February Term 1817.

Monday 3d. Febry. 1817.

Gauthier ux
vs
Forbes.

Action of Debt on Obligation—

Bedard for Defend— pleads compensation as an exception to the demand of the Plaintiffs and states, that by a deed of donation made & executed by to the said Plaintiffs they bound and obliged themselves to pay annually to the said certain monies and articles of rente & pension viagere— that a part of the said rente & pension being in arrear and unpaid by the said Plaintiffs the said Defend paid the same in the name and behalf of the said Pltffs which payment so made he the Defendant is entitled to compensate and sett off against the demand aforesaid of the said Plaintiffs — That proof of the delivery of the articles of the said rente, can be easily and readily made without leading to any long or tedious discussion, which is the only objection made by law to such compensation, where the objects thereof are not entirely liquidated — refers to Forbier, on subject of Compensation—

Sacroix.

Lacroix for Pltffs demurred to the exception — and contended that the payment stated to have been made by the Defendant could not be set up in compensation or sett-off to the demand of the said plaintiffs — That the Defendant had no interest or authority to make such payment on acct. of the plaintiffs, — That the said payment is stated to have been of several articles, not liquidated or ascertained, and therefore not to be admitted as a sett-off against a demand which is liquidated and ascertained cites 105. art. Coutume. —

The Court were of opinion that the payment alledged to have been made could not be set up in compensation agt. the demand of the Plaintiffs, because being a payment voluntarily made by the Defendant of a debt alledged to be due by the Plaintiffs to a third person, the Defendant could claim this debt from the Plaintiffs only in the name and right of the person to whom the debt was due by the Pltffs and whom the Defend. paid it, and therefore the debt so set up by the Defendt. in compensation, could not be considered as a mutual debt — The debt was besides contested and unliquidated, and therefore not to be admitted as a plea of compensation — The Court therefore rejected the Defendant's exception —

see — Poth. Obl. Nº 623. 4. 5. 6

Nouv: Denizt. Vo Compensation. §. 1.

Tuesday 4th Febry 1817.—

Burton.
vs
Derome.—
and
Cattin Intervs

This Cause having been returned from the Court of Appeals for further proceedings to be had therein, before this Court, was on the motion of the Plaintiff in the Term of October last, set down for hearing on the merits on the tenth inst.—

Stuart for the Intervening party now moved, that all proceedings should be staid until security should be given for the payment of the Costs in Appeal to which the Plaintiff had been condemned.—

This motion was resisted by Mr Ogden for the plaintiff on the ground that the Intervening party had waived any right he had to obtain such Security by his consent last Term to have the Cause heard on the merits on the tenth inst. on the motion made by the Plaintiff—

And of this opinion was the Court and rejected the motion of the Intervening party, considering the practice to be clearly settled in this respect—

Wednesday 5th Febr. 1817.

Dodge vs Pickle } On exception à la forme pleaded by Defendt

Action of assumpsit for goods sold &c.

Stuart for Defendt. The declaration is uncertain and insufficient, inasmuchas it is stated in the two first Counts thereof, that the goods were sold "to for, or on account of the Defendant" — this was not only uncertain and indefinite, but gave no right of action to the Pltff as a Sale for another person does not give a right of action to the person selling, but to the person on whose behoof the Sale is made, as the Seller in that case is — merely an agent — the samething is to be observed as to a Sale made on account of another person — and as it is uncertain whether the demand is founded on a Sale to or on account of the Defendant, he is unable to answer with precision thereto —

The Court considered the two first Counts in the Declaration as insufficient on account of their uncertainty and ordered that the same should be quashed.

Monday 10th February 1817.—

Lagusval
vr
Ballingal

Action on a promissory note made by Defr
The Defendant pleaded non assumpsit
and concluded to the Country.—

Vigé for Pliff now moved that Defendant
should be held to alter the conclusions of his plea, as the issue
could not be tried by the Country —

Ross for the Defendant — The transaction between the
parties upon which the present action is founded is
commercial, and may therefore be tried by a Jury — the
note in question was given by the Defendt, a Clerk in the
Commissariat department for freight and demurrage
of a vessel belonging to the Pliffs — and Cases of a Similar
nature have been tried by Jury in this Court — cites cases of
Auldjo & Maitland v. Campbell — & Logan & Watt v. Boag

The Court were of opinion that by the Ordinance of
1785, the nature of the transaction was not alone
sufficient to entitle the parties to a trial by Jury, they
must also be "merchants or traders, so reputed and
understood, and altho' the Pliffs quoad the freight of
the goods might be reputed a trader, yet the Defendant

could

could not,— and in this respect, the present case was distinguishable from those Cited — The Defendant was ordered to change his conclusions to the Court. —

Raymond vs Ballingall } Same point. " " —

Wednesday 12th " February 1817. —

Brook. — vs Bellanger } Action of assumpsit on a promissy Note. —

Roi for Defendant, pleaded, that the action was premature, as Plaintiff had granted a further day for payment, but had commenced his present action before that delay had expired — and therefore concluding that the action should be dismissed —

Beaubien for Pltff — The exception pleaded by the Defendant is irregular and ought to be rejected, it being

being in its nature dilatoire and tending to delay the Plaintiff's action, but not to destroy or dismiss it – and inasmuchas the conclusions of the said plea were not consistent with the matter pleaded the same ought to be dismissed without any further answer on the part of the Plaintiff – cites. Dic. de Droit. Vo Exception dilatoire –

But the Court held that the exception pleaded by the Defendant in this Case was in its nature peremptoire and tended to destroy the present action as premature, and therefore granted a day to the Defendant to prove the fact – See 1. Pigeau. Proc. Civ. des Trib. p. 199. –

Blackwood vs Dagenais } Same point. –

Brace. vs Jones. – } On report of Arbitrators. –

The reference in this Case was made to Leon Lalanne and George Mitchell, with power to them in case of difference in opinion to name a third, under this reference the parties and arbitrators, before entering upon

upon the matters in contest, agreed to name John Powell as third arbitrator, without waiting for any difference in opinion between those already named — under this appointment and consent, the said John Powell together with George Mitchel without the participation of the said Leon Lalanne, proceeded to hear the parties and made their report —

Sewell for the plaintiff moved that this report should be homologated and Judgment entered thereon —

Ogden for Defendt. contended that the report was irregular by reason of the absence of Leon Lalanne one of the arbitrators when the parties were heard, as his opinion might have influenced that of the other Arbitrators had he attended — cits. Case of Masson & Hall. vs. Mabbut Feby. 1812 — and Repse de Jur. Vo. arbitrage —

The Court held the award to be irregular, as both the arbitrators originally named ought to have been present when the parties were heard and the award made up — the rule being, ut omnes judicent, aut nullus — and therefore quashed the award and directed the arbitrators to proceed anew agreeable to the rule of reference —

See. Repse Vo. arbitrage
Nouv. Fer. Ibid. —
Henrys. Tom. 1. p. 438. 441. —

Thursday 13th Febr 1817

Young
vs
Bangs

This was an action to recover from the Defendant as Captain or Master of the Steam-boat, "Car of Commerce" the value of certain goods which had been shipped on board of that Vessel at Quebec in order to be conveyed to Montreal, —

It appeared in evidence that a bill of lading had been signed and given by the Defendt at Quebec for the goods in question, and that upon the arrival of the Steam boat at Montreal, all the goods on board were landed at the Quay where the boat lay, and those interested came and carried them away from thence — that this was the usual mode of unloading the boat, as it was necessary that no time should be lost in clearing out the boat in order to prepare for the taking in of a new Cargo —

It was contended on the part of the Defendant that he was not obliged to deliver the goods he took on board, but that the Consignee or owner of these

goods

goods must take them at the place where the boat unloads them — That in this respect the Steam boat was to be considered as any Ship in which goods were imported where according to the usage of trade and the necessity of the thing, the owners of the goods sent for them, the Contract being completed when the articles shipped were brot. to the port of the delivery, without rendering the Capt liable to any land-carriage, or what was the same thing to deliver the article on Shore to the owner wherever that owner might be found — That the case of the Steam boat was stronger, as the interval between arriving and Sailing was so Short as not to allow time to enquire for the owners of the goods on board, nor could they keep them on board after the arrival of the boat as it required the utmost diligence of the Crew to discharge the boat and prepare it for a new Cargo — nor were the proprietors of the boat bound to provide Storage for such goods as were unloaded and not called for by the owners, the Contract of those proprietors being fulfilled by the transportation of the

goods

goods to the port of delivery, and from the moment they were landed they were at the risk of the owner.

The Court held that the Captain of the Steam boat was bound to deliver the article to the Consignee which such Captain had undertaken to carry to the port of delivery — that the landing of goods on a wharf or quay, without knowing or enquiring whether the Consignee was there to receive them, was not a delivery of such goods, and did not exonerate the Steam boat. — That the proprietors of the Steam boat were not bound to any land carriage, nor to make enquiry after the owners or Consignees of goods put on board of that boat for carriage — but they were bound to put the goods in some place of Security, at the charge and risk of the Consignee, if such goods were not called for within such reasonable time as would enable the boat to prepare for a new trip.

5. J. Rep. 394. Hyde v. Trent. = Poth: Charte Part: No 35. = 2 Esp. N.P. Cases 693. Wardell v. Mowilly an =

Upon this principle the Plaintiff had a Verdict for the value of the goods. —

Monday 17th Febv 1817.

Mc Intire & al
v.
Mc Donald

On action of account.—

The Defendant pleaded to the action under the three day rule in the usual course and amongst other things stated by way of demurrer to the action of the plaintiffs, that the same was irregular and he ought not to be bound to answer thereto, inasmuchas the Defendant has been sued not only in his own name as husband of the late Murchison, but also as Tutor to Grace Macdonald the minor child of the marriage between him and his said late wife—

Ross for the Plaintiffs moved to reject the latter part of the Plea, as being an exception à la forme, and irregularly pleaded with a plea to the merits.—

O'Sullivan for the Defendant contended that the matter pleaded was an exception peremptoire en droit and may regularly be joined with a plea to the merits

Tuesday 18th. February 1817.

Cuvillier & Co.
vs
Bardet & al. &
and
Aylwin Intervs

In this Case the Defendant having made default, the Plaintiff moved for Judgment on the evidence on record and a Cur: advis: vult, was thereupon ordered. &

Mr Rolland on behalf of Mr. Aylwin moved to intervene in the Cause – this was objected to on the part of the plaintiff, who contended that after a Cause is put en délibéré, no proceedings or Intervention therein can be allowed, until that délibéré shall have been opened by the Court –

Rolland in reply, observed that this principle did not apply in default Cases, where there was no contest, and where no hearing had taken place –

But the Court held the rule to be the same in default Causes as in all others, that after they were put under the Consideration of the Court, no proceedings could be had therein at the instance of any of the parties, until that délibéré should be opened upon due Cause shewn – Motion rejected. &

Wednesday 19th. Febry. 1817.

Beaujeu vr. Martin } On the plaintiff's motion for a Ca: Sa: against the Defendant.

It appeared by the return of the Sheriff to the writ of execution sued out against the goods and chattels of the Defendant, that sundry goods and effects had been seized belonging to the Defendant, and that thereupon a guardian had been appointed into whose charge they were put — but that afterwards when the bailiff returned to the house of the Defendt. in order to proceed to the sale of the said goods and effects, the said Defendt. shut his door and refused entrance to the bailiff or to the said guardian, by reason whereof the said goods and effects could not be sold. —

Bedard for the plaintiff now moved for a writ of Ca: Sa: against the Defendant for having with force and violence opposed and prevented the sale of his goods and effects — and also for a writ of Venditioni exponas in regard of the said goods and effects which had been

been seized but remained unsold — The Plaintiff grounded this motion upon the Provincial Ordinance of the 25th. of the King. ch. 2. §. 37 — in regard of the Ca: Sa: — and relied upon the general principle of law, that having a right to take the body of the Defendant the Plaintiff had a right to take the goods also, the remedy in this respect being cumulative —

The Court granted the motion, considering that the Ordinance of 1785. ch. 2. §. 37. included as well the case of opposition by a Defendant to the Sale, as to the Seizure of his effects, although not expressed, and that the securing of his effects was one of the instances in which this remedy was given — as to the writ of vend. exp. the Court held that the different kinds of execution if they could be exercised separately, could be cumulated — See Deniz.t v.o Contrainte. N.o 1. 2. 3. —

Dic. de Droit — v.o Creancier. —

Nouv. Deniz.t v.o Concours d'actions. —

Serpillon on Tit. 33. of Ord.e 1667. p. 608.

1 Pigeau. 36. 37. —

Rep.e de Jur. v.o Contrainte. —

Oakes . . }
v }
Greatwood }

Action en repetition de Dot. —

The Plaintiff was married to the Defendant on the 12th. Augt. 1811, and by their marriage Contract executed on the 16th June preceding it was stipulated that there should be no Communauté de biens between them but that all the property which then belonged to the plaintiff, or which should afterwards accrue to her by succession, donation or otherwise, should be under her sole control and management as her own separate — property — On the 11th. Augt. 1811, the father of the Pltff gave to her a sum of £400, as her marriage portion and which the Defendant received — That the Defendant having afterwards failed in business and his property and effects having been sized for the payment of his debts, the Plaintiff now instituted the present action to recover from the Defendant the aforesaid sum of £400. — and to be authorised to take hold and enjoy the same and all her other property to her own separate use without the control or interference of the said Defendant, inasmuchas there is now danger that her said property will be applied to the payment of the debts of her said husband —

The Defendant appeared by his Counsel and pleaded, that

the

the facts stated by the Plaintiff were not founded in fact nor sufficient in law to ground the present action. —

The Court having examined the proceedings and evidence adduced, were of opinion that the Plaintiff was entitled to recover — they seemed however to think that had there been a Communauté de biens between the parties, the Plaintiff must have been driven to her action en separation de biens, to entitle her to the recovery of her Dot. —

See Poth. Comm.te Nº 463. 516. — see also Case Gregory. vs. Porteous. Decided in this Court and confirmed in appeal —

Ayer. — v Watson } Action to recover from the Defendant the sum of thirty pounds for the value of a horse which the plaintiff let to hire to the Defendant and which was not returned. —

The facts were, that the Defendant hired a horse from the plaintiff to go to South River, on the road the horse was pressed into military service and so ill-used that he died — The hire agreed to be paid was four dollars. —

Mr. O'Sullivan for the Defendant objected to the sufficiency

sufficiency of the evidence adduced to support the demand That the sum in contest exceeds an hundred livres, being ~~for~~ thirty pounds, and the evidence adduced consisting merely of verbal testimony, which is inadmissible — The Contract between the parties was a Contrat de louage for a lesser sum than an hundred livres, still this does not vary the Case when a damage exceeding an hundred livres is demanded, as in neither case can verbal testimony be received to support the demand cites - Poth. Obl. N°786. 788 — Jousse on Ordre 1677. p. 306 Danty. Preuve par Tem. Ch. 3. p. 94. — He therefore contends that the depositions of the Witnesses adduced by the Plaintiff ought to be rejected and the action — dismissed. —

Stuart for the Def. This Case is not founded on a Contract or bailment regarding the value of the horse, or the property in him, but the use of him for a limited time and purpose — The action is founded on the misconduct of the Defendant under this Contract, to prove which verbal testimony must be admitted — Taking the Case in another point of view, that is, that under a Contract, which by law can be proved by witnesses, a fact took place, namely

the

the delivery by the Plaintiff to the Defendant of the horse in question for the purposes of that Contract, which can also be proved by witnesses, the Case is made out, for if the horse is not returned the law imposes the obligation to pay the value of him - the retaining the horse is a tortious act on the part of the Defendant and upon the evidence of the value as established by the Witnesses the Plaintiff is entitled to his Judgment

The Court observed that although the general principle of law in regard of evidence touching agreements above an hundred livres, was correctly stated by the Defendant, yet in the common intercourse of life, where great inconvenience would arise by reducing into writing all the transactions in matters above an hundred livres which daily occur in their various and necessary communications between man and man, this preuve par ecrit seemed to be dispensed with and the readier proof by witnesses admitted - this appears to be the interpretation given by the latest law writers on this subject, and it seemed reasonable that the law in this respect should be made to yield to the convenience of Society, and that the common and frequent transactions in life between neighbours and friends should not be shackled with

the

the rigor and formality of written evidence — and the Court in adopting this principle, consider the testimony offered as affording legal evidence of the facts charged in the plaintiff's declaration, and thereupon award him the sum of £30 for his damages & Costs

See Jousse. Tit. 20. art. 2. Ordre 1667

Serpillon do do p. 319

Poth. Obl. № 809.

Hutchison vs Pierson — } Action of assumpsit on promiss.y Notes.

Declaration contained two Counts. 1st on a promissory Note made by one William Dyer to the Defendant on 14 June 1816. for a sum of £27. 7. 1, and by the Defendant indorsed to the plaintiff — 2d. on a promissory note made by the defendant to the Plff on 21 June 1816 for £68. 18. 6 — making in the whole, including £1. 5. for the Costs of protest, £97. 10. 7. on account of which the Defend.t had paid £34 —— and praying Judg.t for a sum of £63. 0. 7 as the balance.

at

at the return of the writ, the following notice and statement was filed by the pltff. —

"Wm. Hutchison
"Caleb Pierson } Statement & notice —

"Amt. of Defendts note to Pltff. £68. 18. 6

"Recd. on acct. £12. 10 —
12. 10 —
10. — — 45. — — —

Balce due £23. 18. 6

"Amt. of note indorsed by Dfdt. to Pltff 27. 7. 1

£51. 5. 7

"The precise amount of the demand for the recovery
"of which you are prosecuted in this action is the sum of
"fifty one pounds five shillings and seven pence, Current money
"of Lower Canada" —

"O'Sullivan, for Pltff
"1. Feby. 1817."

Two points were raised by the Defend. — 1st. That as the Pltff had not proved the hand writing of Dyer the maker of the note which the Defend. had indorsed to Pltff, he was not entitled to recover on the first Count — 2d. That at all events Pltff could only recover the sum stated in his notice, being £51. 5. 7, and not the balance stated in the declaration. —

The Court held that on the indorsed note proof of the Defendants signature to the indorsement was sufficient — and as to balance stated on the notice it was evidently an error of calculation which the Court was enabled to correct — but independant of this, the notice might be laid out of the question as unnecessary in this Case and thereupon the Court gave Judgt. for Pltff. £61. 5. 7 & Costs. —

Chitty. 390.
Peake. 249.

Thursday 20th February 1817.

Hadden vs Taylor.

On the defendants motion to quash the process sued out in this Cause.—

The Defendant had been arrested on a writ of Cap. ad resp. on an affidavit that he was about to leave the Province — an attachment was also sued out against all the goods monies and effects of the Defendant in the hands of Fredk Wilt. Ermatinger, also upon the necessary affidavit required by Law.— both these proceedings were included in one and the same writ.—

Stuart for Defdt. The proceedings are irregular, two writs are included in one and the same writ — both are addressed to the Coroner, & all writs ought to be addressed to the Sheriff — there was no interest in the Sheriff here except upon the attachment where he was the Garnishee — which is a reason further to shew the necessity of the writs being separate. That the writ of Ca: ad resp: is a new remedy introduced into this Country by the Ordinance of 1785, and we must to the Laws of England for those principles which regulate this writ — and according to those Laws the Creditor who takes the body of his Debtor, cannot have his property at the same time — The Ordinance of 1787 seems to recognize this distinction by pointing out the particular cases or

instances

instances in which the property of a Debtor can be attached before Judgment - one of these proceedings therefore must necessarily fall to the ground, as as these writs are joined a part cannot be set aside, but the whole must be quashed as irregular and illegal -

Gale for the Plff. - The two remedies of Capias, and attachment are granted by Law, and it is no where laid down, that when both may be had they shall not be joined - we have no established forms of writs, which prohibit their being joined, and it seems more consistent with reason where both can be had, that they ought to be joined - It is a known principle of Law, that where a creditor is entitled to exercise different kinds of contraints against his Debtor, that he is not obliged to chuse which he shall take, but he may take them all at the same time and as they may thus be joined in effect, there appears to be no reason why they should not be joined in form - at least there is no law to prohibit it - at all events if the joining of the writs shall be considered as irregular one of them at least ought to subsist -

The Court held, that as the Plaintiff was entitled to exercise different kinds of contraints against the Defendant at one and the same time, and as there existed no law or rule of practice which prohibited their being joined in the same writ, that Defendant take nothing by his motion -

see

see. Denizart. Vo Contrainte – No. 1. 2. & 3.–
Nouv. Denizt. Vo Concours d'actions
Dict. Droit de Fer. Vo Creancier –
Serpillon on Tit. 33. of Ordre 1667. p. 608.–
1 Pigeau – p. 36. 37.–
Repertoire. Vo Contrainte.–
see Case of, Beaujeu. v. Martin – of 19th inst.–

Willard & Co
vs
Hagar & Martin

Action of assumpsit against the Defts as Copartners, for goods sold &c.

Beaubien for the Defendt. Martin – The goods were sold to Hagar on his sole account, and not for the partnership of Hagar & Martin, and the articles were so charged in the books of account of the plaintiffs – The action ought therefor to be dismissed as to both the Defendants, as the evidence adduced shews a different contract from that declared upon.– That Hagar ought not to be condemned upon a partnership Contract to pay what he owes in his own private name only, and in this respect it is the interest of both the Defendants that the present action should be dismissed –

Boston

Boston for Pltffs - considers the evidence sufficient to maintain the action against the Defendants as Copartners, at all events Judgment ought to be granted against the — Defendant Hagan, who makes no defence to the action, and to whom the goods were sold, and in action like the — present the undertakings of the Defendants is several as well as joint —

The Court however held that the action could not be maintained against the Defendants as Partners from a want of proof — nor against the Defendant Hagan individually, as there was no count in the Declaration upon which such Judgt could be founded — the only question before the Court being whether the goods were furnished on a partnership Contract which does not appear to be the Case — the rights of the parties under any other Contract are not before the Court for Judgmt — action dismissed —

See Case. Symes. v. Sutherland & al' —
But see Case. 1. Barnewall & Alderson's Reps. 29. Richardson & al' v. Heather. —

Hurteau vs Robillard } Action of debt on deed of Sale by the Plaintiff to the Defendant for £25. — balance of purchase money of 3 emplacements, or lots of ground by deed of 15th January 1816. —

Plea

Plea - nil. debet. - and further that the plaintiff sold the said three lots of ground free and clear of all debts mortgages and incumbrances, and bound himself to - warrant the same accordingly - but that by a certain deed of Sale of the 3d. of November 1814 made by Jean Bte. Jacques and wife to the said plaintiff, of a certain lot of land therein mentioned and described, debts, mortgages and incumbrances have been incurred by the said Plaintiff, and which affect and bind the said three lots of ground so sold by him to the said Defendant, and same are now liable to the payment and satisfaction of the debts so contracted by the said plaintiff and therefore he ought not to have Judgment for his present demand

The Plaintiff replied, that he had satisfied all that he owed to the said Jean Bte. Jacques wife, under the aforesaid deed of Sale of 3d. Novr. 1814, save and except the rente et-pension viagere, therein mentioned, which the said Plff is bound to pay as the same becomes due - and which the said Defendant well knew at the time he purchased the said three lots of ground from the said plaintiff. - That the Defendant does not alledge or shew any trouble or eviction arising to him in consequence of the hypotheque and incumbrances by him stated, and therefore the Plaintiff ought not by reason of any thing alledged by the said Defendant to be barred of his action aforesaid.

