Boston — Thomas Cordis and Ebenezer Jones also of the same place, late trading together at Montreal under the firm of Bellows Gates & Co. —

Sullivan for Defendt moved, that as all the Plaintiffs except Horatio Gates, resided out of this Province and had given no authority to institute this action in their name, that the same should be dismissed except in so far as regarded the right of the said Horatio Gates. —

Ogden for Pltffs contended that no such authority was necessary as one of the Partners was present, and entitled to bring any action respecting the affairs of the partnership — That if such authority should be considered as requisite, a day ought to be given to them to produce it. —

Sullivan in reply, — The partnership between the

the Plaintiffs being dissolved, their rights in the partnership property become distinct & separate and the name of one partner cannot be used by another for any purpose without his special authority and consent — That by the Rules of Practice sec. 14. §. 2. this authority ought to have been filed at the return of the Process, and no further delay can now be granted for that purpose.

The Court were of opinion that the authority for bringing the action in the names of the absentees ought to have been filed at the return of the process and therfore granted the Defendants motion.

Fogo v. Charles } and Sutherland v. Campbell }

These were actions for defamatory words and a libel, in which trials were had by a special Jury, and verdicts rendered in favor of the plaintiffs for five shillings damages. In both Causes the plaintiff moved for Judgment with full Costs, which was contested by the Defendants who contended for the principle that the Costs ought to be regulated according

according to the sum recovered and not according to the sum demanded. –

The Court held that they had a discretionary power over the Costs, to regulate the same according to the circumstances of the Case, a principle acknowledged in all Courts and so adjudged in appeal in the Case of Ethier. vs Cherrier. Sanv. 1801– and therefore in the Case of Fogo. vs Charles, Costs were given as in a Cause under £30.– and in the Case of Sutherland. vs Campbell, full Costs were allowed

Wednesday. 19th April. 1815.

Lindsay. v. Henry & al and The King Intervs.

On action of special assumpsit, for an account of certain quantity of Tobacco sold by Defendts.

It appeared in evidence in this Cause, that a certain quantity of tobacco had been seized in a boat on the Lake Champlain near the lines, during the war between Great Britain and the United States of America, by some Sailors belonging to His Majesty's Schooner the "Linnet", commanded by Capt. Pring:— This tobacco was carried by the Captors to the Isle aux Noix, and from thence to St Johns where it was put under the charge of one Edgecombe, a Navy agent — while there it was again seized by an Officer of the Customs and sent by the Plaintiff the Collector of the Customs at St Johns to the Defendant in Montreal, with directions to keep the said tobacco until further orders.— While the said Tobacco was in the possession of the Defendants he received an order from His Excellency the Governor to sell the said tobacco on account of the Captors,

which

which he did, without any intimation thereof to the Pltff. As soon as the Pltff found that the tobacco was sold, he claimed the proceeds, as did also Mr Edgecombe on behalf of the Navy - and in consequence the Defendant refused to pay the proceeds to either party until it should be ascertained to whom of right they belonged.—

Stuart for the Pltff contended, that the Defendt had violated his Contract with the Pltff and must be condemned, that he had received the tobacco for the purpose of keeping it until further orders from the Plaintiff, but that without any such orders, and even without notice given him, the Defendt had taken upon himself to sell the said tobacco, which he had no right to do without the previous direction of the Plaintiff, — And although the plaintiff afterwards claimed the proceeds of the said Sale, yet this was no proof that he had either directed that Sale to be made, or that he had approved of it — That the rights of His Majesty on the Intervention depend upon the fact whether the tobacco was taken beyond the line or not - if beyond the line, the — capture by the Navy was right, if within the line, it became the exclusive right of the Pltff as Chief Officer of the Customs in that quarter, to make the seizure thereof. All trade with an enemy is prohibited by the maritime law, but it does not appear that the tobacco in question was taken in a course of trade.—

Ogden for Defts. contends that Plff by claiming the proceeds of the Sale of the tobacco, acquiesced in the Sale thereof, but that Defendt was justified in withholding the payment thereof to the Plff, as the said tobacco had not been declared forfeited, and as there was another person who also claimed the said proceeds — & now ready & willing to pay the same to whom the Court shall direct, but without Costs —

Ross for the Intervention — Goods coming from an Enemy's Country are liable to be seized — Even goods belonging to a Subject taken in a course of trade going to or coming from the Enemy is always considered as prize — 1. Rob. Admtl Rep. 219. Nelly, Peine All trading with an Enemy is interdicted, as being a general principle of Law received among all nations Ib. p. 198. 199. — The tobacco in question was in a course of trade with the Enemy and was rightly seized; the subsequent interference of the Plaintiff was improper, he had no right to touch the tobacco, which was at the time under a higher authority than any he could exercise over it —

The court were of opinion that the tobacco in question was when seized in a course of trade between the United States of America and this Province and therefore liable

to

to seizure — That the capture of the said tobacco by one of His Majesty's vessels of war, entitled the Captors to the benefit thereof, to the exclusion of the Plaintiff as a Custom-House Officer, who in such cases could claim no more than a concurrent right of seizure — The Plaintiff's action was therefore dismissed, and the proceeds of the said Tobacco adjudged to His Majesty. —

Laurin. vs. Bleigné & Sarré. } Action for arrears of a Rente Pension Viagere.

By an act of Cession of the 14th March 1782 one Joseph Lauvergne and Catherine Serrand his wife, conveyed two certain lots of ground to one Louis Lapierre, in consideration and on condition of paying certain articles of annuity, or alimentary pension to the said Lauvergne and his wife. — By deed of Cession of the 27th March 1790, the said Louis Lapierre conveyed to the Defend one of the aforesaid lots of land, on condition amongst other things of paying to the said Lauvergne and wife the said alimentary rent in the room and stead of him the said Louis Lapierre. — After the decease of the said Jos. Lauvergne the said Cath. Serrand his widow by act of 20 Dec. 1803, transferred

transferred and made over to the said pltff, all her right in and to the said alimentary pension accruing to her under the aforesaid deed of Cession of the 14th. March 1782.— On the 28th. day of Decr. 1803, the said Pltff caused the said transfer and conveyance so made to him to be duly notified to the said Defendt—, who accepted the said notification as duly made to him and in consequence always paid the said pension to plaintiff, until within these two years last past— upon this statement, action is brought for the arrears of the said annual rent for the said two last Years—

Plea— That defendant is not indebted to Pltff &c— That long before the institution of the present action, that is to say, before the year 1803, the Defendt had ceased to be proprietor or possessor of the aforesaid lot of ground, and has not since that period held or possessed the same or any part thereof.— That the signification of the transfer made by the said Cath: Serrand to the said pltff, can give him no right of action agt. the Defendt— And lastly that the stipulations contained in the deed of Cession by the said Lapierre to the Defendt— of the 27th. March 1790, gave no right of action to the said

Cath:

Catherine Serrand against him the said Defendt and cannot give any better right to the plaintiff, for the recovery of any part of the said rente & pension viagere from the Defendant as personally liable thereto. —

Replication joins issue. —

Thursday 20th April 1815.

