Chief Justice Reid

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1816–1819

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February Term 1816.

Friday 2d Febv. 1816.

Sarver. vs Baker } Action on a promissory note made by Defendant to one Danl Sullivan and by him indorsed to the Plff.

The Defendt pleaded that he had received no value from the said Sullivan for the said note – that it was given for a puncheon of rum which the said Sullivan as a tide waiter at St Johns had seized in the possession of one Smith, who was exporting the same from the province, at a time when it was prohibited, which puncheon of Rum the said Sullivan without any right or authority, and before condemnation thereof, sold to him the Defendt and that the Plff at and before the time of indorsing the said Note to him, was well acquainted with all the said Facts.

All the above circumstances having been provid the Court held that the plaintiff could not recover the amount of the said note from the Defendant as it was a fraudulent transaction on the part of the said Sullivan and injurious to the public revenue — that the said Sullivan had no authority to sell the said rum, and was not warranted either to receive payment for the same nor security for such payment — and as the Pltff had a knowledge of all the Circumstances he had no better title to the money than the said Sullivan — The Court therefore dismissed the action, but ordered that the note should remain deposited in the Court for the benefit of all those who might claim an interest therein. —

Monday 5th Febv. 1816.

Cantin & al'
vs
Leonard.

Action en reddition de Compte.

The Defendt. pleaded first an Exception et defenses to the action generally — then in another and separate paper, made another plea or Exception to the demand of Pre Etie, one of the plaintiffs, with an Incidental demand, and a third and separate plea or Exception to the demand of Pierre Cantin another of the Plaintiffs —

The Plaintiffs moved that the two separate pleas put in by the Defendant besides the general plea filed by him should be rejected and taken from the record, inasmuchas it was irregular and contrary to the practice of the Court to file separate setts of pleadings in a Cause — Of which opinion was the Court, and granted the motion, except in regard of the Incidental demand which was permitted to remain . —

See Reg. Prac. fo. 24. s. 5.

Lawrence & Dayton
v^r
Cuvillier. —

A rule had been obtained by the Defe to shew cause why Execution should not issue agt him on a Judgt obt. by the Plaintiffs in June 1807. —

The Defendt stated that he ought not to be held to answer to the said rule inasmuchas he was a Member of the House of Assembly now sitting in Parliamt and ought therefore to be privilegd during such Sessions from answering to any Suit or demand made against him in any Court of Justice —

The Court however were of opinion that whatever privilidges the members of the House of Assembly might claim, yet they could not be considered greater than those allowed to members of the Imperial Parliament in England, where they may be sued at any time, and the Suit will not be impeached or staid by privilege provided the person be not arrested or imprisoned — The Defendts objection was therefore over-ruled,

See. Dankins v^s Burridge. 2 Str. 734. Raym^d 1442. — Coup. 844. — 2 H. Bl. 267. & 299 — Lastly see St. 10 Geo. 3. ch. 50 — in Bac. Abr. Tit. Privilege (C) — Comyns Dig. Tit. Parliament. D. (17) &c —

Wednesday 7th Febry 1816.

Young
vs
Rouleau

On action of assumpsit.

The Defendant moved that the plaintiff should be held to file a statement of the precise amount of her demand and of all the payments made by the Defendt on account thereof, and this within such time as should be limited by the Court, in order that the Defendant might be enabled to plead to the action; and failing therein, that the action should be dismissed

Sullivan for the Pltff admits that he is bound to file such statement as required by the Defendt and is willing to file the same within a reasonable time; but contends, that the Defendants motion in this respect is wholly unnecessary, as he can gain no more thereby than what the rule of practice allows. namely, that he cannot be held to answer to the pltffs demand or be considered in default until such statement be filed, but cannot demand that the plaintiffs action should be dismissed on default of her filing such a paper as the rule of practice has not so determined.

The

The Court, were of opinion, that where it was thought reasonable to lay a party under any order of the Court it was necessary to attach some penalty to the non-compliance with such order — In the present instance it appeared that the Defendt. had been arrested and held to bail for a small sum of money (£11. 5.) and it was therefore reasonable that he should have an opportunity of bringing the Cause to a trial as soon as possible, and was entitled to demand the statement in question within a reasonable delay and not to wait until it should please the Plff to file such statement, — The Court therefore gave the Plaintiff until the 17th inst. to file the said Statement, and on default of so doing that her action should be dismissed. —

Reynolds
v.
Palmer.

On saisie arret sued out by Plff before Judge.

Boston for the Defendant moved that the writ of saisie arret in this Cause should be quashed and set aside as having issued irregularly —

Because

Because no Copy of the fiat of the Judge permitting the said writ to issue had been served upon the Defendt and also because no indorsment had been made upon the said writ by the Plaintiff or his attorney, stating upon whose affidavit, and for what sum, the same had issued, according to the rules of Prac. sec. 8. §. 2. & 3.

Ogden for the plaintiff answered, that it was not necessary to serve a copy of the Judge's fiat on the Defendant, as the same was not required by law nor by any rule of practice of this Court — Neither was it necessary to make the specific indorsement on the writ required by the Rules of practice, and now demanded by the Defendant in those Cases where the whole affidavit was indorsed on the writ in conformity to the Ordinc of 1787, as was held by the Court in the Case of Richards. vs. Weston. 10th Ap. 1815.

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

Forcier.
vs
Boucher

The plaintiff had sued out a Commission rogatoire for the examination of witnesses in the district of Three Rivers, but in the Interrogatories proposed to the witnesses, it was not demanded of them whether they were related or allied to either of the parties, in the service of either of them, or interested in the Suit. — The Com. Rog. being returned and opened, the Defend^t. now moved that the same, together with the depositions of the witness taken thereon, should be suppressed as irregular and void in law, by reason of the aforesaid omission in the Interrogatories to the witnesses. cites Code Civile Tit. 22. art. 14. & 20. —

Rolland for Plff contended that Defd^t. should have made this objection before the Com. issued, when a copy of the Interrogatories was served upon him, & that he was now too late —

Stuart in reply — The Defend^t was bound to object only to such Interrogatories as were proposed by the Plff but he was not bound to tell the Plff that he had not proposed the necessary Interrogatories to entitle him to the evidence of the witnesses. —

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

Saturday 10th Febry 1816. —

Laurent
vr
Huberts

The pltff moved that a certain pleading filed by the Defendant should be taken from the files and rejected inasmuches the same had not been accompanied with any list of exhibits nor inscribed thereon — This was objected to as there was no exhibits nor list filed by the Defendt in the Cause, it was not therefore necessary to make such list for the purpose of inscribing thereon the said pleading — And of this opinion was the Court and held that according to the rules of practice the pleadings must be inscribed on the list of the exhibits in the Cause but that it is not necessary to make a particular list for such pleadings where no exhibits are filed — see Fraser vr Weston. 11 ops. 1814. —

Monday 12th. Febry 1816.

Bridge & Co
v.
Patterson

The plaintiffs were Merchants & auctioneers and the Defendant a harness-maker and Sadder – the action was assumpsit for goods sold by Plaintiffs to Defendant at auction, consisting principally of leather and other articles suitable to the trade of the Defendant – To this action the Defendant pleaded non-assumpsit, and concluded to the Country – The Plaintiffs moved that the Defts should be held to alter his conclusions to the Country or that the plea should be rejected, inasmuchers the parties were not such merchants or traders within the intent and meaning of the Provincial Ordce of 1785, as to be entitled to a trial by Jury.

But the Court held that the parties were clearly within the intent and meaning of the Ordinance merchants and traders, and as such entitled to claim the trial by Jury, and therefore rejected the – Plaintiffs motion. –

Reynolds
v.
Palmer & al. —

On action of assumpsit for the sum of £20 for the value of a horse which the Defendants undertook to deliver to the plaintiff. —

Plea — non assumpsit and further, that as Defends are stated to be jointly bound for the payment of the sum demanded they can be condemned to pay only each one half thereof, for which the Plff ought to have instituted his action in the Inferior Court, the same not being within the competence of this Court —

The plaintiff moved that the plea secondly pleaded by the Defendants should be rejected from the files inasmuchas it was a plea to the Jurisdiction and irregularly pleaded after a plea to the action, and further because had not deposited therewith at the time of filing the same the sum of 2 guineas as required by the Rules of Practice —

Boston for the Defendants contended that the above exception must be considered as peremptoire en droit, and regularly filed in the Cause —

But the Court held that the exception was in its nature declinatoire and granted the Plaintiffs motion

Bellows et al
v
Warner

The Defendants took off the default entered against them, and appeared on the 5th inst. — On the 9th they moved for and obtained a rule on the plaintiffs to shew Cause why they shd not be held to give security for costs, being foreigners

Ogden for the Plaintiffs in Cause shewed, that the Defendant's application for security for costs was too late, as he ought to have moved for the same on the 9th inst. under a previous notice of that motion, the four days for such application expiring on the 9th and therefore the obtaining a Rule on the 9th to shew Cause on the 10th why such security should not be given was not complying with the Rule —

But the Court held that the application made by the Defendant on the 9th was within the meaning of the Rule, granted the motion. —

Dorions
v
Clement

The plaintiff having obt. the order of the Court for rejecting a plea & exceptions filed by the Defendant as two guineas had not been deposited therewith at the time of filing the same at the office of the Prothonotary, now moved, that

as

as the time for pleading to the merits of the action had expired since the day of the Defendants appearance, that the Pltff should be permitted to proceed ex parte, and a day fixed for the enquête in this Cause —

Beaubien for the Defendt — contended that the motion was premature, as he was entitled to three days from this day, on which the Judgment of the Court was given in respect of the plea already filed, to fyle another plea to the merits of the action — refers to Rules Prac. Sec XI. §. 6.

But the Court held that the Defendant was not entitled to another day, inasmuches the plea filed by him had been irregularly filed, and on that account rejected, the cause therefore now stood as if no plea had ever been filed, and the Pltff entitled to his motion — That if the plea already filed by the Defendt had been regularly filed, and a hearing and Judgment had been made thereon, in that case the Defendt would have been entitled to three days from the entry of such Judgment to fyle another plea agreeable to the Rule cited, but it did not apply in this case —

Pltff's motion granted —

Dewolffe vs Deshaulels

The cause was entered on the first- inst. when a default was recorded against the Defendt on the 5th the Defendt appd and took off the default — On the 7th the Defendt moved for security for costs from the Pltff, as she had left the Province since the institution of the action — This was opposed on general grounds by the Pltff — and the Court held that the application was too late — that where a defendt allows a default to be entered against him, he is not entitled to four days after entering his appearance, or taking off such default, as the rule of practice is express that the application must be made within four days from the entry of the action — Mo. reported see Whiteside v. Douglass. 17 June 1812 —

Tuesday 13th Febv. 1816.—

Berichon vs Hubert. } Action on a promissory Note.—

The Defendant filed a plea of Exceptions The plaintiff by his answer joined issue thereon, and now moved that a day should be fixed for the enquête on the facts in issue.—

Bedard for Defendant contended that the motion was premature as he was entitled to three days to fyle a reply to the answer to the exception fyled by the Defendant, which were not yet elapsed

Stuart for Plff.— It has been held in practice, that at whatever stage of the pleadings the issue is complete, the parties may proceed to their proofs, or a hearing on law, as the Case may be, the filing of further pleadings being considered mere matter of form, and often employed, (as in the present Case,) to delay a Plaintiff in his proceeding to Judgment.—

The Court were of opinion with the plaintiff and granted his motion.— see Case. Clarke v. McDowall 12 Oct. 1812.—

Cantin et al
v
Leonard

During the vacation the Defendant filed pleas to the action, two of which were on the motion of the plaintiffs rejected as irregularly filed, by order of the 5th. inst. And on the 8th. inst. the Plaintiffs filed a Replication to the pleading of the Defendant which remained of record and which had been filed in the vacation and to which no objection had been taken by the Plaintiffs —

The Defendt. now moved that the said Replication should be rejected as having been filed too late, as the same ought to have been filed in Vacation and at the latest on the first day of the present Term —

Stuart for Plffs observed that he was delayed in the filing his replication from the irregular proceedings of the Defendant who had filed three pleas to the action, and the plffs were unable to reply thereto until it should be ascertained whether the said pleas should be permitted to remain of record That the Court having on the 5th inst. determined that two of the said pleas were irregularly filed,

the

the plaintiffs filed their replication to the remain^{g} plea on the 8th which was regular as being within the three days after such order made —

Rolland in reply — The plaintiffs not having objected to the general plea filed by the Defendant they were bound to reply thereto, without waiting the Judgment of the Court upon other pleas irregularly filed. —

The Court held that the plaintiffs ought to have replied according to the course of the practice, to the plea which had been regularly filed and which remained of record, as no question had been raised touching the same to suspend the regular course of proceeding — Defendants motion granted

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Lamothe.
v^{s}
Foucher.
&
Foucher Opp^{t}.

