February Term 1818.

Wednesday 4th. Febry. 1818.

Stansfeld & al. — vs — Cooper & al.

Action on a promissory Note ag. Cooper as the maker of the note, and ag. Berthelet as the security —

£79 . 10 . 11. — Montreal 4th. March 1817.

Three months after date hereof I promise to pay to Joshua Stansfeld & Co. seventy nine pounds ten shillings and eleven pence, for value received —

Edwd. Cooper

If Mr. Cooper does not pay, I shall

Aug. Berthelet.

On 6th. June 1817. protest ag. Cooper and Berthelet for non-payment —

The

The declaration contained four Counts –

1st Count – on the special circumstances of the Case stating the note made by Cooper, the security entered into by Berthelet – the default of payment by Cooper duly signified to the Defendant Berthelet, and conclusion agt both jointly and severally. a

2d Count – stating the note made by Cooper, the security entered into by Berthelet, the default of payment by Cooper, and the consequent obligation of Berthelet to pay as such security –

3d Count – For monies paid, laid out & expended &c – & assumpsit by the Defendants jointly and severally

4th Count – Account stated – and same assumpsit

Plea of Exception –

1. That the obligations alledged by the pltffs to have been contracted by the Defendants, if any ever were contracted, are of a nature so distinct as not to be susceptible of being blended and combined together in one and the same action –

2d That the Cause, or Causes of action alledged by the said plaintiffs against him the said Cooper, is and are wholly different from the Cause or Causes of action alledged by the said pltffs agt him the said Augustin Berthelet. –

3d

3d. That by the shewing of the said pltffs, the Defds did not, nor could they, become jointly and severally liable— The said Berthelot, if bound or liable at all, having become liable to them the said plaintiffs, not as principal, but as accessary— And the said Cooper if bound and liable, having become bound & liable as principal.—

4th. For that in and by the said declaration the said Augr Berthelot is sued, both as being personally and individually liable to the said Pltffs jointly and severally with the said Edwd Cooper—

5th. Premises and Conclusions of Declaration are contradictory and insufficient.—

Upon this plea issue was taken and the parties having been heard the Court held that the obligations of the principal debtor and of the Caution were different, and both could not be sued together as jointly and severally bound by the same obligation— That the Caution was also different from the co-obligé, the latter being bound as a principal while the former is only an accessary to the obligation of the principal, and bound only on his default— That the Caution, although he may be sued upon the default of the principal debtor, yet he may in that

case

case claim the benefit of discussion, which drives the Plaintiff to prosecute the principal debtor, – in the present case the plaintiffs undertake that discussion by their prosecuting the principal debtor, they could not therefor join the Caution in this action, as their demand agt. him is premature until that discussion shall have been effected – The two first Counts of the declaration were therefor quashed – as to the other two Counts the Defendants were ordered to answer over –

See. Nouv. Denizt. Vo Caution. §. 1. No 2 and §II. N. 8.
Dic. For. Vo Caution –

Pickle Sin
Noro – }

Action on Note –

In this case the Sheriff returned the process served on the Defendant by delivering and leaving a copy thereof with a grown person at his domicile in the Quebec Suburbs – The Defendant obtained a rule on the Plaintiff to shew Cause why the process shd not be quashed as being irregularly served on the Defendant, as he had no domicile in the Quebec Suburbs at the time of the service of the said process –

Upon

upon this motion the parties went to evidence, and it appearing therefrom that for several months preceding the service of the said process the Defendt had lived at the house of his mother in the Quebec Suburbs, but no proof having been adduced to shew that the Defendant had any other domicile — the Court held the service of the process sufficient, and stated, that had the objection been made by the Plff before going into evidence, the Court would have discharged the rule, as it did not contain upon the face of it sufficient grounds to warrant that proceeding — that it was necessary upon every rule and motion of this description, that the Defendant should not merely controvert the allegation in the Sheriff's return as to the place where the process was served being his, the Defendant's domicil, but he ought to shew where his domicil really was, as in a plea of abatement for mis-nomer or the like, the party pleading such plea must always shew how the Plaintiff could have had a better writ, so here he ought to shew where the process could have been regularly served

Rule discharged —

Phillips vs Conant

In this case the Defendant moved to examine a witness about to leave the Province, but in the affidavit produced to ground this application it not being stated that the Defendant might thereby be deprived of the benefit of the evidence of such witness and objection being thereupon taken to the sufficiency of the affidavit, the motion was rejected —

Brown vs Byrne

On defendants motion to quash the process as having been irregularly served

Boston for Defendant stated that the process in this Cause had been served on the defendant on a Sunday, which is irregular, and prayed that a day might be given him to prove it

Sullivan for Pltff — The return of the Sheriff is regular, and the bare allegation of irregular service ought not to be admitted nor any proof allowed thereon the practice in this respect being, that every motion such as that now made by Defend must be supported by affidavit — And of this opinion was the Court and dismissed the motion. —

Thursday 5th. February. 1818.—

Clement v Bouc.—

On defendants motion for an evocation of the cause from the inferior Court.—

The action instituted in the inferior Court was for a sum of ten pounds damages for having dispossessed the plaintiff of a certain pew in the parish Church of Terrebonne, demanding that he should be reinstated in the same, and that the Defendant should be enjoined not to trouble him in the enjoyment of the said pew in future—

Bedard for the Defendant contended that this was an action en complainte, which with title could be supported even in regard of a pew in the Church Lacombe. Vo. Droits Hon. sec. 3. No. 2. Loiseau. Tr. des Seigs. therefore the action could be evoqued, and might have been instituted in this Court.—

Lacroix for the plaintiff contended that the action was purely an action d'injures, for having been disturbed in the possession of the pew in question, and therefore the evocation ought not to be allowed.—

By the Court— The only doubt the Court entertained on

on the question was whether the action en complainte lay. in favor of one parishioner against another for a pew in the Church – and being now satisfied on this head, they are clearly of opinion that the evocation ought to be admitted, the action being in every respect an action en complainte, and reintegrande. see Dic. Carr. de Maillane. verbo. Banc d'eglise. p. 434. –

Robertson
Hoyt. – }

On defendants motion to quash process from irregular service. –

Boston for Pltff – according to the return of the Sheriff, the process was regularly served, and as there is no affidavit to controvert this return, the Defend motion ought to be rejected – refers to practice as settled in case of Brown. vs Byrne, yesterday. a

Stuart for Defend – There is no rule of practice requiring an affidavit to support the present motion – the parties ought to be admitted to go to proof on the fact alledged, in the same manner as on an issue of fact raised by plea –

But the Court considered the practice to be settled, that every motion of this kind must be supported by affidavit & therefore rejected the defendants application –

Monday 9th February 1818.

Clement vs Malbouf } No 620.

Action for having dispossessed the plaintiff of a certain pew in the parish church of Terrebonne.

The pltff, by his declaration, states himself to be a Captain of militia in the parish of Terrebonne, and complains of the Defendant — that on the 2d day of June 1816, the Defendant dispossessed the Pltff of a certain pew occupied by him in the parish Church of Terrebonne for several years last past as Captain of Militia in the said parish — that the said defendant hath closed up the said pew by lock and key, and hath disposed thereof to another person, to the damage of the plaintiff eleven pounds — Concluding to the payment by the Defendant of the said damages, and that "defenses lui soient faites de recidiver"

The Defendant pleaded — 1st a Plea of "exception "peremptoire en droit" — That by the laws of the land the plaintiff has no right of action against the Defendant. That the plaintiff can have no legal possession of a pew in the said Church without a title — and as the Pltff shews no title, nor pretends to any, he cannot maintain his present action — That the plaintiff as Captain of Militia

is

is not by law entitled to claim or hold the possession of a pew in the said Church of Terrebonne — and lastly that at the time of bringing the present action and long before, the plaintiff was not such Captain of Militia as by him alledged, the Defendant contending, that the last temporary militia law having expired on the 1st May 1816, and no subsequent Militia law having been passed, there exists no militia in this Province, and consequently the plaintiffs authority and Commission as Captain of Militia is void and has ceased —

2dly — Plea to the merits — Not guilty — and further, that since January 1816, the Defendant is marguillier en charge of the parish Church of Terrebonne and as such is bound to watch over the interests of that church and the revenues thereof, part of which consists in the rents of the pews in the said Church — That the plaintiff having no right to the pew in question and paying no rent for the same, the defendant as marguillier as aforesaid, and in conformity to a deliberative act of the other marguilliers, did in June last, in the usual and customary manner, publish and advertise the said pew for Sale at the Church door of the parish during three successive Sundays to be sold and adjudged to the highest bidder — That the said Plff not only abstained from opposing the said Sale, but also withdrew from the occupation of the said pew, and the same having in consequence been adjudged to the last

and

and highest bidder, he took possession thereof, and the said plaintiff having disturbed the purchaser in his enjoyment of the said pew, the Defendant, as marguillier as aforesaid caused a door to be put upon the said pew with a lock and key thereon, in order the better to secure to the said purchaser his possession and enjoyment of the said pew against the disturbance so caused by the said Pltff — The said Defendt denying, that he ever by force or violence dispossessed the said plaintiff of the said pew —

The replication joins issue on the matters of law and fact pleaded by the Defendant —

On the 2. April 1817, the parties were heard on the matters of law pleaded by the defendant —

Bedard for Defendant, argued, — This is an action en complainte, which cannot be maintained by any individual against the marguillier for a pew in the church, except the patron, and Seigneur Haut Justicier. — The only action which the plaintiff or any individual can maintain under pretence of disturbance in the possession of a pew, is the action d'injure. — That the plaintiff as Captain of Militia has no right or privilege to hold a pew of distinction in the church — That the plaintiff at the time of bringing the present action was not Captain of Militia as by him pretended, as the Militia Law had expired on the 1st May 1816 —, and there were no officers of militia in existence —

Lacroix

Lacroix for Pluff - The present action is not en complainte, but merely for an injury done to the Pluff in the possession of his pew - That the plaintiff holds the possession of this pew as well by a Judgment of the Court of K. B, as by his situation of oldest Captain of militia in the parish of Terrebonne, and this under the Reglement made by the King of France in regard of the honours to be paid in the Churches in Canada, bearing date 27 April 1716, and the Ordinance of Honoré Michel de la Rouvilliere of the 17th January 1737 - That the plaintiff holds his situation of Captain of militia by appointment from the Crown, which does not depend upon the existence or non-existence of any militia law, and under this appointment he is entitled to all the honors and advantages attached to the situation.