Gaudry & ab'
vs
Cherrier, Vve
Charlebois ~

On action of account of the Community that subsisted between the Defendant and her late husband. ~

The Defendant with her plea filed an account of the said Community, by which she acknowledged to be indebted to the heirs of her late husband in a balance of £1480. 8. 2. ~

The Plaintiffs now moved that the said sum of money should be adjudged to them by provision as being a matter not in contest. ~

Rigé for Defdt contends that a Sequestre ought to be named into whose hands the property of the Succession of Charlebois should be committed, as the Defendant had various claims to adduce against them which were not yet legally established, until which time the monies acknowledged by the said account to be in her hands ought not to be adjudged to the Plaintiffs. ~

Bedard for the Pltffs contends that their motion

ought

ought to be granted, the said Plaintiffs being by law entitled to the said monies by provision - cites - Ordce 1667. Tit. 29. art. 7. - That no sequestre can be appointed for moveable property. -

The Court granted the motion of the Plffs. -

Perrault & al' v. Ermatinger and Ermatinger v. Portelance en Garantie

This was an action for the recovery of the value of a certain quantity of wood which had been attached and seized by the Defendant as Sheriff of the district, and which he had delivered to Portelance. -

In this Cause the Defendant had sued the said portelance as his Garant simple, who had appeared, but had not yet pleaded to the action the said Defendant now moved that the demand in chief and the demand en garantie should be consolidated and joined together from their evident connexion and for the readier attainment of Justice.

Stuart for Plff, contended that the Causes had no connexion and ought not to be joined. -

The

The Court held, that when a Defendant or any of the parties in a Suit was allowed to cale in his garant, the proceedings on the action en garantie were considered to form a part of the record in the principal Cause, and to be so united therewith, that a motion for their junction was wholly unnecessary. — Motion dismissed. —

Vricault
Vricault

June Term 1815.

Friday 2. June 1815.

Perrault & al.
vs
Ennatinger.
and
Portelance Gar.

The Defendant had examined the plaintiffs on certain faits & articles, and now moved, to withdraw from the record the said faits & articles & answers thereto, declaring that he did not mean to make any use thereof - cites. Rcp. de Juris: vo Interrog.s and Poth. Obl. No. 919. 920.

Stuart for the Pltffs objected to the motion, as no party can withdraw from the record at his pleasure any papers or proceedings regularly put thereon; that in the present case if it were the intention of the Defend.r not to make use of the answers to the faits & articles proposed by him, he ought to have filed a disclaimer

The Court rejected the Defendant's motion for withdrawing from the record the answers to the faits & articles, but admitted his declaration to remain, of his intention not to use the said answers on hearing.

Saturday 3. June 1815.

Griffin. vs Fraser.

On rule obtained by the plaintiff on the Defendant to shew cause, why an exception filed by the said Defendant should not be taken from the record, as not having been filed within the 24 hours, and because two guineas were not deposited with the prothonotary at the time the said plea was filed.—

Stuart for Defendt. The plea is in nature of a plea in abatement, or, lis pendens, or exception en droit, which does not come within the rule of practice.— That it is not necessary to pay two guineas into the hands of the Prothonotary on filing such a plea, and if necessary, they must be presumed to be in the hands of the prothonotary by his having received and filed the plea.— That the plea, stating that the declaration is not sufficient in law, nor founded in fact, does not come within the rule of practice, as an exception to the plaintiffs right of action, as no previous hearing is requisite to settle the law of the Case before entering on the merits.—

The

The Court were of opinion, that where a general denegation of the right of action in point of law, was joined with a denegation of the fact in a plea to the action, this could not be considered such general exception as the rule of practice had in view to oblige the party making it to give the special reasons of such denegation in law, as such a pleading must be heard on the merits, and no previous hearing is necessary on such plea, nor on any exception where the special Causes are not set forth. — Rule disch.—

Warner. v Bell }

On action of trespass & assault on Pltff, and also for entering his close and driving away his Cattle.—

The issue having been taken to the Country, the Defendant now moved, that as all the matters stated in the declaration cannot be considered as personal wrongs and tried by the Jury, that therefore the issue ought to be changed and taken to the Court.—

Gale for the Pltff. stated, that the application came too late — that Defendt. had concluded to the Country, the Jury had been struck, and the Venire issued — That all the injuries complained of must be considered as personal wrongs.—

The

The Court, considering that the plaintiff had joined the injuries done to his property, which could not be tried by a Jury, with the injuries done to his person, which could be tried in this manner, and had made one general conclusion for damages on the whole, they therefore held that the Cause could not go the Jury, but that the issue must be changed to the Court as alone competent to determine the whole case. —

Mercier. }
vr }
Digonard }

On trial of the Cause by Special Jury.

In this Cause the Defendant adduced no evidence, but confined himself merely to remarks on the evidence adduced by the plaintiff — The plaintiff rose to reply, but it was objected to, and the Court held, that the practice had always been in this Court in such Cases, that the plaintiff could have no reply, but that in this respect the Course of practice must be regulated by that in England. —

Monday 5th June 1815.

Dow.n
v
Wilson

On hearing on Exception à la forme

Stuart for Defdt. — The exception is founded on the Copy of the Declaration served on the Defendt which states, that a certain quantity of wood had been furnished and delivered by the Plaintiff to the Defendant, and thereupon concluding for the value of the wood as if upon a Contract of Sale, whereas the wood in question might have been furnished & delivered upon a Contract of loan, or any other Contrad besides that of a Sale. — In the originae declaration filed of record the Plff has correctly stated that the wood in question had been sold and delivered to the Defendt, but the copy served on the Defendt was different, and it was upon the Copy which the Defendant founded his plea, it being served on him for this purpose and he was not obliged to look at the originae so as to direct his pleading thereby, as in this Case, service of a copy was entirely unnecessary —

The

The Court held, that all pleadings must be directed by the original proceedings & papers filed in the Cause and not by the copies served on the parties, and if such copies are incorrect, exception ought to be taken thereto by motion. — That there can be no objection taken to a copy of a declaration by pleading thereto as in the present Case, but the objection must be made in limine litis, and by motion*. Exception dismissed. —

* see. Stem. v. Chamberlin. 12 Oct. 1812. a

Friday 9th June 1815

Charles
v.
Baynes

On action for pasture, and keeping the Defendants horses.—

The evidence being closed, the plaintiff moved for a reference to Experts, as it had not been clearly ascertained the quantum to which the Pltff might be entitled.—

Sol. Genl for Defdt opposed the motion, and stated, that the Plaintiff had failed in his proof, and that action must be dismissed—that besides it was too late to apply for a reference to Experts after the party had gone into evidence before the Court.—

The Court reserved to determine upon the motion until the parties should be heard upon the merits, considering that the Plaintiff having chosen to proceed by evidence before the Court, he was not entitled to claim the benefit of another Jurisdiction unless the Justice of his case required it, which could not be ascertained until the parties were heard on the merits.—

Saturday 10th June 1815.