The oppos^{t} filed his opposition on the first inst^{t}, and on the third, without any notice served on him to this effect, filed his moyens in support of his said opposition, with the

the necessary exhibits in support thereof — but of this proceeding no notice was given to any of the parties in the Cause — On the 10th, one Louis Chenier, also an opposant in the Cause, filed a plea to the said opposition and served a copy on the Opposant. — The opposant now moved that the said plea should be rejected and taken from the record as having been filed too late, as according to the Rules of Practice sec. 37. §. 5, every person interested in the Cause, is bound to take notice of the oppositions made therein, and file his answer thereto in three days, under the like rules of pleading as in original suits. —

Pedard for Lt Chenier, contended, that as no notice had been given to him of the filing of the said moyens d' opposition, he was not bound by the Rule of practice referred to, to plead to the said opposition in three days, as by the 8th par. of the same section every party is entitled to ten days for contesting every opposition filed in a Cause, where previous notice has not been served —

The Court were of opinion, that as the §2. of the 37th Sec. of the Rules of practice, seemed to point out

out that moyens d'opposition, were requisite to be filed, only after due notice given to that effect, that the §. 5. ought necessarily to apply to this mode of proceeding where the moyens d'opposition had been filed under such notice, in which case an answer in three days must be made thereto — but as no notice had in this case been given, either to the party filing the moyens, or by him to the other parties, that such moyens had been filed, a delay of ten days ought to be allowed agreeable to the §. 8ᵉ — before concluding the parties from answering the said moyens — The opposant's motion was therefore rejected. —

Wednesday 14th. Febr. 1816. —

Griffin & ux
vs
Langan
& al. —

On the plaintiffs motion to reject certain pleas filed by the Defendants irregularly —

Sewell for the Plaintiffs, stated, that three pleas had been filed in the Cause by the Defendants irregularly and which ought therefore to be rejected 1st. That the Defend. Juliana Langan is sued as Tutrix to James Leslie and Julia his wife, as the said Defendants alledge, and denying that the said Juliana Langan is Tutrix to them — 2d. That there is a Suit between the same parties, and for the same rights, now pending in this Court — That these exceptions are in their nature dilatoire, and the Defendants, at the time of filing the same, ought to have deposited two guineas therewith at the Prothonotary's office, which they have neglected to do — the 3d. plea, is a plea of general exception to the plaintiffs right of action, without setting forth the special grounds on which the same is founded, and ought not therefore to have been received or filed by the Prothonotary. —

Stuart for the Defendants, contends, that the 1st & 2d. pleas above stated, are not in their nature dilatoire, but peremptoire en droit — as they do not

not tend to suspend or delay the progress of the Cause merely, but to destroy it for the moment altogether, being a temporary bar to the action — That as to the 3d. plea, it was not meant to be, nor was it in reality, a separate and distinct plea to the plaintiff's right of action as the denegation was general both as to law and fact; it stated, that the Plaintiffs were not in law entitled to have and maintain their action against the Defendr. nor were the facts alledged by the Plaintiffs in their declaration, true — this was a general plea of law & fact so blended together, that neither could be determined before a hearing on the merits —

The Court held that the 1st & 2d. pleas above mentioned were in their nature perempstoire en droit, and not dilatoire — 1. Jousse. 48. 49. — Serpillon. 59. 96 — and that general pleading to the right of action joined to a denegation of the facts in the same plea, or chef de defenses, was not considered to be that general plea of exception, to which the Rules of practice applied; as no previous hearing was necessary to be had thereon, before examining the merits of the Case, — the Plaintiffs motion was therefore over-ruled — see Case between same parties. 3d June 1815. —

Goujon. v. Davis.

Action of Trover for a horse —

Plea — That plff delivered the horse freely and voluntarily to him the Defendant on an exchange of horses made between them

The Plaintiff by his Replication denied these facts.

Upon the enquête the Defendant having made proof by one witness of the voluntary delivery of the horse by the Plaintiff, the Counsel for the Plff upon the cross-examination of the witness, proposed the question to him, "whether at the time of such delivery the Plaintiff "was not in a State of intoxication and unable to — "comprehend what he was about? — This question was objected to by the Defendant as the matter thereof formed no point in the pleadings or contest between the parties — And the question was rejected by the Court, as it was a point which ought to have been specially pleaded by the Plaintiff to entitle him to make proof thereof, as it tended to invalidate every consent or Contract between the parties. — See Case, Bunker v. Stebb. 4 April. 1815. —

Monday 19th Febry. 1816.—

Dumont
vs.
Lacroix vab

On action en bornage between the Plff as Seignior of the Seigniory of Mille Isles and the Defendants as Coproprietors of the Seigniory of Blainville.—

Beaubien for Hertel, one of the Defendants, states, that he was proprietor for one half of the said Seigniory of Blainville, but that before the bringing of the present action he had transferred and conveyed his said moiety to one Fraser, reserving to himself only the usufructuary enjoyment thereof during his life; That the proprietor of the said moiety ought to be joined in the action, as the same cannot be supported against the usufruitier. cites Poth. Cout. Soc. Nº 232.— That the Defendants Seigniory is bounded in front by the River, and the plff demands that the rear line of the said Seigniory should be made parallel to the front, that is, to follow all the bends & turnings of the River, which cannot be done, nor is it consistent with the usual course of proceeding in such cases, as all the rear lines of Seigniories are straight lines, and ought to made so in the present instance.—

Rolland

Rollard in reply — The action is well brought and can be maintained against the Defend. Hertel as usufruitier he having a sufficient interest in the property to enable him to defend the Suit, and being by law entitled to institute the action en bornage against his neighbour. — That the Plaintiff might as an act of prudence have joined the proprietor, but this regards the interest of the plaintiff only, as by not doing so, he is liable to be called upon at some future period by the said proprietor, to make another bornage with him, but this is no plea or excuse for the usufruitier as his interest is not concerned — cites. Nouv. Denizt Vo Bornage. § 3. — Rep. Vo Bornage. — Domat. liv. 2. tit. 6. § 1. No 6. —

That the Plaintiff does not object to the rear line of the Defendants Seigniory being drawn straight provided the superficial contents do not exceed the number of arres to which he is entitled by the Deed of Concession —

The Court held that the action could be maintained against the Defendant as usufruitier without joining the proprietor, and that the rear line of the Defendants Seigniory should be drawn a straight line in such manner as to allow the superficial measure stated in Deed of Concession, and for this purpose to make the necessary allowances for the bendings of the river in the front of the Seigniory —

Charret. dux. vr Gamelin.

Action for defamatory words. —
The Jury found a verdict for the Defendant and that each party should pay their own Costs. —

The Defendant now moved for Judgment on the verdict, and that his Costs should be allowed him. This was objected to by the pltffs as the verdict was one entire thing and must be taken in toto, or altered and amended by the Court, before any Judgment could be entered up thereon different from the tenor and import thereof. — That in this Case had the verdict made no mention of the Costs, the Court would have divided them, as the whole Cause turned upon a recrimination of ill-language between the parties —

The Court were of opinion that upon the present motion Judgment must be entered upon the verdict as it stood, that although the Court possessed the power of altering or correcting verdicts according to Circumstances, yet such correction will be made only under a special application for this purpose, and under such a statement of Circumstances as will warrant their interference with the verdict — here they saw little room for it had the application been made, and therefore Judgment was entered in the terms of the verdict. —

Dezery
vs
Young

This was an action for house rent and also for rescinding the lease, as the plaintiff was under the necessity of inhabiting the house himself — The Defendant made default, but the Court upon hearing the plaintiff's witnesses were of opinion to adjudge that the Defendant should leave the house on 1st May 1816, although the lease did not expire till 1st May 1817. —

Potts. Con. Towage. No 329. —

Thayer.
vs
Curtis. —

On Defendants motion for a Com. Rogatoire to New York & other parts of the united States returnable the 1st day of April next. —

Ogden for Pltff objected that such Commission could not be granted, nor any proceeding of this kind allowed which will tend to retard the progress of the Cause unless the application be grounded on an affidavit shewing that the same is well founded, — but that no such affidavit has been produced. —

Grant for Defendt stated, that such affidavit is required only where the granting the Com. Rog. will retard the proceedings in the Cause, which will not be the case here, as nothing can now be done in the Cause before the 1st day of April Term next when the said Commission is returnable, unless taking the

examination

examination of witnesses in vacation, which may done should the plaintiff be desirous to proceed. —

The Court considering that the suing out the — Com. Rogr would not create unnecessary delay in the Cause, granted the motion, without any affidavit being produced in support of it. — see case. Charles. v. Baynes. 18 Ap. 1815.

Galernau v Evans } This was an action prosecuted by the Pltff for the seduction of Marie Galernau his daughter a minor, and was tried by a Special Jury — The Case was fully made out on the part of the plaintiff, and on the part of the Defendt the defence made was, that the seduction of the daughter had been made by the Connivance and Consent of the Plaintiff. —

The principal facts in evidence were, that the parties were neighbours and lived in the parish of Repentigny — That the plaintiffs daughter was a young woman about 16 or 17 years of age, and the Defendant a man of 50 years and a married man — That upon one occasion when the plaintiff was coming to town with a load of hay, he permitted his daughter to come in the same Cariole with the Defendant, and to return with him. —

That

That upon her return she showed a dress flower to her father and mother which she said she had bought with money she received from the Defendant, and at same time laying hold of Defendants purse she took three dollars out of it, saying, she ought to have these, as she had gained them — That the Defendant was in the habit of frequenting the plaintiffs house for some time previous to his carrying off the girl — that it was remarked by the neighbours that she was better cloathed than usual, — and one witness said that finding the Defdt and his wife were not on good terms in consequence of the Defendant's frequent visits at the house of the Plaintiff, the witness mentioned this to the Pltff, and advised him to forbid the Defendt visits, as it gave uneasiness to his wife, but did not say on what account. It also appeared that the Defendant had hired persons to seduce the girl, to appoint meetings with him and to assist in carrying her off, that he brought her to town and kept her in a separate room in a public house for two or three days, and there slept with her, and when the plaintiff came in pursuit and carried her away, the Defendt seemed openly to boast and glory in what he had done. —

The charge to the Jury was, that if they saw reason to believe from the evidence adduced that the Pltff

had

had connived at his daughter's infamy, they ought to find a verdict for the Defendant - if they considered the evidence only as shewing a want on the part of the Pltff of a proper attention to his daughter's conduct-, this would go for in mitigation of damages against the Defendt and the Court inclined to be of this opinion - If on the contrary the Jury considered the evidence as in nowise implicating the character or conduct of the pltff in the matter, they ought in that case to allow heavy damages

The Jury gave a verdict for the pltff, with £300 damages. -

The Defendant now moved for a new trial upon two grounds. 1st That the verdict was contrary to evidence and 2dly That the damages were excessive. - On the first point the Defendant referred to the evidence adduced - and on the 2d supported his argument on authorities to shew that the Court was empowered in cases of excessive damages for torts to grant a new trial - cited. Clarke v. Udall. 2 Salk. 649. - Sharpe v. Bryce. 2 Bl. 942. - Goodwin v. Gibson. 4. Bur. 2108. - And also that no evidence had been adduced to shew that the Defendt was in a situation to support such heavy damages. -

The Court held, that there were no grounds in the Case upon which they could determine that the damages were excessive - That if the Jury disbelieved the defence set-

set up by the Defendant, his conduct must then have appeared so openly depraved, that they could not think that £300- were excessive damages — That had the decision of the case rested with the Court, they would not have allowed so large damages, but when there was no rule to guide in regard of the quantum of damages but the judgment to be formed upon the evidence, this was so exclusively the right and province of the Jury that the Court could not take upon themselves to correct it, but by setting up their own opinion in opposition to it, — That had there been evidence to shew, that the means of the Defendant were such that he would never be able to pay £300—, and that a judgment for that sum would be tantamount to perpetual imprisonment, the Court would have had a ground to proceed upon, and would have been warranted to set aside the verdict of the Jury, but this not appearing the Court saw no grounds upon which they were entitled to interfere, and therefore rejected the Defendts motion. — See Dubaly. v. Gunning. A. J. R. 641. —

On Petition of Hugh Munro Esqr } For Envoye en possession. —

The Petition stated, that Philippe Leroux brother of Angelique Leroux wife of the said Hugh Munro, who formerly resided at Lassomption, had now been absent from the Province for upwards of thirty years — That for upwards of ten years last past there had been no accounts received of the said Philippe Leroux, who had left no other heirs in this Province but Laurent Leroux of Lassomption aforesaid, his brother and the said Angelique Leroux his Sister, as ascertained by a certain acte de notorieté in this behalf — The said Petition concluding on this account, that the said Angelique should be put in possession of one half of the property and estate of the said Philippe Leroux, and to proceed to a provisional division thereof with the said Laurent Leroux.