The

The deed of Sale of the 3d. Nov. 1814, is of a lot of land the plaintiff purchased of Jean Baptiste Jacques and wife, in consideration of a sum of 3600#, and the payment of a certain rente et pension viagere, which the said Jacques and his wife were bound to pay to Franc Jacques and his wife from whom the said Jean Baptse Jacques and his wife had acquired the said lot of land by deed of donation of the 28. March 1812 — Of the aforesaid sum of 3600#, six hundred were paid at the time of executing the Contract, the remaining 3000#. were to be paid as follows, viz. 2000# on the 5. January 1815 and the remaining 1000#. on July following — No demand appeared to have been made upon the Defendt Robillard for any debt, mortgage or incumbrance on the said lots of land which had been so purchased by the Defendant, nor was it expressly stipulated in the deed of Sale thereof made by the said plaintiff to the said Defendant, that the said Plaintiff warranted them to be free and clear of all debts, mortgages and incumbrances

Under the above circumstances the question agitated was whether the Plaintiff should be held to give Security to save the Defendant harmless from all demands by reason of the aforesd mortgage —

By the Court — Although this Court has by its —

Judgt

Judgments always endeavoured to secure the bona fide purchaser in the enjoyment of his property when there was appearance of trouble or injury to arise to him, particularly in the case of mortgage – yet it did not follow, that this Court would interpose its authority to compel a person selling an estate to give security to a purchaser upon every transaction in which the Seller may have been concerned and upon which Mortgage may be founded, unless there should be apparent and probable risk arising to the purchaser from such mortgage – That there seemed to be a duty imposed upon every voluntary purchaser, to enquire into the State and situation of the person from whom he purchased, and if he does not do so, or will not stipulate sufficiently against all such mortgages, he must in some measure blame himself – In this Case the plaintiff does not warrant the property sold to be free and clear of all mortgages & incumbrances he only binds himself to keep the Defendant harmless in respect of such mortgages – On these stipulations the Law writers seem to make this distinction – in the one Case the purchaser is entitled to security against every existing mortgage, but in the other, that security is granted only in the Case of trouble or eviction of the property sold – but without adopting this principle

to

to this extent, the Court is of opinion in the case before it that the Defendant ought to have shewn some kind of trouble or eviction, to entitle him to the Security demanded because it appears that the mortgage complained of — applied more directly upon the lot of land which the plaintiff had purchased of the said Jean Bapt^e Jacques as being thereunto specially bound, and which must therefore be first discussed before the Defendant could be evicted of his possession in the three lots of ground he had so purchased, and as there thus appeared no eminent or immediate danger of such eviction "qui "fund à une eviction imminente et inevitable", they — considered that the Defendant was not entitled to the Security by him demanded, and therefore gave Judgment for the plaintiff —

See Potb: Contr. Vente. N^o 86. 82. —
Id — — — N^o 102. 103. 108.
Id. — — N^o 280. 282.

1 Bourjon. p. 478. art. 17. —
2^e d^o — p. 544. art. 6.
Archambault. v. Brouillet. 20^e Febr^y. 1815. —

Whitcomb
vs
Curtis.

Action of debt on Award

The declaration stated, that on the 25th. day of May 1816, the parties entered into a certain Arbitration bond, whereby all their disputes and differences were were referred to the award and determination of three certain persons therein named as arbitrators, who were authorised to give their arbitration bond, or decision in writing signed by them or any two of them within sixty days, after a period of fifteen days from the day of the date of the said bond or agreement had elapsed, in which last mentioned time the parties promised to deliver to the said arbitrators their respective proofs, documents and writings in support of their respective pretentions - To which Judgment of the said arbitrators the said parties bound themselves to submit and comply with under the penalty of £250 - That the said Arbitrators did in conformity to the said Submission or arbitration-bond make their award within the time therein limited, to wit, on the 11th. day of July 1816, and did thereby direct that the Defendt. should pay to the plaintiff £44. 14. 2, as the just balance due by the said Defendant to the said plaintiff on all the matters aforesaid referred to them - which award so made was duly published and notified to the parties on

the

the said 11th day of July 1816. —

The Bond produced, was in these Terms — after naming the arbitrators, it goes on to state — "to whom the parties "give full power and authority to decide adjudge and "award all the aforesaid difficulties and contestations upon "the proofs, documents, writings and sayings of the "parties" — "which papers and instructions the parties "promise to deliver to the said Arbitrators within fifteen "days from this date, to impower them to give their arbitration "bond in writing signed by any two of them within Sixty "days after — To which Judgment the parties promise to — "obey and comply under the penalty payable by the party "who should refuse to comply with the said arbitrament "unto the other" —

The award of the arbitrators was made and delivered as stated in the Declaration. —

Grant for the Defendant, contended, that there was a variance between the arbitration bond stated in the declaration and that produced in evidence — The arbitration bond stated in the declaration, mentions, that the arbitrators were empowered to give their arbitration bond or decision in writing within a certain time — the bond produced in evidence, states, merely that the arbitrators were empowered to give an arbitration bond this variance is fatal — cites 1 Chitty. 303. — That in the

That in the said bond there was no time clearly ascertained within which any award should be given — nor was it given within any of the periods of fifteen or Sixty days mentioned in the submission — cites. Nouv: Deniz: Vo arbitrage

Stuart of Counsel for the Defendt objected further — that there was a variance between the submission and award declared on and that proved — the submission stated is of all differences, that proved refers to certain law suits then existing between the parties — The declaration states, that the award was to be given in 75 days from the date of the Submission — but by the submission it is stated that the award shall be given in Sixty days from that date — The Plaintiff has not established any cause of action out of the award, as by the submission all the authority given to the arbitrators was to award an arbitration bond — this is nonsense, and is evidently an error in the submission, but as it is not stated in the declaration what the parties meant by these words, and that it was such error, it must be taken according to its meaning and import, and the Court cannot help the defective statements of the parties, nor direct them how they ought to state their pleadings — The parties were to give in their papers to the arbitrators to empower them to give their arbitration-bond within 60 days after — but the authority to give an arbitration bond is no authority to decide the differences between the parties. and cannot be so supposed or intended — But even according to the Submission and

award

award, the rights of the parties have not been sufficiently determined upon — The award was not regularly pronounced or intimated to the parties, having been delivered to one of them only —

Boston for Plff — The words in the submission are general, and agreeable to what is stated in the declaration, as to the words stated in the Submission that the Arbitrators should make their arbitration-bond, it is evident this meant their award, because the making an arbitration bond, did not belong to them, it did not answer the ends of the submission, it did not decide the differences between the parties, which was the object intended, and must be so held by the Court. —

The Court considered all the proceedings to be sufficiently correct, except the statement in the submission whereby the arbitrators were authorised to make their arbitration bond, an expression evidently contrary to the meaning and intention of the parties and inconsistent with the object of that Submission, which was to decide and determine upon the differences and disputes between the parties — and the Court therefore considered that they were warranted to reject as surplusage the word "bond" which would leave the other parts thereof sufficiently intelligible and consistent with the intentions of the parties

The award was thereupon confirmed and Judg^{t} for Plff

See. 1. Chitty. 233 —

April Term 1817.

Wednesday 2d. April.

Bunker
v.
Tally. } On defendants motion to quash the writ of Attach. ~~and Capias~~ sued out in this Cause

Stuart for the Defendt. The affidavit of the Plaintiff upon which the Attach. issued is irregular & insufficient inasmuchas it is stated to have been taken in a Cause between the parties, whereas no Cause could exist before the Rings writ was sued out. The affidavit does not state a sufficient Cause of action, it says merely that the Defendant was indebted to the plaintiff in a certain sum of money for goods sold and delivered, but it does not say that they were sold and delivered to the Defendant and for any thing that appears, the goods might have been sold and delivered to another person. That the language of the affidavit is incorrect, for if the words "no part whereof" are gramatically construed, they

apply

apply to the goods sold, and not to the debt sworn to — That the said affidavit goes only to the Defendant's secreting his effects, whereas the Ordinance of 1787 points out a variety of other property belonging to a defendant which must be included in an affidavit to ground an attachment, such as "goods and debts" That the writ sued out is not in conformity with the affidavit, as the latter only goes to the effects of the Defendant, but the the writ of attachment has issued against the Estate property and effects of the Defendt — That the affidavit is in other respects inconsistent, as it would thereby appear that the Plaintiff was the Debtor of the Defendant, by stating the Defendt as "her Creditor" —

Boston for Pltff — The affidavit is regular — the Ordinance of 1787 refers to a Plaintiff making an affidavit, which pre-supposes the existence of a Cause that the different defects alledged against the affidavit are not founded in fact — and that writ of attachment is regular and in conformity to the Affidavit —

The Court considered the affidavit sufficient in all essential points — that it was not so full and comprehensive as it might have been — it goes only

to

to the effects of the Defendant, the ordinance also speaks of the Debts of the Defendant, but the intention of the law seems to be that if debts were to be attached they must necessarily be included in the affidavit — but in this case the effects only of the Defendant appear to have been attached, and the affidavit warranties this — as there has been no attachment of the Debts of the Defendant under this writ, the legality of the attachment in this respect seems not called in question —

Defendants motion rejected —

Park. vr Stuart }

The Defendant being one of the attornies of the Court, and having been sued to answer to the plaintiff by service of the Kings writ of Summons, he now moved that the process should be quashed as irregular, as the rules of practice hold that service of a Copy of the Declaration on an attorney is sufficient to compel him to answer thereto.

But the Court considering the opinion held in the case of Deschambault vs. Ross (October 1811) — dismissed the motion. —

Pothier
Exⁿ
vs
Foucher
et al

On action to obtain the execution of a will &c

Bedard for the Pltff moved that the Defendrs should be held to unite in naming a Counsel in cross-examining the witnesses to be produced by the Plaintiff, inasmuchas all the Defendants, although they have pleaded separately, yet all unite in denying the Plaintiff's right of action upon the same grounds, as otherwise unnecessary delay will accrue in permitting each of the four Defendants to cross-examine upon the same points. &c Cites, Nouv: Denizt Vo Associé and Repve Ve Consorts.

But the Court considering that the Defendants had been sued in different Capacities and had pleaded differently in Defence to the action, rejected the motion

Saturday 5th April 1817.

Boismier
vs
Gauthier

Action for recovery of certain articles of a rente & pension viagere stipulated to be paid by the defendant to the Plaintiff by a certain deed of donation of 24 October 1814.

The Defendant pleaded that the Plaintiff had not fulfilled the clauses and conditions in the said deed of donation contained, and which he the said Plff was bound to fulfill before he can maintain the present action against the Defendant, namely in this, that he the said plaintiff had not caused and procured the said deed of donation to be ratified and agreed to by his children and his Sons in law at Christmas of the year 1815, nor at any time since, but the same hath always neglected and refused — the said Defendant alledging that he was always ready and willing upon such ratification being made, to furnish and deliver to the said plaintiff the aforesaid articles of rente & pension viagere as demanded.

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The Plaintiff in reply, observed, that altho' the Defft had not caused the said deed of donation to be ratified and confirmed according to the terms, yet the Defdt was not by reason thereof entitled to withhold the payt of the said articles of rente & pension viagere, such neglect on the part of the plaintiff only giving right to the said Defendant to demand the resiliation of the said Deed of Donation, but inasmuchas the Defendant was in the possession of the lot of land and premises given in and by the said Deed of Donation, and reaped and enjoyed the fruits thereof, he was by reason thereof bound to pay the aforesaid articles of rente & pension viagere to the said plaintiff —

The Court however held that the clause in the deed by which the Plaintiff was bound to procure the ratification thereof within a certain time was a Condition précédent, to be fulfilled by the Plaintiff before the Defendant could be compelled to fulfill any of the obligations on his part as in the said deed mentioned, and therefore dismissed the action.

Monday 7th April 1817.

Aylwin
vs
Cuvillier
&
Bardet &
al. Tiers Saisis

Saisie-arret on Judgt.

The plaintiff by his declaration stated, that by the Judgment of the Court of Appeals of the 20th Novr. 1816, reversing the Judgment of the Court of Kings Bench for the District of Montreal of the 19th June 1816 the Defendant had been adjudged to pay to him the plaintiff a sum of £272.4.9 with interest from the 16th day of February 1807, and costs taxed at £46.10.9 which Judgment still remains in force and not satisfied. That there are in the hands of Louis Bardet dit Lapierre of Paul Amable Brazeau and of Joseph vincent, divers sums of money, goods, chattels, debts, credits, and effects, due owing and belonging to the said Defts. and in particular a certain sum of money by them the said Louis Bardet dit Lapierre, Paul Amable Brazeau and Joseph Vincent, due to the said Defendant and to Marie Claire Perrault his wife, he the said plaintiff averring that since the time

of

of their marriage, there has existed, and does now exist, a Community of property between the said Defendant and his said wife, and that there has not been any legal dissolution thereof so as to vest in the said Marie Claire Perrault an exclusive right to any property that she may have acquired, since her said marriage, and that the said debts so due by the said Louis Bardet, Paul Amable Brazeau and Joseph Vincent, are debts due to the said Communauté, and as such liable to be attached by the said plaintiff for the satisfaction of his said Judgment — Therefore praying the process of saisie arret or attachment, to attach in the hands of the said Louis Bardet, Paul Amable Brazeau and Joseph Vincent and of each of them, all such sums of money, goods, chattels, debts, credits and effects, which they or either of them may have, due owing or belonging to the said Defendant, or so much thereof as may be sufficient &c —

Plea — The Defendant pleaded, That the matters and things stated and set forth in the Declaration of the said plaintiff were not founded in fact — and further that by Judgment of the Court of K. B. for the district

district of Montreal of the 20th October 1810, the said Marie Claire perrault wife of the said Defendant was separated from him as to property, and by means whereof the Community that subsisted between the said Defendt and the said Marie claire Perrault was dissolved, and in consequence the said Marie Claire Perrault afterwards on the 17th November 1810, renounced to the said Community, since which time she the said Marie claire Perrault had become the Sole and separate creditor of the said Louis Bardet, Paul Amable Brazeau and Joseph Vincent the garnishees in this cause — the said Defendt averring that at the time of the attachment made in the hands of the said Garnishees they owed no debt to him the said Defendant — That the said plaintiff cannot raise in this Cause any contestation on the validity or effect of the said separation, or of the debts so due by the said Garnishees to the said Marie claire Perrault nor of the validity or effect of the dissolution of the said Community, inasmuchas the said Marie Claire Perrault is not a party to the present action —

Answer to Plea — That the matters pleaded by Defr are insufficient in law to bar the Plaintiff of his action aforesaid. That the matters alledged by the Plaintiff in his declaration are — founded in — That the said Defendant cannot be —

admitted

admitted to raise any question in this Cause respecting a debt by him alledged to be due to a third person, his wife, not a party to this Cause, and who does not herself claim the debt in question — and because also he the said Defendant cannot raise any question as to the nature of the debt due by the said Louis Bardet, Paul Amable Brazeau and Joseph Vincent, which it is the interest of the latter only to call in question — That the pretended Judgment of the twentieth day of October one thousand eight hundred and ten, did not operate a dissolution of the community that subsisted between the said Defendant and his wife, inasmuchas the said Judgment was illegally obtained, and was not in anywise carried into effect or execution as the law requires, so as to operate a separation of property, so that the wife of the said Defendant never was separated from him as to property, but is now Commune en biens with him, and therfore the said debt so due by the said Louis Bardet, Pierre Amable Brazeau and Joseph Vincent is liable to be attached for the payment of the debt due by the said Defendant to the said plaintiff — Wherefore

The Garnishees made default

The Cause having been set down for hearing on matters of Law. —

Mr Rolland for the Pltff, argued, that the Defendants plea was insufficient, as it contained

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a reasoning and an argument in favor of the Garnishees, why they ought not to pay the monies in their hands to the Plaintiff, and alledging that the Garnishees do not owe him the Defendant any thing. this the Garnishees do not pretend to say, because they are in default and the plaintiff is entitled to his Judgment against them, and the Defendant is not warranted to set up a plea on behalf of third persons, nor is he warranted in so doing -

Beaubien for the Defendt. The parties must go to proof on the facts alledged before any Judgt. can be had on the law, inasmuch as the plaintiff assumes a right to seize property in the hands of the Garnishees belonging to the wife of the Defendant, and which the Defendant alledges was the separate property of his said wife and not liable to the payment of his the Defendants Debts, and this fact must first be settled -

Stuart. of Counsel for Defend. - This action is - misconceived, and not directed against the proper persons inasmuchas Mrs Cuvillier who is materially interested in the question raised between the parties, is not before the Court, and therefore any Judgment to be given by this Court cannot bind her - It is therefore essentiale for the ends of Justice that all the parties interested should be before the Court, in order to bind them by any Judgment

Rolland

Rolland in reply - The attachment is sued out as well against against the monies due by the Garnishees to the Defendant, as to what they may owe to the Defendant and his wife - and the default and silence of the Tiers Saisis admit the fact of the debt they so owe to the Defendant, and the Defendant cannot be admitted to contest this, under pretence that what the Garnishees owe, belongs to another person and not to him the Defendt -

The Court held that as it appeared that the attachment sued out in this cause was directed against a certain debt alledged to be due to the wife of the Defendant, and it being also alledged by the pleadings, that the said debt was due to her in our separate right as having been separated by the Judgment of this Court from the said Defendant, as to property, and it also appearing that the validity of that separation was now in question it became therefore necessary that the said Marie Claire Perrault the wife of the Defendant should be made a party to the suit, and it was therefore ordered that at the diligence of the Plaintiff the said Marie Claire Perrault should be put in suit for the preservation of her rights and interests therein. ——

Tuesday 8th April 1817.

Russel & Co
vs
Merkell -

The Defendant moved for Security for costs from the plaintiffs inasmuch as by the declaration it appears that one of them is resident in Great Britain out of the jurisdiction of this Court - But it appearing that the other two plaintiffs were resident in Montreal where the business of the firm was carried on, the Court rejected the motion. -

Wednesday 9th April

Vaillancour
vs
Drouin.

Action of debt on deed of Sale -

The Defendant pleaded that he had paid the sum demanded, and to prove the same, gave in evidence a receipt signed by the pltff's mark in the presence of one Witness, whereby the Plaintiff acknowledged to have received from the Defendant on account of what he owed him, a sum of twelve hundred and

ten

ten livres — he also adduced three witnesses to prove the payment of two different sums of money to the Plaintiff, one of thirty dollars, and the other of fifteen —

The Plaintiff now moved for the rejecting from the record the depositions of the four witnesses adduced by him inasmuches their testimony went to prove the payment of a sum above one hundred livres, and a debt established by a deed — vide Poth. Obl. N°. 751. and Rep^re V°. preuve p. 577. — That y^e paper produced by the Defendant as the receipt given by the Plaintiff, not having been proved could not be admitted even as a commencement de preuve par ecrit. — That a paper subscribed by the mark of the Plff could form no commencement de preuve par ecrit, no proof could be made of it, as it must be signed by the party, to become an acte sous seing privé, as the signature but not the mark was susceptible of proof. If the mark of a party was admitted as such comment^t de preuve par ecrit, it would be in the power of every man to make such a com. de preuve at will, which is contrary to the principle upon which it is admitted —

Bedard for Defend^t — considered the paper in question as something of a higher nature in point of proof than a commencement de preuve par ecrit, it was a semi-preuve

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as the presence of another witness would have rendered it a complete proof — That the mark of a person is the same as his signature, and has been so considered and adjudged by this Court — cites. 1 Pigeau. 10. 11. —

The Court held that the execution of any act or deed made by subscribing a mark or cross thereto by a party who cannot write, might be proved by witnesses as effectually, as if the same had been subscribed by the name of that party had he been able to write — That the receipt in question being proved but by one witness it could not be considered as a <u>certitude complette</u> of the payment it enounced, but ought to be admitted as a <u>Commencement de preuve par ecrit</u>, and verbal testimony was admissible to complete the fact therein stated — That the depositions of the three witnesses Samuel Fairbank, Joseph Charbonneau and Jacques Charbonneau, would have been pertinent and admissible had they gone in support of the fact contained in the said receipt, but as they related to different sums of money not apparently connected with the said receipt, the Court therefore rejected the same — but permitted the deposition of Laurent Benjamin Mailloux, which went to prove the said

receipt

receipt, to remain of record, for such further consideration as it might be entitled to, as the Defendant claimed a right to adduce further evidence in the Cause. —

Laurence. v Robin. } Action of assumpsit for Sale of a Mare — Lacroix for Pltff. — Rolland for Dft. —

The declaration stated, that in May 1816, the Defendt had and received of the Pltff. a certain mare of a red colour, about five years of age, worth at the time £15 and on account of which sum the Defendant had paid one pound, leaving a balance of fourteen pounds which the Defendant undertook to pay in September then next, but which he now refuses to pay. —

That on or about the first day of October 1816, the Defendant was indebted to the pltff in another sum of £15 — for the price and value of a certain other mare of a red colour which the Defendant had had and received from the said pltff in the month of May preceding which said mare was worth the sum of £15 — and which the said plaintiff is entitled to have and receive from the

said

said defendant, who then and there received the said mare, deducting therefrom one pound which the said defendant paid on the delivery of the said mare, and which said sum of £15 the defendant promised to pay to the said Plaintiff, but now refuses — Wherefore &c.

Plea of Exception — That the declaration is insufficient and the defendant ought not to be held to answer thereto inasmuchas it does not appear, upon what contract or obligation the plaintiff grounds his action — That the said action is not alledged or stated to be founded upon any contract or obligation made or entered into by the said Defendant, nor does it appear by the said declon that the defendant is in default in the performance of any obligation to which he was bound. &c.

In this Case the Court were of opinion that the declaration was insufficient as it did not state what the nature of the Contract was upon which the undertakings of the Defendant was founded, they however allowed the Plff to amend his declaration upon the payment of 40/- Costs. —

Marcotte
vs
Bellanger

Action of debt on deed of Sale

Lacroix for Pltff — Bedard for Defdt

The pltff by his declaration states that by deed of Sale of the 30th May 1815, he sold to the defendant a certain lot of land for the price or sum of 1200# of which 50 were paid at the time of the Sale, the remaining sum of 1150#. the said defendant together with one Amable Bellanger pere, jointly & severally "solidairement", bound themselves to pay to the said plaintiff as follows, viz.t, 200# livres at St. Michel 1816, and thus to continue the payment of a similar sum annually at the same period until the whole debt was satisfied. — That in November 1816, the Plaintiff prosecuted a Suit in the Inferior Court against the said defendant for the said first payment of 100 livres, for which the plaintiff recovered Judgment and sued out execution thereon, upon which and on the proceedings thereon had the costs amounted to a sum of £2. 17. 3. — That on the 30th Sept. 1816, there became due to the plaintiff another stipulated payment of 200 livres, which together with the amount of the aforesaid Judgment including the aforesaid costs, forms

100 livres at St. Michel 1815.