1 Ed. 334.-
2. d. 309.-

Bedard in reply - By the reglement of 1716, - nothing is determined in regard of the Captain of militia being entitled to a pew in the church, it regards merely the distribution of the pain beni; and as to the Ordinance of Mr De la Rouvilliere, it is not authentic and cannot be considered as of any force -

16th June.- The Court reserved to determine upon the matters of law raised by the pleadings until the parties should have

adjourned

adduced their respective proofs, for which an order was now made. –

And the parties having in consequence adduced evidence respectively on the facts in contest, it appeared that the plaintiff, as oldest Captain of Militia in the parish of Terrebonne had for six or 7 years before the trouble complained of, occupied and possessed the pew in question, which till then had been always considered as the Captain's Pew, or Banc du Capitaine, in that church – That in a Suit which had been instituted in the Inferior Court of this district by the present plaintiff against one Limoges, the Son of the Pltff's predecessor in Office, to which Suit the then Church warden of the said Church had been made a party, the Plaintiff had been maintained in the enjoyment and possession of the said Pew as such oldest Captain – That the Defendant in this Cause conceiving that the Plaintiff had no right to hold and enjoy the said pew without paying for the same, caused the sale of the pew to be notified at the Church door during three successive Sundays, on the last of which it was adjudged to the Defendant's son – That during the three Sundays the pew was so advertised the Pltff abstained from sitting in it, but on the Sunday after the adjudication the Pltff resumed the possession of the pew and refused to give it up to the new purchaser – That the Defendant in consequence went with a workman and caused a lock to be put upon the pew, the key of which he retained, and thereby excluded the

Plaintiff

Plaintiff from any further possession of the pew —
Evidence was adduced on the part of the Defendant to shew that this pew had prior to the Conquest of the Country been reputed as pertaining unto the Church, and since that period had been occupied by others besides the Captain of Militia —
That there were several Captains of Militia in the parish, as well as Militia Officers of a higher rank, such as Majors & Lieutenant Colonel. —

17th Oct. The parties were this day heard upon the whole merits of the Case, when

Lacroix for the plaintiff referred to the evidence adduced by him which he contended was sufficient to maintain the action — The Plff enjoyed the pew in question as — oldest Captain of Militia, and in conformity to antient usage and custom in the Country founded on the regulations of 27th April 1716, and the Ordre of Mr De la Rouvilliere of 17th January 1737. — That had the Plaintiff been in the quiet possession of the pew without any right or claim thereto as Captain of Militia, the Defendant was not justified to dispossess the plaintiff by force. cites Lacombe. Droits Honorifiques. Sec. 3. N° 3. —

Bedard for the Defendt. No person has a right to hold or possess a pew in the Church without a title — The Fondateur and Seigneur Haut Justicier, are the only persons whose right in this respect the law recognizes — The Plff shews no title from the Church — he relies upon his right as oldest Captain of Militia — now the law upon which he founds his right says nothing about the oldest Captain, it states merely a preference in this respect to the "Capitaine de la Côte" —

but

but Mr De la Rouvilliere, whose ordinance of 1737. has been relied upon, never had any authority to make such an Ordinance, as it appears never to have been approved or signed on the Register - it cannot therfore be relied upon as settling the law of the Country - but if it were law, the Plaintiff has not brought himself within the letter of it, so as to entitle him to hold the pew in question. he not having shewn himself to be the Capitaine de la Cote, to whom only this ordinance can apply - That on the 1st May 1816 the militia law ceased to exist, and therfore there could be no militia Officers without a law warranting their appointment - at the time therfore of bringing the present action the Plaintiff could not be considered to be, nor was he, a militia officer, nor entitled to claim any priviledges as such - The Plaintiff being supported by no title must fail in his action - to maintain it against the Defendant as Church warden, the Plff seeing as an individual or other parishioner, ought to have shewn that he had been turned out of possession of the pew in question by force and violence, which is the only case where the action d'injure may be maintained without title, as explained by the authority referred to in Lacombe - There was no actual violence committed by the Defendt upon the Plaintiff - The Defendant as marguillier, caused the sale of the pew to be advertised at the Church door without any claim or opposition having been made by the Plaintiff, who on the Contrary appeared to assent thereto by abstaining from the possession of the pew during

during the three Sundays it was so advertised — that after it was adjudged to one George Malbouf, the plaintiff still persisting to occupy the pew, the defendant caused a door and lock to be put upon it so as to enable the adjudicataire to enjoy it without molestation from the said Pltff, — this the Defendant as representing the Church had a right to do, and it was no actual violence to the possession of the Pltff, which had ceased to exist — The Plaintiff's action is irregular in another respect, because it ought to have been brought against the Defendant in his Capacity of Marguillier, in which capacity only the acts complained of were done by him — now he is sued in his own private capacity & name, and the evidence adduced shews that he acted in a different character, namely as representing the Church, in this therefore there is a fatal variance. —

Sherwood of counsel for the Defendant, refers to the Reglement du Roi of 12 March 1668, touching the honors to be paid to Military Officers in the Church — also to the Ordinance of Rouvilliere of 1737 — also to the Reglement of 9th June 1723, touching the granting of pews in the Churches in Canada, in none of which laws or regulations do we find any such right given to the Captain of Militia as that claimed by the pltff — such a right in the Church cannot be presumed under any favourable construction of these laws, it must be given by clear and positive law, because the Church is the House of God and all are equal in it. — But supposing such right as

that

that contended for by the Plaintiff did exist under the antient laws of the Country, it can no longer be said to exist under the present Constitution and Government — There is no such Militia officer now known to exist as the Capitaine de Côte, the Militia of the present day are wholly different from the Militia under the French System — The Militia laws of England and of this Colony authorise the King to name the Militia Officers, but under these laws and appointments we know no such Officer as a Capitaine de Côte — The powers, duties and priviledges of the Captain of Militia are ascertained by the laws under which he is appointed, but by these laws we do not find that this Officer is entitled to any right or priviledge in the Church, more than any other Individual

Lacroix for the Plaintiff in reply. — contended that the action, was maintainable by the plaintiff as Capt of Militia, that as the Crown had the right to appoint such Officers, the appointment of the plff by Commission from the Crown entitles the plff to hold the rank & situation of Captain of Militia, although the Militia law had ceased to exist — That the action was well brought against the Defendant in his individual capacity, as the Plff could know him in no other, nor has the Defendant justified the trespass complained of under his right or authority as marguillier of the Church — The injury complained of has been sufficiently proved and according to which the Plaintiff is entitled to his judgment as the Defendt.

The

The Court considered that the action was maintainable by the plaintiff against the Defendt for the trespass by him committed in closing up the pew in question, which was a violence in the eye of the law sufficient to support the plaintiffs demand. That whether the plaintiff was or was not a Captain of Militia, and as such entitled to the right and priviledge claimed by him was a question the Court did not see fit nor necessary to determine, as the possession held by the plaintiff of the pew, was alone sufficient to entitle him to the present action against the Defendant for a trespass. — Judgment was therefore given for the Pltff. —

Clement v. Malbouf marguillier &c.

№ 634. —

Or action for damages for refusing to Pltff. as Captain of Militia, the pain beni according to his right in the parish Church of Terrebonne. —

The Plaintiff, Joseph Clement, Captain of Militia in the Burgh of Terrebonne, complains of Charles Malbouf dt. Beausoleil, marguillier en charge of the parish of Terrebonne — for that although the plaintiff as Captain of militia of the parish and Burgh of Terrebonne aforesaid, has a right to obtain and receive certain honors in the parish Church of the

the said parish of Terrebonne, namely to have — precedence of the said marguilliers, and certain other marks of distinction in receiving the holy bread, which by the law and usage of the Country ought to be presented to the plaintiff as Capit-aine de la Cote, immediately after the Seigneur Haut Justicier and even before the Judges of the Seigniors, and consequently before the church wardens of the said Parish. That the Defendant well knowing the premises but intending to vex and disquiet the said plaintiff and to lessen the confidence and respect which his militia men had in him, under frivolous and ill founded pretexts, refused to the said Pltff his right of precedence and honourable — distinction in the said Church of receiving the pain beni in manner as aforesaid, and the right of the said Pltff in this respect still doth contest and withhold to his damage £100. — Concludes — that his right of preference to have and obtain the said pain beni before the Church wardens of the said parish may be declared to belong to the said plaintiff, and that in consequence the said Defendant be enjoined to present or cause to be presented to him the said pltff in the said Church on Sundays & holydays the pain beni in manner as aforesaid — and further that the Defendant be condemned to pay to the pltff the said sum of £100 for his damages & costs —