On the 10th. inst. The Petitioners obtained a Rule on Sr. Laurent Leroux, as Curator to the said Philippe Leroux an absentee, to shew Cause why the said Envoye en possessn. should not be granted. —

The said Laurent Leroux appeared and stated,

that

that the petition could not be granted in manner as demanded, - That the said Petitioners were entitled to only one third of the succession of the said Philippe Leroux, inasmuch as he had another brother, Benjamin Leroux who had died in Canada in 1795, but who had left a daughter to represent him, - That this daughter, named Marie Angelique Leroux was married to one Peter Primm of St. Louis in the Territory of Louisiana and that he the said Laurent Leroux had rendered an account of the Estate and Succession of the said Benjamin Leroux to the said Peter Primm, he the said Laurent Leroux having been named and appointed Tutor to the said Marie Angelique Leroux - That the said Peter Primm wife, although absent from this Province, was entitled to one third part or share in the property of the said Philippe Leroux, as representing their deceased Benjamin Leroux, and therefore the demand of the said Petitioners to have an envoye en possession of the one half of the said Succession ought not to be granted -

Rolland for the Petrs admitted the facts above stated but contended, that as the said Peter Primm and wife were now, and had been for many years absent from this Province, their right in the succession

of

of the said Philippe Seroux could not be taken into consideration, nor was the Court obliged to take notice of the rights of any absentee, in the said Succession — cites. Denizt. V.o Absent - & Envoye en possession. "

The Court held, that as the existence of another heir to the succession of the said Philippe Seroux had been admitted they were obliged to take notice of the rights of such heir upon this petition, although absent from the Province, and therefore adjudged the Envoye en possession for only one third of the succession in question. "

Young. " vs Brydon } Action on promissory Note —

The note in question was as follows —

"Sixty days after date I promise to pay to the
" order of Mr. Mungo Currie £196. 10. 11 Cy for value
" received — and should Government bills of Exchange
" on London be then less than 17½ ℔ Cent, the
" present discount, I promise to pay him any
" difference that may then exist between the rate of
" Exchange at that time & the present discount."

The

The Pltff by his action demanded as well the sum of £196. 10. 11, as the entire sum of 17½ ℔ Cent thereon upon the principle that at the time of bringing the action, and when the Note fell due, Govern.t Bills were at par —

The Defendant made default — and the Pltff having made proof of the rate of Exchange on Govt Bills as stated in his declaration, prayed Judgment — The Court at first had some doubt how far the above Note might not be considered as an usurious transaction, but after looking into the Case and considering that the discount in question was stipulated to be paid upon a Casualty, and also to indemnify the Pltff against a loss he might otherwise sustain, gave Judgment for the Pltff as demanded —

vide. Tate. v. Wellings. 3. T. Reps. 531 —
Sanders. v. Kentish. 8 — d.o — 162
Poth. Tr. Usure — N.o 95. 123 —
Marshal. v. Poole 13. T. R. 98. —

Guy. } Action to rescind a deed of Lease.
vs
Woolffe }

The plaintiff made a lease to the Defendt of a certain dwelling house and premises in the City of Montreal, from 1 Feby. 1814 to 1 May 1817, it being amongst other things stipulated therein that the Defendant should not transfer his lease to any other person, nor make any alteration in or about the premises without the leave or consent of the ~~p~~ plaintiff — The Defendant having contrary to the terms of the said lease, transferred his right in the said house and premises to different other persons, the Plaintiff brought his action to have the same rescinded, which was granted to him by the Court and Judgment entered accordingly. —

see — Dic. de Droit. par Ferriere. Vo Cession de Bail
Denizart — Vo Bail à Ferme, & a Loyer. No 12.
Bourjon. Tit. 4. Des Baux à loyer. ch. 1. Sec. 5. art. 17. 18. and Sec. 6. art. 20. 21. 22. —
Lacombe.. Vo Bail. Sec. 7. de la Cession du Bail.
Poth. Tr. de Louage. No 283. —

Tavernier vs Cuvillier and Smith vs Cuvillier

The plaintiff in each of these Causes had obtained Judgment agt. the Defendant, upon which executions had been sued out against his lands and tenements, that of the Plaintiff being prior in date, the said lands & tenements were seized at her Suit, the other execution being considered in the nature of an opposition was annexed by the Sheriff to the return he made upon the writ sued out by the said Tavernier —

Ogden for Smith, now moved, that he should be subrogated in the room and place of the said Tavernier in prosecuting the Sale of the lands and tenements by her seized and taken in execution, inasmuchas she had neglected and delayed to proceed to the said Sale, and thereby prevented the s^r Smith from doing the necessary diligence in this behalf, who had also sued out an execution for the same purpose. —

Beaubien for the s^r Tavernier contended that the said Smith could not be subrogated in the rights of the said Tavernier without her consent, and that she had a right to proceed on her execution

as

as the saw fit - denying however that any unnecessary delay had occurred in prosecuting the Sale of the lands and tenements in question -

The Court ordered, that on default of the said Tavernier's proceeding in due course to cause the said lands and tenements to be sold between this and the first day of next Term, that the said Smith sh^d be subrogated in all her rights for this purpose -

Hericourt. Vente d'Imm. p. 98. §. 24. -

April Term 1816.

Saturday 6th April 1816.

Aylwin } v. Cuvillier }

The Defendant having obtained an order for a Commission Rogatoire, gave notice to the Plaintiff to attend at the Office of the Prothonotary to see the said Commission made up, and to join therein if he should see fit, at the same time served a copy of the Interrogatories proposed by the Defendt. In consequence of the above notice, the Defendt attended at the Judges Chambers where he obtained an order from two of the Judges admitting the Interrogatories, and afterwards proceeded to make up the Commission at the Office; The Plaintiff did not attend, but on the examination of the Witnesses at Quebec, an attorney appeared on his behalf and made objections to some of the Interrogatories.

The

the Commission being now returned, the Plaintiff moved that the same should be suppressed as having been irregularly sued out, inasmuchas he had no notice given to him, nor any opportunity afforded of objecting to the pertinency of the Interrogatories before they were allowed by the Judges at Chambers —

Beaubien for the Defendt — contended that the Commission had issued regularly — That notice of making up the Commission necessarily comprehended every thing requisite to make it effectual, & was so understood by the Pltff, as he furnished Cross-interrogatories and joined in the Commission — That if there was any irregularity in the notice, it was cured by the appearance of an Attorney on behalf of the Pltff. at Quebec, when the Witnesses were examined. —

It was held by the Court, that the party suing out a Com. Rogatoire, must give a special notice for settling the Interrogatories, before such commission can be sued out, and that a notice to attend at the Prothonotary's Office to make up the Commission is not sufficient, nor is the defect cured by the appce of an Attorney at the time of the examination, it not appearing by whose authority he acted — Motion granted. —

Wednesday 10th April 1816.

Galernau
v.
Evans.

On motion in arrest of Judgt. on verdict rendered in this Cause last Term.

Ross for Defdt. The action by the plaintiff as father of Marie Galernau, his minor daughter, for injury done to him by her having been debauched by the Defendt. does not lie in this Country, as in England upon the fiction of per quod servitium amisit. The injury must be presumed to have been done to the minor, and the action ought therefore to have been, for and on behalf of the minor, or by a Tutor specially appointed to her for this purpose, but as the Case now stands the Defendant is liable to an action at the suit of the minor for damages proceeding from the same Cause. 2d. That the Venire facias, was irregularly sued out, not having been tested in the name of the Chief Justice as required by law.

Vigé for Plff. An action is maintainable by the father for the injury done to his child, without its being brought in the name of that child. Dic. de Droit. Vo. Injure. The action belongs to the parent only, as he is supposed to suffer in the person of his child

cite

cites. Domat. liv. III. tit. 2. art. 6 & 12. on Droit public. Repre vo Injure. p. 238. - Guy Pape. p. 786. quest. 464. —

That objection to the Venire is now too late, & no — ground in arrest of Judgt. —

Stuart in reply — The person complaining of an injury, must have an interest, appreciable à prix d'argent, to support an action in a Court of Justice — the mere mortification felt by a father for the wrong done to his child, is not so — The action given by the French law for such injuries, is more of a reparation or criminal proceeding, but there could be no pecuniary damage granted upon such proceeding — This action is not founded on a loss of service — the plaintiff complains of no personal injury done to him, and therefore he could be entitled to no damage, nor could any damage in such a case be legally assessed by a Jury — The minor is the only person who can — maintain this action. —

The Court held, that the action was maintainable by the father for the injury complained of, and that the damages could be legally assessed by the Jury, as for a personal injury — 2. Desp. 764. — Repre. Vo Puissance Paternelle. p. 114. Sec. 2. — That the irregularity of the Venire was cured after Verdict by the Statt. of Jeofails. Motion dismissed. —

Bell. v Kemp. } Action for assault & battery. —

The Plaintiff had prosecuted a former action for the same Cause, but during the last Vacation and before the institution of the present action, notified to the Defendants attorney, that he had discontinued such action, and also gave in a discontinuance at the Prothonotary's Office. —

Sewell for Defendt pleaded in exception — lis pendens — and contended, that notwithstanding the acts done by the Plaintiff, the former action was still subsisting, as the act of the Court is necessary to put an end to a Suit besides the Consent of the Plaintiff, which can be had only in term during the sitting of the Court. — Tidd's Prac. 841.

Ogden for Pltff. A Plaintiff has a right to discontinue his Suit at any time upon payment of Costs — This was done as far as lay with the plaintiff — by filing an act of discontinuance at the Office and giving notice thereof to the Defendt — This is agreeable to the practice of the Court. —

The Court held the discontinuance to be sufficiently made agreeable to the practice — the only part not complied with on the part of the Pltff was the payt of the Defendts Costs, but this could not be done before the Defendt should present his bill and get it taxed, which the Pltff could not

not compel him to do. — Exception, on plea of abatement of Defend^t was therefore dismissed. —

Sed. vid. 6. J. Rep. 765. — Whitmore. v. Williams —
1 Salk. 329. 2. Raym. 1014. —

Thursday 18th April 1816.

On the Petition of
The Hon. Lr Ch. Foucher.

Toussaint Pothier as Executor of the late Pierre Foretier, having commenced an action agt The Hon. Lr Chas Foucher as Tutor to Marie Leocadie Foucher and agt the other legatees of the said Pre Foretier, stated in his declaration, that on the 3d Decr 1815. having previously, to wit, on the 20th Oct. 1814 made & published his last Will and Testament, written and signed by him, whereby he had disposed of all his property and estate as therein and thereby stated, and for the execution of the said last Will and Testament had nominated and appointed one Hugues Heney and him the said Toussaint Pothier as Executors.— That on the 14th of the said month of Decr the said Hugues Heney renounced to the said Executorship. That on the 15th day of the same month, the said Touss. Pothier, deposited the said last Will and Testament in the office of Louis Guy, notary public, in due form— That on the 18th day of the same month, the St. T. Pothier notified the several legatees to appear in the Office of the

the said Notary to acknowledge the said Will, which they did on the 20th of the month — That on the 17th & 23d days of January 1816 the said Toussaint Pothier went to the house of the deceased in order to make an Inventory in due form of all the property left by him, but was prevented and opposed by the said Legatees, who had possessed themselves of all the property and effects left by the deceased, had disposed of a part thereof, and had now anounced the Sale of the remainder to be made at public auction on the 17th inst. (April 1816) by advertisement in the Montreal Gazettes — by means whereof the said Toust. Pothier complained that he had been prevented and was still prevented from executing the last Will and Testament of the said deceased, and thereupon prayed that the Scellé might be put upon the aforesaid property and effects in the house of the said deceased, to prevent the dissipation thereof by the said Legatees, and to enable the said T. Pothier to fulfill the intentions of the deceased in regard of the execution of the said last Will and Testament —

Upon

Upon this petition an order was given by one of the Judges for the Scellé, and Louis Guy, Esq. was appointed as Commissaire for this purpose — The Commissaire having gone to the house of the deceased and commenced his operations, opposition was made to his proceeds by the Legatees, who presented a requête to the said Judge, stating, that they had never acknowledged the right of Mr Pothier as Executor to have the possession of the property and effects of the deceased, which had always remained in the hands and possession of the Legatees who had caused an Inventory thereof to be made in due form, so that there was no ground for the proceeding by Scellé, and that in other respects the said proceeding was irregular and illegal — Upon this requête the Legatees obtained an order of Surcis upon the said Scellé, directing that the parties should be heard immediately before him upon the grounds of opposition therein contained — and the parties having afterwards appeared and having been heard the Judge directed, that the said Requête en opposition and all matters touching the same should be transmitted to the Court of Kings Bench, and that the parties concerned should be heard thereon the same day, sitting the Court. —

And

And the parties having now appeared in Court Mr Stuart on behalf of the Executor, objected, that the case was not regularly before the Court, nor could any cognizance nor be taken of it - That as being a matier Sommaire the Judge who granted the Saucis had the right to determine upon the opposition made by the Legatees, but he had not the power to transmit the proceedings to this Court, who become legally seized of a Cause by the Kings writ only, and therefore they could take no notice of these proceedings as a Court -

Mr Vigé for the Legatees, contended that the Judge had authority to transmit the proceedings to this Court, who ought now to determine between the parties - He stated - That the proceeding by Scelle' in this case was irregular, as the time for exercising such a right, if ever it existed, had lapsed, the Executor having waited for upwards of four months from the time of the decease of the Testator having come to his knowledge, before he thought of such a proceeding, during which time he had permitted the Legatees to remain in the possession of all the property and effects of the Testator - cites Stile de Gaunt.