Busby et al
vs
Bedard

On Defendants motion for the examin" of witnesses at Quebec under a Commission Rogatoire.—

Stuart for the Pltffs contended that the motion could not be granted without an affidavit to shew upon what grounds the application was made.—

Ross for Defendts maintained that the practice did not require such an affidavit.—

But the Court held, that whenever the proceedings in the Cause were to be delayed or suspended by such a Commission, an affidavit was necessary, and that the practice had always been so— a day was given to produce the necessary affidavit.—

Monday 12th. June 1815.

Forcier. —
vs.
Boucher.

On the Defendants motion for a — Commission Rogatoire to examine witnesses

The Plaintiff objected that the application came too late, as the Cause had been at issue upwards of four days, that is, from the day of filing the plea, as the plaintiff did not conceive it necessary to file any replication, of which the Defendant should have taken notice and made his demand immediately for a Commn Rogre.

Rolland for Defend.— If the Plaintiff has thought fit not to file a replication, this cannot prejudice the right of the Defendant to his present motion, as the delay for demanding the Commission Rogatoire can computed only from the time all the pleadings are filed in the Cause which the parties have a right to make in order to complete the issue, and according to which the Defendants motion is in time, being within four days from the day on which the Replication might have been filed —

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

Lamothe vs Foucher and Gray opt.

On the opposition of John Gray, claiming an indemnification for a certain quantity of land he purchased at the Sheriffs Sale on which there is a defficiency. —

The Sol. Genl. for the opposant, stated the defficiency on the lot purchased by the Opposant, of which he could not obtain the possession, and is therefore entitled to a rateable deduction. — cites. Potts. Vente No. 41. —

Lacroix for Deft. The opposition is irregular as the opposant ought to have claimed his writ of possession in consequence of his purchase and thereby obtain possession of the lot of land purchased by him — That there is besides no proof of any defficiency, upon which the Opposition can be supported —

The Court considering that the opposant has not used any legal course to obtain the possession of the lot of land adjudged to him, nor made proof of any defficiency therein, dismissed the opposition

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M.Kenzie
v.
M.Gillivray
et al.

On the plaintiffs motion for a reference of the matters in contest to arbitrators, as from the time likely to be employed by the Defendants on the several issues raised, the plaintiff will be greatly delayed in obtaining Justice.—

The Court held, that as the parties had entered on the examination of their witnesses before the Court, to ascertain the facts stated in the pleadings, a reference to Arbitrators could not be had in this stage of the Cause without the consent of parties.—

The King
v.
M.c Cord et al
Justices.

On Certiorari to the Justices of the Quarter Sessions of the Peace, to remove proceedings and Judgment on a certain Proces verbal of the Grand Voyer for repairing a certain bridge &c.—

A rule having been obtained to shew Cause why the Judgment of the Justices should not be quashed Mr Bedard in support of the rule, stated.

1st

1st The Proces verbal and Judgment in question ought to be quashed, because the necessary formalities have not been observed by the Grand Voyer, as it does not appear that any requête was presented to him for repairs the bridge in question, nor that any order had been given by him on such requête, notifying the day and place he would meet the parties interested to hear their reasons and opinions, nor the day on which he would visit the bridge in question – nor is there any publication of any such order or notice as req.d by the Prov.l Stat. of 1794. sec. 11. 16. 75.

2d. That the Grand voyer did not annex a plan to his Proces Verbal, as required by the Rules of practice of the Quarter Sessions. –

3d. That the bridge in question is not declared by the said Proces Verbal, to be a pont public, or bridge to be repaired at the public expence, and therefore the public ought not to be burthened with it. – art. 3.

4. That even if the said bridge could be considered as a pont public, yet the said Proces verbal does not point out the persons who ought to maintain and repair the said bridge – see. sec. 16 – but states generally that the Inhabitants from such a cote to such a cote, shall repair and keep up the said bridge.

Mr L.M. Vigé on behalf of the Grand Voyer, stated
1. That necessary formalities have been complied with by the Grand Voyer.- That he is not bound, nor has it ever been customary to require, that he should annex the requete presented to him, his order thereon, and the publication of such order, to the Proces Verbaux made and returned by him to the Quarter Sessions, as in the Proces verbal he refers to such proceedings being had, as the ground work of his operations, as stated in the Proces Verbal in this Case.-
2. That there is no law which authorises the Justices to make rules of Practice in regard of the duty imposed on the Grand voyer, the law having already clearly ascertained this, and by it, no plan is required to be made or filed by the Grand Voyer with his Proces verbaux.-
3. That the Proces Verbal sufficiently shews the bridge in question to be a pont public.-
4 That the residence of the parties bound to repair the said bridge, sufficiently points out the persons liable thereto, more especially as the obligation attaches to the person and varies with his residence.-

Bedard in reply-
, The Requete and order thereon must be published

published at the Church door, and to ascertain that this has been done, these papers ought to appear and be annexed to the Proces verbal of the Grand Voyer.

2. As the Court of Quarter Sessions have thought fit to order that a plan should be filed by the Grand Voyer with his Proces verbal, it was his duty to comply therewith otherwise his Proces verbal was imperfect. —

3. The bridge must be declared "publick", by the Proces Verbal before any but neighbours can be bound to repair it. —

4. The persons bound must be named, and not their residence, which is too general. —

The Court was of opinion that the Requête, the order thereon, and publication thereof, being the ground work of the Grand Voyer's authority and proceedings, the same should always accompany his Proces verbal, as constituting an essential part thereof — And therefore the Court ordered the Proces Verbal and proceedings to be remitted to the Quarter Sessions, that course might be there taken to procure the said Requête &c — to be annexed to the said Proces Verbal, and thereupon sent back to this Court for such further proceedings thereon as to Law and Justice should appertain. —

Forrest v Canane } On action by the plaintiff as Indorsee of a promissory Note made by the Defendt.