Plea of exception peremptre

That Pltff cannot maintain his action against the Defendant alone as marguillier en charge, but that the curé and other marguilliers should have been joined with him. —

That the plaintiff cannot have or maintain his said action

action against the Defendant—

1st. Because the plaintiff was not nor is he now Capitaine de la côte, as him alledged, inasmuchas since the Cession of the Country to the Crown of Great Britain, no such character is known or does exist in the Country.—

2d. Because according to the laws and usages which have obtained in this Country, the marguilliers always received the pain beni next after the Seigneur Haut Justicier and before the Capitaine de la Cote.—

That the Plaintiff as Captain of Militia is not entitled to claim and receive the honors and distinctions by him demanded— 1. Because the reglement of the French King of the 27th April 1716, cannot be considered as in force in this Country, as since the Conquest of the Country there exists no such character as a Capitaine de Côte, and who as such exercised certain judicial powers.— That since the conquest of the Country, and by the late Militia Laws passed in it, there are now several Captains of militia in each parish, and officers even of a higher grade than Captains, such as majors, Lieut. Colonels, and Colonels of militia — and the Defendant avers that at the time of instituting the present action, there were four other Captains and one Major of Militia in the said parish of Terrebonne

2. Because the Plaintiff cannot avail himself of any right under his commission of Captain of Militia, as the Militia law in this Province expired

on

on the first May 1816.—

3. Because the Plaintiff, even as Captaine de cote cannot now be considered as the person entitled to the honors he now claims, inasmuchas an officer of — militia of higher rank, viz^t. Major Jos. Turgeon in whose division the plaintiff is included, and also Capt. Jos. Limoges, were at the time of instituting the present action and still are resident in the said parish of Terrebonne, and if any officer of militia be entitled to the honors claimed by the plaintiff, it must be — either the said Joseph Turgeon, or the said Limoges as Captaine de cote where the church of the said parish is built

The Replication takes issue generally on the matters of law and fact pleaded by the Defendant

On the 2^d. April 1817, the parties were heard on the exception first pleaded by the Defendant as a plea of abatement to the action —

Bedard for Defendant — contended that the Defendant as marguillier en charge cannot alone be sued in this action, because the point in question regards as well the rights of the Church, as the rights of the plaintiff, and no judgment given in this Case can bind the Church, because it is not legally represented before the Court, and therefore the other Church wardens ought to have been joined in the action — refers to the Case of Vigé. Vs. Bender

in

in the parish of Montreal, where the exception was taken that the plaintiff as marguiller en charge could not in the name and on behalf of the Church maintain an action for the possession of a pew in the Church — which exception was maintained and the action dismissed —

Lacroix for Stuff, contends on the contrary that the present action regards merely the usual and ordinary administration of the affairs of the Church to which the marguillier en charge is competent in all cases — Cites case of Dumont v. Rochon, to rescind an act passed in favor of the Church, where the Defendant as marguillier en charge was the only party to the Suit — this was supported in appeal although it regarded the property of the Church — That the present action charges the Defendant as the legal administrator of the affairs of the Church with the neglect of a duty attached to his situation, and claims that he be held to fulfill such duty in future — No new or unusual right is set up, nor any thing claimed of the Defendant which he cannot be held and bound to perform so long as he holds the situation of marguillier en charge — refers to case of Trudeau v. Pepin in October 1796. —

The Court considered that the exception pleaded in abatement by the Defendant was not sufficient to destroy the Plaintiffs action, and therefore admitted the parties to make proof on the matters in issue between them —

And

And it appearing from the evidence adduced that the Plaintiff had refused to receive the pain beni from the Defendant, when offered, by preference to any other, alledging that he would not receive it until he should receive it in the Captain's Pew the possession of which was at the time contested to the Plaintiff — upon this proof the Court dismissed the Plaintiffs action —

Tuesday 10th. Feby. 1818

Delisle & al' vs Portelance & al' } On action of account. —

Declaration. — Jean Delisle, Pierre Guillaume Delisle, Benjamin Delisle and Radegonde Henriette Delisle, Plaintiffs, complain of Louis Roi dit Portelance and Jean Bouthillier, Executors of the last Will and Testament of the late John Delisle, Defendts — For that whereas the said late John Delisle by his said last will and Testament, bearing date the 28th. Dec. 1809 did among other things direct, that his Son Jean Guillaume Delisle should bring back, (rapporter) to his succession, a Sum of £427. 3. 8, which the said Testator gave up to the said Jean Guil. Delisle, and the supplement necessary to equalize this sum with the legacies to his other two children, the said testator gave

and

and bequeathed the same to the legitimate issue of the marriage between the said Jean Guill. Delisle and Radegonde Berthelet, or to their descendants, to be equally divided among them by souches, after the death of the said Radegonde Berthelet, who during her lifetime was to take and receive the rents, issues, and profits thereof as a provision and means of subsistence to her and her children with whom she might share the same in such manner as she should see fit — It being also provided in and by the said last Will and testament, that in case the said Radegonde Berthelet died before the said Jean G. Delisle her husband, the said rents, issues and profits should be paid to him during his lifetime, and that after the decease of both, the said third share should then be divided among the children of the said Jean Guillaume Delisle and Radegonde Berthelet share and share alike, and by souches. —

That on the 11th March 1814, the said Testator died, when the Defendants as his Executors, took possession of all his property and estate —

That at the time of the decease of the said Testator the said Plaintiffs and Fleury Diodore Delisle, were the only issue of the marriage between the said Jean Guillaume Delisle and the said Rad: Berthelet

That by deed of Cession bearing date the 25 March 1815, the said Radegonde Berthelet, duly assisted and authorised by her said husband, being desirous that their said children should enter upon the immediate — enjoyment of the share of the property so bequeathed

to

to them by the said testator, did by the said deed of Cession, quit, abandon, transfer and make over to their said children, the plaintiffs, all the rights of them the said Jean Guil. Delisle and Radegonde Berthelet in and to the rents issues and profits thereof, to hold use and dispose thereof as their said Children should see fit, and for this purpose to demand and receive of and from the said Defendants as Executors as aforesd and all others concerned, the said third part or share of the property so bequeathed to them by the said Testator with an account of their gestion and administration, the said Jean G. Delisle and R. Berthelet renouncing in favor of their said children, to all right of usufruit or enjoyment granted to them in the said third part or share of the said property in and by the said last will and Testament -

That on the 27th. day of March 1816, the said plaintiffs caused the said deed of Cession to be duly signified to the said Defendants, and demanded of them that they should in three days render an account to the said plaintiffs of the said third part or share of the property in their hands so bequeathed to them by the said Testator, and pay over the same and all rents and profits accrued thereon to the said plaintiffs.

That on the 26th. day of June 1816, the said Fleury Diodore Delisle died, and by his last Will & testament

made

made and published on the 7th day of the same month bequeathed all his property and estate to the said Radegonde Berthelet his mother, as his Sole legatee & devisee

That by deed of Cession bearing date the 6th February 1816, the said Radegonde Berthelet dit Daly assisted and authorised by her said husband, made over all her rights in and to the estate & Succession of the said late Fleury Diodore Delisle under his said last will and Testament, to the said plaintiffs, and more especially the rights accruing to him in the Succession of the said late John Delisle — By means of all which acts and proceedings, the plaintiffs became and are now vested and seized of all the said third part or share of the property and estate so bequeathed to them by the said late John Delisle and entitled to have and obtain from the Defendants a just and true account of the said third part and share of the said property, and of all the rents, issues, and profits thereof, and to receive, hold and enjoy the same in future to their own separate use and benefit — and therefore the plffs bring Suit and pray that the Defts be held and adjudged to render such account, and pay the amount of the said third share of the said property to the Plaintiffs with interest & Costs of Suit.

Plea — The action not maintainable in Law — That the late John Delisle did in and by his last will and testament give and bequeath all his

property

property and estate to his said Executors the Defends to be by them held in trust a titre de fidei-commis for the purposes of the said Will. — That in and by the said last Will and Testament, it was among other things directed, that one third part or share of the property of the said Testator should go to the Children of the said Jean Guillaume Delisle and Radegonde Berthelet, and their legitimate descendants, par Souches, to be divided among them, apres le deces de ladite Radegonde Berthelet seulement, who during her lifetime was to take and receive the rents, issues, and profits of such third share as a means of subsistence and provision for her and her children, and that after her decease, the said third share of the said property should be equally divided among her children. —

That the said last Will and Testament contains no legacy of usufruit or jouissance to the said Radegonde Berthelet, nor to the said Jean Guillaume Delisle, and that neither the one nor the other is seized of any property under the said Will, the Defendants being the only persons seized thereof and entitled to hold the same until the full and entire accomplishment of the Testament.