Tit:

Tit: 17. Des Matieres Sommaires - Sec. 1. — Dic. de Droit. de Fer. Vo Scellé — But that in no instance can the Scellé be permitted after an Inventory has been made of the property and effects of the Testator which has been done here by the Legatees - cites. — 2o Pigeau. 271. & 285 — and by some it is held to be too late even if the Inventory be begun. Denis. Vo Scellé. No 74. — Poth. Proc. Civ. ed. in 12o - p. 89. & 93.

That Mr Pothier is not vested with any right or capacity to entitle him to demand the Scellé, in asmuchas the will under which he claims to be executor is a holograph will, and has neither been proved, nor acknowledged by the Legatees —

That by Mr Pothier's not interfering or acting as Executor immediately after the decease of the Testator the Legatees who were in possession of the effects of the Testator, did themselves enter upon the execution of the will by paying certain legacies thereby bequeathed and this they had a right to do — That it is the right of heirs to take the effects of a Testator upon giving security to the Executor — 4 Gr. Comr. p. 279. 2 Arg. 390. Repr Vo Exer Testre. p. 160. 1 Col. in fine and 2o Col. in principio. —

Mr

Mr Bedard on behalf of Mr Pothier, argued That the Testament of the late Pre Foretier had been acknowledged by the heirs & Legatees, in proof of which he referred to the notarial act of 20 Decr 1815 — That after the decease of the said Pre Foretier the Executor had proceeded with all due diligence, but had been interrupted & delayed by the Legatees in proceeding to the Inventory of the effects of the deceased, as appears by the different acts he now produces — That the legatees could not avail themselves of their own laches & tortious acts as the Executor, who being by law seized of all the moveable property and effects of the Testator from the time of his decease, he is in the eye of the law considered the Sequestre & Depositaire of those effects — cites. Gr. Comre art. 297. p. 275. 4e Vol. — Poth. Don. Testre 360. 361. — Troncon. 636. — That it is the right and duty of the Executor to make the Inventory and Sale of the effects of the Testator and not the heirs, and any Inventory made without the consent and participation of the Executor is informal and insufficient. cites, Denizt Vo Executre Testamentre No 21. — 2e Bourjon. p. 376. —

4 Poth. Don. Testre 300 2. Pig. 397. — 2. Bourj: 379. —

Pothr

Poth.- above cited.—
Nouv: Denizt. Tom. 8. p. 212. & 225.—
Dic. de Droit. Vo Executeur. p. 670.
Dic. de Jurisp.ce p. 89.—

That it is the right of the Executor to proceed by Scellé at all times until the Inventory be legally made—

2. Pigeau. from p. 250. to 315— see also p. 271 & 292
2 Bourjon. p. 376.—
Denizt. Vo Execut.r No. 24. 25. 26.—

That by law the Scellé may be obtained at any time as well in as out of Court— St. 34. Geo. III. ch. 6. art. 8. — 2. Pigeau. 279.—

Rolland for Mr Baron & wife, heirs & legatees of the late Pr. Foretier — The title of Executor is alone sufficient to ground a demand for the Scellée— The right of the Executor to have & obtain the possession of the effects of the Testator is incontestible, and cannot be infringed by the heirs — nor can they prevent him from making the Inventory — cits— Nouv. Denizt. Vo Execut. Testr §2. No 3 — §3. No 3— §. 5. No 7. 8. —

The Court held that by Stat: 34. Geo. III. ch. 6. all matters requiring dispatch, such as Interdictions, &c. affixing and taking off Seals of safe Custody and other acts of the same nature, may be done either in or out of Court, or out of Term, these things were considered by the Ordce of 1667. tit. 17. art. 4 — as matiers sommaires, upon which it is held, that the Judge out of Court, although he may determine provisoirement in regard of the difficulties arising thereon, yet he may, and ought, to transmit the proceedings into Court, for a decision on the merits. — This the Judge has done here — and upon looking at the order for the Scellé, the opposition made thereto, the return of the Commissioner in consequence and the order of the Judge transmitting the whole before this Court, they consider themselves legally seized of the Case and competent to determine thereon —.

Reportre Vo Scellé. p. 143
Denizt. Vo Scellé. No. 31.
2 Pigeau. 284.

Upon the first objection taken by the Petitioners, that Mr Pothier had no qualité of Executor to entitle him to demand or obtain the order for a Scellé as the will, being holographe, had not been proved nor acknowledged by the heirs — the Court consider that it is sufficient for the Sr Pothier to allege

and

and state himself to be Executor, without being held previously to establish by authentic evidence the validity or authenticity of the will, such proof, if made in the course of the proceedings being sufficient — but were it otherwise, it will be found in looking at some of the papers produced by the parties in the course of the argument, particularly the acte de depot of the said will, of the 15. Dec. 1815 — and the reconnoissance made by the heirs of the same will on the 20. of the same month, and also the deed of transaction of the said Heirs of the 12. Janv. 1816, enough appears to — satisfy the Court that the qualité of the Executor is sufficiently acknowledged, had this even been requisite.

In regard of the other objection, that the Executor has been too late in pursuing this course by Scellé from his tardy proceedings in the execution of the said will, and the other facts alledged to have taken place — much consideration is due —

It is laid down as the imperative duty of an Executor, that he ought to proceed in making an Inventory of the effects left by the Testator as soon as he possibly can after his decease — In doing this

1 Argou. 390.
Rep.re Vo Exer. Test.rs. p. 100.—
Poth. Don. Test.rs p. 365.—
3. Furgole. 366. No 27.

this there should be no delay, and if any obstructions occur, the Executor should use immediate diligence to get them removed.—

Nouv. Denis.t Vo Exer. Test.rs. S. 2, No 2
Poth. Don. Test.rs 361.

The possession of the effects of the Testator by the heir, is a legal possession, and in some respects not incompatible with the right of possession of the Executor— and therefore if the Executor will permit the heirs to hold this possession, to make an Inventory of these effects and to exercise a right of property therein, he is presumed in law to have waived the right of Scellé, as no longer necessary, by thus trusting the said effects in the hands of the heirs, who thereby are become accountable for them,— the effects are no longer considered to be in danger of being lost, or à l'abandon —

Denis.t Vo Ex. Test.rs. No 24—
2 Pigeau. 266.
Stile de Gaurct. Code Civ. tit. 17. p. 317.
Dic. de Ferrière. Vo Scellé. p. 701. No 6.
1 Prac. de Couchot. 135.
Poth. Proc. Civ. 88. 12.e
D.o 89
D.o 93

The facts in this case justify the opinion that the Executor is too late in his application for the Scellé.— The Testator died on the 3.d Dec.r of which the Executor appears to have had a knowledge at the time— and different proceedings appear

appear to have been had between that day and the 17th of the same month when the Executor went to the house of the deceased to make an Inventory of his effects, and there as well as on the 23d. met with opposition from the Petitioners whom he found in the possession of those effects — then it was that he ought to have used the right he now claims of putting the Scellé upon those effects to secure the same and also his right thereon — his Silence from that period until the 16th April, while he knew that the said effects were in the possession of the petitioners, and that during this time they had proceeded to make an Inventory thereof, was an absolute waiver of the right to obtain an order for the Scellé, which ought to be used with discretion and only in cases of necessity — It is evident that the Executor did not consider the effects of the deceased as being à l'abandon, by being in the hands of the Petitioners, and from the moment an Inventory thereof was made by them, although without the participation of the Executor, the said effects

could

could not be considered à l'abandon, as the persons making such Inventory became charged therewith and answerable for the same — The proceeding by Scellé was therefore no longer maintainable, and the Executor could not legally use it. —

The Court therefore rescinded the order for the Scellé as irregularly obtained, discharged the Garnison, and adjudged the Executor to pay Costs. —

Friday 19th April 1816.

Debartchze
v
Duvert.

Action for Lods & Ventes.

The Declaration states, That on the 11th Augt 1815, the Defendant purchased and acquired from Franc Chicou Duvert, his brother, the half of a certain lot of land in the Seigniory of St. Charles of which the pltff is the proprietor, the said Franc Chicou Duvert being at the time the proprietor of the whole of the said lot of land — That the s. purchase was made by act passed before Bourdages, Notary public, in which was contained a rescision of a certain deed of Sale and Cession made by the said Defendant to the said Franc Chicou Duvert on the 22d July 1814, for and in consideration of a sum of ten thousand livres, of the undivided half of the said lot of land which the said parties till then held in common, but in consequence of the said Sale of the 22d July 1814, the said Franc Chicou Duvert became proprietor of the whole of the said lot of land, and held and enjoyed the same until the said 11th Augt 1815, when the said Defendant

by

by virtue of the aforesaid act of rescision, or acte de resiliement, re-acquired from the said François Chicou Duvert, the aforesaid half of the said lot of land, for the price or sum of ten thousand livres being the same price or consideration for which the said Franc. Chicou Duvert had acquired the said half or moiety of the said lot of Land from the said Défendant.— That upon the said last mentd acte de resiliement, or purchase so made by the Defr there are due to the Plaintiff his Lods & Ventes, which he now claims. —

To this demand, the Defendant pleaded, That the plaintiff had no right of action agt. the Defendant for lods & ventes.— That the said François Chicou Duvert and the said Defendt were brothers, and inherited in Common as heirs of their late father, the lot of land in question. That upon the act or deed of Cession of 22d July 1814, the Plaintiff could claim nothing, such deed being merely an acte de partage, of an undivided property among Co-heirs — And the said heirs afterwards finding, that the said partage was disadvantageous, and operating a lezion of more than a tiers au quart to the said Defendt,

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he had determined to institute an action for the purpose of having the said deed of partage of 22d July 1814 rescinded, to prevent which the said Franc Chicou Duvet agreed to rescind the same, and which was accordingly done by the said act of 11th Augt. 1815. That had the said Defendant suffered no lezion whatever by the said act or deed of 22d July 1814, yet as no lods & ventes were due thereon to the said plaintiff, the voluntary rescision thereof by the said parties could not give rise to such right.—

Replication — Not admitting but denying all matters of law and fact pleaded by the Defendant, contends, that the pretended lezion in the act or deed of 22d July 1814, cannot be urged against the claim of the plaintiff, because the resiliation of that act between the parties, being voluntary, the Defendt cannot be admitted to make proof of that lezion, inasmuchas the said act of resiliation is not founded upon a principle of lezion, clearly expressed therein, but upon other and different motives — and therefore the Defendant cannot be admitted to alledge or prove other and different grounds for the rescision of the said act, than those the parties had in contemplation

and

and have expressed in the said act.— And further because, things were not entieres, or in the same state at the time of the rescision of the said deed of 22d July 1814, as at the time of making and executing the same.—

The words used in the deed of Rescision, are, "Considerant que la Cession & transport des "dits droits dans la Susdite terre, leur est "desavantageux et onereux" &c.

Upon the hearing of this Cause Mr Rolland for the plaintiff argued, that the deed of the 22d July 1814, is an act carrying mutation of property, and was carried into effect by a possession under it — the act of resiliation of that deed was a voluntary act, and carried lods & Ventes, "comme les choses n'etoient plus entieres. cites, Prudhom. liv. 3. ch. 68. p. 355, 8. 9— To have exonerated the Defendant from the payt of lods & Ventes on the said acte the same ought to have been rescinded by the Sentence of a Court of Justice — Id. p. 351—2. 3— also p. 326.—329— Bilcoc Tr. Fiefs. ch. 44. "double droits sont dus au Seigneur sur resiliement volontaire" Id. ch. 36, Sec. 1. p. 185.— 1. Gr. Cout. 1175. No 39.— Duplessis liv. 2. ch. 2. Sec. 1. p. 97.— Brodeau sur Louet.