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a sum of £15. 7. 3. which the Defendants now refuse to pay –

Plea of Exception – That as the plaintiff had obtained a Judgment in the Inferior Court in November 1816, for a part of the money for which the present action is brought he ought to have gone to the same Jurisdiction for the recovery of the second payment of 200 livres – That Plff cannot join the payment for which he has already recovered a Judgt. with the said remaining payt. of 200# in order thereby to bring a suit in this Court, such proceeding being irregular, nor is the Plff entitled to a second Judgt. for the same sum of money, but ought to be held to pursue his remedy under the Judgt. he has already obtained. –

The Court maintained the plaintiff's action for the 200#., but dismissed it in regard of the demand for the amount of the Judgment in the Inferior Court in regard of which the Court held that the Plaintiff could not obtain another Judgment, but must pursue his remedy on the Judgment he had already obtained in the Courts as in the Inferior Court. –

☞ The Coobligé solidaire, is liable for the damages & default of his fellow Debtor – Potts. Obl. № 273. in fine

Friday 11th April 1817

Campbell
vs
Sutherland

Action for a malicious prosecution, in having arrested the Plaintiff on action for a libel and held him to bail for a large Sum of money—

On trial by Special Jury—

The evidence having been gone through the counsel for the plaintiff, upon addressing the Jury, requested that the Court would direct the taking of a Special Verdict, in order to preserve to the Plaintiff the question of law arising upon the legality of the arrest of the plaintiff under the rule of practice of this Court, Sec. 8. §. 9.—

The Court however declined according to this request, unless they should see cause so to do after hearing the observations of the party—

Whereupon the Counsel for the plaintiff stated to the Jury that there was a question of law raised by the pleadings touching the validity of the plaintiffs arrest which depended upon the legality or illegality of one of the rules of practice this Court, and as this question of law had not been

determined

determined by the Court, the Jury were now called upon to determine how far this arrest was legal or illegal under this rule of practice — The Counsel thereupon proceeded to argue that a Defendant can be arrested only for a debt under the law and not for damages, and to shew the distinction between debt and damages, citid. 3. Bl. Com. 154. — and thereupon that the rule of practice permitting such arrest for unliquidated damages was illegal —

The Court charged the Jury that an action of this kind could not be maintained without proof of probable cause and of malice in the Defendant, that want of probable cause was considered as proof of malice, of which they must judge according to the circumstances In regard of the rule of practice the Jury had nothing to do with it further than to consider it as legal, and upon which the proceedings touching the arrest of the Pltff were legal, —

The Jury found a Verdict for the Defendt — Whereupon the Counsel for the Pltff moved that he might be permitted to present a bill of exceptions to the opinion of the Court, to be by them approved and preserved of record — which was granted —

Saturday 12th April 1817.

Vaillancour
v
Drouin

Action of debt on deed of Sale. & sec p.

On Defendant's motion that Pltff should shew Cause, why he the Defendt should not be admitted to his serment suppletoire

Bedard for Defendt. The serment suppletoire of the party is admissible to complete the proof of such facts, the probability of whose existence appears from other evidence, and the Judge may ex officio defer to that party in whose favor the strength of the evidence lies — cites. Jer. Dic. Droit. Vo Preuve — and Vo Serment deféré par le Juge. — That the receipt signed and subscribed by the mark of the pltff, in the presence of one witness is a Semi-preuve, and induces a belief of the fact that the Plaintiff made and signed that receipt, and the oath of the Defendant ought to be taken so as to render that proof complete — Poth. Obl. No 921. 922. 926.

Rolland

Rolland in answer. — The Defendant's motion is premature and ought to be dismissed, as this matter can be suggested to the Court only after the Cause has been heard — Serpillon. p. 103. — That there is besides no ground for the application, as the testimony of a single witness to the Plaintiff's having made his cross or mark to the receipt in question, does not constitute a semi-preuve, nor proof of any kind, such a paper in this Case cannot be proved by witnesses, — the proof of a mark or cross cannot be made, and proof of the Plaintiff's — acknowledgment of the contents of the receipt, is equally inadmissible by law — Serp^{r}. 105 — Poth. Obl. N^{o} 783, and N^{o} 832 —

The Court reserved to determine on the motion until after hearing on the merits of the Cause. —

See Poth. Obl. N^{o}

Arnoldi vs Brown Cur^{t}. } Same point —

Thursday 17th April 1817.

Ferguson vs Millar &c

On the plaintiffs motion for hearing - The Defendant objected, that the Plaintiff had not yet served a copy of the declaration which the plaintiff had been permitted to amend under the order of the Court, and therefore the motion was premature

Boston for Pltff alledged that due notice of the amendmt had been served upon the Defendant, which he now filed -

It appearing that the Plaintiff had not served a copy of the declaration as amended on the Defendant but had only served a notice on the Dft that the Plaintiff had amended his declaration in conformity with the order of the Court, by substituting the word plaintiff for Defendant in two different parts, this notice was held insufficient, as a copy of the amended declaration must be served on the party - Motion rejected. -

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Hagar & al: vs Conroy &c

On the plaintiffs motion to examine the defendant de novo, on faits et articles on certain supplementary Interrogatories, to be proposed by the Plaintiffs touching certain facts

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in regard of which the answers of the Defendant already given are in contradiction with the evidence in the Cause.

Quesnel for the Defendt. contends that there is no such contradiction in the answers of the defendant as alledged and if there were, the plaintiff is not entitled to a second examination of the Defendant upon faits & articles — it is the right of the Judge but not of the party to examine upon supplementary articles — refers to 1. Pigeau 234. — That the defendant being sued as Tutrix, she has declared her knowledge on the facts submitted to her, and having answered pointedly upon every Interrogatory, she cannot be brought up to be examined a second time. —

Stuart for Pltff. The answers of the Defendant are not conclusive nor pointed, and it being essential for the ends of Justice that the truth should be declared it therefore becomes necessary in this Case that the Defendant should be held to answer more fully and precisely than She has done upon several of the Interrogs proposed to her — Faits nouveaux may be put by the Judge where there appears ambiguity in the answers of the party — The Plaintiff is willing to submit the faits nouveaux to the Court, which he means to propose to the Defendt — in order that the same may be proposed as coming from the Court — cites. case, Blake. v. Beek.

The Court finding that the Defendant had answered fully to the several Interrogatories which had been heretofore proposed to her by the plaintiff, and considering the supplementary Interrogatories now offered, to be more calculated to supply a defect or omission in those first proposed, than to draw from the Defendant a more full and pointed answer thereto, they therefore rejected the plaintiffs motion — See Serpillon. p. 112 to 114 — N° 2

Friday 18th April 1817.

Whitney vs Chrysler } Action on Judgment rendered in the Supreme Court of New York.

An exemplification of the record and Judgment was certified under the hand of the Clerk and Seal of the Supreme Court of New York — This Seal and Signature of Clerk, and his official situation, were further certified under the hand of Smith Thompson the Chief Justice of the said Court; and Mr Tompkins the Governor of the State of New York, certified the hand writing and Signature of Mr Smith as Chief Justice under the Great Seal of the St State.

Four witnesses were called by the plaintiff who proved that they had often seen the same Seal affixed to official papers of the State of New York, and who gave it as their opinion and belief that the Seal affixed to the exemplification of the record now produced, to be the great Seal of the State of New York.

By the record it was stated that the Defendant had appeared and was heard by his Counsel in the Cause before the Supreme Court of New York.

Sullivan for the Defendant, contended that the record ought to have been certified under the Seal of the Union, and not under the Seal of the particular State of

of New York, as foreign Courts were not obliged to take notice of the Seals of particular States, but of the Seal of the United States, as they were known and considered by foreigners and in foreign Courts, as a body or nation, under their joint title, or name, of United States, but the Sub-divisions and individual arrangements of particular States would not be noticed. —

But the Court considered that the State of New York, although but one of the body or Union, yet was an independant State, having Courts of Justice regularly established, and that the acts and Judgments of such Courts when regularly brought forward and duly certified, must be received and considered as binding upon the parties thereto in this Court. — and it appearing that the Defendant was a party to the Suit and had been heard before the Supreme Court, the Court saw no reason why the Plaintiff ought not to have his Judgment here this Court — Judgt for Pltff

See. 2. Camps. N.P. 502. Molony. v. Gibbons —
October Term 1812 Trew v Gilman
April Term 1814 Hunter v Fry. —

Foucher
v.
Pothier

Action for a malicious prosecution, in having seized certain goods chattels and effects in the possession of the plaintiff, by virtue of an order of Scellé, obtained by the Defendant as Executor of the late Mr Foretier, against the effects belonging to his succession. —

Bedard for the Defendant, pleads for exception, 1. That the Defendant acting as Executor of the late Pierre Foretier, was entitled to obtain the Scellé — 2. Pigeau 266. — 2 Bourj: 297. — 6 Fer. Inst. Just. 129. — 2. That the plaintiff's action is premature, as he ought not to have instituted the same until the action brought by the Defendant, and in which the order for the Scellé was obtained should be first determined. 3. That the Plaintiff is not entitled to sue for damages in his own name, as the proceedings under the Scellé were had against him as Tutor to his daughter, he having no personal interest or right in the property in question — 4. Nor ought the Defendr to be sued in his individual capacity, the acts by him done, in suing out and proceeding on the Scellé, being done as Executor of the last will and Testament of the late Mr Foretier, in which capacity alone he can be answerable to the Plaintiff. —

The Court however were of opinion that the Defendant must be answerable in his own name for the tortious acts done by him, under whatever cloak or capacity he may have acted — and that the plaintiff had a right to his

action

action for damages done to him personally, although they may proceed from a malicious prosecution agt. him in his capacity of Tutor to his Daughter. —

Dargan- Injures Incidents. 503. —

Lamothe v. Kelly & Allen- Guardn

On Rule on the gardien to shew cause why an attachment should not be granted against him for not representing the effects seized and taken in execution at the Suit of the plaintiff, and which had been committed to the charge and custody of the Gardien.

It appearing by the return of the Sheriff, that the effects in question had been committed to the charge and custody of the Gardien, and that the same had not been given up when demanded, the Court made the Rule absolute. —

Cadron. vs Cadron

Action by the Plaintiff, a mineur emancipé against the Defendant who had been his Tutor, to render an account of the estate in his hands belonging to the said plaintiff. —

Bourré for Defendt. The plaintiff ought to have been assisted

assisted by a Curator or Tutor ad hoc, because although a mineur emancipé, may alone prosecute his rights in all matters touching personal property, yet where the realty is, or may be concerned, he ought to be assisted by a Curator; That the present action calls on the Defendant to render an account generally of all the property and estate belonging to the Plaintiff, under which the realty may come in question, and as the Plaintiff has not limited his demand to moveable property he ought to have procured the assistance of a Curator or Tutor to enable him to prosecute it, and therefore it ought to be dismissed — cites. 1 Pigeau. 65. — 2 Pigeau. 310. — 1 Bourj: 74.

Rolland for Plff. The action can be considered only for moveable property, and for this purpose the Plff is sufficiently authorised — 1 Bourj. 71. Repr. vo Curateur, and Dic: Droit. vo Emancipation. —

The Court considered that under the action brought the Defendant was liable to account as well for the real as for the moveable property of the Plaintiff, and therefore that it was necessary that the plaintiff should be assisted by a Curateur aux Causes — That the law made a distinction where the Minor was emancipated by marriage, or by the act of the Judge, as in the former case the minor did not require the assistance of a Curator, — The Court therefore directed, that before proceeding further in the action the Plaintiff should procure the appointment of a Curator to assist him —

Nouv: Denizt. vo Curatelle. §. 2. No 11. —
Repre vo Curateur. p. 195 —
1 Bourjn 71. — Lacombe. vo Mineur. 14. —
Nouv. Denizt. vo Emancipation. §. 5. No 7. 12 —

Marotte
vr
Monplaisir
& al'

Action for value of certain arrears of a rente & pension viagere —

Stuart for Defrs demurrs to declr as insuffe it not being therein stated between whom the deed of donation was passed upon which the arrears of rent became due — Because it is not stated for what consideration the Defdnts became bound and undertook to pay the said rente & pension, nor at what time the same became due. That the principle of the present demand for the payment in money of the articles alledged to be due and in arrear is inadmissible, inasmuchas the said articles are payable en nature, and the plaintiff is not entitled to recover the value in money without shewing that the Defendants were en demeure, which the Plaintiff has not done by his Declaration

Ross for the plaintiff contended that the declaration was sufficient and that he was entitled to the conclusions thereof. — That after the expiration of the day of payt the Defendants must be considered to be en demeure, no after demand being necessary to create such demeure, but if it were, yet it sufficiently appeared that such demand had been made —

The Court were of opinion, that although the declaration was loosely drawn, yet sufficient appeared on the face of it to maintain the action — and held that unless

it

it had appeared that a demand was stated to have been made on the Defendants for the delivery of the articles the action must have been dismissed, as a demeure was necessary to be established, before the Obligation of the debtor to pay an article en nature, could be converted into the payt of a sum of money as a damage in lieu thereof — The Exception was dismissed — Poth: Obl. № 143. —

Bragg
v
Davis

Action of assumpsit

The Defendant pleaded for exception, that the action could not be maintained, as there was no consideration stated to ground the promise and undertak[ing] of the Defendant. —

The plaintiff by his replication sets out the particular consideration upon which the undertaking of the Defendant was founded, namely the making of a certain lease, and with his replication files the lease —

The Defendant now moved that the lease should be taken from the fyles and rejected, as having been irregularly filed, as the same could not be admitted as an exhibit in support of the Plaintiffs demand, however necessary as every such paper or document in the possession

of

of the plaintiff ought to be filed with the declaration

The Court after hearing the parties directed that the exhibit should be taken from the fyles as having been fyled irregularly - it appearing that the same was an essential document to support the plaintiff's action and ought therefore to have been fyled at the return of the writ - As to the exception raised by the Defendt. the Court dismissed the same, the declaration being sufficient, although the exhibit filed therewith and upon which the undertaking of the Defendt. was laid, appeared not to be so, yet the exception could not apply to this, yet it was evident that it was so meant, which was improper, as it was pleading to the evidence -

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Boyd vs Jones.

Action on a promissory Note.

The plff's declaration was dated 21 March. 1816 and stated the note to be made on the sixteenth day of November last - In support of this demand, a note was produced in evidence, dated 16th Novr 1816 -, but this was held not sufficient, and the action was dismissed

Boston for plff
Grant for Defdt.

De Beaujeu vs Gauthier dux

Action for Cens rentes & Seigniorial rights. under a certain deed of Cession made by Franc. Marcille and Pierre Darpentigny to the Defendants, bearing date the 6th. Oct. 1812.

Lacroix for Defendants, pleads for exception, that before the bringing of the present action the Defendant Pierre Antoine Gauthier was and now still remains interdicted by act of 29th October 1811 — also because the wife of the said Pierre Antoine Gauthier not being authorised by her said husband is unable to plead to the action — Therfore the action cannot be maintained against the Defendants. — That the Plff well knew before the bringing of the present action that the Defendant Gauthier had been so interdicted, as the said plaintiff was on the said 29th day of October 1811, one of the Prothonotaries of this Court.

Bedard for Plff — Although the Defendant Gauthier, was at the time of bringing the present action interdicted the said action is nevertheless regularly brought and ought to be maintained against the Defendants, in asmuchas they are prosecuted in the same right and capacity in which they were parties to the deed of Cession of 29th October 1811, which was executed subsequent to the said Interdiction — That the Interdiction in question, is not for "cause de demence", but for "Cause de prodigalité", of which the plaintiff was not bound to take notice, nor had

he

he any knowledge thereof — and besides, Marie Josette Lalonde the wife of the Defendant Gauthier, who was — appointed his Curatrix, was present at the passing of the said deed, and is as well able to defend the present action as she was to pass that deed — That the wife does not want authority from her husband when she acts as his Curatrix cites, — Poth. Puiss.ce Mari: No. 75. — Denizt. v.o Nullité. no 12. 3. Guyot Fiefs. 477. No 3. —

The Court considering that the Defendts had been parties to the deed of 6th. Octr. 1812 upon which the Plaintiffs right of action accrued, in which deed the incapacity of the Defendant was not stated, and might therefore have been considered by the Plaintiff to have ceased; a day was therefore given to the plaintiff to put in suit the said Marie Josette Lalonde in her capacity of Curatrix to her said husband in order to defend the present action — Costs reserved. —

McIntire val' } v.s McDonald }

Action of Account — and to deliver up certain real Estates held by the Defendo which belong to Pltffs.

Ross for Pltff. The action is brought by the Plaintiffs as well as heirs of the late John McIntire their late father as Devisees of the late Sophia Murchison their mother to obtain from the

Defendt

Defendant, who had intermarried with the said Sophia Murchison, the possession of certain real property of which the said Defendant became possessed and which belonged to the said late John M'Intire and wife — and also to render to the Plaintiffs an account of the one half of the moveable property belonging to the Community which subsisted between the said John M'Intire and Sophia Murchisson, and which came to the hands of the said Defendant in consequence of his marriage with the said Sophia Murchison. The said Defendant was also sued in his capacity of Tutor to Grace M'Donald, minor child of his marriage with the said Sophia Murchisson, the said minor child having a claim on the Estate left by her said mother for a sum of twenty five pounds bequeathed to the said child by her said Mother —

Sullivan for the Defend. pleaded for exception to the action that the same was irregular and could not be maintained in the manner and form as instituted, because it was double — being against the Defendant personally, and also as Tutor to his minor child, which was irregular, as the Defr could be liable only in one of those capacities, and both could not be united in the same action, for what he did, or neglected to do in his own name, he was not answerable for as Tutor to his minor child, and the reason applies to what he did or neglected to do in his capacity of Tutor to his said Child —

Ross

Ross in reply - It was necessary to bring all the parties having an interest in the property before the Court, that their respective claims therein might be adjusted. here the Defendant acts in a double capacity and it was necessary that he should stand before the Court in both, this is the safest course, and there is nothing inconsistent in it, as the Defendant cannot be made liable for what in Law there is no obligation —

The Court dismissed the exception, as they considered the action regular, inasmuch as it tended not only to obtain an account from the Defr of certain property in his hands belonging to the Plaintiffs, but also to obtain payment of certain monies belonging to them the Plaintiffs as heirs & legatees of their late father and mother, and it was therefore fit and proper that all persons having claims on the said property or monies should be parties to the Suit that their interests therein might be preserved

Saturday 19th April 1817.

Vaillancour
vs
Drouin.

On the hearing of this Cause the Defr moved that the Serment suppletoire should be deferred to him, in consequence of the testimony adduced by him of the Plaintiff having made his mark to a certain receipt produced by the Defendant, in the presence of one witness (Maillour) such testimony forming a Semi-preuve in favor of the Defendant.

Rolland for Pltff contended that there was no room for the Serment suppletoire, the testimony referred to by the Defendant not constituting a Semi-preuve, nor any proof whatever in his favor refus to Danty. ch. 11. Som. 7. & 11.

The Court were of opinion that the proof made by the Defendant was not sufficient to admit him to his Serment Suppletoire.

There are different opinions and authorities which may apply to the point here determined, but the safer

seem

seem to reject the oath of the party — see the distinctions taken by Pothier on Nº 808. Tr. Ob. — where he considers the act of the notary, or rather of a private individual, certifying the writing not signed by the party, as no more than a "déposition de temoin" — in which case it can not be considered as making any proof — see what is said ~~said~~ in the Repv de Jur. Vo Preuve. p. 587. — On the other hand see. Poth. Ob. Nº 759 — Repv. Vo Preuve. p. 567 — Dic. Ferr. Vo Preuve — tit. Sem-preuve p. 452. —

Cantin val'
vs
Leonard
and
Contra.

This was an action brought by the plaintiffs as children and heirs of the late Marie Dufour dit Latour, against the Defendant, their father, for an account of the Community that had subsisted between him and his late wife the said Marie Dufour dit Latour. To this action the Defendant pleaded amongst other things, that he had accounted to the said plaintiffs for their respective rights in the said Community, and had paid to each of them their share therein; — And the question here was whether this defence had been sufficiently made out in proof —

The Defendant produced in evidence an Inventory of the said Community regularly made on 6th March 1793, also a Proces Verbal de Vente of the moveable property; at the bottom of the Inventory there was a brief statement made by the notary, before the Inventory was closed, of the State of the said Community and the share of each of the plffs therein — Agreeable to this Statement the Defendant paid to each of his said children at different times, their respective shares in the said Community, and took receipts from them accordingly; all his said children being at the time either of age, or acting under the authority of their husbands.

There

There was an Incidental demand made by the Defdt against Hétu, one of the plaintiffs, for an account of the Community that had subsisted between him and the late Monique Lemard his wife, the daughter of the Defendt and to rescind and annul a certain deed of transfer made by the said Defendant to the said Hetu of his rights in the succession of his said daughter, by reason of fraud and deceit practised on the Defendant by the said Hetu. —

Stuart for Plffs — referred to the general principle of law by which it is established that no receipt or discharge taken by a Tutor from his Pupil, can exonerate the Tutor unless an account in due form shall have been first duly rendered —. and that the Statement at the bottom of the Inventory, was not an account, nor contained any of the requisites of an account which a Tutor owes to his Pupil —

The Court considered the Statement at the bottom of the Inventory to be sufficient, on the following grounds.

1st — Because it was founded upon all the essential documents regarding the said Community, which had been produced and communicated to the parties

2d Because the said Statement, although it did not contain all the parts of an account formally rendered, yet was correct as to the share of each Child in the said Community. —

3dly

3ly Because the plaintiffs were of age or legally qualified to give the receipts in question to their father for their respective shares in the said Community, and to entitle them to come against their own act they ought to have shewn some error in the said account, or some injury arising to them from the said account not having been formally made —

4ly Because an account of a Communauté thus made and rendered by bref etat, and with communication of the documents upon which it is founded, is sufficient, when the parties agree to accept it in that form —

see. Nouv: Denizt. Vo "Compte". §.7. No 3. —
Lacombe. Vo "Restitution en Entier" No 4 —

The Ch. Just. differed in opinion from the Court upon the principle that every Tutor is bound to make and render an entire and perfect account to his pupil, and that the Statement in question could not be considered as such account — referred to —

Ordce 1667. Tit. 29. art. 5. 7. 8 —
Poth. Tr. des Personnes — p. 622.
Repse Vo Compte & Nullité §7. p. 262
2 Pigeau — p. 29. —
Serpillon. p. 551. — Tit. 29.
2. Bouje 603. No 122. 3. — and 692. no 98 —
Vredon. v. Damour — Judgt Oct. 1811
Drouin. v. Meloche — 1812

William Hall –
qui tam, &c –
vs
One barrel Pork, &
one barrel Flour. –
H: and Gates. Claimt

On Information against one barrel of Pork and one barrel of Flour, for having been illegally imported and brought from the United States of America into this Province –

Ross for the Informt – stated that the Flour and pork in question had been brought into this Province from the United States of America by a Circuitous route through the Province of Upper Canada, and that by the law now existing in regard of such importations, vizt – the Ordre 28. Geo. III. ch. 1 – these articles ought to have been imported by the way of St Johns –

Stuart for the Claimt – contended that the Ordre of 1788, could not apply, as it was meant to regulate only the immediate intercourse between the American States with the then Province of Quebec in regard of the importation of these and certain other articles but was never meant to apply to the importation of those articles from a Sister Colony – That since the passing of the said Ordinance the Province of

Upper

Canada had been erected into a separate and independant Province with legislative powers, under which a trade and Commerce was carried on between that Province and the United States of America, and according to which the flour and pork now seized, had been imported into that Province from the said States, and afterwards brought from the said Province into this Province of Lower Canada — That as the importation of these articles from the Province of Upper Canada into this Province was in nowise prohibited or restricted, the Court could not look beyond that point to enquire when the article grew, was manufactured or from whence it was imported into the said Colony of Upper Canada, as its identity was lost the moment it got into that Province — That the same principle held with regard to articles of the produce & manufacture of the United States of America, carried from Canada to the West Indies, which by a direct course are prohibited

The Court held that the restriction contained in the Ordinance of 28th of the King could not be extended beyond the object of regulation therein referred to, of a direct communication and intercourse between this Province and the United States of America — That the articles having been legally imported into the Upper Province were in law to be considered as the produce & manufacture

of

of that Province, on their importation from thence into this Province — This Province has no right to examine into the nature of the trade & intercourse carried on between the Upper Province and the United States of America, nor to impose any restrictions thereon, and what has been imported into the Upper Province becomes an object of legitimate trade with this Province unless expressly prohibited and as the importation of pork and flour into this Province from the Upper Province is not prohibited, the articles now seized must be delivered up to the claimant as his property —

See Skinner vs Bell. — 2. Burr. 1173.