That the legacy to the said Radegonde Berthelet, is merely of an aliment, payable to her alone, and to be secured to her by the said Executors without the power of encumbering or alienating the same by the said Radegonde Berthelet, and therefore the pretended deed of Cession and abandon, made by the said Jean Guill^{e}

Delisle

Delisle and the said Radegonde Berthelet on the 23d March 1815, is wholly null and void and can have no effect in law. —

That the property in question was bequeathed to the legitimate issue born and to be born of the marriage between the said Jean Guillaume Delisle and the said Radegonde Berthelet, and to their descendants, to be divided among them only after the decease of the said Radgonde Berthelet, and it is at the time of the decease only of the said Rad. Berthelet, that it can be ascertained who the persons are who will be entitled to claim as legatees under the said will, and it is then only, that the substitution will be open, and the possession of the Defendants legally determine. — But inasmuchas the said Radegonde Berthelet is still alive, and as it does not appear that the pltffs are the only children of the said Radegonde Berthelet, or what children she may have at the time of her decease, and that she may survive all her children, and that others besides the plaintiffs may become entitled to claim the property so bequeathed, at the time the said substitution will be be open, that is, at the time of the decease of the said Radegonde Berthelet — the present action is therefore premature and cannot be maintained. —

That the intentions of the Testator ought to be followed, and by his said will it is evident that he meant that the said Radegonde Berthelet should not in any manner alienate, transfer, or yield up in favor of any person whatsoever the alimentary subsistence so bequeathed

to

to her, but that she should receive it annually, and for this purpose, that the Defendants as Executors should remain seised of the property till her decease. —

Replication — That the action of the Plaintiffs is well founded. — That the late John Delisle did not give and bequeath the property in question to the Defendants in fidei-commis, but to the said Radegonde Berthelet, en usufruit, during her lifetime, and to the plaintiffs afterwards as her sole and only issue. — That the Defts were appointed as Executors merely to realise the property, and pay the legacies — and therefore in virtue of the before mentioned deeds of Cession & transfer made and executed by the said Radegonde Berthelet, the Plaintiffs are become possessed of the right to the said property, and entitled to their action of account against the Defendants. —

The following is the clause in the will of the late John Delisle, respecting the Substitution in question

"Les biens du dit Sieur Testateur seront partagés
" et divisés en trois parts égales, en une des quelles, seront —
" comprises les dites £487. 3. 8. cours actuel dont ledit Maitre
" Jean Guillaume Delisle a été avantagé comme dit est,
" et que ledit Testateur lui abandonne en pleine propriété
" par ces presentes, et le supplement necessaire pour egaler
" cette part aux deux autres, ledit Testateur le donne et —
" legue aux enfans nés et à naitre du legitime mariage du
" dit Mre Jean Guil. Delisle avec Dame Radegonde Berthelet,

ou

" ou descendans d'eux en legitime mariage, pour en
" faire partage entre eux egalement et par souches, apres
" le decés seulement de ladite Dame leur mere, laquelle en
" recevra les rentes, revenus et produits, sa vie durante,
" et dont elle sera payée sur ses simples reçus, sans qu'il soit
" necessaire de l'autorisation de Son epoux, ni de Justice, et
" sans qu'ils puissent être arretés par aucuns Créanciers, —
" voulant que les dites rentes et revenus lui soient assurés
" annuellement pour subvenir à ses nourritures & entretien
" et de ceux de ses enfans avec qui elle voudra bien les —
" partager comme elle jugera à propos, s'ils excedent ce qui
" lui sera necessaire pour elle même. — Et si ladite Dame —
" Radegonde Berthelet décéde avant ledit Mr Jean Guil-
" Delisle son epoux, les dits Executeurs Testamentaires, ou
" substituts, pourront, si bon leur semble, employer les rentes
" et revenus assignés par ces présentes à ladite Dame Radeg-
" Berthelet, pour fournir aux nourritures et entretien du dit
" Mr Jean Guill. Delisle, son epoux, mais non pas au —
" paiement de ses dettes, et sans qu'ils puissent etre saisis
" ou arretés par aucun de ses Créanciers. — Et apres le décés de
" ladite Dame Radegonde Berthelet et du dit Jean Guillaume
" Delisle, s'il lui survit, le supplement des Capitaux —
" necessaire pour egaliser la presente part aux deux autres,
" sera partagé et divisé entre les enfans et descendans en
" legitime mariage des dits Jean Guillaume Delisle, et
" Radegonde Berthelet, par portion egale, et par souches" &c —

The clause in the deed of Cession by Jean Guillaume Delisle and Radegonde Berthelet his wife to the Plaintiff runs thus —

"Lesquels, Jean Guillaume Delisle & son epouse

" voulant

" voulant que leurs enfants ci-apres nommés, jouissent
" et possedent immediatement les Capitaux appartenants
" aux dits enfans conformement au dit testament, ainsi que
" des interets des dits Capitaux et les loyers des maisons, tel
" qu'il sera expliqué dans la reserve ci-apres mentionné — Ont
" par ces presentes, cédé, quitté, delaissé & abandonné, à
" (the Pltffs severally named) leurs enfans, tous et chacuns les
" droits que les susdits Sieurs et Dame Cedants peuvent avoir
" demander ou pretendre dans la Susdite Succession à quelque
" titre que ce soit, à la reserve seulement des interets pour la
" premiere année sur les Capitaux ainsi que de leurs parts
" dans les loyers &ca Et à l'effet que dessus, les dits Sieurs
" et Dame Delisle, ont par ces presentes quitté, abandonné
" et delaissé, aux dits (Pltffs) leurs droits et pretentions —
" s'en devêtant et demettant en leur faveur, pour par eux
" en faire et disposer en toute proprieté, et comme de chose
" à eux appartenante au moyen de la presente Cession et
" demission; pour par eux recevoir des dits Execut. Testament.
" et de tous autres qu'il appartiendra les Capitaux & interets
" qui pourront leur echoir et appartenir, suivant le juste
" et fidel compte que doivent leur rendre les dits Executeurs
" Testamentaires &c renonçant expressement les dits Sieur
" et Dame Cedants a tout usufruit ou jouissance qu'ils
" peuvent avoir dans la dite Succession, et à quoi ils renoncent
" bien formellement par ces presentes — Promettant les dits
" Sr & Dame Cedants ratifier & approuver tout ce qu'ils les
" dits Cessionaires leurs enfans pourront faire, toutesfois
" et quant ils en seront requis." — &c

The Cause

The cause was heard on the 10th June 1816, and by Interlocutory order of 9th Octr following, the Court made an Interlocutory order, directing that Jean Guillaume Delisle and Radegonde Berthelet his wife should be made parties to the Cause from the interest they appeared to have therein. —

In February Term 1817, the said Jean Guillme Delisle and wife appeared and by their plea consented that the conclusions taken by the plaintiffs in their declaration should be granted to them. —

The Cause was afterwards heard on the 12th april 1817, when Beaubien for the Pltffs contended that as John William Delisle and his wife had repudiated the legacy of a usufruit given to them by the late John Delisle, and had made over all their rights in this respect to the plaintiffs their children who stood next in the appointment under the will as well as in the line of legal succession, the substitution in favor of Delisle & wife thus failing, the same were open in favor of the Pltffs refers to Poth. Tr. des Substitutions Sec. 6. art. 1. §. 2. & art. 2. —

Rolland for the Defendants. — The legacy given by the will to Jean Guillaume Delisle and his wife cannot be considered as a Substitution, but merely a legs d'aliments in favor of Mrs Delisle, which

cannot

1. Henrys. liv. 4. ch. 4. Quest. 23. aux obsv^s. p. 733. — Nouv. Denis^t v^o Alimens. §. 9. N^o 2. — Jd. Digest liv. 2. Jd. 15. — Pothier des Substitutions Sec. 6. §. 2.

cannot be changed nor destroyed by any act or consent of Mrs Delisle, much less can it be conveyed or transferred to another - cites Rep^x v^o Aliments. p. 324 + Id. verbo Transaction. p. 238. The Executors are in possession of all the Estate of the Testator by virtue of his will, and by it they are entitled to the administration of the property bequeathed to the children of Jean Guill. Delisle, during the life time of Madame Delisle - The children are not entitled to claim the property until after the death of their mother nor can any partage be made of it until that time. - Rep^x v^o Substitution. sec. 33. p. 539.

That the Substitution in question is in favour not only of the children born, but also in favour of such as may hereafter be born of the marriage between Jean Guill. Delisle and his wife, and to the descendans d'eux, which applies to the descendants of such children at the time of the decease of the said Radegonde Berthelot. — That it is only such children who may survive the said Radegonde Berthelot who are entitled to the benefit of the substitution, and not merely the children now alive - and should there be no child of the said Radegonde Berthelot alive at the time of her decease the property in question must revert to the Children of the second marriage of the Testator

Beaubien in reply - It is sufficient to ground a substitution, that the usufruit is given to one person

and

and the right of property to another — this created no Fidei-commis in the Executors as they derived no benefit from it — it is a substitution in favour of the children, whether the motive be to provide an alimentary allowance to the mother or otherwise — The abandon made by Madame Delisle to her children was legal and by it the Substitution became open in favor of the children — The words in the will, "descendans d'eux" refer to the relative words, Jean Guill. Delisle & Radegonde Berthelet — which is explained by another part of the Testament — the term, descendans, is synonimous with, enfans. —

The Court considered, that although according to the general rules of Substitutions, when the person in whose favor it is made in the first instance (the grévé de Substitution) abandons and gives up his right, the next in the order of substitution is entitled to take the property — Poth. Substit. Sec. 6. §. 2. p. 556 — yet in the present instance there was something more to be considered, which was the intention of the Testator as expressed in his will — That it was evident from the clear expressions of the will that the Substitution in this Case could not be open to the Plaintiffs until after the death of their mother Mrs Delisle for it is only then that the Exers were bound to deliver over their charge and account to the pltffs — the word "seulement" sufficiently indicates this intention — which the Court cannot permit to be altered by any act of the parties. — Without therefore entering upon the other points raised in the Cause, the Court sees sufficient in this to dismiss the action.

Shuter & ux
vs
Thayer ux

Action of debt on deed of Sale.

Declaration, stated that by deed of sale of the 26th. Augt. 1815, the Plaintiffs sold to the Defendt a certain lot of ground & house situate in the City of Montreal for and in consideration of a sum of two thousand pounds, and concludes for the payt of five hundred pounds for an installment thereof now due and in arrear with interest & Costs.