Let.

Let. R. Nº 2. —

Bourjon. Vol. 1. liv. 2. tit. 4. Des Censives. dist. XV. 134. 6. 7.

Henrys. Tom. 2. liv. 3. quest. 29. aux observations. —

Duplessis. 1. Vol. p. 98. —

Pothier Cont. Vente. Nº 322. —

Bedard for Defendt — The Defendant being injured, lesé, by the deed of 22e July 1814, was entitled to demand and obtain the rescision thereof from a necessary cause inherent in the act itself (la lesion du tiers au quart) therefore the act of rescision altho' voluntarily made by the parties on 11 augt 1815, gives no right to lods & Ventes. — cites

Prudhom. liv. 3. ch. 66. p. 348.

Poth. Fiefs. ch. 5. p. 1. sec. 1. Cor. 2. p. 136. — 137. 140.

2. The act of 11 Augt 1815, only rescinding an act or deed upon which no right of lods accrued, cannot give rise to such right. — cites —

Dumoulin Tit. 1er DES Fiefs. art. 33. Nº 18. p. 389.

Potts. Ibid. part. 2. ch. 1er Du Profit de Rachapt. sec. 1. Reg. 1. p. 190

See also — 4e Reg. p. 193. —

3e. The sum of 10,000ff, the stipulated price for the lot of land in question, being still due & unpaid, the Defendt and his brother could rescind the act of 22e July 1814, without giving rise to any rights to the Seigneur. —

cites

cites. Prudhom. loco citato. p. 350 —

Pothi. ibid. p. 140. —

Rolland in reply contends — that the transactions between the parties cannot be considered as an arrangemt de famille, as the said Franc. Chicou Duvert could have sold the property in question to any other person besides the Defendant. That the rescision in question was made for another and a different sum from that for which the lot of land was sold by act of 22d July 1814 — That the said act of rescision does not allege any lezion de tiers au quart, nor any other sufficient cause, which in law could operate such rescision, it states merely that it was desavantageux et onereux — which might be true, yet this did not render it liable to rescision, otherwise it might be said, that every act or agreement which might prove disadvantageous or unprofitable to either of the contracting parties, (and this generally must be the case) would be liable to rescision upon the demand of the party dissatisfied therewith — On this account the Defendant ought not to be admitted to make proof of a lezion de tiers au quart, as the ground work of the said acte de rescision, when that act on the face of it, states another and a different ground, as well might the Defendant be allowed

under

under the general words, "desavantageux & onereux" to prove, "lezion d'outre moitié de juste prix," fraud, error, infancy, or any other Cause for which an act may be rescinded, as that set up by the Defendant — That the parties to the said act of rescision are not before the Court and therefore proof of the lezion ought not to be admitted

The Court held, that sufficient was alledged in the act of rescision of the 11.th Augt. 1815, to let in the Defendt. to a proof of the facts alledged in his plea. — That had the rescision been made, even without stating therein any Cause, yet if a sufficient cause were pleaded as the ground of such rescision, it ought to be admitted to be proved — For as the rights of the plaintiff, as Seignior, or of a third person, cannot be bound or affected by any act or declaration made by the parties without his knowledge and participation, it is on this account, that had it been as clearly and fully expressed in this act of rescision, as it is in the plea, that it was made in consequence of a lezion de tiers au quart in a division between heirs, yet the Seignior would not have been bound by such Statement, because it might be untrue or fraudulent, and he could therefore compel the party setting up such act against his

demand

demand, to make proof of the facts therein stated — upon the principle, that it is only upon the truth of the transaction, that the rights of the Seignior can be determined — So upon the same principle, the party ought to be admitted to support the act he has made by shewing the true grounds of it, although these be not fully stated on the face of it. —

The question is therefore reduced to this simple point — Is a Recision of the deed of 22d July 1814, voluntarily made between the parties, for a lezion de tiers au quart, between heirs, subject in law to the payment of Lods & Ventes to the Seignior? — If it is subject to such lods & Ventes, it will be unnecessary to admit the Defendant to make proof of the fact of lezion, as being wholly — immaterial — if on the Contrary the existence of such a lezion, be a sufficient cause for such a rescision, whereby the plaintiff will be excluded from the right he now claims, the Defendant must be admitted to make proof of that lezion. —

The question is not altogether new, as it has been already determined in this Court, that the rescision volontaire of a deed of Sale and Conveyance of an

estate

estate, "pro Causa antiqua", or for a Cause existing at the time or prior to such Sale, is a sufficient bar to the right of lods et ventes, because it is considered, that the party takes back his property, not by a new Contract, but by rescinding the old, under which it was alienated, such is the case of a voluntary Resolution du Contrat de Vente, for the non-payment of the consideration by the purchaser — see. Debartchze. v. Chaland. 20. Ap. 1814 — The principle in this case is the same, and therfore the Defendant must be admitted to make proof of the lezion by him pleaded, as being a sufficient bar to the demand of the Plff. —

Claude Poquet de Livoniere — Traité des Fiefs. liv. 3. ch. 6. p. 217.
Prudhomme. liv. 3. ch. 16. p. 350. —
Argou. liv. 2. ch. 4. p. 170.
Guyot. Traité des Fiefs. 3. Vol. ch. 12. §. 19. max. 3. p. 489. —
Repert.e de Jur.e v.o Lods & Ventes. §. 28. dist. 7.e —
Dumoulin — Fiefs. Tit. 2. p. 103. —

Saturday 20th April 1816.

M^c Gillivray, val
v
Debarasse.

This was an action instituted by the plaintiffs against the Defendant as the maker of a promissory note payable to them. The Note was subscribed by the mark of the Defendant in the presence of two witnesses, but neither of these witnesses was produced on the enquête day to prove the making of the Note, as it appeared that they were absent from the Province and could not be had, the proof on the part of the Plaintiffs was therefore limited to proving the signature of those subscribing witnesses, and their absence from the Province — upon this evidence the Defendant contended that the proof of the making of the note had not been made out — But the Court held the proof to be sufficient, and gave Judgment for the Plaintiffs.—

see. cases — Prince. v^s Blackburn. 2. East. R. 250.
Adams. v^s Kerr. — 1. Bos. Pul. 360.
Cunliffe v. Sefton. — 2 East. R. — 183.
Barnes. v^s Trompowsky 7. T. R. — 265.
Holmes. v Pontin. — Peakes N. P. 99.
Currie. v. Child val^r — 3 Camps. N. P. 283.
Peake's Evidence — 102.

Chalifoux. ux
v.
Marotte. ux
and
Montplaisir
& al' — T. Saisis

The Tiers Saisis having made their declaration in this Cause, by which it appeared that they owed to the Defendant certain articles of a rente & pension viagere, the Defendant not satisfied with their declaration, obtained a rule on them to shew Cause why they should not be adjudged to pay to the Defendant certain other articles besides those declared by them to be due to the Sr Defendt and which the Defendt contended were in arrear & unpaid.

Stuart for the T. Saisis - The proceeding is irregular as the Defendant can raise no contest with the T. Saisis on their declaration, nor can any thing be adjudged to him thereupon, as the Defendant is the debtor in this case and not entitled to such advantage - It is for the Plaintiff, the Creditor, to raise such discussion with the T. Saisis, if he be not satisfied with their declaration, and he alone is entitled to reap any benefit that may arise thereupon. ux

Ross for Defendt - The Defendant is more interested in the Declaration of the T. Saisis than the Plaintiff, because upon their declaration truly made, much expense may be saved, as a new Suit between the parties may thereby be

prevented

prevented – And it is upon the principle of doing justice between the parties that the plaintiff is permitted to contest the declaration of the Garnishees without proceeding by a new suit agt. them – the same justice must be due to the Defendt as to a Plff in this respect, because he has the same interest, and there is no authority in law that excludes the Defendt from such discussion – cites. 1 Pigeau. 652. 657. 661. – Poth. Proc. Civ. p. 197. –

The Court were of opinion, that the right of contesting the declaration of a T. Saisi was an extraordinary proceeding which ought not to be extended beyond the cases in which it was warranted by law and there appeared no authority for admitting such a proceeding unless at the instance of the plaintiff – The Rule was therefore discharged. –

Morgueson et al. vs Lawson.

On an action en petition d'heredité, and Familiæ erciscundæ. –

Vigé for Defendt pleaded in abatement, that there

there were several other heirs who were not joined in the action, qr being as well en partage as ~~[illegible]~~ en reddition de compte, it was therefore irregular – cites. Poth. Cont. Soc. Nº 162. 164. – Denizt. Vº Partage. –

Gale for Pltff. The Plaintiff is not bound to join all the other heirs in the suit – The Defendant was the sole person in possession of the property to be divided, and as there was no community of possession with the other heirs it was unnecessary to call them into the suit. – But there are two questions to be determined by the present action, the first is touching the reddition de compte which the Plaintiff is entitled to maintain agt the Defendt alone, before there can be any discussion had on the other question touching the partage, when the other heirs may be called in. – cites – Pand. Just: lib. 5. tit. 3. De hored: pet. 26. sec. 1. art. 2 – Id. Tit. 4. §. 2. §. 8. – Id. lib. 10. tit. 2. art. 1, §1. De actione familiæ erciscundæ – see also. art. 2 §. 12. 13. –

The Court were of opinion that all the heirs ought to be joined in the action to entitle the Plaintiff to the conclusions of his demand, and therefore gave leave to him to put the other heirs in Suit, on paying the Costs of the Defendt's plea. –

June Term. 1816.—

Thursday 6th June 1816.—

M.Donald } vr
M.Leod &ab. }

On rule on Pltff to shew cause why he should not be held to give security for Costs as not living within the jurisdiction of the Court.—

Mr Sewell for Defts in support of the rule, stated, that although it be mentioned in the declaration that the Plaintiff is resident at Montreal, which is admitted to be the case when the process was sued out, yet by the affidavits produced by the Defendant it appears that the Pltff is domiciliated and resident at a place called the Red River in the Indian Country, and acting there as a Governor, and that he had left Montreal to return to that place before the writ sued out by him was returned into Court — therefor Defendt is entitled to Security for Costs under the rule of practice in this respect.—

Stuart for Pltff — The rule of practice applies only to non-residents, but not to persons not domiciliated within

within the Province – It is enough that the Pltff was resident within the jurisdiction of the Court when the process was sued out. –

But the Court held that the plaintiff having left the Province after the suing out of the Process was liable to give security for Costs, which was ordered accordingly. –

M^c Donald Michael v M^c Leod et al

On Defend^s mo. that Writ of Capias sued out in this Cause should be quashed as irregularly sued out. –

Ross for Defend^t – The plaintiff is not entitled in this Case to an arrest of the body of the Defend^t – inasmuchas the action is not for a debt, nor a liquidated demand but for damages alledged to have arisen from a trespass and imprisonment – That no debt having been sworn to in this Case there could be no arrest of the Defend^t – as the law gives no power to the Judge to use his discretion in granting an order for an arrest upon a statement of circumstances respecting the nature of the trespass, or fixing any sum for which a Defendant shall be held to bail, where no debt appears –

Stuart

Stuart for Defendant — refers to adjudged cases of Adhemar. v. Corrigal — and Sutherland. v. Campbell

The Court considering the practice on this point as settled, rejected the Defendant's motion.

Friday 7th. June 1816.

Cadieux v. Renaud

On the plaintiffs motion for hearing instanter on an exception à la forme, pleaded by the Defendant.

O'Sullivan for Defr. The plaintiff by moving for a hearing instanter on the Exception, admits the truth of the facts therein contained — Now it is there stated that there is no addition given to the Defendr. in the writ or declaration, which is fatal, and the exception must therefore stand admitted — It is besides stated in the ~~exception~~ Declaration, that the Defendant is a revendeur, which is no legal addition, as every man who purchases any article whether for private use or otherwise must be considered as a revendeur, whereas the Defendant at the time of suing out the process was a trader, known by the description of petit-marchand, and not a re-vendeur, which is too general.

Papineau for Pluff – The Defendant is stiled revendeur by the declaration & writ, which is sufficient, as this is a character well known to be a retailer of provisions & other small articles which is tantamount to petit-marchand, and equally descriptive of the Condition of the Defendant

The Court considering the addition given to the Defendant and that contended for by him to be synonimous in law, and equally discriptive of a trader, or person who buys to sell again, dismissed the exception —

Tuesday 11th June 1816.