Objection was taken to the action as the Indorsemt to the Plaintiff did not state that it was for value received, nor that the Defendant was a merchant, trader or banker whose note could be negotiated by a blank indorsement — and upon this objection the action was dismissed. —

Aylwin v Cuvillier } The Defendant pleaded an exception à la forme and also a plea to the action, both which were filed within the 24 hours after the Defendts appr.

The Plaintiff demurred to the plea of exceptions and contended that by pleading to the merits the Defendt must be considered as having waived every exception to the form. 1 Pigeau Proc. Civ. 159. —

Beaubien for Defendt. contended that the plea of exception filed by him was in time, and he had a right to file it, and as to adding a plea to the merits, it could not at present come under the Consideration of the Court, until the exception had been first disposed of. — This was

every

every days practice, with this difference that the pleadings were on separate papers, but substantially the same as in the present Case. — The Court were of opinion with the Defendant, and dismissed the demurrer. —

Thursday 15th June 1815.

Odell vs Scott.

On Defendants motion to reject from the files a demurrer to the Defendants plea filed by the 1st because, being in the nature of an exception it was not filed in the 24 hours after the filing the plea, and 2d because the demurrer is general and states no special grounds upon which the same is founded.—

Stuart for Plff — The Rule of Practice does not apply to exceptions or demurrers made to pleas, either as to the time of filing them, or the form of making them.

The Court held that the demurrer to a plea is within the rule of practice, both as to the time of filing pleas of exception, and as to the form of making it, and it was therefore ordered to be taken from the files—

N.B. In this Case the Ch. Justice gave the opinion of the Court, although he did not hear the point argued, and upon objection taken thereto by the Counsel, the Court held that the Judgments of the Court could legally be pronounced by him when the Case was heard by a competent Court although he were not present at such hearing—

Algie
vs
Lamb

The Defendant at the closing of the enquête on the 8th inst. reserved a right to examine the plaintiff on faits & articles and on the 9th made his motion for that examination

The Plaintiff objected to the motion, and contended that it was made too late, as on the last enquête day the Defendant instead of reserving his right to examine the plaintiff on faits & articles, ought to have moved for such examination to be had in a reasonable day, and in this respect the practice is different when the enquête is had in Termtime to what it is when had in vacation — cites case Smith v. Isler. 1809.—

But the Court granted the motion, considering the reserve made by the Defendant on the last enquête day as equivalent to an application by motion for the faits & articles, under the rules of Practice — That case of Isler & Smith was determined under the former Rules of practice, and cannot be taken as precedent. —

Turner

Turner. v Hancox } Action of assumpsit on protested bill of Exchange. —

At the trial of this cause by a special Jury, the Plaintiff's clerk was called as a witness to produce the correspondence between the parties at the time the Defendant forwarded the bill of Exchange in question to the plaintiff, to shew thereby the nature of the diligence done on the bill. — This was objected to by the Defendant, as the said correspondence being in the possession of the plaintiff, had not been filed with his other exhibits in the Cause. — see Reg. Prac. Sec. 1A. §. 3.

But the Court admitted the correspondence to be read considering, that all corroberative evidence of the title upon which the action is founded, ought to be received, although the same may not have been filed. —

Sed quære - if this be conformable to the rule of Prac. —

It was also held by the Court in this Case, that the strictness of notice is dispensed with, when the person to whom the notice ought to be given is absent, and has no domicile — Also where the party has undertaken to pay, and holds funds in his hands to indemnify himself in case of payment — see Chitty. 171. 2. & on note (y)

1 B & P. 652.
Bul. N.P. 273.
1 Esp. Rep. 516.
Chitty. 155.

Friday 16th June 1815.

Griffin v Fraser

On rule on plaintiff to shew cause why a paper filed by him stiled a Replication should not be taken from the record, the same not having been filed during the last Vacation agreeable to the course of practice

Ross for Plff. The plea filed by the Defendant being in the opinion of the Plaintiff inadmissible he considered that it was not safe to answer thereto until he should get the opinion of the Court thereon as otherwise his filing a replication in the usual course might have been considered as a waiver of any objection he might have to the admissibility of the Plea - That the plaintiff took the earliest opportunity of getting the opinion of the Court by moving the case on the first day of the Term -

But the Court held, that the plaintiff ought to have replied to the Defendants plea in the usual course, and as the Court did not sit at the time the Replication was due, the same ought to have been filed with a reservation of the point as to the regularity of the Plea - Rule absolute.

Stuart. — vs Forbes et al.

On action agt. Defendts as heirs &c —

The counsel for the Defendts moved that the faits & articles submitted to Nancy McDonald wife of John Forbes one of the — Defendants, should be suppressed as irrelevant and inadmissible, inasmuchas the said Nancy McDonald being a femme covert she cannot bind herself by any act she may have done without the authority of her husband. —

The plaintiff contended that the motion was premature, as the plaintiff may have an authority to shew that the wife acted under the consent and authority of her husband — and of this opinion was the Court and rejected the motion. —

Ryan. — vs Stevenson

On the enquête day, no witnesses were produced by either party, and so entered on the enquête book. — The Defendant now moved to fix the cause for hearing on the merits, which was objected to by the plaintiff who produced a subpoena containing the names of several witnesses with a return of service thereon, which he alledged to

to have sued out and to have duly forwarded to his client, but as the witnesses did not appear on the day fixed for the enquête, he conceived that the plaintiff had no witnesses to produce, and was not apprized of the Contrary until the enquête day had passed — on these these Circumstances therefore he considered that the Plaintiff ought to have another day for the examination of his witnesses. —

But the Court held, that the plaintiff ought to have alledged on the enquête day those facts which were then within his knowledge, such as issuing the Subpona and what diligence had been done thereon, and thereupon claiming a continuance of the enquête until another day, not having done so the Plaintiff must be considered as having abandoned his right to such further day — The Defendant's motion was therefore granted. —

Monday 19th June 1815.—

Charles. v. Baynes. } The Court after hearing the Cause on the merits, although the Plaintiff had not made sufficient proof of his demand, yet considering the nature of the demand and the evidence adduced, they ordered the whole matters in contest to be referred to experts.—

Labbaye v. Pell.— } On action for recovery of a deposit of £25. in the hands of Defendant.—

The plaintiff had examined the Defendant upon faits & articles, and now moved that he might be permitted to examine witness to controvert the answers given by the Defendant to the said faits & articles, contending that where was any avowal made by the party as in the present case, it was equivalent to a commencement de preuve par ecrit, and therefore verbal evidence ought to be admitted to prove the whole case— cites. 1 Pigeau. 267.— Potts. Obl. N° 826. 12e. edit.—

Ogden

Ogden for Defendt contended, that there was no acknowledgment whatever of the plaintiffs demand in the defendants answers, and therefore verbal testimony could not be admitted. —

The Court held, that there was nothing in the answers of the Defendant to the faits & articles which could be considered as a commencement de preuve par ecrit, and as there appeared nothing in the case to impeach the veracity of those answers verbal testimony could not be admitted to controvert them — Serpillon. 104. §. 12. —

Eno vs Rivard

On action of damages for trespass and cutting down wood on the Common of the Isle du Pas.