Plea. Nil debet — Further, that the plaintiffs in and by the said deed of Sale, did warrant the lot of ground and premises therein and thereby sold to be free and clear of all charges, burdens, & incumbrances upon the faith of which warranty the Defendant bound and obliged himself to pay to the said plaintiffs the consideration money in the said deed mentioned but in this respect the said Plaintiffs have deceived the said Defendant, inasmuchas at the time of making the said deed of sale, there was and now still is due and owing upon the said lot of land and premises a certain annuity or yearly rent of forty pounds current money of this Province due to one Elizabeth Phillips which annuity or yearly rent is secured on the said

lot

lot of land & premises by hypotheque on the said deed of Sale mentioned, and is a real charge burden and incumbrance thereon — And therfore as the said Plaintiffs have broken their covenant with the said Defendant in regard of the said warranty, they the said plaintiffs ought not to have or obtain from him the Defendant any part of their demand aforesaid but that the same ought to be dismissed with Costs —

Replication — joined issue on the first part of the plea and demurred to the second part

Sherwood of counsel for the Defendant argued that from the nature and extent of mortgages in this Country, every bona fide purchaser was in danger of being troubled by the mortgages of the Seller, unless that Seller was in good faith to declare the amount of all such mortgages — it therfore became necessary for Courts of Justice, particularly when vested with equitable powers, to protect the fair purchaser agt. any fraud or deceit which may have been practised agt. him — In this Cause the Plaintiffs have warranted the property sold, free and clear of every burden and incumbrance, yet by deed of annuity bearing date 29th. June 1811, a mortgage has been created upon the property in question in favor of a Mrs Phillips

for

for the payment of an annual sum of Forty pounds during her life time — this was within the knowledge of the Plaintiffs, and they were bound to have signified the same to the Defendant, their silence was a fraud upon the Defendant and in direct violation of their contract with him — The Plaintiffs therefore are not entitled to recover, this fraud being a bar to their action, cites Lacombe. Vo Condition. — Whatever is repugnant to good faith in agreements is void, and whatever is concealed in a contract between parties, particularly the Contract of Sale, is considered as unfair dealing and prohibited — cites. Potb. Vente. No 233. — Concludes therefore that the Court will protect the Defendant in his bargain with the plaintiffs by ordering them to give security that the Defendant shall not be troubled for the payment of the said annuity. —

Stuart for Plff in reply, The court must judge according to the principles of law upon the points in contest between the parties — If the principle contended for by the Defendant were admitted, no Seller could ever recover upon any deed of Sale, as it rarely happens but by some transaction in life such Seller may have created a mortgage upon his property — but this principle of mortgage existing on the property sold being a bar to

the

the action of the Seller does not hold in law — for the purchaser must shew that he has been troubled in his possession and enjoyment of the thing sold, by reason of such mortgage — The annuity complained of has produced no such "trouble" to the Defendant, as he does not shew that he was ever called upon or prosecuted by Mrs Phillips to pay that annuity, which alone could entitle him to the equitable consideration of the Court — In regard of the security demanded by the Defendant, it is a thing the Court cannot take any notice of, because there is no such demand made by the pleadings, according to which only, the Court can regulate its judgment — The Defendant here has pleaded that by reason of the mortgage in question the action of the plaintiffs ought to be dismissed to this plea the plaintiffs have demurred, and the only question befor the Court is whether that plea be sufficient or not — The principles of decision adopted by the Court on similar cases are in favour of the plaintiffs, even in regard of security which has been refused, even when mortgages existed on the estate sold — cites — Hurteau. vs Robillard 20 Febr. 1817 — and Leblanc. v. Bergeron 20 Oct. 1817. —

The clause in the deed of sale of 26th Augt 1815 in regard of the warranty was as follows —

"With promise of warranty against all gifts
" dowers, mortgages, substitutions, alienations,
" and other hindrances whatsoever"

The Clause in the deed of Annuity to Mrs Phillips, of 29th June 1811, stipulating the mortgage was as follows —

" The said John Shuter did and doth hereby
" bind, charge, incumber, and hypothecate
" all and singular his Lands & Tenements
" real or immoveable Estates, as well those
" whereof he is now seized and possessed, as
" those which he may hereafter acquire"

The Court held that wherever the Seller covenanted by the deed of Sale, that the property sold was free and clear of all debt, mortgage or incumbrance, the proof of the existence of such debt, mortgage or incumbrance entitled the purchaser to security against any trouble that might accrue to him therefrom, because the Seller has failed in his Covenant with the purchaser, and when it appears that this debt, mortgage or incumbrance existed at the time of the Sale, either by the act or with the knowledge of

the

the Seller, such stipulation has been considered as an act of bad faith and concealment, reticence, on the part of the Seller, and an act of Stellionat, which would ground a demand on the part of the purchaser for a rescision of the deed — Pothier. Vente. Nº 339 — 1. Bourj. 478. art. 17. 2 Bourj. 544 —

In the case of Hurteau v. Robillard there was no clause of warranty in the deed of Sale that the property was free and clear of mortgage and incumbrance — It is true that in the Case of Leblanc v. Bergeron, this warranty was stipulated, and there the Court would have ordered the security required, to be given, but the plea of the Defendant stated no specific mortgage to which such security could apply — and the security was therefor not adjudged to be given — In those cases where the deed of Sale contains no clause of warranty that the property is free and clear of incumbrance and mortgage, and where the Seller only binds and obliges himself to warrant and defend the purchaser against all debts, mortgages, and incumbrances — there the ~~Plaintiff~~ must shew, not only the existence of such debt, mortgage or incumbrance but also that he has been troubled by reason thereof before he can compel the Seller to give any Security against such debt &c — so held — Archambault. vs Brouillet. 20 Febv 1815 — Hurteau. v. Robillard 20 Febv 1817. & authorities there cited —

In regard of the issue raised as to the sufficiency of

of the defendants plea in this case to obtain under it the security required, the Court considered, that as the Defendant appeared to be entitled to this security, the granting of it was not going beyond the plea, but was giving something less — The Court did not accede to the demand made by the plea that the action ought to be dismissed, but considered, that if the plaintiff obtained judgment against the defendant, it ought to be upon this equitable principle, that the plaintiff should give security to hold the defendt. indemnified against the annuity in question — As to the Costs the Court allowed Costs to the pltff up to the time of filing the plea, each party to pay his own Costs subsequent thereto. —

Laurent Latour
Louis Ducharme. vs.
Laurent Latour and
Pltff en Garantie
Dom.que Ducharme vs.

On action petitoire, founded on a deed of Sale of a certain lot of land and house made by Dominique Ducharme to the plaintiff, bearing date the 16th. June 1815. —

Plea. 1. That the pltff is not, nor was he at any time befor the action brought, proprietor of the lot of land and house in question. —

2.

2. That Dominique Ducharme the person from whom the plaintiff derives his title, was not at the time of the sale made to the said plaintiff viz^t. 16 June 1815. the true and lawful owner and proprietor of the said premises and could not give any right or title thereto to the said Plaintiff.—

3. That on or about the 19th day of January 1815, the said Dominique Ducharme and Agathe Lorimier his wife, sold the said premises to the Defendant for the sum of six thousand livres payable in six years by equal instalments of One thousand livres with interest reserving the buildings thereon — which buildings so reserved the said Dominique Ducharme and wife afterwards on the same day and year, agreed to sell also to the said Defendant with all their rights in the said lot of land, for and in consideration of another sum of Six thousand livres, allowing to the said Defendant the right and preference of purchase in case they the said Dominique Ducharme and wife should see fit to sell the said rights in the said lot of land and houses, and it was thereupon agreed that in the meantime he the said Defendant should have the use and occupation of the said buildings for and in consideration of an annual rent of Ten pounds.— That in consequence of the said Agreement the said Defendant entered into the possession of the said lot of land and hath since held and possessed the same as the owner and proprietor thereof.—

That

That about the end of May or beginning of June 1815, the said Dominique Ducharme and his wife, having consented and proposed to sell the said buildings and lot of land they had so reserved, the Defendant, by virtue of the aforesaid promise of the said Dominique Ducharme that he the said Defendant should be entitled to hold and retain the said premises upon the consideration aforesaid whenever he the said Dominique Ducharme should see fit to sell the same, thereby became entitled to hold and retain the said premises as having become the purchaser thereof on the Condition of paying six thousand livres for the same with interest thereon as aforesaid —

That afterwards to wit, on or about the first day of June 1815, the said Defendant offered to pay to the said Dominique Ducharme and wife the entire sum of twelve thousand livres, being the price of the whole of the aforesaid lot of land and buildings, with such interest as might be then due thereon, which sum of money the said Dominique Ducharme then & there refused to accept or receive. — That he the said Defendt was always, and still is ready to pay to the said Dominique Ducharme and wife the aforesaid sum of money and interest, and therefore contends, that he the said Defendant at and before the passing of the said deed of Sale by the said Dominique Ducharme to the said plaintiff, he the said defendant had become and was the true and lawful owner and proprietor of the said premises, and therefore the said plaintiff cannot have or maintain the present action against him. —

Upon

upon this plea, the plaintiff put in suit the said Dominique Ducharme as his Garant formel, who appearing took up the fait & Cause of the said plaintiff and replied to the said plea, denying all the matters and allegations therein contained. —

It appeared, that by a certain deed of 25th. March 1810, Dominique Ducharme, as well in his own name as the attorney of the Heirs of the late Jean Marie Ducharme, sold the land in question to the Defendant and afterwards on the 19th August following the said Defendant and his wife re-sold the same lot of land to the said Dominique Ducharme, reserving to themselves the enjoyment and use for two years of the said lot of land and the half of the buildings. —

Afterwards on the 19th January 1815. Dominique Ducharme and wife appear to have made the following proposition to the Defendant, in writing.