Rouville vs Hardie. } Action to rescind the lease of a house under the Law Rédé. —

The Declaration stated that on the 10th Feby 1814, the plaintiff leased a certain dwelling house in the City of Montreal to the Defendant for the space of seven years — That on the 30th December 1816 the plaintiff being under the necessity of resuming the possession of the said house in order to live therein herself

herself, notified her intentions in this respect to the Defendant by the ministry of two public Notaries and required him to deliver up to her the Pleff on the first day of May 1817 the possession of the said house, which the said Defendant hath refused to do — Wherefore &c —

Plea — That Plaintiff doth not mean or intend to occupy the said house herself, and the mere allegation of such intention is not sufficient in Law to entitle her to the present action — That Plaintiff ought to state and shew that she is under the necessity of re-assuming the possession of her house — That the Defendant is not bound to deliver up to the Pleff the possession of the said house as demanded — and if he were, yet the action is premature and ought not to have been instituted until after the first of May 1817, the day on which the Plaintiff required that the said House should be so delivered up —

Referred to the Case of Fisher v. Dumont — 5. April 1805 — where it was laid down that the Lessor must shew a necessity arising from a change of Circumstances, or other Cause to entitle him to dislodge his Tenant under a Lease —

The

The court however held, that according as the law had been received and stood in France, the proof of a necessity, or change of circumstances in the situation of the Lessor, was dispensed with when he claimed the possession of the house for himself, differing in this respect from the requirements of the Civil Law, or Lex Fide.— The Court therefore considered that enough was stated in the declaration to entitle the plaintiff to her action — That the action was not premature in as much as the Defendant from the first intimation of the plaintiffs intention, denied and contested her right to have and obtain the possession of the said house, and by his plea still continues to contest and deny the same, and the Plaintiff was therefore interested to have this right ascertained with the Defendant from the moment he denied the same, as the question was open for litigation from that instant—

Judgt. for Plff—

See. Poth. Louage. № 329. —

Repert.re Vo Bail à Loyer. Sec. 12

Nouv: Denizt. Vo Bail à ferme & à loyer

§5. № 7.

Bedard vs
Delagrave

On action of account. —

This action was instituted against the Defendant by the Plaintiffs as Executors of the late Mr Fichette for an account of the effects which belonged to his Succession, and which the Defendant had been charged to sell and dispose of at public sale, after having made an Inventory thereof as a notary —

The Defendant not having rendered the account demanded within the time limited by the Judgment of the the Plaintiffs now moved that the Defendant should be contrainte par corps, until the said account should be rendered —

Stuart for the Defendant, contended, that the Defendant was not a comptable in this Case, not having acted in any capacity of Tutor, Curator or such like when by law he is considered as Comptable. Ordre 1667. Tit. 29. art. 1. — That even if he were a comptable, yet he cannot be held by his body to render such account, as by law in such case, the Plaintiffs could demand only the seizure & sale of the Defendants effects, but not the imprisonment of his person. — refus to. 8e art —

But the Court that the Defendant although he had not acted in any of the capacities mentioned in the 1er art. of 29e Tit. of Ordre of 1667 — he was —

nevertheless

nevertheless a comptable, and as such was contraignable par corps to the rendering and perfecting the account demanded, — The Plaintiffs motion was therefore granted —

See. Nouv: Denizt. vo Comptable. §1. No 1. —
Id. — vo Compte. §. 1. No 2.
Id. — " do — §. 2. No 1. —
2. Pigeau. p. 388. — Compte en general —

This Judgt was rendered in vacation under a consent of the parties to that effect. —

Friday 6th June 1817.

Terrien
vs
De Longueuil
& al'.

On the pertinency of certain faits et articles, proposed by the plaintiff to the Defendants.—

This was an action instituted agt the Defds as the representatives of the late David Alex. Grant Esq. to rescind a certain deed of Concession made by him to one Joubert, and a deed of Sale by Joubert to the plaintiff, of a certain lot of Land in the Barony of Longueuil, upon the ground that the same had been made and executed with a view to elude the provisions of the arret of the French King of 6th July 1711.—

The objection taken to the Interrogatories proposed was, that the facts proposed to be proved thereby were of a nature to impute an improper conduct in the parties concerned and to attach a stigma to their character, by thus contriving to elude the law — and further that the action was of a nature to effect a forfeiture of the lot of land in question, and therefore the Defendants could not be bound to answer to any

Interrogatories

Interrogatories which might tend to produce such forfeiture –

Bedard for Pluff, refers to cases already decided of Cartier vs Longueuil – and Brosseau, vs. Longueuil where the same points were settled – contends that there is no act of turpitude or of forfeiture in the case –

Ferguson
Milton

Monday 16th. June 1817.

Samothe
vr
Foucher.
and.
Gray, purchaser

By virtue of the writ of Execution sued out in this Cause, the Sheriff on the 1 June 1812 sold a certain lot of land to Mr Gray —

On the 15th February 1816, the purchaser obtained a rule on the Sheriff to shew Cause why he should not be held to amend his return by stating that a part of the land sold had not been delivered to the purchaser —

On the 14th April 1817, the Sheriff answered, that he could not alter or amend his return, that he had sold the premises as advertised and put the purchaser in the possession thereof — That the purchaser after such a lapse of time, might have lost the possession of the land in question by his own negligence or other Cause not within his, the Sheriffs knowledge, and therefore he was unable to alter his return. —

The Court held that the purchaser had delayed too long to obtain relief under this proceeding against the Sheriff and as it was stated that the land deficient was in the possession, the party must prosecute his right by some other course, as any act of the

Sheriff

Sheriff could not benefit him in regard of his title or claim against such third person — Rule discharged.

Hicks.. vs Cartier.. & Drolet Garant

Action of Trover and Conversion. —

The Plaintiff living in the State of Vermont one of the united States of America, lost a certain horse in that Country, which he afterwards found in the possession of the Defendant, against whom the plaintiff brought the present action — The defendant brought his suit en garantie against Drolet from whom he had purchased the horse by giving in exchange a certain mare. The Defendant also pleaded to the plaintiffs action, not guilty. The Garant pleaded, that before the action en garantie instituted agt. him he had offered to restore to the Defendt the mare which he, the Garant, had received in exchange from the Defendant for the horse in question, and that he the Defendant might if he saw fit contest the Plaintiffs right, but that he the Garant was not disposed to do so and therefore had made the said tender in order to avoid litigation and expence — which tender he reiterates by his plea, and thereupon prays that the plaintiffs action be dismissed with Costs —

On the hearing, the Defendant moved to

reject

reject from the record the depositions of three of the witnesses adduced on the part of the plaintiff — two of them because they were the relations of the plaintiff within the degrees prohibited by law, and the third because, he had instituted a complaint agt. the Defendant for an assault it being a principle that where a Witness has a Proces Criminel against any of the parties to the Suit, his testimony cannot be received — Contends, that if Defendt. shall be adjudged to restore to the Plaintiff the horse in question, his recourse against his Garant may be granted to him Potts. Vente. Nos 620. 622. 623 — Repre Vo Echange. p. 586.

Bedard for Garant. The action en Garantie ought to be dismissed, upon the Tender made by the Garant, and the Defendant held to pay costs, as he has entered into a contest with the plaintiff contrary to the express desire and intimation of the Garant

Sewell for the Plff — The testimony of the two witnesses the relations of the Plaintiff, must be admitted, as it goes to establish facts in a foreign Country, where such testimony would be received — namely the property of the plaintiff in the horse in question — of the plaintiff's having lost him — and the identity of the horse claimed now in the possession of the Defendant — That it is not a sufficient objection to the testimony of the other witness, that a criminal prosecution has been commenced against the Defendant for an assault, as this cannot be considered to be the prosecution of the witness, it being carried on in the name of the King, and the party complaining is admitted as a witness — That the only

case

case where the testimony of a witness was rejected by reason of a suit he might have depending agt. one of the parties, is, when that suit regards the determination of a similar right, as that in which the witness is called to give his testimony — 1 Pigeau. 281. 282. —

The Court rejected the defendants motion in regard of the depositions of the witnesses, considering the facts to be proved by them to be in a foreign County where such testimony is admissible, more particularly in regard of domestic animals, whose identity can seldom be proved except by some of the family to which they belong — as to the testimony of the other witness, the objection would go to his credibility, but not to his competency — The Court thereupon gave Judgment that the Defendant should deliver up to the Plaintiff the horse in question or pay the value thereof, being £25. — and the Costs — In the action en garantie, the Court adjudged the Garant to pay to the Defendant the sum of £25. — being the value of the horse at the time of bringing the action — The Court did not consider the tender made by the Garant as sufficient, because that tender being founded upon the principle of a rescision of the contract between the Defendant and Garant, was not a sufficient defence to the action — because the Defendant was entitled to his damages arising from the eviction of the horse in question by reason of the insufficiency of the title of the Garant, and these damages might be greater than the value of the thing regarding which the Contract had been made —

That

That this was the case in the present instance, it being in proof that the horse in question between the time he had come into the possession of the Defendant to the time of bringing the action, had increased in value from £15 to £25. — and this difference the Garant was by law bound to make good to the Plaintiff. That the Defendant was not bound to take back the mare he had given in exchange for the said horse, as there was no room for a rescision of the Contract between the parties although the Garant had failed to fulfill his part of it, and besides it was in proof that the mare was in a worse state than when so exchanged and had been sold by the Garant to another person — In regard of the Costs, the Court adjudged the Garant to reimburse to the Defendant all the Costs in both Suits, except the Costs and expences of the witnesses and enquete on the issue between the Plaintiff and Defendant, which the Defendant was adjudged to pay. —

Poths. Vente. Nº 130. 132. 133. —

Hart. v Belrose }

On the defendants motion to be discharged from his confinement in gaol in the District of Three Rivers where he is now held under a Ca: Sa: issued out of this Court. —

The Plaintiff obtained Judgment against the Defr on the 19th June 1815, for the amount of two promissory notes made and given by the Defendant to the plaintiff. —

On

on that Judgment the following proceedings were had

On the 21 July 1815, the Plaintiff sued out a Writ of execution against the goods and chattels of the Defendt addressed to the Sheriff of the District of Montreal — Upon this writ a return of "nulla bona", was made —

On the same day an execution was sued out agt the lands and tenements of the Defendant, addressed also to the said Sheriff, upon which a return of "nulla Tenementa", was made. —

On the 25th July — a writ of Ca: Sa. issued addressed to the said Sheriff upon which a return of "non est inventus" was made

On the 28th July, an alias Ca. Sa. issued, addressed to the Sheriff of the District of Three Rivers — who returned "That the Defendant could not be taken because closely "shut up in his house and refusing admittance". —

On the 13th October 1815, Another writ of Ca: Sa: issued, addressed to the said Sheriff of Three Rivers and returnable on 1st June 1816 — To this writ the said Sheriff returned — That he did not execute this writ, because the Defendant had lands and tenements then under discussion, and a sum of £128. 10. 6 in the hands of the Sheriff levied from his, the Defendant's, goods & chattels

On said 13th October 1815, another Execution

was

was sued out against the goods and chattels, lands and tenements of the Defendant, addressed to the said Sheriff of the district of Three Rivers, returnable 1st April 1816 — To this writ the said Sheriff returned — "That the said Defendt "had no other goods or chattels but such as were under seizure "at the time of receiving that writ — nor had he any other "lands or tenements but such as had been already seized and "which remained unsold by reason of certain Oppositions "returned into the Court of Kings Bench at Three Rivers "and yet undecided". —

On the 5th Augt 1816, another writ of Ca: Sa: was sued out, addressed to the said Sheriff of Three Rivers, under which the Defendant was arrested and confined in gaol, and from which arrest and confinement the Defendant now moved to be enlarged, as the same was irregular and illegal. —

The Court held the arrest and confinement of the Defendant to have been irregularly made and therefore granted the motion — upon the principle, that as it appeared by the return of the Sheriff of the district of Three Rivers, to the writ of Execution sued out against the Lands and Tenements of the Defendt, that the said Defendant was possessed of certain goods and chattels, lands and tenements in that district, the plaintiff was bound to have discussed the said goods and chattels lands and tenements

before

before he could sue out an execution against the body of the Defendant, under the Act^{e} of 1785.—

Hagar et al^{s} v^{s} Conroy.—

Action for monies had and received by the late Louis Chaboillez, husband of Defd^{t}. to the use of the Pltffs.—

The declaration stated a demand founded on the several money Counts, but contained no specific count upon any particular transaction.— The Plaintiffs filed no statement of their demand under the rules of practice, but filed a list of Exhibits with a promissory note made by one Cherrier to the plaintiffs, with the blank indorsement of the plaintiffs thereon.— It appeared in evidence that this note so indorsed had been delivered by the Plaintiffs to the late M^{r}. Chaboillez and that he had received the amount of it from the maker Cherrier.— The action was brought against the Defendant as the representative of the late M^{r}. Chaboillez to recover from her the amount of the monies so received by M^{r} Chaboillez, as being merely the agents of the Plaintiffs, and accountable to them for the monies so received.—

Stuart for Pltff.— The action is supported by the promissory note of Cherrier, the amount of which was received by the late M^{r}. Chaboillez and the Defendant

as

as holders of the note under the blank indorsement of the plaintiffs — The late Mr Chaboillez was not the proprietor of the note, nor could he become so under the blank indorsement of the plaintiffs, as such indorsement does not transfer the property in the note, either by the Laws of England or the Provincial Statute which is founded upon the same principle — cites Kyd on bills. p. 95 1 Esp. 31. — The only question therefore is in respect of the payment of the money to the late Mr Chaboillez & to the Defendant, which is made out by the testimony as well of Cherrier himself as of one Desbantels who was agent for the Defendant —

Quesnel for Defend^t — did not file any plea, but observed that irregular evidence had been admitted and therefore the Plaintiffs action could not be supported — That the action as laid in the declaration was on a general assumpsit, there was no Count or demande founded upon any particular Contract, but to prove this general assumpsit, a particular contract ~~in~~ writing had been produced and given in evidence, this was, Mr Cherrier's note of hand — now according to the principles of practice established in this Court, no particular Contract can be produced in evidence on a general assumpsit, but such particular Contract must be declared upon, before proof of it can be admitted — cites case of Hammond v. Wilson.

That

That neither the Defendant nor the late M. Chaboillez were merchants, so as to render the transaction in question a Commercial transaction — the proof must therefore be such as established by the law of the Country, which requires written evidence of all facts touching matters above 100 livres — now the writing here produced is not the writing declared upon and cannot therefore be received in evidence — if this be admit. as will might a deposit, or any other act or promise be proved under an action of general assumpsit — If the case is to be considered as Commercial, still the Pltffs cannot recover under the present form of action — they ought to have brought a special action on the Case in order to be let into the proof of the Special circumstances — cites Gilb. Ev. 161. 2 Comyn. on Cont. 3. 4. Comps. Rep. 414. 818. — 4. Burr. 1984 — The Defendant is stated to be sued as Tutrix, but there is no regular proof made of her being Tutrix, no acte de Tutelle, being filed with the declaration — Objects to the testimony of Currier and Deshautels as interested Witnesses, as by their testimony they exonerate themselves and charge another person — That the promissory note in question must be considered as being the property of the late M. Chaboillez, he having received the same from the Pltffs with their indorsement upon it, which in law transfers the property unless otherwise agreed — cites Lovelass on Bills. p. 8. & 126. — That by the Provincial Stat. of 36. Geo. ch. a promissory note, made & subscribed

by

by a merchant or Trader, may be afterwards transferred by a blank indorsment, so far as to entitle the holder under such blank indorsement to his action against the Drawer or any other party to the note — now it is in evidence, that Cherrier, the maker of the note here was a merchant, if so, the note was legally transferred by the Plaintiffs by their blank indorsment to Chaboilloz, so as to entitle to his action agt Cherrier, or to receive the amount of the note from him. So that whether the case be considered Commercial or not the action cannot be maintained —

Stuart in reply — The action is not founded on any special contract between the parties, but upon a fact, of the receipt of money by the late Mr. Chaboiller on account of the Plaintiffs — To prove this Mr. Cherrier is brought up as a witness, having in his possession the note of hand in question with Mr Chaboilloz's receipts on the back of it for part of the money, and the receipt of the Defendts agent for the balance — and to prevent surprise on the Defendant, and to shew the nature of the evidence to be adduced, and the transaction on which the money was received, the Plaintiffs filed with their declaration a copy of Cherrier's note with the Receipts and Indorsement upon it, although strictly speaking they were not bound to do so, as the said note was not a paper of which they had the custody, nor which belonged to them, it having become the property of Cherrier by his having paid the amount of it — This was a sufficient statement even according to the requirement of the Rules

of

of practice — as to the Defendants capacity of Tutrix it was not necessary that this should be ascertained by any written document filed of record by the Plffs in bringing their action, it was sufficient to give evidence of the fact when denied — That a blank indorsment does not transfer the property of a note either by the laws of England or of Canada — That Cherrier was a good witness after having paid the debt, so also was Desbarats, who was a mere agent and without any interest —

The Court held that although by the Rules of Practice in all actions of assumpsit founded on the money Counts, a statement of the particular sum due and intended to be proved ought to be filed, yet in fact this had been complied with in the present instance by the filing of the particular exhibit which was given in evidence, namely Cherrier's note of hand, with the receipts thereon — That the admitting evidence of the payments made on this note by Cherrier, was not contrary to any established principle of practice or adjudged case in Court, as the execution of that contract was not demanded, nor was the validity of it anywise in question, it was incidentally only brought under consideration as the channel through which the late Mr. Chaboilly received the money in question,

it

it therefore did not appear necessary to have stated this note in the declaration, more especially as the plaintiffs were not in the possession of it — That in the present instance it was not necessary to enter into the consideration of the question whether a blank indorsement transferred the property of the note to the holder, as by the evidence before the court it appeared that the late Mr. Chabouiller had acknowledged that he had received the said note in order to recover the amount thereof for the use and benefit of the plaintiffs — this shews that the Defendt became accountable for the money so received, and the only remaining question is whether the late Mr Chabouiller and the Defendant received the whole amount, and on this point the evidence appears to be sufficient to warrant a Judgment for the Pltffs —

Judgt for Pltffs —

—

See cases on question whether a blank indorsement transfers the property of the note —

1 Salk. 130. — Lucas. v. Haynes —
12. Mod. Rep. 192. 3. Clerk. v. Pigot —

=

See on the other hand —

Doug. Rep. 633 — 6. Peacock. v. Rhodes
6. T. Rep. 21. on note — & Bulle
Chitty on bills. 103 — Evans Essays on bills. p. 14
Kyd on Bills. 89. —

Emery dux. et
vs
Archambaut. } Action for arrears of rente & pension viagere.

In this Case it was held, that articles of rente et pension viagere, payable, au besoin of the Donors, were payable on demand, the besoin being considered as tantamount to the will of the party.

Malbouf
vs
Clement } Action to recover possession of three pews. a

This action was brought by the plaintiff, as being the marguillier en charge de l'Oeuvre & fabrique of the parish of St. Louis de Terrebonne to recover from the Defendant the possession of three certain pews which he held and possessed in the church of that parish besides the pew occupied and used by him and his family —

Papineau of Counsel for Pltff — It is contrary to common right that one parishioner should possess more than one banc or pew in the Church — The Defendant holds three besides one used by his family — these three the Defendant must give up — there can be no title set up to a banc d'eglise under possession however long — cites Durand de Maillane. vo Fabrique — The Defendant

has

has produced no deed of Concession or title from the Church wardens to hold those pews, which alone could authorise him to hold them. Id. vo Banc. — No possession can avail a parishioner against the Church, although it may be sufficient against another parishioner — cits. Loret sur Brodeau let. A. Som. 9. Denizt. vo Banc d'Eglise. No 1. 2. 3. — Nouv. Denizt. Id. §. 3. —

Lacroix for Defendt — The Plaintiff is not authorised to prosecute the present action, as there was no assemblée or meeting had of the Old marguilliers to warrant the prosecution cits. Denizt. vo Marguillier. No 40. & 42. —

The present action cannot be maintained as an action petitoire, the Plaintiff shews no title, no authority to support it — it can be considered only as an action possessoire, and as such cannot be mainted against the Defendt as by the evidence it appears that he is not in possession, nor has been in possession for many years, of the pews in question — That the Defendant acquired the possession of the said three pews by having become the adjudicataire thereof about 25 years ago, but gave up his right thereto in favor of other parishioners who since that time have occupied and possessed the said pews and paid the rent thereof annually to the Church, and therefore the present action ought to be directed agt the persons in possession and not against the Defendant, nor can any Judgt rendered against the Defendant in regard of the said pews be made executory against persons not parties to this Suit —

Bedard

Bedard for Pltff in reply — The authority of the Plaintiff is sufficiently established to bring the present action under the assemblée de marguilliers, which was held for this purpose — The only question raised by the Defendant is in regard of his possession of the pews in question, as he seems to admit the principle of the action, that he has no right to possess the pews — but this defence must also fail him, because it appears by the evidence, that although the Defendant does not actually possess those pews himself, yet the Church can know no other occupier, as he has regularly paid the rents thereof to the Church and taken receipts therefor in his own name for these last twenty years and upwards — the persons occupying those pews can therefore be considered only as the servants of the Defendant, or persons occupying in his name — It also appears by a protest made at the instance of the Defendant agt the Pltff on 23e Febv 1816, that the Defendant claimed the possession of the said three pews as belonging to him —

The Court were of opinion that the action was well founded, and therefore gave Judgt for the Pltff

1. That the plaintiff had sufficient authority under the acte de delberation of the Church wardens, to prosecute the present action. —

2. That

2d. That according to the Common law principle, a parishioner is entitled to the occupation of no more than one pew in the Church, which must apply here as nothing has been set up by the Defendant to controvert this principle.

3d. That under the evidence adduced the Defendant must be considered the possessor of the said pews, and must therefore be adjudged to deliver them up to the Church —

Caillé & ux.
vs
Bertrand & ux
and
Mattre mis en Cause.

Action of Account.