The Plaintiff by his declaration stiled himself Seignior and possessor of the Isle du Pas, and the Defendt one of his tenants on that island. — That the predecessors of the Plff then Seigniors of the said Island had set apart a certain portion thereof for a Common, for pasturing the cattle of the Inhabitants on the said Island — That on the

the said Common the Plaintiff had for upwards of thirty years reserved for himself, owned and possessed, a large quantity of wood and timber growing thereon, viz^t. maple trees, plane trees & sundry others for his own sole use and benefit.— That the Defend^t. knowing the premises, and that he had in common with the other Inhabitants of the said Isle du Pas only the right of pasture for his Cattle in the said Common, yet cut down one hundred of the said trees so reserved, to the damage of the Pltff fifty pounds—

The Defendant by his plea stated, 1^st. That he was not guilty, &c— 2^dly. That the Plaintiff had no right of action agt. him, by reason of his pretended right as Seigneur of the said Isle du Pas, nor any individual right of property therein.— 3^dly. That the Defendant and all the other tenants on the said Isle du Pas, have always held used and enjoyed the right of cutting wood on the said Common for their own proper use, as a right attached to the Soil of which they are proprietors— 4^thly. That the Defendant has acquired the right to cut down wood as aforesaid by having held used and enjoyed that right for thirty years and upwards—

No title was produced or given in evidence on the part

of

of the Plaintiff, but witnesses were called by him to prove that he was Seignior in possession of the said Isle du Pas, and that his father had also been Seignior thereof for many years before – That he used to charge one shilling per cord for every cord of wood taken by the Inhabitants of the said Island on the Common, when they applied to him for his permission to cut wood there – That about 2 years before the institution of this action finding that a great many persons cut down wood on the said Common without his permission he caused a notice to be read at the Church door of the Island forbidding the Inhabitants to cut wood there without his leave, in consequence of which notice many of the said Inhabitants solicited & obtained his permission to this effect – That the Defendt. had cut down about ten cords of wood on the said Common without such permission, and persisted in his right to cut more –

The evidence on the part of the Defendant, was 1st a deed of Concession by Jacq. Brisset, Seignieur of a part of the said Isle du Pas, bearing date the 16 Novr. 1713 to one Jos. Auburchon, of a certain lot of land in the said Island, " avec droit de Commune

en

"en celle establie en ladite Isle du Pas." — and further on, it states — "Sera tenu ledit preneur de faire les clotures
" de ladite Commune, comme sont obligés de faire les
" autres habitants; et pourra prendre ledit preneur un
" arpent de terre dans ladite Commune pour y construire
" une maison et jardin, si bon lui semble". — And for this the tenant was bound to pay, "pareilles rentes
" et droit de Commune comme les autres habitans"

The other evidence adduced by the Defendt consisted of the testimony of several witnesses, who proved, that the Defendant & his father in common with the other tenants on the said Isle du Pas, for forty years and upwards had always taken and cut down wood on the said common when they wanted it. —

17th June. On the hearing of this Cause the Defendant contended, that the plaintiff had made no proof of any right or title in the Common, it must therefore be presumed to be the Common property of all those who are proprietors of land in the Isle du Pas, and as the Defendant is admitted to be one of those proprietors his right in the Common must also be admitted, and the Pltffs pretentions rejected, had the Defendant —

made

made no proof whatever in the Cause. — The deed of Concession filed in the Cause shews what the nature of this droit de Commune was, and it certainly cannot be considered as a gratuity by the Seignior to the Land holders inasmuchas they paid a consideration to the Seignior therefor. — The Defendant also shews the enjoyment he has had of this right for upwards of thirty years, which is equivalent to title, had he none other. — The Plaintiff cannot alone maintain this action as his right in the said Common, if any he can have, is a joint right with all the other tenants on the said Isle du Pas, who ought to have been joined in the action — Denizt. Vo. Comte d'Habit. No 22.

Ross for Pltff. contended that the action was founded upon the plaintiff's right of possession without reference to any other title — his possession has been proved, and as the Defendant has set up title to the wood in question it was his duty to have supported that title by sufficient evidence, which he has not done — The title produced by the Defendant, if it can apply to his case, shews merely

that

that the Censitaires upon that Island were entitled to a droit de Commune -, and from this he infers, that he is entitled as well to the wood as to the hay and grass growing on that Common, an inference not applicable, because a droit de Commune, according to the general sense and acceptation of the term, means only the use of a Common for the feeding of Cattle, and where more is meant to be given, more must be expressed - The Defendant's possession can never give him right to more than the title he has produced it would be admitting the establishment of a Servitude without title, if possession alone could be said to give it.

The Court held that where a Common was given by a Seignior to his tenants or habitans, that common must be considered to be the joint right of all the parties, as well the Seignior as the tenants, unless otherwise expressed and limited in the Grant — That a Commune, or Common, may be as well for the pasture of Cattle, as for the enjoyment of the wood growing thereon, or for both, according as the original grant shall determine, but when it is silent, the mode

Denizart. Vo. Commte d'Habitans. No 1.

mode of enjoying that Commune, must serve to — explain the rights of the parties therein. — In the Case before us the Plaintiff shews no title under which the Common of the Isle du Pas had been granted, he trusts to his possession and preferable right as Seigneur, and contends that no more was given to the tenants than a right of pasture, and as the Defendant claims more, he must prove more by sufficient title — The Plaintiff admits, and the title produced by the Defendant shews, that as a land holder in the Isle du Pas, he was entitled to a right in the Common, that he gave a consideration to the Seignior for this right, but as the nature of this right is not specified or limited by the said title, evidence has been adduced to shew in what manner the droit de Commune was enjoyed by those tenants, which was by cutting down and carrying away wood and sending their cattle to pasture there — This evidence is of the same description as that produced by the Plaintiff, verbal testimony, and much of it proceeds from the mouths of the Plaintiffs witnesses, to ascertain the title of the Defendt —

Had

Had the plaintiff produced the title which limited the enjoyment of the Defendant in this Common to that of feeding his Cattle only, as contended for in the declaration, the testimony adduced by the Defendant to support his claim could not have been admitted but as both parties have trusted their rights to the possession and enjoyment they respectively held in this Common, the Court must adjudge in favor of the Defendant, whose possession seems equally founded to entitle him as well to the wood as to grass growing on the said Common, both which were consistent and legal, and the Plaintiff has not established by his evidence the exclusive right in himself to the wood on that Common — Action dismissed —

Denizart. Vo Communauté d'Habitans & Commune
Nouv: Deniz.t Vo Commune. §. 2. No 3. —
Traité de Commté D'Habitans par Fremainville p. 23. 26. 28.