The King. }
M.c Cord & others } Justices.

On a motion made on the 18th april last on behalf of one Allen for a Rule on the Defendts as Justices of the Peace why a Mandamus should not issue addressed to them enjoining them to admit the said Allen to enter into the necessary security to entitle him to obtain a licence as a Tavernkeeper in the parish of Sorel.

Stuart in support of the application, stated, that the mode of obtaining licences to keep a house of public entertainment or to sell Spirituous liquors in any other place or parish than the Cities of Quebec and Montreal or town of Three Rivers, is regulated by Stat. 35th of the King, ch. 8. sec. 3, by which it is enacted, "that no licence "shall be granted for keeping any such house in any "other part of the Province, unless that the person or persons "applying for the same shall produce a certificate under "the hands of three respectable house holders of the parish "one of which shall be a church warden thereof, where "such house is intended to be kept, certifying that the "person or persons so applying is or are fit and proper persons "for keeping such house or other place of public entertainment" and by sec. 4th it is enacted — "that no licence shall be "granted for keeping any such house or other place of "public

"public entertainment till the person or persons applying
"for the same shall have entered into bond before two
"or more Justices of the Peace in the sum of ten pounds
"Current money of this Province with two Sureties in the
"sum of five pounds, same Currency each, to do his or
"her utmost to keep the peace and an orderly house" &c.

That in conformity to the said Statute the said Allen had presented to the Justices a Certificate in due form signed & subscribed by three respectable householders of the parish of Sorel, one of whom was a Church warden of the protestant Episcopal church at William Henry in the said parish, but upon this Certificate the Justices had refused to admit the applicant to enter into the requisite Security, alledging as a reason, that the said Certificate was not sufficient, as the same was not subscribed by a Church warden of the parish church of Sorel, that is the Roman Catholic Church, there being no other parish Churches within the district, but those of the Roman Catholic establishment, — That by this interpretation of the law, the applicant and all other Protestants must be excluded from the benefit of the law in keeping houses of public entertainment, because the marguillier of the Roman Catholic church cannot be presumed to

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be sufficiently acquainted with the person, character or Conduct of a protestant, and therefore justified in refusing such certificate – that such has been the case here, the applicant solicited this Certificate from the present marguillier of the Roman Catholic Church at Sorel, but it was refused by him on this plausible pretence, that he was totally unacquainted with the said Allen – That the applicant was therefore without remedy unless the present mode of relief were granted to him, inasmuchas he could have no action at law against the marguillier nor against the Justices, nor would an information lie against the Justices for an exercise of their discretion in interpreting the law on this subject – That a Mandamus is a prerogative writ and can be issued only from the Supreme – Court of the District where the Complaint is made – in the same manner as writs of Certiorari, Prohibition &c refers to Com. Dig. Tit. Mandamus – 4. Bac. Abr. 507. a

The Court having seen the affidavits filed with the above motion, granted the Rule returnable on the 19th. April –

On the 19th April the Justices were heard by Mr Gale, who stated – that the parish where

Allen

Allen resides and for which the licence in question is sollicited, is the parish of Sorel, in which there is but one parish Church, which is a Roman Catholic church; now according to the words of the Statute, one of the persons signing the Certificate of the applicant for a licence, must be a Church warden of the parish, which clearly means a warden of the parish Church, and not of any other church which may be in the parish: according to this construction of the Statute the Justices have constantly acted, without discrimination as to religious opinions, requiring in every instance the certificate of the marguillier of the parish. —

Stuart in answer — The protestant religion is that of the Sovereign, and the established religion of the Country, and the church-wardens of any church of that religion must be known as muchas those of the Roman Catholic Religion. That a parish is only a certain extent of ground within which ecclesiastical authority may be exercised, but there may be many churches of different persuasions within that parish, and any Church warden de facto without reference to his religious persuasion, if within the parish,

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is qualified by law to give the necessary certificate.

The Court held that the Statute of the 35th. Geo. ch. 8. being of a beneficial nature, ought to be interpreted liberally, and if any doubt existed, it ought to be explained in favor of this application — That it certainly could never have been contemplated by the Legislature, that persons not of the Roman Catholic religion should be excluded from obtaining licences as Tavernkeepers under this Statute, which would in some measure be the Case, if the Certificate of the marguillier of the parish church of every parish in this Province were always necessary to be obtained by every applicant for such licence — inasmuchas this marguillier cannot be presumed to be acquainted with the character and conduct of a person not of his church or persuasion — this fitness in the person to obtain a licence, is the object the legislature had in view and not his religious belief — and therfore if such fitness can be certified in a way to meet the view of the Statute, it will be sufficient — The words of the Statute are, "three respectable householders of "the parish, one of whom shall be a churchwarden "thereof" — By those words, we must understand

the locality of residence of the Church Warden more than the Church or persuasion to which he may belong — had it been otherwise intended the Legislature would have pointed it out by more express language, in saying, that he should be a Churchwarden of the parish Church — Neither can we consider it more necessary that the Churchwarden herein referred to should belong to the parish Church, than that the other "respectable "householders of the parish", also referred to by the said Statute, should belong also to that Church, it being evident, that Characters of this discription living within the bounds and extent of the parish, whether Protestant or Roman Catholic should be qualified to give the certificate required. The Court is therefore enabled to say, that any Church Warden of the established Religion within any parish in this district can give the requisite certificate for obtaining a tavernkeepers license within such parish. — It is indeed true that much consideration is due to the discretion exercised by the Justices in admitting persons to obtain licences as tavernkeepers, and this Court will never interfere with that discretion in so far at least

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as regards the fitness of the person or place where such a licence is to be given — but when this discretion turns upon the interpretation of a public Statute, it becomes the duty of this Court to controul that discretion where such interpretation is made contrary to the intention of the Legislature and the rights of the Kings Subjects, as otherwise there could be no remedy but by applying to the Legislature to correct any wrong interpretation of its acts —

Under this view of the Case, the Court nevertheless suspended making the rule absolute for issuing the Mandamus until next Term, that in the mean time the Justices might be apprised of the opinion of this Court, and conform thereto without further proceedings being had on the present rule, provided they should consider the applicant for the licence in question in other respects qualified to obtain the same. —

Afterwards on the 5th instant, the said Allen by his Counsel prayed the Court that the Rule for issuing the writ of Mandamus might be made absolute with Costs against the Justices, as upon

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a further application to them in consequence of the opinion of this Court last Term, they had refused to admit the applicant to obtain the license demanded, without alledging any other objection than that already made to the sufficiency of the certificate produced by the applicant — And the Justices being again heard, who declared that they had nothing further to state to the Court than what they had already said, but that it was their wish that the order for issuing the mandamus should be given, before they would proceed further on the business —

— Whereupon the Court this day made the Rule for issuing the writ of Mandamus — absolute. —

Wednesday 12th June 1816.—

Wagener vs Teasdale

On defendant's exception to the declaration and writ that he was therein stated to be a trader, he the Defendant denying that he was a trader — and the parties having been heard instanter on the said exception on the motion of the Plaintiff — The Court dismissed the exception upon the principle, that although the Defendant alledges that he is not a trader, yet this was not sufficient, as he ought to have set out what his profession was so that the plaintiff might have a better action — and although the plaintiff by moving for a hearing instanter, is by the rules of practice presumed to admit all facts and allegations stated in the plea of Exception, and thereby to have admitted in the present instance that the Defendant was not a Trader, yet this admission will not cure the defect in the plea of Exception.—

Spatz vs Huntoon

The Plff was stated in decln to be a furrier, & Defdt a Trader — and action for furs sold — The Court refused to compel Defdt to alter his conclusions from County to Court, as they considered the parties to be traders in contemplation of law, and the nature of the dealings between them —

Monday 16th June 1816.

Griffin ouxi
vs
Langan
Intrix &c

On action against the Defendants by the Plaintiffs for indemnification for the loss and damages suffered by them in consequence of the rescision of certain deeds of Sale made by the late Patrick Langan to the Plaintiffs, the said rescision adjudged by this Court on the 20th Oct. 1808.—

Stuart for Defend. Langan, pleaded, that the Plaintiffs are not entitled to maintain this action agt. the Defendants, because by the Judgt of 20th Oct. 1808, a right was reserved to the Plaintiffs to proceed under that Judgt. to establish any right of indemnity they might have as the Defends, the said Judgt being in this respect only interlocutory and therefore the present action became unnecessary while the right of the Plaintiffs existed under the former action which qua'ad the present demand must still be considered as subsisting —

O Sullivan for the Defend. Leslie, stated,

that

that he was not bound to answer to the Plaintiffs on their present demand, for the reasons stated by the Defendant Langan, and further because by the Marriage Contract between him and Julia Langan, it is stipulated that there shall be no Communauté de biens between them but that each shall manage and administer the property respectively belonging to them without the interference of the other, and therefore he ought to be put out of this Cause, inasmuchas the object in question regards the Succession of the late Patrick Langan, in which he has no interest, the same regarding only the said Julia his wife.—

Sewell for Pltffs. The reservation to the plaintiffs by the Judgt of 20 Oct. 1808. of a right to prosecute for their indemnity was proper— it runs thus "The "Court do order and adjudge that the said Patrick "Langan shall be held and bound to indemnify & "reimburse to the said Plaintiffs, all such damages "Costs and charges, which they have, or may suffer "or sustain in consequence of the present Judgment "for which their recourse is hereby reserved to them "against the said Patrick Langan agreeable to Law".

It is evident that this cannot be considered as an Interlocutory but as a final Judgment, as it was impossible to ascertain damages in the Cause which at the time of rendering the Judgment had not yet accrued. — As to the exception pleaded by Leslie, he cannot upon the fact by him stated in regard to his marriage Contract be entitled to withdraw from the Cause, by reason of the power he may be entitled to exercise over the property of his wife — at all events he ought to be adjudged to pay the Costs of his plea, as the Plaintiff could not know the nature of his Contract with the said Julia Langan. —

The Court held the Judgment of the 20th Octr 1808 to be so far final in regard of the rights of the Plaintiffs, that they were entitled to prosecute the present action under it — and as to the plea of the Defendant Leslie, they considered that he was entitled thereupon to be put out of the Cause, but that he should pay Costs up to the time of his filing the sd plea

Potts. Comte. No 464. 12o — p. 495 — Separation Contractuelle. —

Wednesday 19th June 1816.

Tavernier, vve
Perrault. —
vs
Aylwin. —

Action of Debt on Judgt — transferred to Plff by John Blackwood

It appeared that John Blackwood of Montreal, Merchant had obtained a Judgment against Austin Cuvillier, Thomas Aylwin and John Harkness formerly partners in trade as merchants and brokers under the name of Cuvillier Aylwin and Harkness — This Judgment was rendered by Default agt the Defendants, and on Service of process being made only upon Austin Cuvillier one of the Defendants — This Judgment was afterwards for a valuable consideration transferred by Blackwood to the plaintiff, who thereupon instituted the present action against Thomas Aylwin that the Judgment might be declared executory agt him as one of the said partnership & therefore liable to pay the amount thereof. —

Rolland for Defendt — The Judgt rendered in favor of Blackwood is null and void quoad the Defendant Aylwin, because service of the process having been made on one of the partners only, namely

namely Austin Cuvillier, after the dissolution of the partnership, it is therefore not binding on the Defendant, who at the time had left Montreal, where the business of the partnership was usually carried on, and had gone to reside at Quebec cites. Poth. Cont. Soc. No 90. 157. — Rep^ts v^o Societé. That the Defendant is still in time to propose this nullity against the Judg^t, as he has never before had an opportunity of objecting thereto, and not being legally considered as a party to the said Judg^t it must be ~~considered~~ regarded as res inter alios acta, cites - Rep. v^o nullité. art. 7. Id. v^o Chose Jugée No 17. — It was objected also against the form of the Judgment, that it was against one of the Defendants only, — and that the amount of the Costs on the said Judgment had not been ascertained —

Beaubien for Pltff — It is not a moyen de nullité in the Judgment, that the Defendant was not duly summoned — and if it were, yet he can take advantage thereof only by an appeal from the Judg^t Poth. Obl. No 18. 19 — 35. 36. — It was rather a mal jugée, than a moyen de nullité as the Defendant was called before the Court. —

That

That although the partnership between the Defendant and his other partners were dissolved at the time of serving the process, yet such dissolution can affect only such transactions of the Individual partners as took place subsequent to such dissolution but cannot affect the rights of third persons interested in the transactions prior thereto — That the demand upon which the Judgment was founded being for a Partnership debt, and therefore service on one of the partners must be considered as service on all. —

The Court were of opinion, that as it appeared that the partnership in question was dissolved, at the time of the service of the process on Curillier, it was not binding on the Defendant, nor could the Judgment rendered in consequence, in anywise affect him — they therefore dismissed the Plaintiffs action —

Arglwin } Same Case. — See Sousse on Ordre 1667. tit. 2. art. 6.
v.
Curillier }

Deboisheu
vs
Laurin.