This action was instituted by Pascal Caillé, and Marie Anne Cotté his wife, daughter of the late Ignace Cotté and Rose Pinconneau to obtain from the Defendants Louis Bertrand and Rosalie Lefevre his wife, a daughter of the said Rose Pinconneau by Jos. Lefevre her first husband, an account of the Community which subsisted between the said late Ignace Cotté and Rose Pinconneau, as to all the rights of the said Marie Anne Cotté in the Succession of the said late Rose Pinconneau, they the said Defendants having taken possession of all the property and Estate left by the said Ignace Cotté and Rose Pinconneau —

By Judgt. of the 20th April 1815, the Defendants were ordered to make and render to the Plaintiffs on or before the first day of the then next June Term, the account demanded —

In June Term 1815, the Defendants moved that they might be permitted to fyle a plea of exception to the Plaintiffs action, in consequence of certain Facts having come to the knowledge of the Defendants since the issue joined on the former plea, namely, that since the institution of the present action, the Plaintiffs had sold and transferred all their right and interest in the Successions in question to one Pierre Mathe, by act of 6th December 1814, for and in consideration of a sum of 1200. livres, and therefore that the Defendts were entitled to be liberated from the present action on payment of that sum, without being held to render the account directed by the said Judgt. of the 20th April 1815 — the rights so transferred being Droit Litigieux.

This motion was granted and the parties having afterwards been heard upon the matters stated in the Plea so filed, it was ordered that the said Pierre Mathe should be made a party to the Cause at the instance and diligence of the Defendants, —

9 Oct. 1816

And afterwards on the first day of February

Term

Term last the said Pierre Matte having been put in Suit as a party interested, and the Defendants by their Declaration in this behalf having demanded that the conclusions of their said Plea or Exception should be adjudged to them against the said Pierre Matte, and thereupon that the action and demand aforesaid of the said Plaintiffs should be dismissed with Costs

The Court after hearing the parties held that the act of Transport of the 6th. Decr. 1814 by the Plaintiff to the said Pre Matte was a transport de droits litigieux and therefore that the Defendants were entitled to all the benefit of that transport by reimbursing to the said Pre Matte what he had paid for the same, and Judgment was entered accordingly —

See. Dec. Droit. Vo Transport de Droits litigieux
Potts. Cont. Vente. Nos 186. & Nos 583. 584.
Domat. liv. 1. tit. 2. sec. 10. No 34. —

Thursday 19th. June 1817.

Payan & St. Ouze
vs
Martin.

Action by Pltff, as special Tutor appointed under an order of the Judge, to his minor child to prosecute this action, for assault & false assault

Rolland for Defendt. pleaded for exception to the action that the same could not be maintained by the Plaintiff as Tutor inasmuchas his appointment as such was irregular, having been made without any avis de parens - cites. 1. Bourj: 46. - 1 Pigeau. 69. Repre. Vo. avis de Parens. - 1 Bourj. 54. dist. 6. - Repre Vo. Mineur - 1 Pigeau. 70.

Bedard for Pltff - The Tutelle is dative en Pais Coutumier and must be made by the authority of the Judge - That the authorities cited by the Defendant do not apply to the special but to the general appointment of the Tutor, in which the avis de parens is necessary, but in all proceedings to be had in a Court of Justice touching the interests of the minor, the Judge can, appoint a Tutor to assist the minor, without any avis de parens cites. Just. Instit: by Ferr. liv. 1. Tit. 23. par. 2. p. 371.

The Court considered the appointment of the Plaintiff as Tutor for the purposes of this Suit sufficiently made, it being merely for the regularity of the proceedings, and without any administration of property attached to it, in which case the Judge was competent to make the appointment without avis de Parens.

Bechart
v.
Perrault

Action for monies laid out and expended on acct of Defendant, on a certain deed of Sale & Judgt

The Pltff states by his declaration, that by deed of Sale of 16th April 1816, he purchased from the Defendant a certain lot of land for which he paid to the said Defendt a sum of 4000 livres —

That in June Term 1816, one Joseph Bechart obtained Judgt in this Court agt the said plaintiff for a sum of £12.10 in consequence whereof the aforsaid lot of land was seized and taken in execution and afterwards sold for a sum of 2400 livres.

That out of the monies so levied there was paid and deducted to Madame De Longueuil for lots et Ventes and to Louis Honoré Joubert for his rights on the said land as bailleur du fond a sum of £81. 9. 11½ as stated in a certain Judgment of distribution of 18th April 1817 — all which is ascertained by the Judgments and different acts filed by the Plaintiff. —

That the plaintiff is founded in demanding from the said Defendant, the said Sum of £81. 9. 11½, as being so much taken out of the proceeds of the said lot of land sold as aforsaid, with interest thereon from the said 18th day of April 1817 —

Stuart for Defendt excepted to the declaration as insufficient inasmuchas it was not therein stated or shewn, that the monies which were adjudged to Madame de Longueuil and Louis Honoré Joubert on the aforsaid Judgment of Distribution of 18th April 1817, was for a debt which the Defendant owed

to

to the said Madame De Longueuil and L. H. Joubert and which they had a right to claim out of the monies arising from the Sale of the said lot of land.

And after hearing the parties the Court were of opinion with the Defendant as to the insufficiency of the declaration, and therefore dismissed the action. —

Belisle, Tutor &c.
vs.
Roger &ux — } Action of account. —

This was an action instituted by the Plaintiff as Tutor to the minor Children of the late Belisle his brother, deceased, against the Defendants Jos: Roger dit Latouche and his wife, widow of the said late Belisle to obtain from them an Inventory and account of the property of the Community which subsisted between the deceased and the Defendants wife — Upon the marriage of the widow of the said late Belisle, with the Defendant, the plaintiff who had been appointed the Sub-Tutor to the said minor Children, presented a petition to the Judge praying that a new appointment of a Tutor to the said Minors should be had, as by her second marriage the widow had lost her appointment as their Tutrix, and upon this petition a new election was had without

without the knowledge or consent of the said widow or of her husband, when the said plaintiff was appointed Tutor to the said minor children, and thereupon instituted the present action.—

L. M. Vigé for the Defendants, pleaded fin exception that the plaintiff could not have or maintain his action against the Defendants inasmuchas his nomination and appointment as Tutor to the said minor children was irregular and illegal and gave him no right of action against the Defendants— That the widow by her second marriage did not lose the tutelle of her children, as no Judgment had been rendered agt her which deprived her of that right— That the penalty of being ipso facto deprived of the tutelle of minor Children by a second marriage, existed only in the Civil Law, or Pais de Droit Ecrit, but not under the Customary Law. 1. Bouj: 59— That the widow is not deprived of her right of Tutelle by her second marriage except when her husband wastes & dissipates the property of the minors — 1. Bouj. 42. 59. — 2. Pigeau 27. — It is also a principle of Law that the second husband is bound jointly with the widow for her administration, which could not hold, if the tutelle and consequently all administration under it, ceased to exist from the moment of the second

marriage

marriage - Denvt. Vo Tutelle. No 56. - That even had the right of Tutelle ceased by the intermarriage of the Defendants, yet the appointment of the Plff as Tutor was irregular, having been made without any notice or communication given to the Defendants, and under such an irregular appointment the plaintiff cannot maintain any action against the Defendants -

Rolland for Plff - The authorities of law are numerous and precise to shew that the widow by her second marriage loses the Tutelle of her minor Children

cites - 2. Pigeau. 27. -
Ferrare. Vo Tutelle. -
Repre Vo Tutelle. Sec. 2. §. 2. p. 311.
" Sec. 3. §. 2. p. 316 -
1 Bouj. p. 482. art. 1. ch. 2. Sec. 1. dist 3. No 15. 16.

That if the appointment of the plaintiff as Tutor was irregular, it was a cause of destitution and for proceeding to a new appointment, but the appointment must hold in the mean time, and this Court cannot examine into the validity of it under this exception -

The Court held that the validity or regularity of the Plaintiff's appointment as Curator could not be enquired into under the present exception, that the plaintiff holding the appointment under legal authority was

warranted

1 Mesle. 115. Fer. Jr. Jut, P. 125.

warranted to institute the present action and do all legal acts as Tutor until he should be deprived, "destitué," of that appointment — That a course was pointed out by law for setting aside an illegal or irregular appointment of a Tutor, and the Defendants must take that course if they are aggrieved by the appointment of the Plaintiff — Exception dismissed. —

Plenderleath.
vs
Burton —
and
Turnstall & ux.
Oppos^ts

On Opposition afin d'annuller. —

The Sheriff having seized and taken in execution certain real estate belonging to the Defendant by virtue of the Writ of Execution sued out in this cause, caused the same to be advertised for Sale, subject to the following among other charges, viz^t — "charged also with the payment "of eleven thousand one hundred and eleven pounds "two shillings and two pence Currency, one half of "which last mentioned sum (bearing interest to be "discharged half yearly,) is to be paid to the heirs of "Sarah Christie wife of the reverend James Turnstall "at her decease; and the other half of the said Sum

(bearing

" bearing interest to be discharged in the like manner)
" is to be paid to the heirs of Catherine Christie, widow
" of the late Col. John Robertson, at her decease, in —
" conformity to an act or transaction, passed before Papineau
" and Barron, notaries, bearing date the 8th. day of Augt
" 1800. — To this charge the said James Tunstall
and wife made the following opposition. —

The opposition stated, that the late General Christie on 13th. May 1789 in the City of London, made his last will and Testament, and thereby amongst other things gave and bequeathed to certain Trustees therein named, a sum of five thousand pounds Sterling to be secured and placed out upon Government Funds or Parliament any security, the interest whereof to be paid yearly to Sarah wife of the Testator during her life time, and after her decease, one half of the said Interest to be paid to the said Sarah Christie the oppost and on her decease, the one half of the said principal sum of five thousand pounds to be paid to the heirs of the said Opposant — That the said Testator did also will and bequeath to the said Opposant the sum of two thousand five hundred pounds like Sterling money, to be paid to her upon her attaining the age of majority, or upon her marriage — That the said Testator did appoint the Defendant in this Cause, Napier Christie Burton, his

universal

universal Legatee — That after the decease of the said General Christie, which happened on the 19th Janv 1799, the said Trustees having refused to act, the said Sarah wife of the said Testator, by an act or agreement made and passed before Papineau & Barron notaries, bearing date the 8th Augt 1800, between her and the said Defendt it was amongst other things stipulated and agreed, that the aforesaid sum of five thousand pounds Sterling of which the interest was directed to be paid to her annually by the aforesaid last will and Testament, should remain vested and secured upon the real Estate of the said Defendant which had been devised to him by the said Testator, he the said Defendt undertaking to pay to the said Sarah during her life time the interest of the said Sum of money, and after her decease to pay & continue the said interest to the said Opposant and her Sister Catherine Christie in equal halves, and on the decease of each of them to pay the one half of the said principal to their respective heirs, in conformity to the aforesaid last will and Testament — That the said Sarah the Opposant, by and with the consent assistance and authority of the said James Tunstall her husband intervened and became a party to the said act and approved and confirmed the same — and further consented and agreed that the aforesaid sum of two thousand five

hundred

hundred pounds given and bequeathed to her the said Oppost. and to be paid to her when she came of age or was married, should remain vested and secured in the same manner as the aforesaid sum of five thousand pounds, in order that the interest thereof should be paid to her annually during her life time and the principal to her heirs after her decease.

That the right of the said Opposant as Creditor of the said Defendant, is only that of a moveable and hypothecary claim upon the property of the late General Christie in the hands of the Defendant, but which does not operate or create any right of servitude, ground rent, real right, nor any burden or charge upon the property of the Defendt. That nevertheless the Sheriff of this district had advertised the lands seized by him under the writ of Execution sued out in this Cause, to be sold subject to the payment of the interest of the sum of five thousand pounds to the Opposant during her life time and the principal to her heirs after her decease according to the aforesaid agreement of 8th. Augt. 1800.

That the said Opposant is entitled to claim and demand that the aforesaid premises so seized and taken in execution be not sold subject to the aforesaid charge or burden, inasmuchas the right of the said Opposant upon the said premises not being a servitude or burden thereon, but a moveable hypothecary claim, she is therefore entitled to have and receive out of the proceeds of the Sale, the aforesaid principal sum of money

That should the said lands and tenements so seized and taken in execution be sold subject to the payt. of the said

interest

interest and principal in the manner as advertised, the said Opposant will be deprived of the full benefit she would otherwise be entitled to of a mortgage upon all the other property of the late General Christie in the hands of the Defend^r., and her right of mortgage limited to that part only upon which the burden of the payment of the aforesaid principal Sum of money and interest shall be assigned —

That the intervention of the said Opposant in the aforesaid act or agreement of 8^r Aug^t. 1800, cannot be considered, nor was the same meant or intended to alter the rights of the Opposant under the aforesaid last will and Testament — and because that part of the said act or agreement by which it is stipulated that the aforesaid sum of two thousand five hundred pounds which had been bequeathed by the said last will and testament to the said Opposant, should be paid to the heirs of the said Opposant after her death, is null and void in law, as it gave no right to her heirs, they were not parties to that act, nor could it operate as a donation in their favour, nor could it convey to them any right to the said sum of money —

That the said Defendant by procuring the Sale of the said lands and tenements to be made subject to the said charge would thereby exonerate himself from his personal Obligation to pay to the said Opposant the said Sum of money, and oblige her without her consent to change the person of her debtor.

And finally because on a certain opposition made by the said Sarah Christie to the Sale of a part of the said lands

and

and tenements in a certain cause wherein Agathe Dumas was plaintiff, the said Napier Christie Burton, Defendant, and the said Sarah Christie, Opposant, this Court by its Jugt rendered on the 19th. October 1813, declared the right of claim aforesaid of the said Opposant, did not operate a claim or opposition afin de charge, but only afin de conserver —

Wherefore prays that the seizure and sale in manner as aforesaid of the said lands and tenements be set aside as irregular, and that the rights of the said Opposant in the said sum of money be reserved to her —

Rolland for Defendt. contended that the act or agreement between the parties of 8th. Augt. 1800 was a complete bar to the present Opposition — that the rights of the Opposant under that agreement were in nowise altered changed or injured by the proposed Sale of the Defendants Lands and Tenements, and therefore the Opposant could not be admitted to alter what she had acceded to by the said agreement cites — Potts. Hyp. ch. 3 — Obl. Nº 564 —

The Court held that the stipulations in the act of agreement of 8th Augt. 1800, were binding upon all the parties — That it was with a view no doubt to accomodate the Defendant that the Opposant consented that the principal sum of money due to her under the said Will should remain vested upon the property of the Defendant

and

and be paid to her children after death, this was a valid arrangement particularly when considered to be made by the Children of the same family touching the property left them by their father — Nothing therefore can change this arrangement but the same consent by which it was made, unless some unfair advantage were intended to be taken or some injury done to the Opposant under the Sale of the Defendants Lands and Tenements as advertised under the execution sued out in this cause — but this does not appear to the Court — the rights of the Opposant cannot be affected nor injured in anyway by this Sale, nor can it limit any recourse she might otherwise have had in regard of the monies she claims — her Opposition is therefore not founded and must be dismissed —

Ferguson
vs
Millar et al

On action ag^{t} Defendants as special bail —

The Defendants moved that they might now be permitted to surrender the body of one Malcolm Macdonell the original debtor now present in Court, and that a rule might be granted to them on the Plaintiff to shew Cause to morrow why all proceedings against the

the Defendants in this action should not be stayed in consequence of such surrender and the payment of Costs up to this day—

Mr Boston for Pluff, stated, that although he was not bound to take notice of the present application to the Court, yet he thought it proper to state that the present application could not be granted, being made too late — that the Judgment against the principal debtor had been rendered upwards of two Years ago, and a "non est inventus," returned upon the Ca. Sa. issued thereon — that the Defendants as his bail were thus become personally liable for the Debt, and an offer to surrender the body of the debtor was too late, and could be of no avail to the Defendants —

Stuart for the Defendants, observed, That the bail have an undoubted right to surrender the body of the debtor, and the question hereafter will be discussed whether that surrender was in time or not — at present however it is consequence that this surrender should be allowed because the Defendants at this moment find their Debtor here in Court, but they may not be able to produce him at another day — the application therefore ought to be granted saving the rights of all parties, until a hearing shall be had on the rule Nisi now prayed for

The Court permitted the surrender to be made, saving the rights of the parties — and granted the rule to shew Cause —

Friday 20th June 1817.

Bertrand Curatrix. — v. Bautron, dr Major.

Action by Plaintiff, as Curatrix to her husband, interdicted from cause of insanity, for arrears of rente & pension viagere.

Lacroix for Defendant, pleaded, that the wife cannot be appointed Curatrix of her husband nor can she in that capacity institute any action as she requires the authority of her husband for this purpose, her appointment of Curatrix cannot supply this defect — cites Domat. lw. 2. Som. 2. Sec. 1. Tit. Curateurs. — 1. Argou. 73. — 2. Pigeau. 91. — 1. Bourj: 77.

But the Court considered the appointment of the Plaintiff as Curatrix to be legal, and in that Capacity, that she was entitled to maintain the present action agt. the Defendant —

Sec. Denizart. Vo Interdiction. No 51. 52. —
2. Mesle — Minorité. p. 13. —
Repre. Vo Interdiction. p. 442. —

Brook. &
v.
Brook. &
and
Platt Opp.t.

The Defendant moved that the monies arising from the Sale of his lands and tenements, should be paid over to him on his giving security to bring back the same agreeable to any order to be made thereon. &

Bedard for the Defendant, stated as the grounds of this motion, — that all the Defendants real Estate has been sold under the writ of execution sued out in this Cause, the proceeds whereof much exceeded the amount of the plaintiff's demand, so that the Defend.r was now without the means of subsistence except what might accrue to him from the said proceeds. & That the only objection to the present motion was on the part of the Opposant, the wife of the Defendant, who had instituted an action of Separation a.z.t. him, and under this pretence claimed one half of all the Defend.rs estate as her property, and as the said property had been sold at the suit of the plaintiff, she had made her Opposition in this cause claiming her rights on the proceeds, according as the same shall be adjudged to her upon her said action en Separation — That the event of the Suit so brought is not only uncertain in regard of the rights so claimed by the Opposant,

but

but might be drawn out into a long and tedious discussion, which would reduce the Defendant to great necessity, unless he could have the use of the monies levied by the Sheriff in the mean time, as the interest of that money would be sufficient for his subsistence — That the Plaintiff is willing to — accede to the present motion on the Security offered by the Defendant. —

Stuart for Oppos^{t} — The rights of the opposant in this Case remain to be determined, and till then the Court cannot dispose of the monies in question, as the most serious injury might result to the Oppos^{t}. That the sale of the Defendant's property in this Case, has been effected by fraud and collusion, and with a view to deprive the Opposant of her just rights therein, and the Circumstances of this Sale constitute one of the Opposant's grounds of complaint, and shews how necessary it is that this money ought never to be permitted to be withdrawn from this Court until the rights of the parties shall have been — determined upon. — That it is not usual for the Court to direct the payment of monies to any of the parties in a Suit before the determination thereof except in the Cases of alimentary allowance — and

even

even in that case it is done with a sparing hand, but in this Case the Defendant, who has no right to complain if he permitted all his property to be sold claims that the whole shall be handed over to him for his use; such a demand is unprecedented, and if granted would tend to embarass the Opposant in her claim for Justin —

Ross for the Plaintiff consents that the Defendants motion be granted —

By the Court — The consent of the plaintiff to this motion has removed the principal difficulty — the only question now to be looked to, is, whether the claim of the wife for a separation ought so far to tie up the property of the husband as to prevent his enjoying it, from an apprehension of injury to arise to the wife — the property sold being stated to have been community property the husband is entitled to enjoy the proceeds, as from it he derives a means of subsistence as well for himself as for his wife, and if any presumption can be taken in this case it must be in favor of the husband, as the law will not presume that the husband has committed an unjust or an illegal act in order to deprive the Opposant of her rights, or give grounds of Complaint for a separation — The right of the husband cannot be controverted by the wife until she shall have established her claim, and therefore the Court see no difficulty in granting the Defend^{ts} motion

Bragg vr Davis.

Action of Special assumpsit.

The declaration stated that on the 28th. day of January 1817, the defendant by his certain act or undertaking in writing, of that date, signed & subscribed by him, for a valuable consideration by him had, did undertake and promise to pay to the pltff, by the name and description of, "Mr I. Bragg," the sum of fifty pounds Halifax Currency, and then and there delivered the said act to him the said plaintiff, then present and accepting of the same - by reason whereof the said pltff became and now is entitled to have and recover from the Defendt the sum of fifty pounds. Current money aforesaid —

Plea - Non-assumpsit —

The writing produced in evidence by the Pltff to support his declaration, was as follows -

"Mr S. Davis agrees that he is to pay Mr
" I Bragg the sum of fifty pounds Halifax Currency
" separate from the lease — Montreal the 28th. day of
" January 1817." — "Simon Davis" —

The plaintiff on the enquête day, besides proving the above exhibit, entered into evidence to shew upon

what

what considerations the said undertaking had been made, namely, the assignment of a certain lease made by the plaintiff to the Defendant, which the plaintiff held of a certain farm at Longue Pointe in the parish of Montreal —

To this testimony the Defendant objected,

1st That it was giving evidence of a consideration not stated in the declaration, nor expressed in the paper writing filed by the Plaintiff in support of his demand —

2. That it was giving evidence of Contracts, leases and undertakings exceeding a sum of an hundred livres, and as the said Contracts, leases, & undertakings have not been declared upon, nor produced before this Court in evidence, verbal testimony of their existence and contents cannot be admitted —

And of this Opinion was the Court and rejected the testemony objected to, as being inadmissible and after hearing the parties, dismissed the Plaintiffs action, as no valid consideration had been proved for the undertaking of the Defendant —

Boston for Pltff.

Bowen for Defdt

Lamontagne v. Whitney. }

On action to rescind a deed of Lease in consequence of the Defendant's having infringed the stipulation therein contained not to under-lett the premisis.

The Court on the evidence adduced gave Judgt for the plaintiff, considering the principle of law to be as stated by the Plaintiff —

see. Poth. Louage — Nº 283.

Denizt. Vº Bail à Loyer. Nº 12. & Suiv.

Repse Vº Id' _____ p. 32.

Ferrière Vº Bail —

Bourjon. Tit. A. Ch. 2. sec. 5. art. 17.

Du _____ dº — sec. 6. art. 20. & suiv.

Du _____ dº — Ch. 6. sec. 1. art. 12.

French v. Conant } val'.

On Saisie arret. for board & lodging —

Under the writ of attachment sued out in this cause the movements of a Carding mill were attached and seized as belonging to the Defendants —

the

The machinery was put up in a house rented by the Defendants, and fixed thereto by screws so as to steady the whole and fit it for working; the wheels could easily be detached from the building, and carried from one place to another and were contrived for this purpose —

The Court, upon the objection taken that the above machinery was not a moveable and therefore not liable to seizure, held that it was a moveable, and held the attachment good. —

Marcotte
vs
Lebeau.

Debt on deed of sale of a "coupe de bois." —

Lacroix for the Defendant pleaded nil. deb: and further that by the deed of sale in question the Pltff is bound to provide and furnish to the defendant a road to communicate with the said wood, which he hath not done although demanded, by reason whereof the defendant hath not been able to enjoy the said "coupe de bois" but hath been wholly deprived thereof, contrary to the terms and and conditions of the said deed of sale, and therefore the Pltff is not entitled to his action aforesaid —

Rollin for Pltff in reply, states, that the Defend^{t} is

indebted

indebted to the plaintiff in manner and form &c. and further that the Defendant is in the possession and enjoyment of the "Coupe de bois" in question.—

The clause contained in the deed of sale in question, was in the following words — "avec la liberté par ledt "acquereur de passer par le chemin que ledit Vendeur a "sur le terrain des dits Filions pour parvenir à sa terre, et "de passer aussi sur cette derniere pour aller jusqu'à son "bois, et ce en voiture & en toute saison &c —"

The Court upon the evidence adduced that a free passage and communication to the wood in question had been refused to the Defendant, dismissed the Plaintiffs action, considering that he was bound to provide such means of communication to the Defendant —

October Term 1817.