Tuesday 20th June 1815.

Dufresne
v
Foiran.

Action on deed of sale for the arrears of certain payments due thereon as stipulated by the said deed with interest.

The payment of the purchase money was stipulated to be made in the following manner, "huit mille livres ou chelins de vingt coppres "payables en douze ans par paiemens egaux de Six "cent soixante six livres treize sols quatre deniers, "chelins de vingt coppres, avec interets de six pour cent "a compter de ce Jour, dont le premier terme de paiement "sera du et echû dans le cours d'avril mil huit cent "quatre, le second à pareil terme de l'an suivant, et "ainsi continuer de la en avant tous les ans à pareil "terme, jusqu' au parfait paiement de ladite Somme "de huit mille livres ou chelins de vingt coppres, et "a chaque payement en deduction du capital, les interets "diminueront en proportion des paiements qui seront faits".

On

On this deed several payments had been made at the terms therein limited by the Defendant to the Plaintiff, who had first imputed these payments upon the interest of the whole Capital, and the balance in deduction of the Capital —

The Defendant on the contrary contended that all the payments made by him ought to be imputed to the payment of the principal alone and for no part of the interest, as it became payable only after the whole capital had been satisfied —

But the Court held that the interest should be calculated upon each term of payement as it became due, (and not upon the terms or instalments which had not become due) and that the payments made by the Defendant should be imputed thereon, first on the interest, and then on the capital of the payments thus become due. —

October Term 1815.

Wednesday 4th October 1815.

Oliva. vs Jacobs.

The plaintiff resides in Quebec, and had authorised one William Hall to appear and prosecute the present suit in this Court.— At the return of the writ the plaintiff appeared by the said William Hall, and the Defendt. appeared in person: The Defendant now moved, that the plaintiff's suit should be dismissed as he had not appeared in person nor by an attorney of this Court at the return of the writ to prosecute his said action.—

This motion the Court over-ruled, considering that the Ordinance of 1785 did not extend to prevent a person not resident within the jurisdiction of the Court from appointing any other person besides an attorney in Court, to represent him and prosecute his suit for him.—

Friday 20th October 1815.

Bergeron
vs
Cadieu & al
and
Bedard Int^s

On motion of M^r Bedard the Attorney of the plaintiffs for distraction of his costs on the Judgment rendered in this Cause the 19th day of June last.

M^r Bedard had served the notice of his motion on the Defendant Cadieu personally, and on the two other Defendants by leaving the same with M^r L. M. Viger their attorney in the Cause.—

L. M. Viger for the said defendants now contends that the servia of the said notice on him is insufficient, as he has no authority to represent the said Defendants, or to bind them by his acts, his authority in this respect having ceased, when the final Judgment was rendered in the Cause, on the said 19^e June last.

The said L. M. Vigé for Cadieu, states, that Execution has been sued out on the aforesaid Judg^t of the 19th June last, which he has paid — That no new Execution can issue ag^t the Defendants on that Judgment, as there can be no partial execution of the Judgments of this Court — That the said execution bears on it,

besides

besides the principal debt, only the costs of the witnesses and Experts, which presumes that all other costs were satisfied — That distraction of Costs cannot be granted to the attorney after execution issued, all claims being considered as comprehended therein — Denizart. Vo Distraction and Lacombe. eod. Vo. — That if the Court should grant the present motion, it ought to be at the proper Costs and charges of the attorney making the same. —

Bedard in reply — contends that the present motion is an incident in the Cause, and therefore service thereof on the attorney of the parties is sufficient. — That Cadieu cannot object to the distraction of the Costs demanded, inasmuchas it is evident the said Costs have not hitherto been paid, nor included in the execution already issued. — That previous to the suing out of the said execution he notified to the Pltff that the present motion would be made, which is the reason why the plaintiff did not include the attorneys fees and disbursements in that writ. —

The Court was opinion that the service of the notice on the attorney of the Defendants was sufficient as it regarded the execution of the Judgment rendered in the Cause, in which it was competent for the

attorney

Attorney to represent his client in the Cause — That as it was agreed on all hands that the Costs of the plaintiffs Attorney had not been paid nor included in the Execution issued in this Cause, distraction of the said Costs ought to be granted, but as the Attorney had delayed his application till after the said Execution had issued, he ought to pay the Costs of this motion.

Verdun. —
v.
Ant. Prevost
and
Franc. Prevost
Gar.

On action en Declaratn d'hypothegue

The declaratn stated — That on the 20th Oct. 1814, the plff obtained Judgt in this Court against one Jacques Auclaire, for a sum of £18.15 for a debt, £4.11 for interest, and £6.15 for Costs, including as well the Costs on the said Judgt as of the writs of execution sued out thereon — That by the return of the Sheriff on the said writs of execution it appeared that the said Auclaire had no estate real or personal to satisfy the same. That the said Judgment was rendered against the said Auclaire for nine instalments or terms of payment due to the plaintiff upon a deed of Sale of a certain lot of land

dated

dated 7th Febry. 1806. which gave to the pltff a general mortgage upon all the property of the said Auclaire from that date. —

That by deed of exchange of the 18 Novr. 1809, the said Auclaire exchanged the said lot of land with one François Prevost, from whom the said Auclaire rec'd a certain other lot of land, upon which the mortgage aforesaid of the said plaintiff also attached from the said 18th day of November 1809, in the possession of which said last mentioned lot of land the said Auclaire remained for about two years —

That on the 30th May 1813, the said Jos. Auclaire made a retrocession in Court to the said Franc Prevost of the said last mentioned lot of land he had so received from the said Prevost in exchange under the aforesaid deed of 18th Novr. 1809, by virtue of which retrocession the said François Prevost again entered into the possession of the said last mentd lot of land —

That by deed of Sale of the 18th March 1813, the said Franc Prevost sold the said last mentioned lot of land to Antoine Prevost the Defendt, by means whereof the said Defendt became and now is possessor of the said

said last mentd. lot of land, and liable hypothecairt. to the part. of the plaintiff's debt, interest & costs afores. and thereupon action is brot. &c. — —

Antoine Provost the Defendant called in the Sr. François Prevost as his Garant formel. —

The said Francs. Prevost appeared and took fait & cause for the Defendt., and pleaded, amongst other things, to the plff's action, that the same could not be maintained agt. Defendt., inasmuch as the aforesaid deed of Exchange between the said Audaire and the said Garant of the 18 Novr. 1809 had been wholly resolved and done away by the aforesaid retrocession of the 30th May 1813, the parties being thereby repleaced in the same situation in which they were before executing the said last mentd. deed, and whereby the said Garant took back the lot of land afors. free and clear of any burden, charge, or hypotheque in favor of the said plaintiff — cited — *

* Denizt. Vo. Vente. No. 56. — Domat, Tit. 2, Sec. 12 No. 4. — 1. Bourj. liv. 3. tit. 4 Ch. 9. Sec. 5, p. 488.