" D. Ducharme aussi que Mad. Ducharme
" consentent de gré à gré, de vendre à Louis Ducharme
" la terre de Lachine pour la somme de 6000 livres,
" se reservant les batimens et un morceau de terre,
" depuis la derriere de la grange en droite ligne
" chez le voisin — Louis Ducharme fera le choix du
" quel coté — et en cas que nous trouvions à propos
" de la vendre, Louis mon frere s'oblige de l'acheter
" pour la somme de 6000 livres, pour tous les batiments
" et pretentions sur ladite terre, et dicitte que ces choses

" se

" se decident, Louis Ducharme payera à Dominique
" Ducharme la somme de 40 piastres par chaque année
" pour loyer des dits batiments, excepté que Louis —
" Ducharme soit bati, alors il ne sera pas tenu de
" reprendre ladite maison. D. D."—

"Louis Ducharme s'oblige de donner 1000 francs par
" chaque année avec l'interet, non compris ce qui a été
" en a compte sur ladite terre — Au Lac des Deux —
" Montagnes 19 Janvier 1815."—

(signé.) "Agathe Lorimier, dct. D. Ducharme
"D. Ducharme."—

Under this written proposition, considering it a commencement de preuve par ecrit, verbal testimony was admitted to prove more fully and particularly the above proposition and agreement between the parties, and also to shew the defendant's refusal to accept of the terms contained in the above proposition in refusing to pay the interest on the principal sum agreed to be paid to the said Dom. Ducharme, and that upon this refusal on the part of the said Louis Ducharme, the said D. Ducharme conceiving himself no longer bound by the above proposition sold the above premises to the plaintiff — When the deed of sale from D. Ducharme to the pltff was executed all the parties attended at the Office of Louis Thibaudeau the Notary, and at the instance of the Defendant a clause was inserted in the deed

deed, whereby the use and enjoyment of the upper part of the dwelling house was reserved to the said Louis Ducharme for a certain space of time and after the deed had been executed the Defendr acknowledged, that if had not got the land it was his own fault, as he had refused to pay the interest on the 12,000^{tt}. the sum agreed to be paid for the whole lot and buildings — the said Defendant also offered 500^{tt}. to the Plaintiff for his bargain after the execution of the deed, which the pltff refused to accept —

It became a question in the cause whether verbal testimony ought to have been admitted — as it became evident from that testimony that the proposition to sell made by Dominique Ducharme to Louis Ducharme had never been accepted, — and it also became a consideration should such testimony be admitted, whether the notary and his wife could be allowed to speak to facts which took place <u>before</u>, <u>at the time</u>, and <u>after</u> the passing of the deed of Sale by Dominique Ducharme to the plaintiff.

Stuart for Pltff & Garant — The Defendant is in possession of an estate belonging to the Pltff, and has refused to deliver it up under pretence of a prior purchase from the former proprietor Dominique Ducharme under an <u>acte sous seing privé</u> — but

this

this acte sous seing privé can be considered only as a mere proposal of Sale, being signed only by the vendors and not formally accepted by the Defendant and was therefore not binding on the vendors until such acceptance by the vendee. cites Poth. Vente. Nº 31. 32. and Nº 478. — the facts in the Case also shew, that such proposal to sell never was accepted by the Defendant, but on the Contrary was wholly rejected, and has ever acquiesced in the Sale made by the said Dominique Ducharme to the plaintiff, by proposing certain conditions to be inserted in the deed of sale in his the defendants favour. — The Plaintiff is therefore entitled to his Judgment agt. the Defendt.

Bedard for Defendt. The lot of land in question was sold to the Defendant by his brother Dominique Ducharme before the Sale made by him to the Pltff and the Sale so made to the Defendant was carried into effect by a prior possession. — The acte sous seing privé, produced by the Defendant, contains an absolute Sale of the property and not merely a proposal to sell — the terms of it are express, that the Sale was complete as to a part, and that the conditions under which a reserve was made of the other part, are also arrived and have taken effect, which entitles the Defendant to the whole — The plaintiff has adduced testimony to shew that the Defendant had given up his right to keep the land under

the

the sale made to him by Dominique Ducharme — to this verbal testimony the defendant has objected as being inadmissible — cites. 1 Pigeau Proc. Civ. 266. where there is an act in writing, whatever the value of the thing may be, verbal testimony concerning it cannot be received — and the Court in adjudging upon the objections taken to that testimony by the defendt must reject it. — The testimony also adduced to shew what was said and done at the time of passing the deed of sale by D. Ducharme to the plaintiff, is illegal and contrary to the acknowledged principles of law. — The deed made by D. Ducharme to the Plaintiff without having received tradition or possession of the premises sold, cannot affect the right of the Defdt had the sale to him with the possession he then had and still holds been even subsequent to that made to the Pltff — Such Sale to the Pltff does not operate a conveyance of the property — so held in Case of Leheup. vs. Labadie & Legrary Cart also case of Bourassa. vs. Denau — cites also Pothier, Vente Nº 313. — Repre de Jur. vo Tradition. 221. Pothr. Vente Nº 33 — Lacombe Vo Vente. Sec. 5. Nº 16. — That taking the writing in question to be only a promesse de vendre, Dominique Ducharme ought to have been liberated from his promise before he could sell to any other person, as there

was

was no limitation of time for the Defendant to accept the promise so made – cites. Repv. de Jur. vo Vente. 484. Pothier. Vente. 480. – But the acte sous seing privé contained a perfect and complete Sale of one half of the property, it could be considered as a promesse de vendre in so far only as regards the buildings, but in this respect the right of the said defendant is still open to him. – The testimony of the notary and his wife cannot be admitted so as to affect a notarial act passed by that notary, nor any act in writing whatever, nor can the consent of the Defendant to that act be proved by witnesses.

Stuart in reply. – The Defendant never had a title to the land in question, as the mere proposal of one of the parties to sell, gives no title. This sous seing privé is not even a promesse de vendre, it contains only a consent, but not that kind of Obligation which arises from a promesse. The Defendant never had even possession under this consent to sell, it was a possession of mere suffrance and held in the name of Dominique Ducharme, who had some years before purchased the property from the Defendant, and had given the Defendant permission to possess it – The Cases cited by the Defendr. do not apply – in these there were absolute sales, not mere pourparlés. – The sous seing privé, has never been sufficiently proved nor the date of it clearly ascertained, it

it may be admitted as to its contents, without that carrying proof of its date, nor can it be used against the plaintiff who was no party thereto, nor can he be bound thereby — The principle of law referred to in regard of what passed at the Notary's does not apply here — the testimony of the Notary this wife could not have been admitted against the deed which was then passing, but it was admissible against third persons not parties to that deed, and proving the consent of the defendant to that deed, does not affect or vary in anywise the stipulations therein contained, such consent being intended to shew that the Defendt thereby waived his right to the property sold — and under this testimony the consent of the Defendt is evident from his proposing to include in the deed certain reserves in his own favor, which were acceded to — the motives upon which the Defendant assented to this sale not being made known, the Plaintiff could take no notice of them — and had the Defendant even been the absolute proprietor of the premises in question such consent would have bound him and rendered the Sale to the pltff valid — The only outlet with regard to this consent, is his not having signed the act, but his answers on faits et articles ascertain this fact as effectually as if he had signed the deed — The not having the possession of the property is no bar to the

Pltff's

Plaintiff's action, as with a title translatif de propriété, the plaintiff can maintain this action against the man in possession — cites Case of Normandeau. v. Donegani & Dupéré - Gar.t — But here the defendant had no possession in his own right and name under any title, it was the possession of Dominique Ducharme he held and therefore livery of seisin given by Dom: Ducharme to the plaintiff, was a sufficient transfer of the property to him —

The Court considered the writing made by Dominique Ducharme and wife as not being an absolute sale of the property therein mentioned, but only a promise or proposition to sell, the perfecting of which depended upon the Defendants accepting the terms therein stated, because the defendant is no party to this writing, nor in any manner bound by it until his acceptance of the proposition therein contained — Had the possession held by the defendant of the premises in question been transferred to him in consequence of the above proposition of sale, the Court would have considered it so far executed, as to have compelled the parties to complete the same, but the possession held by the defendant was that of a tenant, who holds always in the name of the proprietor. — It therefore was necessary for the Defendant to shew by some act

act on his part, his acceptance of the terms contained in the above proposition of sale. — The Garant has not however waited for this, but has entered upon the contrary proof, by adducing evidence to shew that the Defendant refused to accept the terms offered by the said written proposition — To complete this evidence verbal testimony has been adduced and it has been agitated, how far such testimony is admissible — but in the answers given by the — Defendant to the faits et articles proposed to him by the Garant, and in the written document in question, there is sufficient written evidence in the cause to admit verbal testimony to verify any fact essential to be ascertained about the execution or non-execution of the proposed sale in question — in regard of the testimony of the Notary and his wife had it been adduced to prove any matter tending to affect in anywise the act passed by him in his — official capacity, the Court must have rejected it, but the facts stated by this testimony tending only to affect a Stranger to that act and to prove his consent thereto, such testimony was admissible — this point being settled, the Court must necessarily determine according to that evidence, that as the Defendant never accepted, but appears on the contrary to have refused to accept the propositions of sale made to him by the said Dominique Ducharme, the said Defend

cannot

cannot now retain the premises in question under pretence of a purchase which he never made — and Judgment must therefore be given for the plaintiff. —

Black v. Yule. } On action of assumpsit for goods sold and delivered —

The declaration in this case contained the usual money counts, and concluded to the payment of the sum demanded with interest and Costs. —

The cause was tried by a special Jury, and a verdict given for the plaintiff for the sum demanded but nothing was found in regard of the interest —

The plaintiff now moved for Judgment upon the verdict, with interest on the sum awarded to the plaintiff from the date of the demande en justice but this was opposed by the Defendant —

Stuart for Plaintiff, contended that interest was due and ought to be adjudged to the plaintiff from the day of the demande en justice, when the Defe was considered to be en demeure — cites. Dic. de Droit. vo Interets. — Repv de Jur. vo Interets Judiciaires 1 Despeisses. 214. 215. — Institutes de Loisel. p. 231. — refers also to case of Davis. vs Allison & Hamilton

on

on award of arbitrators, where no interest was granted by the award, but the Court gave interest on the sum awarded from the day of the demand.