Thursday 2d. October

Ratel
v.
Corbin
and
Gar.

The action en Garantie having been returned this day, Rolland on behalf of the plaintiff on that demand, moved that the return should be joined with the proceedings in the original action.

Bourré for the plaintiff in the original action, objected to the motion and stated, that the Defendant had not done sufficient diligence in the Cause to entitle him to the motion - that the original Cause was returned into Court on the 6th. day of June last, when the Defendant appeared, during the rest of that Term the Defendant was dormant, he neither pleaded to the action nor obtained any order for calling in his garant, and the Pltff was consequently entitled to proceed agt him by default,

that

that during the last vacation the Defendant sued out his process en garantie, but the Plaintiff ought not to be delayed thereby, as this proceeding has been taken at the risk of the Defendant and out of the regular Course of proceeding.—

The Court granted the Defendants motion, but without retarding the plaintiff from proceeding in the cause against the Defendant in the same manner as he the plaintiff would have been entitled under the rules of practice, had not the said motion been granted.—

Bowman vs Gauvin.— } The defendant moved, that inasmuches no proceedings had been had in this cause for two terms, that the same should be declared to have been abandoned and thereupon dismissed according to the rules of practice Sec. 24. and the decisions thereon had in the Cases of Adhemar vs Corrigal— and McDonald & Co. vs Cuvillier

Stuart for the plaintiff refers to later decisions in the Court of appeals on the question, by which it has been held that if the party in default was ready and willing

willing to proceed, the plaintiff was not entitled to the effect of a peremption of the Cause, but merely to recover his costs on the application — That the plaintiff in this Cause has always been ready and willing to proceed, and now moves that this Cause be set down for hearing on the — inst. —

The Court granted the plaintiff's motion, upon his paying to the Defendant 25/- for his Costs on the above motion for dismissing the Cause. —

Gordon ux
v
Mendell.

On action petitoire. —

The declaration stated that on the 8. June 1801, one Phineas Fox was possessed and seized as lawful owner and proprietor of a certain lot of land in the Seigniory of Lacole under a certain deed of Concession made to him by Napier Christie Burton, the Seignior of the S. Seigniory bearing date the said day — That at the death of the said Phineas Fox, which happened in 1812, Elizabeth Fox his daughter and Sole heiress, the wife of the plaintiff became and was and now is the true and lawful owner and proprietor of the said lot of land and entitled

to

hold and enjoy the same.— That the Defendant hath wrongfully possessed himself of the said lot of ground and now unjustly detains and withholds the same from the Pltffs.—

Plea. Denies all the facts stated in the declaration— Further that the Defendant is in the just and lawful possession of the said lot of Land— That the said Phineas Fox on or about the 10th day of June 1802 gave legal and quiet possession of the said lot of land to one Jacob Daly for a good consideration, to wit, for the sum of £37:10, and at the same time did sign and deliver his bond to the said Jacob Daly with condition that he the said Fox would make execute and deliver to the said Daly, his heirs and assigns, a good and sufficient title in and to the said lot of land— all which right of the said Daly in and to the said lot of land and to have and obtain a title thereto, he the Sd Defendt purchased from one Timothy Hastings then having the right of the said Daly; which said bond so made and signed by the said Phineas Fox on or about the 7th day of September 1814, was lost or destroyed, so that the Defendant cannot now produce the same.— That since the time he the said defendant hath had and obtained possession of the said lot of land, he hath cleared 50 acres thereof and hath otherwise improved the

same

same to the amount of £250.— which sum he prays may be ordered to be paid and reimbursed to him before the possession of the said lot of land be taken from him.

Replication joins issue on the several facts and allegations contained in the Plea.—

On behalf of the plaintiffs there was filed a notarial Copy of a deed of Concession of lot N° 78, south side of the domain, by N. C. Burton, Seignior of the Seigniory of Lacole, to Phineas Fox, dated 8 June 1801— and it was besides proved by verbal testimony, that the late Phineas Fox came from England about the year 1797, with his wife Margaret Fox, and his daughter Elizabeth, now the wife of the Revd Gordon,— and settled at Champlain in the State of Vermont, where he and his family resided about eight years, when they removed into Canada and settled on the Seigniory of Lacole where they remained until the said Phineas Fox died in 1812.— That the corpse of Fox was brought from his house in Lacolle to Champlain aforesaid, where it was interred — that this was done in a private manner as the intercourse between the two Countries was then interrupted by the war — That no clergyman officiated at the funeral, nor was there at the time any clergyman at Champlain — nor are there

there any registers there kept of burials, baptisms or marriages, proof of these facts being there made by parole evidence.— That when the said Phineas Fox and his wife first settled at Champlain, their said daughter Elizabeth was then a girl about 8 or 10 years old and was considered by them as their legitimate child and treated as such— That the said Fox and his wife were methodists, and stated that they had been married in London— that their said daughter Elizabeth, some years after their settlement at Champlain joined the Methodists, and was baptised by immersion according to the rites of that sect, as being the legitimate issue of the said Phineas and Margaret Fox— That the said Phineas and Margaret Fox always lived and cohabited together as man and wife, and were always so treated and considered, and the said Eliz. Fox was treated and considered as their daughter— That in November 1812 the Plaintiff Gordon and the said Elizabeth Fox were married by one Samuel Ashman a Justice of the Peace for the County of Clinton in the State of New York, according to the forms prescribed by the laws of that State, according to which no register of such marriage is kept,— that since the said last mentioned period the said plaintiffs have lived together as man and wife, and have one child issue of their said marriage.—

On

On the part of the Defendant no evidence was adduced.

The question now agitated was whether verbal evidence could be admitted to prove

1st The marriage between Fox & his wife —
2. The birth & baptism of their daughter Elizabeth
3. Marriage between the Pltff. —
4. Death of Phineas Fox. —

The Court considered the evidence sufficient, and as being the best the nature of the circumstances would permit — and thereupon gave Judgment for the Pltff. —

See. Nouv. Denizt. Vo Etat. §. 2. No 2. 3 — and No 5 — case of Sr & Dlle Fourcault

Nouv: Ferriere. Vo Filiation. and Question d. Etat. —
Dict. Ferriere Vo Edit. —
2. Bardet. p. 335. —
1 do —— p 109. —
Jousse on Ord. 1667, tit. 20. art. 14. —
Dic. des arrets. Vo Etat. —
Ferriere, Comm. sur l'art. 318. Sec. 2. § 1. No 21. p. 711 —
2. Arrets de Bardet. p. 49. —

Bedard & al
Exrs &c
vs
Delagrave. & al

On action of account. —

This was an action instituted by the Pltffs as Executors of the last will & Testament of the late Messire Trichette, against the Defendant, a notary public, who had made the Inventory of the effects left by the said late Mr. Trichette, and had caused the same to be sold at public Sale, in order to obtain from the Defdt an account of the said Sale and the monies by him received thereon —

The Defendant pleaded that he was not bound or liable to render to the plaintiffs the account by them demanded — and set up an Incidental demand for a sum of £100. — for his trouble, care and labor in and about the selling the effects of the said late Mr Trichette and collecting the monies arising from such Sale —

In consequence of an Interlocutory Judgment rendered on the 20th April last, the Defendant rendered his account, and it was afterwards referred to Practicians to ascertain what sum was due to the Defendant upon his Incidental demand, who reported that he was entitled to £37. 0. 8 —

The

The account then stood thus between the parties —

Amount rec.d by Defend.t as p.r acc.t rend.d —	£407. 2. 8½
Paid by him. — — — — — — — — — —	304. — —
	103. 2. 8½
Allowed to Defend.t by Practicians. —	37. 6. 8
Balance due by Defend.t	£65. 16. -½

On the hearing of the Cause the plaintiffs objected to the Incidental demand set up by the Defendant, contending that the same was unnecessary, as his claim for his services in selling the effects and collecting the money, constituted a part of the account rendered by him and ought to have been inserted therein, and thereupon the quantum of that demand would have been ascertained without raising an Incidental demand in this behalf, which was wholly unnecessary, and therefore the Defendant ought to be held to pay the Costs thereon particularly as his claim had been substantiated but for a small part of the demand, and as the Plaintiffs had constantly offered to allow to the Defendant whatever Sum should be so determined by Practicians —

Stewart for the Defendant contended that the Incidental demand was proper and necessary, and

as

as he had succeeded for a part thereof, he was entitled to his Costs thereon —

But the Court gave Judgment for the plaintiff, with Costs against the Defendant as well on the principal as on the Incidental demand, as they considered the Incidental wholly unnecessary —

Mitchel vs Clarke et al

On rule to shew Cause why an alias Exon should not issue on the Judgment rendered in this Cause. —

Sherwood of counsel for Cross, one of the Defendants moved that he might be permitted to file a written plea to the demand now made, inasmuch as the viva voce reasoning which might be used by him would be wholly lost should the Cause be carried to another Court, —

Ross of counsel for the Plaintiff — This application is contrary to the rules of practice in regard of Rules Nisi, Sec. 21. N° 14 — and has frequently been refused,

Sherwood

Sherwood in support of his motion further stated that he has matters of importance to alledge in his defence against the present rule, namely, that that this Cause originated upwards of seven years ago and that the execution which has already been sued out, has not been returned, and it is therefore of the utmost importance to the Defendants that these grounds of defence should be stated on the record.

The Court considered the reasons alledged were not sufficient to entitle the Defendant to make any written plea to the rule, inasmuchas they regarded merely the regularity of the proceedings, which must be made appear before the Court could adjudge upon the plaintiff's application - and therefore rejected the Defendant's motion.

Armaringer
v
Raizenne

Action agt. the Defendant, for having in his capacity of Justice of the Peace defamed the character of the plaintiff

On trial before a special Jury -

The

The plaintiff having proved the notice to the Defendt required by St 24. Geo. II. ch. 44. an objection was taken thereto, inasmuch as the name of the attorney, prosecuting the action on behalf of the plaintiff was not indorsed thereon, as required by the said Statute.—

Grant for the Plaintiff, contended, that although the name of the attorney was not indorsed upon the said notice, yet it was written at the bottom of the notice which is sufficient, as thereby all the essential required by the Statute are complied with, and it is not said that a notice wanting this formality shall not be read in evidence to the Jury—

The Court held the notice insufficient, the Statute in this respect being imperative that the name of the plaintiffs attorney shall be indorsed on the notice given to the Defendant— and rejected the same as insufficient—

2. Bos. & Pul. Foy. v. Orchard & L. Eldon. p. 41.

The Plaintiff then contended that he was entitled to proceed with his Cause and give evidence against the Defendant for his acts, and declarations made by him in his individual capacity and not as a Justice of the Peace, where no notice was necessary—

But the Court would not allow the plaintiff to proceed as he had sued the Defendant for acts done by him as

a

a Justice of the Peace, he could not now be permitted to change the nature of the action, or to adduce evidence of acts done by the Defendant in a different capacity.(a)

The Plaintiff was thereupon non-suited

(a) The Justice is entitled to notice even when he has gone beyond his authority — Peake's Ev. 426. 430. — 3. Camp. Rep. 421. — 1 Esp. 339.

Friday 3. October 1817.—

Grignon. v Bautron & al.—

This was an action ag.t the Defendants for having cut a Canal across the Kings high way, and so negligently guarded and notified the same in the night time that the Plaintiff fell into the said Canal, by means whereof he was much hurt and bruised.

Sullivan for Pltff moved that this Cause should be tried by special Jury.—

Ross for the Defendants contended that this action could not be tried by a Jury, inasmuchas the action was not grounded on any tort personnel done by the Defendants to the plaintiff, but for an injury growing out of an act done by them, not by necessary consequence but from a fortuitous circumstance—

But the Court were of opinion, that whether the injury complained of were direct or consequential on the act of the Defendants, the law in this respect made no distinction, if it were an injury done to the person of the Pltff— and therefore granted the motion—

Monday 6th October 1817.

Pothier
v
Foucher
& al'.

On action for enforcing the execution of a Will -

On the enquête day, Mr Bedard of counsel for the pltff, having filed a collated copy of the original will certified by Mr Guy, the depositary thereof, and another notary be called a witness, who had compared another copy with the original will, in order to prove that the said copy was correct - This was objected to by Mr Vigé for the Defdts who contended that the authenticity of the copy filed was sufficiently established by the notarial certificate of Mr Guy the depositaire of the original, and no other proof in regard of another Copy can be admitted - Bedard in reply - stated that in case the copy certified by the notaries should be ordered to be taken from the record in consequence of the objections raised by the Defendants, he was entitled to have another authentic copy proved in this manner in order to support the demand of the Plaintiff -

The Court refused to admit the testimony offered as they considered the certificate of the public Officer in whose custody the original will was deposited, as constituting the best proof of the Copy - and to admit

any

any other proof upon the possibility of a contingency which might not happen, was wholly irregular.

Burton
vs.
Roi.

Or action petitoire. —

The action was instituted by the Pltff as Seignior and proprietor of the Seigniory of Lacole, to obtain from the defendant the possession of certain lot of land held by him in the said Seigniory of which lot of land the Plaintiff is owner & proprietor —

Plea — That Pltff is not owner and proprietor of the lot of land in question —

In support of his demand the plaintiff adduced several witnesses to prove that the plaintiff has for several years last past held and possessed the Seigniory of Lacole as the Seignior and proprietor thereof — and that the lot of land in question is within the Censive of the said Seigniory. —

On the part of the Defendant it was contended that this proof was not sufficient, nor could the plaintiff establish title by verbal testimony, but ought to have proved his title to the said Seigniory, by producing the deeds thereof —

But

But the Court held the evidence sufficient, as the Seignior in possession was entitled to demand an exhibition of title from every Censitaire, and if no title was shewn, to expel him from the Seigniory — That the Censitaire was not warranted to contest the title of the Seignior, without shewing a better title in himself — that here the Defendant shewed no title, and the Plaintiff as Seignior in possession was entitled to maintain the present action against him — Judgt. for Pltff —

Laprance. }
v }
Rousseau }

Action of Special assumpsit for wages as a Guide in one of the Defendant's Canoes from Montreal to Michilimackinac. —

Plea — Non-assumpsit — That pltff did not do his duty as guide — refused to obey the orders of the Defendant — traded on his own private account — and brought-down passengers in one of the Defendants Canoes from — Drummond's Island to Montreal — Contrary to his agreement with the Plaintiff in this behalf —

The evidence adduced by the parties stated, that the Plaintiff did his duty in every respect as guide

of

of the Defendants Canoe in going to Michilimackinac That on the 18th July 1815, the americans took possession of Michilimackinac in consequence of which the Defdt and several other British Merchants who were trading there, removed with their property to Drummonds Island That when at Drummond's Island the Defendant found it necessary to erect a shed or building for the protection of his property and required the Plaintiff and the other men of the Canoe to assist in doing so, but the Pltff refused, alledging that he was not by his agreement bound to do so — That according to the opinion of the Traders to that Country it is understood, that Canoemen are bound to assist the Trader in constructing any building which may be considered necessary for the protection of his goods and property, and that this came within the meaning of their agreements — It was also in evidence that the Plaintiff had brought two or three passengers in one of the Defendants Canoes from Drummond's Island to Montreal without the permission of the Defendant —

The words in the agreement, after stipulating that the Pltff hires and undertakes to serve as guide in going to & returning from Michilimackinac in one of the Defendants Canoes, are — "servir, obeir, & executer
" fidelement tout ce que ledit Sr Bourgeois, ou tous
" autres representans leur personnes aux quels ils pourroient

" transporter

" transporter le present engagement, lui demander route
" de licite et honneti — faire leur profit — eviter leur
" dommage, les en avertir s'il vient à sa Connoissance
" et generalement tout ce qu'un bon engagé doit, et est obligé
" de faire" —

Stuart for Plff, contended that under this contract the Plaintiff was bound to act only as the guide of the Canoe but in no other Capacity, nor to do any work or labor which did not belong to the situation or duty of a guide, and that the erecting of a building to store the Defendants goods was no part of the Plaintiff's duty under his Contract —

Lacroix for the Defendant on the contrary contended that the Capacity in which the Plaintiff acted did not exonerate him from the obligation of doing what was necessary in case of an emergency to protect the propety of the Defendant — it was one of those obligations attached to every agreement of this kind, and so understood according to the Custom of the trade. —

Hedden
v.
Hart.

On action of assumpsit on note.

The first count in the declaration stated that on the 17th day of October 1816, at Montreal, one Henry G. Rogers made his certain note in writing commonly called a promissory note, his own proper hand being thereunto subscribed, and then and there delivered the said note to the said Defendant, and thereby promised to pay to the said Defendant fifteen days after date, or to his order, for value received, £14.19.2 Current money of the Province — and the said Defend to whom, or to whose order the payment of the said sum of money in the said note specified was to be made, after the making thereof, and before the payment of the said sum of money in the said note specified or of any part thereof, to wit on the same day & year aforesaid at Montreal aforesaid, indorsed the said note, and thereby ordered and appointed the said sum of money therein specified, to be paid to the said Plff and then and there delivered the said note so indorsed to the said Plff — And the said plff avers, that he did afterwards to wit, on the 2d day of November 1816 at Montreal aforesaid shew and present the said note so indorsed as aforesaid to the said Henry G. Rogers

for

for payment thereof, and the said Henry G. Rogers then and there had notice of the said indorsement and was then and there requested to pay the said sum of money therein specified to the said plaintiff — but that the said Henry R. Rogers then and there wholly refused and neglected so to do — of all which said premises the said Defendant afterwards to wit, on the same day and year last aforesaid had notice, by means whereof the said defendant became liable and promised &c —

O'Sullivan for the Defendant, pleaded that the said first Count of the said declaration and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against him the said defendant, and that he the said defendant is not bound by the law of the land to answer the same, and this he is ready to verify — wherefore &c And for causes of demurrer, or exception "peremptoire en droit" to the said first Count of the said declaration, states — 1st That it doth not appear, nor is it alledged in and by the said first Count, that payment of the said promissory note ever hath been or was demanded of the said Henry G. Rogers, who is alledged to have made and signed the said note, and that upon refusal of

such

such payment, a protest for the non-payment thereof was made, after the third and before the expiration of the Sixth day after the said pretended promissory note became due viz^t. &c—

2^d. That the said first Count in the said declaration is in other respects irregular &c—

Ogden for the Plaintiff joined issue on the above plea— and in argument contended that by St. 3 A. Geo. 3. ch. 2. S. 4 although a protest be necessary to be made, yet it is not necessary to state the protest in the pleadings, as it is merely matter en pais, —

By the Court— The Provincial St. of the 3A^t. of the King ch. 2. seems to put inland bills upon the same footing as foreign bills in England as to a protest and notice thereof, in case of an action by the Indorsee ag^t. the Indorser— In foreign bills, in England, it is necessary to state the protest and notice thereof in the declaration; but not so in case of inland bills, as there the action can be maintained without any protest, the only injury arising from the want thereof being the loss of the — damages and interest to which the plaintiff might be entitled — but in foreign bills the protest must be stated and proved, — and this seems to be the intention of the above Statute, as it not only requires that a

Bayley 189.

protest

protest should be made in case of non-payment, but also that notice of the protest, as well as of the non-payment should be sent to the party — and this is a material allegation — and ought to have been stated in the declaration — The Court therefore gave Judgment quashing the first Count of the declaration.

Dupré.. vs Ricutort

Action to rescind a donation made by the Plaintiff to the Defendant, from survenance d'Enfans. —

Beaubien for the defend^{r}. pleaded, that before the bringing of the present action, the Plaintiff had sold and conveyed all his right and title to the land in question to one Jean Bap^{te} Gendron, and therefore he the Plaintiff has no right of action ag^{t} him the Defendant in regard of the same — That the rights thus acquired by Gendron from the Plaintiff, were droits litigieux, as they regard the title to a property in dispute between the parties, and therefore if the present action be brought to enforce the purchase of Gendron no more can be claimed of the Defendant than what Gendron gave to the Plaintiff as the consideration of the purchase he so made, namely, the sum of 300 livres

and

and this sum the defendant is willing to pay to the said Gendron and to retain the land in question. —

Rolland in reply — That had the pltff even sold the land in question, which he denies, yet as the pltff could make no tradition thereof to Gendron, as the same was in the possession of the Defendant, the right of action must therefore remain in him the Plaintiff and not in Gendron. That the Defendant cannot plead or avail himself of the sale by the plaintiff to Gendron, —

The Court held that the action was well brought by the Plaintiff — That the sale by the Plaintiff without tradition of the property did not divest him of his right of action, as he only, and not the purchaser in this case, was entitled to bring the same — That it was therefore unnecessary to consider the terms and conditions of the sale so made by the plaintiff to Gendron, but if it were, the same could not be considered as a Sale of droits litigieux there appearing two things which controvert this opinion 1st. It was not the uncertain event of a law suit which was sold, nor did the purchaser appear to run any risk in obtaining what he had purchased; The estate itself, and not the espérance or right to obtain it was here sold, and the tradition or delivery thereof is stipulated to be made at the risk and charges of the Seller — The principle of the Pltff's action being right, he is entitled to his Judgt —

Poth. Droit Prop. N° 286.

Rep. de Jur. V° Revendication

Sed vid. Poth. Vente. N° 317.

Poth. Vente N° 583. A.

2. Bouj. 146. 147.

Rep. de Jur. V° Donation § 8. p. 196. 7.

Lefevre.-
v.
Desgroseliers

Action en reddition de Compte

On Inscription en faux against the Testament produced and filed by the Defendant with her plea.-

Moyens de faux, alledged by the Plff

1st. L'acte est dressé en forme de testament solemnel devant notaires, mais il n'est pas passé devant deux notaires, ni devant un notaire et deux temoins, ainsi que la loi requiert -

2°. Que ledit pretendu acte est nul, en ce qu'il n'est signé que du notaire et d'un temoin, tandis que la loi requiert la présence et signature de deux temoins pour la validité d'un tel acte reçu par un seul notaire.

3°. Que ledit Testament n'a pas eté lû au Testateur par ledit notaire, ainsi que la loi requiert, et qu'il n'en est aucunement fait mention dans l'acte -

4t. Qu'il n'y est pas fait mention de la personne qui auroit lû ledit acte est Testament au dit Testateur si toutesfois il auroit eté lû au Testateur, ce dont il n'est pas non plus fait mention. -

5°. Que ledit acte ou Testament n'a pas eté lû au testateur en presence du notaire ni des dits temoins instrumentaires, et qu'il n'en est faite aucune mention dans l'acte. -

6°.