The Plaintiff replied — That the aforesaid retrocession did not destroy the mortgage he had acquired on the said lot of land, and therefore his action was well founded. —

The

The Court were of opinion, that the retrocession made from inability to pay the consideration upon which the said deed of exchange had been made, extinguished any right of mortgage which the plaintiff could claim upon the lot of land in question; — upon the same principle it had been settled that the Seignior was entitled to no Lods & Ventes upon a Sale which was rescinded in this manner the principle in law being that the purchaser is never considered the real proprietor of an estate so as to impose any burden thereon until he has paid for it. —

1. Bourj.ne p.488. = Poth. Vente No. 328. 329. = Prudhom p.352. = A. Poquet de Livonniere p.216. = Dumoulin Fief p.103. = Guyot Fiefs. 3 Vol. p.489. = Poth. Orleans. p.102. —

Denau. vs Denoyer & Lebert et al Gar.ts

On action petitoire. —

The pltff by his decln states, that by certain deeds of Sale bearing date the 16th Febry & 28th March 1814, he purchased from one Jos. Roussain of Terrebonne and Franc. Roussain of Montreal; from Jacques Denau of Laprairie; from Pierre Hurteau of the same place, as well in his own name as in the name and behalf of Franc Hurteau his brother, Veronique Hurteau, widow of the late Pierre Lalanne; André Jourdain and Catherine Lefevre his wife, being the legal heirs

heirs and representatives of Marie Josette Demers dit Dumai their aunt, all their right and title in and to the Succession of the said Marie Josette Dumai, and more especially in and to a certain house & emplacement situated in the parish of Laprairie and bounded &c — That by means of the said deeds of Sale the said plaintiff became proprietor of the said house and emplmt, and acquired all the rights of the said heirs therein — That the Defendt now detains and with holds the possession of the said lots of land, and refuses to deliver up the same to the said pltff — wherefore &c

The Defendt put Louis Lebert in suit as his Garant formels. —

The Plaintiff called in the said Jos. Roussain & others from whom he purchased the rights in question, as his Garants formels. —

The said Louis Lebert taking fait & cause for the said Defendant, pleaded by form of exception peremptoire to the Plaintiffs action, that the said Defendt ought to be held and maintained in the possession of the premises in question, inasmuchas the pltff shews no sufficient right or title to oust the said Defendt thereof. That the rights acquired by the said pltff cannot avail him against the rights now held by the said Defendt in the said premises acquired by a prescriptive possession

of

of thirty years and upwards, and whereby he hath acquired a lawful title in and to the said premises and become the true and lawful owner and proprietor thereof. —

Answer to 5e Exception by Garants of Pluff. — That on the 20th Novr 1780, Marie Josette Dumai, the aunt of the said Garants, married one Basile Bourdeau, and by their marriage Contract a Communauté was established between them, and it was therein stipulated, that the Survivor should have right to dispose of all the property thereof without being held or bound to make or render any — partage or account thereof, and after the death of the Survivor, it was stipulated, that the property of the said Communauté, should be divided according to the Custom. That before, and at the time of the said marriage, the said Marie Josette Dumai then was, and always continued to be until the time of her decease, possessor and proprietor of the said premises, which she had acquired by Deed of Donation from her father and mother of the 6th Oct 1762. —

That about the 28th Augt 1784, the said Marie Josette Dumai died without children, leaving as her heirs and legal representatives the said Garants of the Pluff. That although the said Basile Bourdeau by the said marriage Contract was entitled to enjoy and dispose of only the moveables & other Conquets of the said Communauté, after

the

the decease of the said Marie Josette Dumai, he had nevertheless held and retained the possession and enjoyment of the aforesaid lot of ground until the time of his death. —

That about the 2e. March 1813, the said Basile Bourdeau died, leaving as his heirs the said Garant Alexis Lebert dit ——

That the said Alexis Lebert this Coheirs having entered into the possession of the property left by the said Basile Bourdeau, and particularly of the said emplacement, and refusing to render any account to the said Garants of the Plaintiff, of the said premises, the said Jos. & Franc. Roussain instituted an action agt the said Alexis Lebert & al' in this Court during the vacation after June Term 1813, demanding an account of the Sc. Communauté and of the said emplacement with the issues and profits thereof. —

That by a Transaction between the parties of the 30th Septr 1813, the said Louis Lebert stipulating as well for himself as for the said Alexis Lebert and the said Louis Racine as well for himself as for the said Christine Laflem and Franc. Guyotte, agreed, that the said Jos. & Franc. Roussain, as

well

well for themselves, as for and in the name of their said Coheirs should be put into the possession of the aforesaid emplacement and its appurtenances, to hold and dispose thereof as their own property & estate, as they should see fit, acknowledging therein & thereby that they the said Alexis Lebert dit- had not, nor could pretend to have, any right therein. —

That the said Garants being thus the true and lawful proprietors of the said emplacement & premises transferred their rights therein as before mentioned, to the said Pliff, who thereby became the owner and proprietor thereof and entitled to claim the same from the said mis en Cause the Garants of the said Deft. —

That the said Alexis Lebert as heir of the said Basile Bourdeau cannot avail himself of any right of prescription, because the said Basile Bourdeau as husband of the said Marie Josette Dumai, could not acquire by prescription the said premises, nor transmit any right of property therein to the said Alexis Lebert as his heir. Wherefore &c —

Reply to answer to Exception — maintains that the plea of prescription pleaded by the said Alexis

Alexis Lebert is sufficient to entitle him & the said Defend.t to hold and retain the possession & enjoyment of the said premises in manner as alledged. — That the Transaction between the parties of the 30 Sept. 1813 cannot now avail the said Garants of the s.d Plff as the same was afterwards rescinded by the parties.