O'Sullivan for Defendt. – refers to Case of Cardinal v Birlinguet – decided in appeal, where interest on the verdict was allowed by the Court below, and for that Cause the judgment was reversed in appeal – it was a case of an Assault where the whole matter was left to the Jury – So in the present Case the Jury were competent to determine as well on the interest as on the principal sum demanded, and on a full consideration of the whole demand their verdict has been founded, and it is impossible for this Court to say what the Jury had in contemplation in giving their verdict – cites case of Lee. v. Lingard. 1 East Rep. 401. where it was held by L^d Kenyon – "That there was no foundation "for the additional charge for interest on the Sum "awarded – Whatever interest is intended to be "given, it forms part of the damages assessed by "the Jury or by those who are substituted in their "place by the parties" – cites also Selwyn's N. P. 392. – 3 Wils. Rep. 365. Blaney. v. Hendrick – refers also to Case of Johnson. v. Walker, where on an award the Court refused interest –

It

It would be interfering with the rights of the Jury to add to, or alter their verdict, upon any matter over which they had jurisdiction. —

Strachan in answer — The power of the Court is not taken away by the Jury — as well might it be argued in respect of the Costs as in respect of the interest — The Jury here have said nothing of the interest — it was not left to them — the only question they had to consider was whether the debt demanded was due — the interest was a legal consequence — In England no judgment carries interest, because the interest thus forms part of the damages and is included in the Judgment — The Case of Arbitrators is stronger than that of a Jury, as arbitrators can determine law and fact which the Jury cannot —

The Court were of opinion that they could not interfere with what had been determined by the Jury — that interest here formed a part of the plaintiffs demand and necessarily came under the contemplation of the Jury, and whether they have thought fit to grant or to disallow that interest, their verdict is equally conclusive — The power of the Court in regard of interest can

commence

commence only from the time the verdict was rendered, when they can apply the law of the Country in regard of "interets judiciaires", by allowing it from that period – In a Court of Chancery, the Court exercises a discretionary power in regard of interest under special circumstances but in matters referred to master, it is allowed only from the time that his report is confirmed

2. Atk. 440.
1. Vez. – 496.

1 P. Wms 377.
2 Atk. 111.
212.

Interest was therefor allowed from the date of the verdict

Wednesday

Wednesday 11th Febr. 1818.

Charles.
v.
Bull
&
Hoyle Opp.

On rule Nisi to set aside a writ of fi. fa. as having ~~been~~ improvidently issued — and on merits of oppos.n —

In this case the plaintiff obtained Judgm.t against the defendant on 20th Oct. 1814, and on 7th Nov.r following sued out a Ca: Sa: ag.t the Defendant under which he was taken and committed to Gaol. — On the 25th Jan.y 1816, the plaintiff informed the Sheriff, that in conformity to an agreement made and security received, he the plaintiff consented to the enlargement of the Defendant for Six months, and directed the Sheriff to release him accordingly. — At the expiration of the Six months, viz.t on 23d July 1816, the Defend.t surrendered himself again and was re-committed to Gaol under the writ of Ca. Sa. where he remained until the 23d. August following when he made his escape — The Sheriff made his return on the Ca: Sa. on 23d July 1816 — stating the above circumstances of the detention and release of the Defend.t —

On

On the 31 August 1816, the plaintiff sued out a writ of fi. fa. against the goods and chattels of the Defendant, under which the several goods and effects seized were now claimed by the Opposant Hoyle as his property.—

To this Opposition a plea was put in by the Plaintiff denying that right of property in the opposant.— upon which plea issue was joined.—

On the 5th inst. the Defendant by his counsel moved, that the above writ of fi. fa should be set-aside, as having been irregularly sued out inasmuchas the discharge of the Defendant from Gaol under the Ca. Sa. with the consent of the plaintiff, operated a discharge to the defendant from the debt in question, and a novation of the plaintiffs debt created under the security taken by him before the suing out of the said fi. fa — and inasmuchas the said fi. fa. issued more than a year and day after rendering of the judgment in this Cause without any rule served on the Defendant to shew Cause to the contrary or any judgment of the Court to that effect.—

Boston for the Pltff shewed cause agt the motion and contended, that the suspension of the writ of Ca. Sa, was only for the space of Six months

and

and by particular agreement between the parties and no principle can be taken up against the Plff in this respect, more especially as the Defendant acquiesced in the Plaintiff's right afterwards to detain him, by surrendering himself in conformity to the said agreement — That the Defendant having afterwards escaped from Gaol, without satisfying the Plaintiff, the latter was entitled to his writ of fi. fa against the goods and effects of Defendant without any previous rule to shew Cause, as the said writ was sued out about eight days after the Defendants escape. —

On the opposition of Hoyle, the Plaintiff contended that the same cannot be supported because founded on a fraudulent Conveyance made to the Opposant by the Defendant of the property in question on the 24th August 1816, the day after he escaped from Gaol and was flying from the pursuit of the Plaintiff. That besides the bill of sale in question, without which no shadow of right can be pretended by the Opposant, has been irregularly brought forward by one Jos: Corbin, a witness, who received it from the Opposant and produced it upon his examination — this paper must be rejected, because it comes irregularly before the Court, it ought to have been filed with the moyens d'opposition, as the groundwork thereof,

and

and although this paper is found in the possession of the witness, it is evident that this must have been put there to answer a purpose, but it will not benefit the Opposant, to whom the paper belonged, and who apparently divested himself of it that it might not be filed in the Court. It also appears that the wife was the Clerk of the Opposant, who had the control over this paper at all times — refers to case decided in this Court. April 1812. Wagner & Ritchie. vs. Mc Donald, and Mc Duague & Forbes. Opp.ts.

Stuart for Defendant in answer, observed that the writ of Ca. Sa. was satisfied and the Defend discharged; and the agreement entered into by the Plaintiff was an absolute novation of his debt — the suing out of a fi. fa. was therefore irregular at least without previous notice given to the Defendant — In regard of the Opposition of Hoyle all is regular, and the Sale of the effects to him clearly proved — the Plaintiff alledged no fraud against the transaction, and proof of it cannot be admitted — the question in issue is the right of property, and this is made out to be in the opposant — The bill of Sale was committed to the witness for safe custody & was not in the possession of the Opposant when the moyens d'opp.n were filed.

The

The Court however held, that as the Pltff was entitled to exercise every kind of contraint against the Defendant until he obtained paymt of his Debt, that the Pltff was entitled to sue out the fi. fa. in question and therefore discharged the Rule obtained by the Defendant — In regard of the opposition of Hoyle, it was considered that he could acquire no property in the effects in question under the bill of sale from the Defendt at the time the same was made, as it was done in fraud of his creditor the Plaintiff — the opposition was therefore dismissed —

see.

No. 510

Joseph v Stanley

Action of assumpsit for £14. 18 — for goods sold &c.

Plea — That the plaintiff agreed to accept a draft drawn upon her by one Solomon Benjamin in favor of the Defendant for £14. 12. 7, on account of the present demand, with tender of 5/5 as being the balance — This agreement to accept the draft was denied by the plaintiff and the parties proceeded to make proof thereon — when it appeared that

sometime

sometime in October 1816, the Defendant called at the house of the plaintiff on a Sunday with the draft in question to request her acceptance of it — the plaintiff then read the draft and the letter which accompanied it, and said, that as that day and the two next were holidays with her, if the Defendant would call on the — wednesday following, she would accept the draft — The Defendant did not however call with the draft till some time in February or March following and tendered the said draft to the Plaintiff's daughter who attends the Pltff's shop and offered at same time the balance of 5/5, but her daughter refused to take the draft or the money, saying, that her mother was not at home, and she could not interfere in the business — upon this the Defend^t told her to acquaint the Plaintiff of the matter upon her return — The Plaintiff afterwards instituted the present action without any further notice or demand — and the Court held that the promise to accept the draft was tantamount to an acceptance, and gave judg^t for 5/5 with Costs to the Defendant —

Bayley on Bills 78. 79. 4th

Pothier, Exer
vda
vs
Foucher & al.