6t. Qu'il n'y est pas fait mention de la personne, ou des personnes en presence de qui ledit acte ou testament auroit été lû au dit Testateur. —

7t. Qu'il y est faussement allegué que ledit acte a été fait, et que les dispositions testamentaires y contenües ont-été dictées et nommées par ledit Testateur au dit Notaire, presence des temoins denommés en l'acte, tandis que les dits temoins ni aucuns d'eux, n'etoient presents pendant que le notaire a ecrit le contenu en l'acte, et pendant tout le tems qu'a duré la confection du dit acte ainsi que la loi requiert. —

8e. Qu'il y est faussement allegué que ledit Testateur auroit lui-même dicté et nommé comme son testament & ordonnance de derniere volonté, les dispositions et le contenu au dit acte, — tandis que le testateur etoit alors non seulement depourvu de Jugement, mais qu'il n'auroit lui-même dicté aucune des dispositions contenües au dit acte de Testament. —

9e. Qu'il y est faussement allegué que ledit testateur etoit alors sain d'esprit, memoire, et Jugement, tandis que ledit Testateur n'avoit pas sa connoissance pendant la plus grande partie du tems, du moment ou le notaire a commencé a ecrire ledit acte ou testament, jus qu'à ce qu'il l'ait terminé, et que ledit testateur s'est assoupi — plusieurs fois tandis que le notaire redigeoit ledt. acte; et qu'enfin ledit testateur etoit dans un etat à ne pas savoir ce qu'il faisoit. —

10t. Qu'il y est faussement allegué que les temoins instrumentaires ont été specialement requis pour assister

comme

comme temoins au dit acte, tandis que les dits temoins, auroient été envoyés chercher apres que le notaire avoit commencé à rediger ledit acte et Testament, et que d'autres temoins appellés en premier lieu auroient refusés d'être temoins à l'acte, declarant, qu'ils ne trouvoient pas led. Joachim Lefevre en etat de pouvoir tester. —

11.o Que les dispositions testamentaires contenües en ledit acte, auroient été suggerées au Testateur par les personnes présentes, et qu'on se scroit en plusieurs instances contenté d'une signe de Tête comme exprimant la volonté du Testateur que le notaire auroit ainsi redigée par ecrit. —

12.o Que ledit acte n'a aucune autenticité ni validité quelconque. —

Answer to the above moyens —

Que le second moyen de faux n'est aucunement fondé en loi, et par consequent inadmissible. —

Que les 3.e 4.e 5.e 6. 9. & partie du onzieme moyens sont de même inadmissibles et doivent être rejettés; les dits moyens n'ayant trait qu'à la forme, ou ne pouvant militer contre la verité du contenu au dit testament. —

Que tous les autres moyens sont insuffisans et sans fondement en droit ou en fait. —.

The Repliques, joints issue —

Rolland

Rolland for Pltff, in support of the moyens de faux, argued,

That the authenticity of an act passed before notaries, cannot be attacked without an inscription en faux – Rep. de Jur. Vo "Inscription de faux." p. 286. – That only one of the witnesses present can write, this not sufficient, as both witnesses ought to have subscribed their names to the act. – Id. Vo Jerrams. 58. No 22. – Id. Vo "Signature" – Id. Vo "Notaire" Lecamus on art. 289. & Gran. Comre p. 131. No 6. 7. 8 – 1 Duplessis 590. & seq. – That the Testament was not read by the notary nor by any other person – (Here Mr Rolland was stopped by the Court to hear the objections raised by the Defendents Counsel to the moyens de faux). –

Vigé for Deft – The moyens de faux here alledged are of two kinds, being partly moyens de nullité, and partly moyens de faux – that the latter only are admissible upon an Inscription en faux – as the former can and ought to be taken advantage of without such inscription en faux as being apparent on the face of the act – Whatever therefore attacks the form of the act, must be considered as a moyen de nullité, but whatever attacks the truth of the act must be considered as a moyen de faux, and these alone are pertinent upon an inscription en faux – That according to this distinction, many of the moyens in question were not admissible, as affecting merely the form of the act, and ought therefore to be rejected, and the parties admitted to make proof upon the others –

Rolland

Rollard for Plff contends that all the moyens are pertinent inasmuchas they all tend to destroy the validity and the authenticity of the act, which cannot be attacked but by the inscription en faux.—

Nouv. Denizt. Vo Faux Incidt. §1. No 4. Part: Not. 1 Vol. 193. Fern. Dic. Vo Insrip" de faux. — Repr de Jur. co. Verb. —

Repr: Vo Nullité. 4 & 263. — Denizt. Vo eod. No 4. No 15 & 42. — Potts. Pro. Cw. ch. 4. art. 1. p. 311

Dic. de Brillon Vo Testament No 198. — Id. Vo Faux — Insrip" — faux

see also. Ordce 1735. concerng Testaments art. 47. —

The Court held that the inscription en faux is admitted and received against an acte authentique, only when the truth of the act is attacked, and when it is intended to ascertain some falsity in the act — That all objections to the form of the act, and to such things as are essential to its validity must be considered as moyens de nullité, and not as moyens de faux — and as moyens de nullité may be alledged and admitted against an acte authentique, without any inscription en faux, they ought not to be received or admitted as moyens de faux — and according to this distinction the Court rejected the 1st 2d 3. 4. 5th 6th & 12th moyens de faux alledged by the Plaintiff, without however depriving him of the right to use the same as moyens de nullité, against the Testament in question as he should be advised the other moyens were admitted as pertinens, and the parties ordered to proceed to their proofs thereon. —

Chevrier & al'
vs
St. Julien.

Action by the pltffs as Syndics of the parish of St. Michel de Vaudreuil, to recover from the Defendant, one of the parishioners his quota of money and materials for repairing the presbytere of the said parish, as stated in a certain acte de repartition duly homologated &c.

Plea of Exception peremptoire That pltffs have no right of action as Syndics &c., as no permission was ever given by the Governor of the Province for the time being, to assemble the parishioners of the said parish to enable them to proceed to the election of Syndics for building the said presbytere as required by law &c. — and therefore the election of the said Syndics are null and void —

That the declaration of the said pltffs is insufficient in law, 1st. Because it is not stated nor does it appear that the Bishop or Superintendant of the Romish Church in the Province ever issued his mandate or permission to proceed to the building of a Presbytere in the said parish of St. Michel de Vaudreuil as required by law — nor that the building of the said presbytere was ever legaley authorised or permitted — 2d. Because it is not stated, nor does it appear that the election of the said plaintiffs was ever confirmed by the Governor or Commander in Chief of the Province for the time being; or that the said plaintiffs were ever authorised to make a State and estimate of the

the expences to which the building of the said presbytere might amount — 3d That it is not stated, nor does it appear, that the estimate of expence or repartition was ever confirmed by the Governor &c —

Plea to merits — Nil deb: — Election of plaintiffs as Syndics not confirmed — Plaintiffs not authorised to make an estimate &c — nor was the same ever confirmed Facts stated in the declaration not true. —

Replication — The objection to the nomination of the plaintiffs as Syndics &c is too late, as the Defendt ought to have taken advantage thereof before the Commissioners appointed for the building & repairing of Churches &c — That it was not necessary to state in the declaration that the Roman Catholic Bishop had given his mandate or permission to build the said presbytere, it being sufficient to alledge that an acte of repartition for the building of the said presbytere had been made by the plaintiffs in their said capacity and which had been homologated and confirmed by the said Commissioners — That it was not necessary to alledge in the said declaration that the election of the plaintiffs as Syndics as aforesaid, nor the repartition made by them had been confirmed by the Governor &c — and joining issue on all the other points of law and fact pleaded by the Defendant. —

On

On the hearing of the Cause the following admissions were made by the parties —

That the defendant is a roman Catholic and possesses the lands and tenements in the parish of Vaudreuil, as stated in the declaration. — That Sir Geo. Provost late Governor in chief of this province by a Commission under the Seal of the Province appointed Messrs Lotbiniere, Reid, mondelet, Ross, Guy and Caldwell, Commissioners for the building and repairing churches &c — That after the departure of Sir Geo. Provost from the Province, and after he had ceased to be Governor in chief thereof, Sir John Sherbrooke was appointed to that situation, and thereupon issued his proclamation of 12th July 1816, confirming the different civil officers in their respective appointments under the Government — That it was in virtue of the aforesaid Commission and proclamation that the said Commissioners Lotbiniere Reid, Mondelet, Ross, Guy and Caldwell acted, and confirmed the election of the said plaintiffs as Syndics and homologated the acte of Repartition made by them. — That Dominique Mondelet is Secretary of the said Commissioners.

The chief argument taken by the Defendants counsel was, that the authority vested in the Governor in chief under the Provincial ordre of 31st Geo. 3. ch. 6. lasted only during the time he held that situation, but from the moment he ceased to hold that situation, his power under this Ordinance ceased to exist, and also the power of every person acting under him

him, and therefore as at the time of the confirmation of the election of the Plaintiffs as Syndics, and of the acte de repartition made by them, upon which the present action is founded, Sir Geo. Provost had ceased to be Governor in chief in this Province, and in consequence could not legally have confirmed the said acts, neither could the Commissioners aforesaid, who acted under his Commission have done so –

But the Court held that the authority delegated by the Governor in chief to Commissioners for the execution of the above ordinance, did not cease to operate, although the Governor who conferred that power had ceased to exist, but that the authority when legally vested in the Commissioners continued to operate and give effect to the law, until that power should be expressly revoked – That the power granted to the Governor in chief by the said ordinance, was granted to him as representing the highest executive authority in the Province, and therefore the acts done or Commissions issued by him in the exercise of that authority did not cease, although he ceased to be Governor, but must continue to operate and have effect, so long as there existed an executive authority in the Province, unless it were otherwise provided for.* – That the acts of the Commissioners in this case being legal and sufficient, the other objections raised by the Defendant must fail, as coming too late before this Court,

as

as they ought to have been proposed before those Commissioners who had power to determine the same — Judgt was therefor given for the Plaintiffs. —

* The words in the above Ordinance are — "And be it "further enacted, that the trust herein before vested in the "Governor or Commander in Chief for the time being, "may be executed by such person or persons as he may "for that purpose name and constitute".

Thursday 9th October 1817.

Bridge & Penn
v
Flynn & ux.

Action of assumpsit for goods sold and delivered by the plaintiffs to the wife of the Defendant as a marchande publique.

The Plaintiffs moved to examine the Defendants upon faits et articles.—

Sherwood for the Defendants objected to the motion, 1st Because, by the rules of evidence received in the Courts in England, faits & articles cannot be admitted; and by the — Provincial Ordinance of the 25th. of the King, in all commercial cases, such as the present, the rules of evidence according to the laws of England must alone govern —
2d That in no case can the wife be admitted to give evidence against her husband. cites. Co. Lit. lv. 6. 2 Sta. 1094.—

Sullivan for Pltffs contended that it was according to the course of proceeding in this Court in matters of evidence in commercial cases to admit the faits & articles, and as in this Case the wife was the person who transacted and carried on the business with the knowledge and consent of the husband her acts must necessarily bind her husband, as being his authorised agent in the trade she so carries on —

The Court held upon the first objection that the established course was in Commercial cases to examine the Defendant upon *faits et articles*, and had been long settled in this Court — That as to the examination of the wife of the Defendant, the point was new, but seemed equally clear —

Boucher Instit. Com. p. 21. — The wife, when a *marchande publique* is presumed to carry on her business with the knowledge and consent of her husband, and she is thereby considered as his authorised agent for all her acts in conducting that business — and therefore her acts, acknowledgments and representations are evidence against her husband, the same as the — representations of any other agent — Thus, in England, in an action of assumpsit by a Servant for wages, the Plaintiff was allowed to give in evidence a deed executed by the wife of the defendant at the time of hiring, which though void as a deed, was admitted in order to shew the terms of the Contract — And in an Anonymous Case reported in 1st Str. 527. where an action was brought for nursing the Defendants child — Pratt. Cb. J. — admitted evidence on the part of the plff that the Defendants wife had represented her agreement with him to be for so much p week, because such matters, he said, are usually intrusted to the women — Phillips. on Ev. p. 69. Bul. N. P. 287.

If therefore the acts and representations of the wife may in these and similar cases be given in evidence by third persons ag^t the husband, the next consideration is whether, she can be held to give that evidence herself against her husband under this form of *faits et articles*.?

It

Phs. on Ev. 63. & on notes —
2. Vern. Rep. 79.

It is certainly a maxim of Law, received both in the Courts of Common Law and in Chancery in England, that a wife cannot be examined as a witness against her husband. neither can a party to a Suit be called as a witness, if he has any interest. —

Phs: on Ev. 57.

Faits & articles are unknown to the Courts in England, but a practice in some respects similar in point of form and substantially the same obtains in the Court of Chancery, where it becomes necessary to procure evidence from the mouth of the party, sufficient to establish a demand against him, and that is by a bill of discovery —

1. Mad. Ch. 160. —

In Chancery, every bill requiring an answer, is more or less a bill of Discovery, but the bill, to which this title is peculiarly given, is employed merely for the discovery of facts in the knowledge of the Defendant — This bill lies also in aid of proceedings in Chancery in order to relieve the

Id. 161 —

party from the necessity of procuring evidence. — And it is observable that wherever the assistance of a Court of Equity is required, upon equitable circumstances, such as for a discovery, a bill will lie, if a legal demand be shewn; and in such case the bill is retained with

Id. 163 —

liberty to bring an action — And when the bill avers that an action is brought, or where the necessary effect in law of the Case stated by the bill appears to be, that the plaintiff has a right to bring an action, he is entitled to a discovery to aid that action so alledged to be brought, or which he appears to have a right and

an

an intention to bring. — This is allowed not only in cases of assumpsit, but also to enable a party to bring an
Id. p. 167. action for damages — and indeed in almost all cases in support of a legal demand, unless where it may lead to a legal accusation, or subject the party to some penalty
Id - 173. or forfeiture. — And in this particular case (of a Discovery) it is said, if a bill is filed against baron and feme, the feme must answer though her answer will not be evidence against her husband or herself, unless perhaps when she
2. Mad. Ch. 262. — afterwards becomes discovert — And in case Wrottesley vs Bendish. 3. P. Wms 236 — It was objected that the wife was not bound to answer — for if she did, yet her answer could not be read against her husband, nor could she be a witness against him — therefore it was a vain thing to insist upon her answering, when such answer could not be made use of, after it should be put in, being no more to be regarded than the answer of an infant — besides the wife is supposed to be sub potestate viri, and not to answer freely — Ld. Ch. Talbot — "I do not now " give any opinion whether the answer may be read agt " the wife or not, but as in all times heretofore, the wife, " as well as the husband, has been compelled to answer, " I would not take upon myself to overthrow what has " been constant practice" —

But in Chancery the wife is not only bound to

answer

answer to a bill of discovery, but her answers may be taken as evidence against her husband - and the case of the wife trading by the husband's permission seems a case wherein such evidence would be received -

see Digest. Ch. Reps. Tit. Baron & Feme. № 32 -
2. Freeman Bowyer. v. Peake -
1 Eq. Ca. abr. 226. pl. 15. Rulter v. Baldwin

In this Court the faits et articles although not in form, yet in substance are tantamount to a bill of Discovery, being given in order to assist the party in making his proof.

Plaintiff's motion was granted.

Tavernier v. Cuvillier
Smith v. Cuvillier

Wednesday 15th October 1817.

Mezieres vs Pasteur.

Action for recovery of damages on the non-performance by Defendt of certain articles of Copartnership entered into between them touching the printing and publishing a certain public newspaper called the "Spectateur", and for the nomination of Arbitrators in conformity to the said articles of Copartnership to settle and determine the matters in dispute between them.

Rolland for the Plaintiff moved, that as the parties were at issue, the matters in contest should by order of Judge of this Court be referred to arbitrators to be named by the parties or their default by the Court.

Sherwood for the Defendt opposed the motion and stated, that the present action was founded upon an allegation that the Defendant had refused to comply with his contract to which the Defendant has answered that he was always ready to perform, and was always ready to name arbitrators amicably, and therefore ought not to be driven thereto by a law suit - it is an unnecessary proceeding, and an improper one, unless the Plff can establish by evidence that the Defendant refused to name arbitrators - which is the previous point to be established - but as the case now stands there

is

is no point before the Court which can be submitted to arbitrators — That an amicable arbitration is different from that ordered by the Court — as the first act as amiables compositeurs, whose jurisdiction the Defendt in this case is ready to acknowledge, but the latter are bound to act according to the strict letter of the law, and to their authority the Defendant has never submitted —

Rollard for the plff in reply — The plea of the Defendt justifies the present motion, as the supposed readiness of the Defendant to submit the matters in contest to arbitrators, is not a material point in the Cause, unless as to Costs, the only question is, whether the Defendant was bound to submit the matters in dispute to arbitrators or not, and the Plff contends that by law as well as by the Covenant of the parties the present motion ought to be granted — cites Poth. Cont. Soc. Nº — and Repv Vº Societé. —

The Court considering the nature of the Contract between the parties and the Covenants therein expressed considering also the plea of the Defendt they granted the Plaintiffs motion and ordered the parties to name arbitrators in two days —

Breuil
Lejault

Cours d'eau

Monday 20th October 1817.

Bender v Foucher } Action for medicines and attendances as an apothecary &c

The Plaintiff having obtained an order for the examination of the defendant upon faits & articles and having in consequence communicated the faits & articles to the Defendant, he was called to answer thereto, but did not appear in person, but by his attorney objected to the pertinency of the faits & articles – This the Plaintiff contended was irregular, as the Defendant ought to have appeared in person agreeable to the order of the Court, and obtained a further day to answer, in case he had any thing to allege against the faits & articles proposed to him, but being now in default the Plaintiff moved that the above faits & articles should be held and considered as confessés & avérés. – and the Defendt having obtained a rule on the Plaintiff to shew Cause why certain of the Interrogatories proposed by him to the Defendant, namely, the 3. 4. 5. 6. 8. 9. 10. & 11th – should not be suppressed, as irregular and improper, and Mr Ross being now heard in support of the said Rule he stated – That the present action being for medical

assistance

assistance, and services rendered as an apothecary and Surgeon by the plaintiff to the Defendant in the year 1801, the Defendant has pleaded a plea of prescription thereto, and the plaintiff has replied by stating a new undertaking within the year and day — The first point therefore to be determined is whether there has been such new undertaking or not, for if no new undertaking should be made out, then all that the plaintiff can ask is the serment decisoire of the Defendant — Now the Interrogatories to be proposed in the first instance to the Defendant ought to be limited to the new promise of the Defendant, but no more, and therefore the Interrogatories to which the Defendant now objects, as they regard the nature and extent of the original contract as stated in the declaration, ought to be disallowed as wholly irregular as they proceed upon the principle that the Defendant has made a new promise, which has not yet been established

Beaubien for the Plff. contends that as the Defdt is in contempt in not having appeared in person when thereunto required to answer to the Interrogatories proposed to him, he was not entitled to have obtained the present rule on the plaintiff until that contempt had been purged — That the action of the plaintiff although not instituted within the year and day, is

not

not thereby destroyed, as even in that case he is entitled to a proof out of the mouth of his adversary, and the only mode by which this proof can be established is by faits et articles and not the Serment Decisoire of the Defendant - that had the plaintiffs action been brought within the year and day he was entitled to have proved his demand by his own oath — and whether the Defendant shall admit or deny the new undertaking stated by the Plaintiff, he is equally well founded to examine the Defendant upon the faits & articles proposed to him —

The Court declared the Rule absolute, and dismissed the plaintiffs motion —

See Fer. Com. on art. 225 — 9 Cos. Uniq. № 4 —

Ermatinger & al. — vs. Perrault. —

On action of assumpsit —

This action was instituted by the Pltffs as Trustees and assignees of the estate and effects of Robt Armour & Co to recover from the Defendant a certain debt due by him to the said Armour & Co

To this action the Defendant pleaded per exception à la forme, that the demand was insufficiently stated,

as

as the plaintiffs alledged themselves to be the assignees of the estate and effects of Robt Armour & Co, but not that the said Robert Armour & Co had become bankrupts, and had in consequence made such assignment, as thereby the Plaintiffs would be entitled to all the actions of the Bankrupts; but as assignees of the estate and effects generally of Robert Armour & Co the Plaintiffs are entitled to no action at the Defendant without shewing that the particular debt demanded had been assigned to them, which is not done here the Defendant therefore contended that the declaration was insufficient and that the action ought to be dismissed

And the Court being of opinion with the Defendt the action was dismissed. —

Marotte — }
v }
Monplaisir }

Action for arrears of rente & pension viagere

In June Term last the Plaintiff obtained a provisional Judgment for part of his demand, on his giving security to abide by the judgt of the Court in regard thereof upon the final hearing of the cause — The Plaintiff now stated, that he had been unable to procure the necessary security to entitle him to the benefit of the said Judgment, and prayed that the Court would exempt him

him from giving the said Security, inasmuches since the rendering of the said Judgment another quarter of the said rente & pension has become due by the Defendant, which is now in arrear and unpaid, and which is a sufficient security to him for the object of the said Judgment. —

But the Court, upon the objection made by the Defendant's counsel, refused the application. —

Chicoine
vs
Duplaise
vs
Vve Lorier.

Action en declaration d'hypotheque for arrears of rente & pension viagere.

The plaintiff in support of his demand produced and filed two copies of deeds passed before Letetu, public notary, the said copies certified by one Besse a public notary from the minute in the possession of the widow of the said Letetu — These Copies the Court considered as not sufficiently authentic, as after the decease of every notary the Prothonotaries of the different Courts are the legal Depositaries of the minutes of such notary, and who therefore alone can grant certified copies thereof, which can in law be considered as authentic — and therefore from want of sufficient evidence, the Court dismisses the action. —

Pierson } No. 707. Action of assumpsit on promissory Note.—
vs
Newell }

This action was brought by the plaintiff as indorsee of one William M. Gage, for the balance due on a promissory note made by the Defendt to the said Gage for £212. 10, dated 24th Novr 1815, and payable on the 1st May 1816 — indorsed to pltff 24 Novr 1815, — balance demanded £108. 15. 11. —

Plea, Non assumpsit. — further — that the said note was indorsed to the pltff on 1st Febr 1817. — That Defendt is entitled by the laws of vermont where the said note was made, to set off on the said balance so claimed by the Pltff on the said note, all and every such sum and sums of money as were paid by the said Defendant to the said William M. Gage, the payee of the said note previous to the indorsement thereof to the said plaintiff, and every sum and sums of money by the said Wm M. Gage then due and owing to him the said defendant — That he the said Defendant hath fully paid the said note, to the said Wm M. Gage, and that at the time of the said indorsemt made of the said note to the said Plaintiff, he the said William M. Gage was and now is indebted to him the said Defendt in a sum of £153. 13. 9 — In support of this plea, the defendant filed two notes made by the said Wm M. Gage and one Luc Johnson, payable by them jointly & severally to one Buckley Hutchins, and by him indorsed to the Defendant on the 28th March 1815. —

The clause of the act in the State of Vermont, as sheets the

the payment of indorsed notes is in the following words. —

"It is hereby enacted by the General Assembly of
" the State of Vermont, that the Indorsee or Indorsees
" of any bill or promissory note for the payment of
" money to any person or persons, his or their order, or
" to the bearer, may maintain an action thereon, in
" his, her or their own name or names for the recovery
" of the money. — Provided always, that in all such
" actions it shall be lawful for the Defendant or Defendants
" to plead an offsett of all demands proper to be pleaded
" in Offsett, which the Defendant or Defendants may
" have against the Original payee or payees, before notice
" of such indorsement against the indorsee or indorsees, and
" may also plead, or give in evidence on trial of any
" such action, any matter or things, which would equitably
" discharge the Defendant or Defendants in an action
" brought in the name of the Original payee or payees."

Under this law the Court permitted the sett-off pleaded by the Defendant, and gave Judgment accordingly

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Pearson v Newell } No 714 —

In this Case the same principle was held as in the preceding. —

Vandandaigue

Vandandaigue
Vezina. vs } On action hypothecaire.