On action to recover damages from the Defendant, for having unjustly with-held and refused to grant a Certificate to the Plaintiff to enable him to obtain a licence to keep a tavern, house of public entertainmt

Papineau for Defr The Stat. 35. Geo. 3. ch. 8, is not imperative on the Defendant as marguiller to grant a certificate to any man however fit and capable he may be to keep a house of public entertainment — there is a discretion vested in the marguiller in respect of granting such certificates he may grant or refuse them as he sees fit, without being bound to give his reasons for so doing — There is no law that says there shall be one or more taverns in every parish, and therefore that the marguiller shall be held to give such certificats in order to give operation to the law, as a loi publique That as there are several marguillers in the parish where the Plaintiff lives besides the Defendr — it was at all events necessary that he should have stated & shewn that the other marguillers had refused to grant such certificate before he could maintain an action

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against the Defendant - The plaintiff alledges that the Defendant wrongfully and maliciously refused to grant to the Plaintiff the certificate required but the refusal to comply with such request does not imply malice, because there was no obligation on the defendant to comply with such request -

Stuart for Pltff - Contended, that it was first necessary that the evidence should be heard to ascertain the facts stated in the declaration, as the question of law depending in some measure upon those facts cannot otherwise be decided - This is an action for non-feazance, the not complying with the obligations of the law, and is therefore maintainable against the Defendant - cites, Com. Dig. Tit: Mis-feazance. - The Defendant in his capacity of Marguillier must by law be considered as a public Officer, quoad the granting these Certificates - and as it was necessary that the power of granting such certificates should be vested in some person or body, that person or body whom the law vests with this power, necessarily requires that this duty should be performed by them, otherwise the law would remain a dead letter and without execution. If a discretion be given to the marguilliers in this

respect

respect, it must be exercised with due correctness and on Sound principles – the charge against the Defendant is, that he has not exercised his discretion in this way, which has occasioned the injury complained of – That as all the marguilliers of the parish are equally bound to the duty of granting such certificates the Plaintiff could maintain his action against any one of them who might refuse wrongfully to grant it, but this duty attaches particularly on the Dept who is Marguillier en charge –

The Court held that the Defendant as marguillier was vested with a discretionary power in granting certificates for obtain[g] a tavernkeeper's licence – and that in the exercise of this discretion he was not accountable to the Plaintiff for any injury he might allege to have sustained by the refusal of such certificate – action dismissed –

See. Basset. v. Goodschall et al. 3. Wils. 121. –
see also. Rex. v Holland. 1 T. Rep. 692. –

Debartchze
v.
Duvert.. }

In this Case the Defendant having made proof of the lezion alledged by him, the plaintiff's action was dismissed

See case stated. 19 April last. p. 59.—

Thursday 20th June 1816.—

Marot.—
v.
Monplaisir

On action for arrears of certain Rente et pension viagere.—

The Plaintiff having moved that a certain allowance should be adjudged to him par provision as a means of subsistence until the Cause should be finally determined — It was objected by the Defendt's Counsel, ~~contradicted~~ that in this Case there could be no provisional allowance granted, because the Defendants allege by their plea to have paid to the Plaintiff all they owe to him on account of his present demand — That this is not a case between a father and his children, or a husband and wife, where such provisional allowance might be granted by way of aliments, on account of the connection between the parties, the Defendants being on the contrary strangers to the plaintiff, and the pension viagere ; the consideration which they have stipulated to pay for a certain lot of Land sold to them by the Plaintiff.—

The Court however considering that the Plaintiff had parted with his property from the

the view and expectation of procuring thereby the means of subsistence, and that the plaintiff was in a necessitous situation, granted the Plaintiffs motion upon his giving Security to refund to the Defendts such part of the allowance so granted as may appear to be already satisfied upon the hearing of the Cause. a

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Mc Donald
v
Mc Leod et al. }

On Exceptions pleaded by Defendr—

The Plaintiff by his declaration stated himself to be of the City of Montreal in the district of Montreal Esquire, to which the plaintiff pleaded in abatement that the Pltff was not of the City of Montreal in the District of Montreal, but was & resident at and domiciled in a place in the Indian Country called the Red River, and therefore as the Pltff had not given his true residence & domicile that the action should be dismissed as irregularly instituted — cites. Code Civil. Tit. Des Ajournemens 1 Pigeau 132. 159. 160. — 1 Jud. Prac. 587. 2. a

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The Plaintiff demurred to this plea contending that sufficient appeared on the Declaration to maintain the action, and that it was immaterial when the residence of the Pltff was whether at Red River or Montreal — That at the time of suing out the writ the Pltff was at Montreal which is sufficient. —

And the Court considering that by the Rules of practice in regard of Writs for issuing writs, it is directed that the names of the parties to the Suit shall be expressed, but nothing said as to residence, considering also that it appears by the affidavit taken by the Plaintiff, that at the time of suing out the Process he was resident at Montreal, this was held sufficient, and the Plea of abatement was dismissed. —

Fraser — v. Williams

Action on a Promissory Note — Plea — Non-assumpsit — Under this Plea the Defendt — offered proof to shew that the note was given conditionally — but the Court held

held that according to the Rules of practice Sec. 43. such proof could not be admitted, as the Defendt ought to have pleaded the matter specially to be admitted to prove it.—

October Term 1816.

Wednesday 9th October. 1816.

Pothier. vs Mathe.

On action to compel Defendant to erect a party wall, or mur mitoyen between their respective lots of ground in the St. Lawrence Suburbs of Montreal — and also for arrears of Rente Constituée.

Vigé for Defendt pleads tender of the arrears of the Rente Constituée — and as to the party wall demanded the Defendant contends that the Pltff is not entitled to have the same of stone and mortar in manner as demanded by the said plaintiff, because such is not necessary nor required either by the usages of the Country or the Contract between the parties in this behalf — That by the usage of the Country the mur de cloture between property of Individuals

in

in the Suburbs has never been used, but a wooden fence of boards or pickets has always hitherto been used to divide the possessions of neighbours in the said situations — that the expression in the Contract between the parties, is clôture de Separation, which cannot be understood to be a mur de Clôture, but that kind of fence hitherto used and known as a division fence between neighbours. —

Bedard for Plff. — admits the tender of the arrears of the rente Constituée pleaded by the Defendant, but contends, that notwithstanding such tender, by contesting the demand of the Plaintiff the Defendant must be condemned in Costs — By the 209th art. of the Custom of Paris a Stone fence ought to be made in every town and Suburbs for dividing the possessions and properties of neighbours — Desgodets on 209th art. This article of the Custom makes a part of the law of the Country by virtue of the Ordinne of 1663, which introduces the Custom of Paris as the law of this Colony. —

The Court considering that by the British Stat. 14 Geo. 3. ch. 83. S. 8. it is enacted, "that all "causes thereafter to be instituted in any of the Courts

"of

"of Justice to be appointed within and for the said Province
"by His Majesty, his Heirs and Successors, shall with
"respect to such property and rights be determined agreeably
"to the said laws and Customs of Canada until they
"shall be varied or altered &c." That therefore whatever
could then be considered as Customary in the Country
must be received as confirmed by this Statute and forming
a part of the law thereof — That although the Custom
of Paris was introduced into the Colony by the Orde
of the King of France of 1663, yet it may have been
modified in many respects from local circumstances
which rendered it inconvenient or impracticable,
such modifications by long usage may be considered
as forming the Customs of Canada in contradistinction
to the Customs of Paris, and according to such Customs
of Canada the Civil rights of the Kings Subjects
are held and must be regulated and determined —
Under this view of the Case it therefore rests to
be ascertained whether according to the antient
usages of Canada, the adjoining lots of land
and possessions in the Suburbs of Montreal
were separated and divided by a party wall

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of Stone & Mortar or by a wooden fence such as pleaded by the Defendant — to ascertain which fact the parties must go to their proofs —

Interlocutor ordering proof —

Hicks. vs Cartier.

Action en revendication. —

This action was instituted to recover a certain horse which the plaintiff, a person resident in the united States of America, had lost and which had come to the hands of the Defr — The Plaintiff having come into this district and made oath to the identity of the horse thereupon obtained a Saisie-revendication, under which the horse had been attached and held by the Sheriff. —

The Defendant now moved to quash the proceedings, inasmuchas no power of attorney had been filed by the plaintiff, an alien, to warrant the prosecution of the present action, in conformity to the rules of practice, sec. 14. §. 2. —

Sewell for Plff. The plaintiff cannot be turned out of the Court because he has not filed a power of —

of Attorney, as a day may be given to him by the Court to file such power, or the Defendant may proceed to Judgment, according to the terms of the rule of practice — But according to the strictest interpretation of this rule, there appears sufficient in this Cause to warrant the prosecution thereof without any further warrant of Attorney, namely the affidavit sworn to by the plaintiff at the time of suing out the writ of attach. The power of Attorney may also lie in the hands of a third person who does not chuse to part with it, and therefore it can only be brought up in evidence on the enquête to be had in the Cause —

The Court considered the plaintiff to be in default by not having filed the Power of Attorney in question, nor demanding a delay for this purpose according to the above rule of practice — they therefore dismissed the Plaintiff's action, saving his further recourse

Thursday 10th October 1816.

Lacombe
vs
Raymond

On action against the Defendant a notary public, by the plaintiff, a merchant and trader, on two Counts, one for goods Sold, and the other for a promissory Note made by Defend. to Pltff and payable to order.—

The Defendant by his plea concluded to the Court on the one Count, and to the Country on the other—

Ross for the plaintiff now moved, that the Defend should be held to conclude either to the Court or to the Country upon both his pleas, as he was not entitled to conclude to the Court on one and to the Country on the other—

Rolland for Defendt, contended, that Pltff's motion was too late, as the plea was filed on the 4th and the Replication became due on the 7th That the pltff's motion even if granted would be without effect from its uncertainty—

Ross in reply, alledged that the plea had been irregularly filed, and therefore not too late to have it corrected—

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The Court considering that by the Provincial Ordre of 1785, that the suit between the parties was not grounded on a promise or Contract of a mercantile nature only between merchant and merchant, trader and trader so reputed and understood according to law, that therefore a trial by Jury could not be had upon any of the issues raised by the plea — they therefore directed the Defendant to conclude to the Court upon both issues. —

Nouv. Denis^te. vo Consuls des Marchands. §2. N^o 6. — Id. Billet de Commerce § N^o 11. —
Note to order not a commercial transaction unless made between merch^ts.

M^c Intire & al^a
v^s
M^c Donald.

Action en reddition de Compte et partage —

In the declaration and writ one of the Plaintiffs was stated to be of Montreal, and another of Lachine, without shewing where these places were situated — To this an exception was taken, by plea of abatement, by the Defendant, and the Court after hearing the parties, admitted the plaintiff to amend on payment of Costs. —

Young ... }
v
Pinçonneau }

On action of assumpsit. —

The declaration in this Case was in English but the writ was in the French language, in which the addition of "Gentleman," was given to the Defendant —

The Defendant pleaded in abatement that the word "Gentleman" in a french writ, not conveying any legal addition to the Defend.t in the language of the writ, was irregular & insufficient and therefore the proceedings ought to be quashed But the Court held, that the Defendant ought to have set out by his plea, what his legal addition was to entitle him to take advantage of any insufficient addition given him by the Pltff and therefore held the plea insufficient —

Friday 11th October 1816.—

Delisle. v. Phelan.

On action by the Pltff as Road Treasurer for the rent of a bench let by the Commissioners to the Defendant in the New-market place.—

O'Sullivan for the Defendt pleaded, that the plaintiff had no right of action in this Court for any monies accruing from the Sale or lease of benches in the new market, that if the plaintiff as road treasurer had any action whatever in this respect, it was before the Justices.—

Desrivieres for the Pltff contended that the right of action was vested in the road treasurer by the St. 47 Geo. III. ch. 7. §. 16.—

The Court were clearly of opinion that the action was well brought by the road Treasurer in this Court under the said Statute, and therefore dismissed the Defendants exception.—

See 2 Show. 30. King v. Stanton.—6. Bac. abr. (K) Tit. Statute—
4 T. Rep. 202. King v. Harris.—

Friday 18th October 1816.

Luc Berthelet
Benj.n Berthelet } On an action petitoire.