The Court after hearing the parties made an Interlocutor admitting the Defendant to make proof of the prescription under which he claimed a right to the premises, and this proof having been adduced and the parties again heard thereon, the Court held that no sufficient prescription had been proved to entitle the Defendant to retain the possession of the said premises — the right of Bourdeau, under whom the Defend.t claims, was that of holding the property in the right of another person, not for himself, nor with the view of acquiring title therein as he must have known that no possession however long could ever have gained that title. — It has been said, that after the death of Marie Josette Dumais in 1784, the said Bourdeau

Poth. Prescrip. N.o 171.

held

held the said property in his own name, and could therefore establish a prescriptive right thereon, but it is a principle in law, that nemo potest sibi mutare causam possessionis suo, as a man's possession is always considered to continue under the same title under which it began, until the contrary be made appear, which has not been done here —

Poth. Presump No. 172.

Judgt for Plff —

Irvine & al
v
Forbes & al

On action of assumpsit —

This action was instituted by the Plffs. as merchants & Copartners against Daniel Forbes of Vaudreuil, merchr and John Forbes and Nancy M'donald his wife, father and mother, and heirs of William Forbes late of Vaudreuil aforesaid, Merchr deceased, who in his life time carried on trade with the said Daniel Forbes as merchants & Copartners under the name or firm of Daniel and William Forbes; for the recovery of the value of a certain quantity of Rum sold & delivered to the said Daniel & William Forbes. —

Plea.

Plea of Daniel Forbes - Non-assumpt. -
Plea of John Forbes & wife - Denies that they are the heirs of the said late Will. Forbes - That the said John Forbes & wife before the expiration of the delay allowed by law to make an Inventory of the Estate of the said late William Forbes their Son, and to deliberate whether they would accept of or renounce to his Succession, viz.t on the 27 March 1815, renounced to the same in due form of law. -

Replication joins issue on the plea of D. Forbes, and on the plea of John Forbes & wife, adds, - that after the decease of the said Will. Forbes, and before the making of the said renunciation, the said John Forbes & wife did as heirs of the said late Will.m Forbes, possess themselves of the property and estate of the said Wm Forbes, and did receive debts due to, and pay debts due by his - Succession, and did authorise the receipt and payment of such debts, and did commit several actes d'heritier, whereby they became liable as heirs of the said William Forbes to the payment of the demand aforesaid, and could not afterwards legally renounce thereto. —

By the evidence adduced it appeared that on the 29th day of Dec. 1814 the said John Forbes presented

his

his petition to the Judges of the Kings Bench at Montreal, stating, that the affairs of the Estate of the said late William Forbes were in a complicated and confused state, that there were large sums due by persons who refused to pay the same as there was no person authorised to prosecute for the recovery of the said debts nor give receipts and discharges in case of payment thereof, and that there was reason to believe the greater part of the said debts would be lost from want of means to recover the same, that there were besides Contracts entered into with Government which remained unexecuted, whereby the estate of the said William Forbes would be liable in heavy damages; and therefore praying, that without being considered to have done any act as heir of the said Wm Forbes, he might be authorised to do all provisional & conservatory acts for the benefit of the said Estate, to sue for debts and give discharges for the same and to execute all contracts entered into by the deceased, and this during the delay — allowed for making an Inventory of the said Estate and deliberating thereon - This authority was granted

as

as prayed for.— In consequence of this authority the said John Forbes appointed the said Daniel Forbes as attorney to do all acts for him in regard of the said Estate in the same manner as set forth in the said petition, and gave public notice of this appointment in Canadian Courant on 18th Febry. 1815.— That the said Daniel Forbes acting under the said authority gave orders to one James Fraser an Auctioneer in Montreal to sell certain furs and liquors which remained in his possession belonging to the said estate, and to apply the proceeds thereof towards the payment of certain debts due by the Succession of the said late William Forbes, which the said Fraser did accordingly.—

Under these acts and proceedings the plaintiffs contend. that John Forbes had committed an acte d'heritier, and was liable to pay the debts of the Succession of the said late William Forbes.

Sullivan for the Defendrs admitted the liability of Daniel Forbes one of the Defendrs but contended that John Forbes was sufficiently authorised under the order of the Judge to do all the acts he had done, the same being for the benefit of the Estate of the deceased.—

1 Pigeau. 60. 174.
2e dn 262.—
Poth. Suc. 130.—

When

When a person liable as heir, declares, at the time of doing any particular act, that he does not mean to do it as such, it secures him from the consequences. cites. 1. Journ. Palais. 369.— That in the present instance the Defendt. derived no benefit from the act, and it cannot therefore be presumed to have been done as heir. arret. 2. Journ. Pal: 1680.

Stuart in reply— The most essential act the Defendants ought to have done when they got the property of the Estate into their hands, was to have made an Inventory thereof, but none appears to have been made; on the Contrary the Defendants under colour of an authority from the Judge become possessed of the property, and when prosecuted will neither shew what the amount of that property was, nor what has become of it— It is evident that John Forbes previous to his renunciation to the estate of his Son, committed an acte d'heritier, both by word and by deed, and a Succession can be accepted by either— Potts. Suc. ch. 3. sec. 3. art. 1. p. 332. & 333.— 2 Pigeau. 361. 2. 4. 5. The 5th Defendant sets up an authority he derived from the Judge to do all conservatory acts for the benefit of the Succession— this may be applicable as to any particular act necessary to prevent injury to the Succession, which may be done even without authority from the Judge. 1 Pigeau. 59.— but no authority of

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the Judge could warrant the general administration of the estate, such as expressed in the advertisement of the 18 Febry. 1815, without incurring the liability of heir; — and the acts proved of ordering the property of the Estate to be sold and the proceeds applied to discharge the debts thereof, cannot be considered as Conservatory acts. even under the order of the Judge, but were such acts which an heir or general administrator only could have done —

The Court were of opinion that the Defend^a John Forbes had acted in his own wrong by assuming, thro' his attorney, a general management of the Estate of the late Wm Forbes, which the order of the Judge upon the petition of the said Defend^t was not intended, nor could legally, authorise. — That the s^d Defend^t was also blameable in thus interfering with the Estate of the deceased without first making an Inventory thereof, so as to enable the Pltffs to recover their debt, upon the Defendants renunciation to the estate — the want of such Inventory makes the renunciation pleaded by the Defend^a wholly insufficient, and indeed had it been regularly made, it is very

doubtful

doubtful how far it would have protected the Defendt after having caused effects to be sold and debts to be paid belonging to the said Estate.— Judgt for Plffs—