The declaration stated, that by deed of Donation made and executed on the 25th June 1808, Jean Bapte Cusson and his wife gave a certain lot of land to Jacques Cusson their son, upon the following among other conditions namely, — "et sera encore tenû ledit Donataire, ainsi qu'il le "promet et s'y oblige de payer et deliver de ce jourd'hui en huit "ans, à Jean Bapte Cusson, Joseph, et Genevieve Cusson, ses "freres et Sours, à chacun, la somme de quatre cent livres, ou "chelins de vingt coppres, pour leur tenir lieu de legitime."

By act of 3d July 1810, Joseph Cusson, and Genevieve Cusson made over their respective shares of their said legitime to the Plaintiff.

On the 14th April 1817, the plaintiff obtained judgment against the Donee, Jacques Cusson fils, for the amount of the legitime so transferred to him the Plff by the said Joseph and Genevieve Cusson, on which Jugts executions were sued out and returned without satisfaction having been obtained.

On the 18th June 1811 the said Jacques Cusson fils, sold the said lot of land so given to him, to one Ignace Crepeau, who on the 26th October 1816 sold it to the defendant, subject among other things to the payment of the legitime stipulated in the said deed of donation of 25 June 1808.

The

The defendant filed no plea, but submitted to the Court whether the plaintiff's action was well founded inasmuchas the original Contract for the payment of the legitime of the said Joseph and Genevieve Cusson was made between Jean Bte Cusson pere, and Jacques Cusson fils, to which contract the said Joseph and Genevieve Cusson were not parties, and were not therefore entitled to maintain any action for any matter or thing stipulated in their favor in that Contract. If therefore the said Joseph and Genevieve had no such right of action, neither could the Plaintiff, in whose rights he now stood. —

The Court considered the action to be maintainable and gave judgment for Plff.

see Potts. Obl. No. 72.

Dougeass v. Cartier. —

The Plaintiff in this cause obtained a rule on the defendant to shew Cause why execution should not be granted on the Judgment rendered in this Cause in the Court of Appeals in July last — which rule was served on Mr Sewell who had been the attorney of the Defendant in this Court —

It was contended on behalf of the defendant that the service of the rule on Mr Sewell was irregular, as he ceased to be the attorney of the Defendant from the moment of

of Judgment having been rendered in this Court, and therfore the rule ought to have been served on the Defendt personally —

But the Court considered that as all notices are served upon the Attorney of the party, even after Judgment, in case of an appeal, that whatever proceedts under such appeal may be directed, or become necessary in this Court for carrying the Judgment into execution are regularly had upon notice to the attorney who represented the party in the Inferior Court, when there have been no laches on the party of the Plaintiff — they therefore made the Rule absolute —

Dodge. v Pickle. } On action of assumpsit for certain quantities of tobacco sold & delivered to Defdt

In this case the Court gave judgment against the Defendant, on the acknowledgement proved of the agent of the Defendant, that the tobacco had been delivered to him as such agent —

see. Paley. Pr. & Agent. p. 174 a

Ferguson
vr
Millar val'

Action of debt on Recognizance
of Sp. Bail. —

Judgment was rendered in the action agt Malcolm Macdonnell the original debtor on the 20th April 1813 — Return of non est Inventus. 1 June 1813 on Ca: Sa: issued the 6th May preceding. — The present action returned into Court on 1. Oct. 1816 and appearance on 4th of same month — and on the 19th June 1817 the present motion for surrender of the said Malcolm Mc.donald in discharge of the Defendants, his bail. —

On motion to be permitted to surrender the body of the principal debtor in discharge of the present action upon payment of Costs. —

Stuart for Defendts The present application is addressed to the equity of the Court, and is agreeable to the practice of the Courts in England, as well as the authority vested in this Court, which without referring to any precedent in the Courts in England, can give the relief sought for according to the intent and meaning of the original obligation of the Defendts — To shew that the Courts in England have acceded to this equitable construction of the obligation of the Special bail — cites — 1. Ted. Pr. 148 — 1 Raym. 156 — even

after

after a second Scire facias — the form of proceeding here is not by Scire facias against the bail but by action. That after an action has been brought and discontinued a delay of eight days is granted to the bail in England to surrender the debtor, under the rule established in Queen Anne's time, which counts from the 2d Scire facias, or last action brought agt the bail. — cites 7. T. R. 356. 7. — 8 T. R. 422 — H. Bl. 118. — 6 Mod. R. 133 — and by the rules of practice of this Court this delay has been extended up to the time of giving Judgment against the bail on bail to the Sheriff, and the same principle ought to apply in the case of Special bail, as the same reason must apply to both —

Boston for Pltff — The recognizance of Sp. bail is founded on the provincial Ordinc of 1785, according to the terms of which no surrender can now be made — and in England after the return of non est inv. by the Sheriff on the Ca. Sa, the Surrender cannot be made — Hunt. vs Cox. Burr. Rep. 3d. Vol. —

Ross of counsel for Pltff — The surrender must be made within the time limited by the Ordc of 1785 — as there is no other rule to guide, nor any authority in this Court to change that rule — That in this Case the Sp. bail was given five years ago, and the present action has now been pending upwards of one year, during all which time no offer of surrender was made, and therefore the Defendants have no claim on the equity of this Court after so long delay — the offer to surrender ought to have been

been in limine litis, and not after contesting the rights of the plaintiff — and if it can be admitted that the Defendts are now to be allowed to surrender the body of the principal debtor, it may be set down as a principle, that no time is fixed at which such surrender cannot be made, even after judgment and execution against the bail themselves —

Stuart in reply — although the Ordce of 1785 says, that the bail may surrender the debtor within a certain specific period, yet nothing is said in that Ordce against making the surrender at a later period — and it is consistent with the principles of the law of this Country, that if a party do not perform what he has undertaken, or is bound to do, within a limited time, yet Courts of Justice will after such default give a further day, ex gratia, to comply with the terms of the Original agreement — and agreeable to this principle in England, after the forfeiture is incurred yet relief is given by the Courts upon motion, by allowing the surrender — this equitable power being thus admitted how ought it to be applied in this Country? — no time is fixed by the Ordinance, and the parties are therefore well founded in applying to the equity and discretion of the Court for relief — In England this relief has been extended & fixed to eight days after the return of the Ca: Sa: and when this rule shall have been adopted and settled by the practice here, the parties will be bound by it, but until this shall be the case, the matter is perfectly open, and there is no other rule but the equitable power of the Court. —

The

The Court observed that there were three periods limited by the Ordr of 1785, at which the surrender of the Defendant, or principal debtor might be made, namely, pending the action against him — within one month after Judgment — and within 15 days after the day on which the plaintiff might legally have and obtain execution by Cap. ad satisfr agt the debtor — here all these delays have expired and a much greater period — the return of non est invent. has been made on the Ca. Sa — the bail have been sued upwards of a year ago, they have contested the claim of the plaintiff, and on the eve of judgment being rendered they offer to surrender the debtor — The Defendants seem too late in applying to the equity of the Court — they have trusted to their own strength in contesting the Plaintiff's right, and are not now entitled to any equity beyond what the law will allow — In England, when the proceedings against the bail are by Scire facias, they allow the surrender of the debtor at any time before Judgment even on a Second Scire fa. but when they proceed by action of debt, as in this case, the surrender must be made within eight days after the return of the writ, or it will be too late — under the present Circumstances the Court does not consider itself warranted in extending the rule beyond this period, and they must look to the rules adopted in England upon cases of this kind until a different practice shall have been settled by the Court — Motion dismissed —

1 Esp. N.P. 226. 227. 228.
1. Tid. Pr. 236. 8
2. dr 967. 973.

Charles
vs
Bull —
and
Hoyle oppt

On motion of Mr Stuart to be permitted to enter appearance for the Defendant on the Contest raised by the Opposition in this Cause.

Boston for the Pltff objected to the motion, and stated, that the Defendant was represented by another Attorney until the rendering of the Judgment in this Cause, since which time the Defendant has left the province and has given no authority to make the present application, nor can it be granted until the Attorney who has already appeared for the Defendt be first put aside — That the present application is also too late as the opposition made by Hoyle the Oppost is now ready for judgment — and there is an appearance of Collusion between the Defendant and the Opposant, by their both employing the same Attorney —

Stuart on behalf of Deft — The power of the Attorney employed by the Defendant ceased with the judgment and he is now at liberty to employ whatever Attorney he pleases to represent him, which he may do at any time before Judgment rendered in the Case of an opposition or an execution — Offers also to produce the letter of Attorney to warrant his appearance for Defendt —

The Court on seeing the letter of Attorney, granted the motion. —

Beauchamps

Beauchamps
vs
Content. —

Action on a Sentence arbitrale. —

The declaration stated, that on the 23d day of December 1816, the parties having several law suits then pending in the Court of Kings Bench and being desirous to terminate the same, by an acte of compromis bearing date the same day, passed before Sequin notary public, they named and appointed Joseph Turgeon and Joseph Edwd Farribault, as arbitrators, with power to them to settle and determine the whole matters in contest, and to make their award in one month from the date of the said compromis, and in case of difference of opinion to appoint such person as sur-arbitre. — That in virtue of the said Compromis, the said arbitrators having taken upon themselves the burthen of the said award, met at different times and heard the said parties and their witnesses, and having differed in opinion, they thereupon named and appointed Bonaventure Panet as sur-arbitre, before whom the said parties were again heard together with their witnesses, and having deliberated on the whole, the said arbitrators and third-arbitrator did award adjudge and determine —

1st That the said plaintiff should be maintained in the possession and enjoyment of a certain lot of land then in contest between the parties —

2d.

2dy That the said plaintiff should pay £3. 10. for the use and profit of certain Cows which had been in his possession belonging to the Defendant —

3dy That the Defendant should pay to the pltiff one pound, for damages in not having delivered to the Pltff the possession of certain buildings

4dy That the Defendant should pay to the Pltff the sum of five pounds as damages for having aspersed the Plaintiffs character by certain defamatory language and also that the said defendant should by a notorial act gain-say the words he had used in regard of the Pltff, should acknowledge the pltff to be an honest man, and signify a copy of such act within eight days from the day on which the present award should be communicated to him — And finally that the said Defendant should pay the whole of the Costs upon the aforsaid lawsuit each party to pay his own arbitrator, the expence of the sur-arbitre to be divided between them. —

That the said award was deposited at the Office of the said Sequin, and on the 20th February 1817 a copy thereof was duly served on the Defendant, who afterwards on the 1st March then afterwards, being desirous to comply with the said award, by act passed before the said Sequin, did gain-say the words which he the Defendt had

had used as injurious to the Plaintiff, character, and acknowledged the said plaintiff to be an honest man, but that the said defendant had neglected and refused to pay to the plaintiff the sum of Six pounds awarded to the said Plaintiff by the said Arbitrators for his damages and also the Costs aforesaid, the whole amounting to £41. 11. 7 — Wherefore &c —

The Plea, stated, first an exception pumptoire that, it was not alledged or shewn in and by the declaration, that before the alledged nomination of Bonaventure Panet as sur-arbitre, there was any difference of opinion between the said Joseph Turgeon and the said Joseph Edward Faribault the arbitres, so as to render such nomination necessary or by reason whereof the said Joseph Turgeon and Jos. Ed. Faribault, could be or were authorised to make such nomination —

2°. That the matters stated in the declaration are untrue and unfounded in fact —

3d. That the pretended acte or Compromis in the said declaration mentioned, is not the deed of him the said Defendt

4. That he the Defendant doth not owe to the said Plff the sum of £41. 11. 7 in the S. declaration mentioned in manner & form as therein & thereby demanded, nor any part thereof. —

The Replication stated – that the reasons of exception alledged by the Defendant are insufficient inasmuchas the Defendant hath acquiesced in the nomination of the said Bonaventure Panet as sur-arbitre and with the award given by him – and joining issue on the other matters pleaded by Defendr –

At the enquête the plaintiff produced one Etienne Chaput as a witness to prove that the parties consented to the nomination of Mr Panet as sur-arbitre – that Mr Panet was in consequence sent for – and after his arrival that the parties were heard before him & the other arbitrators and that he sat with them and examined the witnesses – But on the objection taken by the Defendant, this testimony was rejected, as tending to prove by verbal evidence the consent of the Defendr in matters exceeding an hundred livres –

The following act of the Defendants acquiescence with the award of the arbitrators was filed by the Plaintiff –

"Pardevant Nous &c – Fut present Amable
" Content, Cultivateur en la paroisse de St Charles de
" Lachenaye, lequel a dit et declaré, que n'ayant rien
" de plus à cœur que de se conformer au Jugement
" arbitral rendu contre lui par Messrs Jos. Jungon
" Joseph Edouard Faribault & Bonnaventure Panet
" Ecuiers, le dix fevrier dernier, dans une Cause qu'il
" leur

" leur avoit soumise à la poursuite d' Etienne —
" Beauchamps concernant diverses injures qu'il avoit
" eu le malheur de dire et publier contre le caractere du
" dit Etienne Beauchamps — En conséquence dit et
" declare par ces présentes ledit Amable Content, que —
" c'est à faux et malicieusement qu'il a dit et publié
" des injures contre ledit Etienne Beauchamps, qu'il les
" desavoue, et s'en retracte, et qu'au contraire, il reconnoit
" ledit Etienne Beauchamps pour un trés honnête homme
" Et a requis acte de ce que dessus pour Servir à l'avenir
" tel que de raison" — "Fait & Passé ver 1 Mars 1817" —

On the hearing of the Cause, Rolland for the plaintiff argued — That the Sentence arbitrale, altho' rendered with the assistance and participation of the tiers-arbitre was binding on the parties, and that the Defendant by acquiescing in their decision and submitting to their award, could not now object to the appointment of Mr Pant as sur-arbitre — cites - Repre de Jur: Vo "acquiescement" p. 132 — Poth. Obl. No 11. "Chose jugée". p. 362. en 8vo Lacombe. Vo "Compromis" No 2. — Dic: Droit. Vo "acquiescement" — 1 Journal des Audiences. p. 45. — Kyd on awards. p. 322 — Repre Vo Compromis. p. 315 — Id. Vo arbitrage. 548. That the consent of the parties was not necessary to confirm

confirm the nomination of the tiers-arbitre, as the two Arbitrators had a right to make this nomination without such consent — And even if there were any slight oversight in the proceedings, yet they must be favorably considered in this Case, as the award of arbitrators ought to be supported when Justice has been done to the parties — cites — Jousse — Administration de Justice Civile — "Arbitrage"

Stuart for the Defendant — The award is a nullity in law, by having been made and signed by persons incompetent to make it — Panet never had any authority to join in the award, nor had the Arbitrators any authority to appoint him, as there did not appear that difference of opinion between them which alone warranted the appointment of a Sur-arbitre — That the acquiescement of the Defend^{t} — if of any effect, can cure want of form only, but cannot make good what is absolutely void, this being a thing cannot be confirmed — cites — Poth. obl — on Chose jugée N^{o} 17 & 35 — in regard of a nullity of a Sentence pronounced by an incompetent Judge — That the retractation des injures, as appears by the act

of

of the Defendant, filed in this Cause, can be considered as an acquiescement only of that part of the award of the arbitrators which regards the injures, but cannot be considered as an acquiescence with the other parts of the award — cites. Now: Deniz Vo "Acquiescement" where there are different & distinct heads of contest adjudged upon — and this — acquiescement was besides made in error, and upon the supposition that the appointment of the Tiers arbitre had been regularly made, and therefore not binding on the Defendant — Repre Vo "acquiescement" p. 32. —

Rolland in reply — The acquiescement of the Defendant to the award covers even the "defaut de pouvoir of the arbitrators, as stated in the authority from Lacombe — The Court must presume that there was a difference of opinion, or some sufficient Cause for naming the Sur-arbitre, and this has been sufficiently acknowledged by the Defendant in submitting to the award — But putting Mr Paint out of the question altogether, and consider his participation in the proceedings as merely officious and without authority, still

Give

we have the award and determination of the two arbitrators named by the parties who were competent to that effect — "acquiescement" covers even want of Jurisdiction, and therefore the opinion of the Sur-arbitre must be received as binding on the parties — Poth- Chose jugée, N° 17 — When the party condemned does not mean to confirm the Judgment of the arbitrators he must protest against it, to save his right. —

The Court considered that the Defendant by acquiescing in the judgment of the arbitrators, as he had done by his act of the 1st March 1817, sufficiently recognized the authority of Mr Panet as Sur-arbitre in all the matters in contest, and therefore gave judgment for the Plaintiff. —

Seers
vs
Sewell & al } On action hypothecaire. —

The declaration stated, that by deed made and executed before Delisle, public notary, bearing date the 26th February 1816, Josette Connoissant, widow of Thomas Seers, and mother of the plaintiff, sold to one John Bragg a certain lot of land mentioned & described in the said declaration, for and in consideration of the sum

of

of £1125.— ~~on account of which and thereon thereby~~ ~~acknowledged to have received £125.—~~ and it was stipulated that £125.— part of the said sum of money should remain in the hands of the said Bragg on Constitut, in favor of the representatives of the late Pierre Bonthillier, and that the remaining sum of One thousand pounds should remain in the hands of the said Bragg during the life time of the said Marie Josette Connoissant, on paying the interest thereof, and at her decease, the said principal sum of One thousand pounds should be paid to the five children of her marriage with the said late Thomas Seers, on their being of age, and in the mean time, that the part & share of each of the said children, not of age should remain in the hands of the purchaser until that event, on his paying interest thereon — for the due performance of all which obligations the said lot of land became bound and mortgaged.—

That on the 1st May 1817 the said Josephte Connoissant died, whereby the plaintiff her Son, hath become entitled to demand payment of the sum of £200 as his share in the aforesaid principal sum of money, from the Defendants who are now in possession of the aforesaid premises, or that they quit and abandon the same to be sold in the usual manner for the payment of the same.— Wherefore &c.—

Stephen Sewell, one of the defendants pleaded — That the demand of the Plaintiffs is ill founded, inasmuch as it

it does not appear in and by the declaration, that the said John Bragg ever contracted any obligation with the children of the said Marie Josette Connoissant who were no parties to his deed, and that the promise of the said John Bragg to pay to the said Children the sum of one thousand pounds as stipulated in the said deed, could only bind the said John Bragg towards the said Marie Josette Connoissant, or her heirs, or other legal representatives; and as the plaintiff does not prosecute the present demand as one of the heirs of the said late Josette Connoissant, he is not entitled to maintain the same against him the said Defendant.

That the demand aforesaid of the said plaintiff is insufficient, inasmuchas he does not allege or shew that the same hath been adjudged to him against the said John Bragg, or that he the said Pltff hath discussed the property of said Bragg.—

The other Defendants Edward Hartley and James Robinson, pleaded, for exception peremptoire, that the declaration was insufficient, inasmuchas it was not therein stated that the plaintiff was one of the children of the said Marie Joseph Connoissant in the said deed of sale mentioned — That it is not stated in the said declaration what sum of money is due to him the said plaintiff, nor that any sum of money

whatever

whatever is due to him the said plaintiff —

Upon these pleas issue was taken by the Pltff, and the parties heard thereon — when Rolland of Counsel for the Defendant Sewell argued — That no debt appeared to be ascertained against the principal debtor, nor has his property been ever discussed — That the Contract between Bragg and Widow Seers did not enure to the benefit of her Children, as they were no parties to that Contract, nor can they claim anything therein unless as heirs of the said Widow Seers, which the Plaintiff does not allege in his present action, or that he founds his claim as being heir of the said Widow Seers —

Beaubien for Pltff, — The reasons alledged by the Defendt ought to be considered more as a plea to the merits, than in bar of the action — The deed executed between the Widow Seers and Bragg, could not be considered as contracting or stipulating in favor of a third person, but contained a stipulation for the payment of money due by Bragg to the said Widow Seers, to be made to another, which is legal and binding on the parties. Poth. Ob. N° 57 N° 61. 62. — That the plaintiff has stated himself to be the son of the said Marie Josette Connoissant, which was sufficient, and the bringing of the present action as such, is an acte d'heritier and binds him as such. — That although the — Plaintiff has not discussed the property of Bragg the original debtor, yet he was not bound to do so, to entitle

him

him to his present action, as that is only a plea of dilatory exception to the action, but no bar to it, and the effect thereof would be merely to suspend all further proceedings in this suit, until that discussion should be had; but to entitle the defendants to the benefit of this plea, they ought to have tendered the necessary money to defray the expence of such discussion, which they have not done — nor are they entitled to the benefit of this plea, as they purchased the property subject to the payment of the debt in question —

The Court considered the Contract as stated in the declaration between Marie Josette Connoissant and Bragg, as made for the benefit of her children, which must be understood to be the same thing as her heirs, as in that capacity alone they are entitled to claim — The present action being instituted by the Plaintiff, who styles himself, one of the Children of the said Marie Josette Connoissant, is sufficient, as by that act, he makes himself the heir and liable to all the consequences of having interfered in the succession of his mother, the exceptions of the Defendants therefore seem without foundation in this respect — As to the plea of discussion of the principal debtor, this cannot avail the Defendants without a tender of sufficient monies to carry on that

discussion

discussion which has not been done here – The exceptions were therefore dismissed. &

Leblanc vs Bergeron } Action of debt on deed of sale, of 20th Janv. 1816 for a sum of £12. 10. an instalment become due on that deed.

Plea. Nil debet – Further that the plaintiff warranted the lot of land and premises sold, to be free and clear of and from all dowers, debts, hypothecs and incumbrances whatsoever – whereas in fact the said lot of land was at the time of making the said deed of sale, and still is, charged with divers dowers, debts and hypothecs due and owing by the said Pierre Leblanc or his predecessors, proprietors of the said lot of ground and premises, by reason whereof the said Pierre Leblanc was not, nor is he, entitled to demand or have the price or sum of money demanded until the said dowers, debts, hypothecs and incumbrances shall have been removed and discharged, or good and sufficient security given to bear the said Defendant harmless from and against the said dowers, hypothecs, & incumbrances. Wherefore &c

Replication – Joins issue on first plea – Denies the existence of any dowers or incumbrances on the lot of land

in

in question – That Defendt does not shew any trouble in the possession of the said lot of land by reason of the incumbrances by him alledged. – And Further – That upon the supposition that the plaintiff's wife might be entitled to dower upon the said lot of land, which however Plaintiff denies – Yet Defendant is not by reason thereof entitled to a discharge of such dower or to obtain the security he demands by reason thereof because the said dower is not yet open, and may never exist – and because the wife of the Plaintiff hath ratified and confirmed the deed of sale made by the said Plaintiff to the Defendant of the lot of land in question, whereby her right of Dower would be barred in regard of the Defendant –

The deed of sale from the Plaintiff to the Defendt contained a clause of warranty against all debts dowers and mortgages in the usual form – and the question now was whether the Defendant was entitled to obtain from the plaintiff the security by him demanded before being adjudged to pay the consideration money in question. –

The Court considered the plea as insufficient in so far as regarded the security required by the Defendt –, inasmuchas no specific claim of dower or other incumbrance was set up upon which the Court could order such security –

That

That although the plaintiff, by his replication had improperly mentioned something in regard of the possible existence of dower in favor of the wife of the plaintiff upon the lot of land in question, yet this right was too uncertain and insufficiently set out to enable the Court to adjudge thereon They therefor considered that the Defendant had not made out a sufficient claim to the security he required — and gave Judgment for the Pltff. —