By deed of cession of 6th Febry. 1814 the Plaintiff Luc Berthelet and his wife, transferred and conveyed to Jean Bte Luc Berthelet, Denis Berthelet and Benjamin Berthelet their children, the said Jean Bte Luc Berthelet, then a major, being present and accepting as well for himself as for his two younger brothers the said Denis and Benjamin Berthelet, who were then minors, certain lots of Land and houses to be by the said Jean Bte Luc, Denis, and Benjamin Berthelet severally held, enjoyed and possessed as their own separate property and freehold by virtue of the said Deed - the said deed of Cession being made in consideration of a certain annual rent or pension viagere to be paid by the said Grantees to the Grantors during their life. In consequence of the said Deed of Cession, the Defendt Benj.n Berthelet entered upon & took possession of the lots of land & house which had been by the said deed

of

of Cession conveyed to him as aforesaid, and paid annually to the said plaintiff the rente & pension viagere he had become bound to pay — Afterwards in February Term 1816, the plaintiff instituted an action petitoire in this Court against the said Defendant, claiming the lots of land and house then held and possessed by the said Defendant under the aforesaid deed of Cession, as being the property of him the said Plaintiff, & praying that the Defendant should be adjudged to deliver up the same to the said plaintiff as the owner and proprietor thereof, with all costs and damages &c — The Defendt by his plea, stated, that he held the said lots of land and house as his own proper freehold by virtue of the aforesaid deed of Cession of the 6th Febry 1814 — To which plea the plaintiff replied, that the acceptation made by the said Jean Bte Luc Berthelot for and on behalf of the said Defendant then a minor was without authority and could produce no effect —

On the hearing of the Cause on the 18th June last, the Defendant contended, that the acceptation of the act of Cession made by Jean Baptte Luc Berthelot on the behalf of the Defendant ought to be considered good and sufficient in law and binding on the parties thereto,

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it being a principle in law that no person can be allowed to come against his own act. — cites. Meslé. Minor. 510. — 2. Bourj. 120. Lacombe. Vo. Donation — Poth. Don. entre Vifs p. 55. 56. 12° — That the Donation made by the Plaintiff besides having been accepted as above stated, was also ratified by the Defendant in January last after he came of age, and before any express revocation by the Plaintiff of the said Deed — That the present action was commenced but it cannot be considered as a revocation, as it is of a very different nature — Argou. liv. 3. ch. 11. —

Stuart for Pltff — In cases of donation, acceptation is absolutely necessary for the validity of the act. Repert. Vo. acceptation de Donation — Poth. Tr. Don. entre vifs in 12°. p. 24. 61. — There was no obligation on the Plaintiff as the father of the Defendant to procure the acceptation of the Donation to be made in a valid form, as he was not the Tutor of the Defendant, and therefore no action of damages could lie against the plaintiff for such neglect — That in the pais de droit Coutumier the Tutor must be appointed by the Judge before he can act, whatever his relationship to the minor may be whereas in the Pais de droit ecrit, the title of father gives him certain rights over the property of his child and enables him to act as his Tuteur Naturel without

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any appointment or authority of the Judge, and in that case he could not take advantage of his own laches had he failed to get the said donation legally accepted —

That the donation in question being made to the major and minor jointly, must be invalid as to both — That the present action is in effect a revocation of the Donation, and was instituted in December 1815 before the acceptation made by the Defendant, and prevents it from having any effect.

The Court considered that as the father had the administration of the property of his Child, he was bound to do every act necessary for the preservation thereof, and it was therefore his duty to have taken proper means for the acceptation of the donation in question, upon the same principle that the law holds him bound to do it had he been the Tutor duly appointed to such child, as in both Cases the father was equally entitled to, and held the administration of the property of the child — and it was a principle in law that no man should be allowed to benefit by his own laches nor his own wrong, and in no case will this principle apply more strongly than in the transactions between father and child. — That in the present case there is distinguishing feature which will prevent the Plaintiff from

3. Gr. Com^r. p. 1087. N^o 44.

from taking advantage of the want of acceptation in the deed of donation, and this was the acceptation by one of the Donees who was of age, as well for himself as for the minors, in which case it is held, that the insufficient acceptation for the minors shall not render the donation void for such part or share of the property given to which they would have been entitled by such Donation, but the whole shall enure to the benefit of the Child who has effectually accepted, and more especially as the Donation appears to have been made to the Children jointly, the acceptance by one will therefore make it valid and bar the Plaintiffs action.—

Dic. de Brillon V° Donation. Mineur. p. 754.

Augeard. 3 tom. arrt. 23. p. 91.—

Lacombe. Com^u sur l'Ord^ce 1731 d. Donations— Note on art. 11.

Denaut
v.
Garrelin

Action of assumpsit on Promissy Note.—

The Defendant made his promissory note for £25.— payable to one Antoine Lanctot, or order for value received — Lanctot endorsed the same to the plaintiff in the following words — "Payez le montant "de ce billet à Francois Denaut, valeur reçue. Sept^r. 19^e. 1816. "et ne sachant signer, j'ai fait ma marque ordinaire — "devant temoins, lecture faite — signé. Antoine sa + marque Lanctot Temoins présens. John Duff. Ls Barbeau.

The Defendant pleaded for exception or demurrer to the Plaintiffs action, that the Plaintiff could not maintain his action against the Defendant on the said note by virtue of the said Indorsement, the same not being subscribed by the proper hand and with the name of the Indorsor.—

By the Court — The question for the Court here, is whether, the indorsment in question can be considered as an indorsment "written and signed on such promissory "note &c" according to the requirement of the Stat. 34^a Geo. 3. ch. 2. and we are of opinion that it is, as signing by making a mark is sufficient — in another instance we find the Statute requires more than the mere signing, where it speaks of the notes which, shall not

not be considered as negotiable_ sec. 9th_ "nothing shall
" be construed to extend or render negotiable any notes
" whatsoever that are not subscribed in the handwriting
" of the person making the same"_ which makes
it clear that every person making a negotiable note
must be able to write and subscribe his name_ but in
respect of the indorsement, this is not required, it being
sufficient, that the indorsement "be written and signed
" on the note_ Exception dismissed_ see Casey_ Longueuil.
v. Cheeseman. 5. Febv. 1811_ _

According to Freeman's Report of the Case of Lemayne. v.
Stanley_ the Court said_ It is not necessary to write, for
some cannot write, and their mark is then a sufficient signing
See. Philipp's Ev. 397.

An attestation by a mark has been adjudged to be a
sufficient subscription within the meaning of the
Statute_ Id. p. 381. Harrison. v. Harrison. 8. Ves. Junr_ 185.
Addy. v. Grix. ib. 504. a_

Beaudry
vr
Vincent. }

Action of debt on deed of Sale. —

The declaration stated, that by deed of Sale made and executed on the 10th Augt 1807, the plaintiff sold and conveyed to one Joseph Emond a certain lot of ground and house in the Quebec Suburbs of Montreal for and in consideration of a sum of £800. on account of which the purchaser paid to the plaintiff £50. the balance the purchaser undertook to pay as follows, £400. in Six successive years by equal payments of £400, to be reckoned from 29 September 1808, and the remaining £2250. was vested on Constitut and assigned to the Pltff, the same forming an annual rent of £93. That afterwards on 31 Augt 1814, it was agreed by and between the said plaintiff and the said Emond, that the said sum of £2250. instead of remaining on Constitut should be paid in six successive years to be reckoned from 29 Sept. 1814 in equal payments of £375. — That on 29th Sept. 1816, there were due and in arrear two terms of payment of the said last mentioned sum of money making £750. — That afterwards on the

16th —

15th September 1815, the said Emond sold and conveyed to the Defendant the said lot of ground who undertook to pay to the plaintiff the said sum of 2250# in the manner above mentioned — That on the 29th Sept. 1816 there was due & in arrear on account of the said last mentioned sum of money a sum of 374#. 14s. which the said Defendt refuses to pay although demanded — Whereof an action hath accrued to the plaintiff &c —

The Defendant made default, and the Pltff having made proof of his demand moved for Judgment. —

But the Court held that the Plaintiff was not entitled to recover, as the Defendant could not be considered the Debtor of the plaintiff — That the undertaking of the Defendt with a third person, to pay the debt of that third person to the Pltff. gave him no right of action agt the Defendt — as it was an undertaking to which the Pltff was not a party, and which could be altered or changed at any time by the parties thereto, without the Consent of the Pltff Action therefore dismissed. — Potts. Obl. Nº 54. 55. —

Buck vs Scott.

The Defendant having moved for security for Costs from the Plaintiff, as not residing within the Province, the same was granted — He afterwards moved that the writ and process should be quashed as having been irregularly served this was opposed by the Plaintiff, that the Defend^t by moving for security for Costs from the Plaintiff recognized the jurisdiction of the Court, by demanding and obtaining from it a Judgment for such Security, this was admitting himself to be regularly before the Court and entitled to such Judgment, and he is therefore too late in objecting to the regularity of the process* — And of this opinion was the Court and rejected the motion

* not having reserved the right to make such motion at the time he moved for the security for Costs.

Park vs Bragg and Contra

Action for house rent, accrued under a lease between the parties —

The Defendant pleaded payment, and set up an Incidental demand for work and labor done by him for the Plaintiff.

The Plaintiff joined issue on the plea of payment and pleaded for exception to the Incidental demand that

that the same was irregular and inadmissible in law inasmuches it had no connexion with the demand in chief, and could not be set up as a defence thereto agreeable to the 106th. art. of the Custom — that the said Incidental demand was besides unliquidated uncertain and could not be set off against the demand in chief which was liquidated and certain by a deed of lease between the parties — that by admitting such an Incidental demand the Plaintiff would be delayed in obtaining that Judgment upon the principal demand to which he was entitled — The Plaintiff further set up a demand against the Incidental demand of the said Defendant, founded on a promissory note made by him to the Plaintiff —

The Defendant contended that his Incidental demand was regularly made and admissible in law — Objected to the Incidental demand set up by the Plaintiff upon the Incidental demand of the Defdt as an irregular proceeding, as the Plaintiff ought to have joined all demands he had agt. the Defdt and which were of a nature to be joined, at the time of instituting the present action against him.

The

The Court were of opinion, that an Incidental demand although not of the same liquidated nature as the demand in chief, was nevertheless admissible, when the conclusions thereof tended to the same object as demand in chief, and was of a nature to have been joined in the same action with the demand in chief — under this view they considered the Incidental demand set up by the Defendant as maintainable — In regard of the Incidental demand set up by the Plaintiff to rebut the Incidental demand of the Defendant, the practice in this respect is new, but still there appears to be precedent for it according to the course of proceeding in the Courts in France, and therefore the Court consider themselves bound to admit it, although they consider it a practice liable to abuse, and productive of much inconvenience — See 1 Pigeau 335. 6. Poth. Proc. Civ. — Denizt. Vo Reconvention No 3. — Fer. Dic. Vo Reconvention — 1. Bacquet droit de Justice. p. 29. —

See also 1 Pigeau Pr. Des Trib. 407. —

See Camus on 106th art. Cout.

Saturday 19th Oct. 1816.—

Hammond
v.
Wilson } On exceptions to the sufficiency of the Plaintiffs declaration.—

Stuart for Defendt. The first Count in the declaration, being an action for work & labor done and materials found as a Carpenter, is for a sum of £125— upon a specific Contract — the 2d. and 3d. Counts, are what are considered as money Counts, in each of which is demanded a sum of £255. 14. 7 — the declaration then goes on to state, that the Plaintiff had received on account of his said demand a sum of £53.— leaving a balance of £202. 14. 7, for the paymt of which balance the declaration concludes — this balance evidently must be the balance on the Counts for £255. 14. 7, as it can have no reference to the first Count, and shews that the first Count has been entirely overlooked in the Conclusion of the demand, and must therefore be dismissed as irregularly before the Court.—

Boston

Boston for Pltff, contended that the substance of the first Count was comprehended in the other Counts, which included certain extra work done by the Plaintiff, beyond the sum stipulated in the first Count which was on agreement between the parties.—

But the Court considered the Conclusions of the declaration as not embracing the first Count which they therefor dismissed as irregularly before the Court.—

Tesseyman
vs
Gerhard.

Action on two promissory Notes.—
In this Case the Defendant was arrested as being about to leave the Province,— the demand was founded upon two promissory Notes, one of which was not yet due, but which the Pltff contended he was entitled to recover from the Defendant immediately, as the Defendt was an absconding Debtor, which was tantamount to his bankruptcy, and therefor liable to be called upon

for

for the payment of all his debts.— The Defendt was in default— But the Court held, that by the Defendants being about to leave the Province did not entitle the Plaintiff to prosecute the recovery agt the Defendt— of a debt not yet payable — and therefore dismissed this part of the demand. an—