During the enquête in this Cause, one Doucet, a public notary was adduced as a witness on the part of the plaintiff and being interrogated in regard of the instructions he had received touching a certain act passed by him at the instance and request of the Defendants, he objected to the question, and stated to the Court that he could not answer the question without revealing the secrets communicated to him and the trust reposed in him by the parties, as a public officer, and submitted to the Court whether he was bound to answer or not—

The Court after hearing the parties, held, that in this case the notary was not bound to answer, nor to reveal any secrets confided in him in his official capacity—

Jer. Dic. Vo Notaire. p. 289.
Denisart. — Id. — No 51
Nouv. Jerr. — Id — p 675—
Dic. des arrets. Vo Notaire—temoin
Langlois, Droits des Notaris, cites arret of 21 Oct. 1609. ch. 47. p. 148—

See Case. Denisart. Vo Lettres missives—
also— 2. Desp. 555. where this principle is held to extend to the, "Mediateurs d'une affaire"— les Ministres, anciens— et Diacres, de la Religion pretendue reformée."

Thursday 12th Febry 1818.—

Allison Turner & Co
vs
Wisely.— } Action of assumpsit for goods sold &c—

This action was brought by Alexr Allison, Thomas Andrew Turner, as well in his own name, as Curator to Alexander Allison of Perthshire in that part of Great Britain called Scotland and Elizabeth Spence his wife, — absentees from this Province, the father and mother of the said late John Allison and heirs to his Estate, the said Alexander Allison, Thomas Andrew Turner and the said late — John Allison, heretofore having been Copartners and traders under the firm of Allison, Turner & Company.— The Plaintiffs having made proof of the sale and delivery of the goods by them as Partners to the Defendant there rested the Case, and prayed Judgment against the Defendant —

Rolland for the Defendant contended that the Plaintiffs had not made sufficient proof inasmuchas the Curator has not shewn by

any

any evidence that the persons he represents are the heirs of the late John Allison, nor is there any evidence to shew that the said John Allison is the son of the said persons—

The Court however considering that as the capacity in which the Curator stood had not been particularly contested by the Defendants plea, gave Judgment for the plaintiffs, but ordered, that they should give good and sufficient security, before suing out execution, to save harmless the said defendant from and against all other and further demands that may ~~be~~ hereafter be made against the said defendant by any other person or persons, as heirs and legal representatives of the said late John Allison for the whole or any part of the monies adjudged to the Plaintiffs by the said Judgment.—

Monday 16th Febv. 1818.

Hall
vs
Stanley
& al.

Action of debt on Obligation.

By obligation bearing date 1 March 1816 the defendants acknowledged themselves to be indebted to the plaintiff in a certain sum of £543.10.3, with certain interest and costs therein specified — and it was agreed that the defendants should pay this sum by instalments of £20. — each month, to commence on 1 April 1816 — and in case they failed in paying any of the said instalments at the time appointed, that then the whole of the said debt and interest thereon should be demandable and become due and payable by the Defendants to the plaintiff without any previous notice or demand given or made on the said Defendants or either of them, and that the plaintiff should be thereupon entitled to all legal course against the said defendants for the recovery of such arrears as might be still unpaid at the time of such default — Action is now instituted for a balance remaining due on the whole sum, of £163.10.3 wt. interest from 8 Oct. 1815, on the principle that the Defendants had failed to pay the instalment of £20 become due to Plff on the above Obligation on —

Plea.

Plea. That Defendants were not in arrear &c— but have paid all they were bound to pay by the aforesaid obligation— That Plaintiff was bound by law to— have shewn a demand on the Defendants, and to have put them en demeure on their undertaking aforesaid before he can claim the whole of the remaining balance on the said Obligation —

To this it was replied, that such demand and demeure were not necessary in consequence of the special contract of the defendants waiving their right in this respect.—

And the Court held, that the action was well brought for the whole balance due on the Obligation as the defendants had waived their right as they legally might, to any previous demand or demeure in this respect— and gave Judgt. for Plff.

Whitcombe. vs Curtis & al.

Action on Recognizance of Special Bail.—

The action was instituted by Joshua Whitcombe of Standstead in the district of Montreal Yeoman, against Henry Curtis of the City of Montreal in the said district Merchant, and Elijah Curtis also of the same place, Merchant, Defendants, and states

states, that the defendants in the Court of Kings Bench at Montreal on the first day of October 1816 became pledge and bail for one David Curtis of Standstead aforesaid, Esquire, that if it should happen that he should be condemned at the suit of him the said plaintiff (in a certain cause then pending in the said Court between the said plaintiff and the said David Curtis &c—) in case he the said David Curtis failed to pay &c— they the said defendants would pay for him.— That the said Plaintiff having afterwards obtained Judgment against the said David Curtis &c— which he the said David Curtis hath neglected to pay & satisfy therefor Pltff is entitled to his action &c— against the said Defendants.—

Plea. Nihil debt.— No such record or— recognizance as that stated by the plaintiff— no such record of proceedings at suit of the said Plaintiff. &c— upon which plea issue was joined.

The Copy of the Judgment filed by the pltff upon which the execution was sued out against the said David Curtis, was thus entitled

"Joshua Whitcombe of Montreal in the
"District of Montreal, Yeoman— Pltff
"David Curtis ag.t of the same place, Esq. Dft.

and

and in the Recognizance of bail entered into by the Defendants, the action in which that Recognizance purports to be taken is entitled thus —

"Joshua Whitcombe of Standstead, in the
"district of Montreal, yeoman, Plaintiff
"David Curtis and of the same place, Esq. Defend.

The Court held this variance fatal, and dismissed the action. —

No. 617.

Nicols & Sanford
vs.
Leonard Dutelle
and
Contra. en

On action of assumpsit for goods sold &c

Plea — non assumpt. — and Incidental demand for a sum of twenty five pounds for the value of certain goods wares and merchandises delivered by him to the said Nichols & Sanford to be sold by them as auctioneers at and for that sum — the said Incidental demand containing the several money counts and concluding to the payment of the said sum — To this demand the said Nichols and Sanford pleaded that they had sold the several

several articles delivered to them by the said Dutelle at and for the best and highest price that could be got for the same, at public and open sale, and had rendered an account thereof to the said Dutelle —

It appeared in evidence that the Defend^t had sent thirty pairs of shoes and thirty six gallons of brandy to the plaintiffs for the purpose of being sold at vendue, and the proceeds to be applied in part payment of the debt he owed to the plaintiffs — the Defend^t at the time affixed a price upon the said article namely, that the Pltffs should sell the shoes at four shillings the pair and the brandy for nine shillings, or eight shillings ~~and six~~ ~~pence~~ ~~p~~ per gallon — The Plaintiffs sold the shoes and brandy but not at the above prices, but at the prices they would bring namely, the shoes for three shillings and some pr 3/1 and 3/9 — and the brandy pr 4/2 ~~p~~ gallon —

Bourré for the Defend^t contended that on the Incidental demand, the said Pltffs

were

were accountable to the said Defendant for the sums at which he had limited the shoes and brandy, or that the plaintiffs should return the same to him —

Boston for Plffs answered — that when articles are sent to public vendue, for sale, the price of them cannot be fixed or limited to any particular sum as this is illegal — vide to Esp. N. P. p. 16. — Comps. Rep. 395. — but all articles sent to public vendue must be sold for such price as they will bring fairly, without being bid up to the particular sum limited by the owner, which is a fraud on the purchaser —

The Court admitted, that puffing at auctions, and using means to raise the price of an article sold at public vendue to a certain sum was illegal, and the auctioneer cannot be held to more than to sell such articles as are sent to him for the best and highest price they will bring — but it was perfectly fair and allowable for the owner of goods to limit a price for the sale of them, by which the auctioneer must be bound when he receives the goods upon those terms —

Whin

when a price is limited, the goods must be sold at this price, and that no fraud may be practised on the public, they ought to be set up at the price so limited, or it should be notified that they will not be sold under the price so limited — The Court therefore gave judgment for the Plaintiff upon the principal demand, deducting therefrom the amount of the Shoes and brandy according to the prices limited for the sale thereof by the said Defendant, and dividing the Costs of the Suit between the parties —

No. 560.

A. Ferguson vs. Millar & al. } Action on Recognizance of special bail. —

This action was instituted by Andrew Ferguson late of Danville in the State of Vermont now of the City of Montreal, Merchant, against the Defendants, for that they on the third day of October of the year 1812 in the Court of Kings Bench at Montreal, appeared in person in open Court, and then and there became pledge and

bail

bail for one Malcolm M.donald late of Charlottenburg in the province of Upper Canada lumber merchant, that if it should happen that the said Malcolm M.donald should be condemned at the suit of one James Wilson, then of the City and district of Quebec, and James White, then also of Quebec aforesaid, Merchants and Copartners trading together at Quebec under the firm of William Robertson & Co. in a certain action or plea of trespass on the Case upon Covenants and promises, then depending in the said Court by and at the Suit of the said James Wilson and James White against the said Malcolm M.donald, that he the said Malcolm M.donald should pay &c. and in his default the said defendants undertook and bound and obliged themselves to pay the said condemnation money and Costs for him, to the said James Wilson and James White, as by the record of the said Recognizance still remaining in the said Court doth more fully appear &c.

To this action the defendants pleaded, Nil. Deb.t and also denying the facts and allegations stated in the declaration.—

To support the plaintiffs demand, an extract from the Registers of the Court of Kings Bench for the district of Montreal was produced and filed which

which contained the recognizance entered into by the defendants, but it was stated to be in a Cause wherein John Wilson and others were plaintiffs against Malcolm Mc donald, Defendant—
This variance the Court considered to be fatal and therefore dismissed the action—

Drolet. —
vs.
Destroismaisons } Action on Obligation, in which the defendant had made an election of domicile, and at which the process had been served, not on the Defendant personally, but by speaking to another person resident at that place — The Defendant made default — and the Court considered the process duly served & gave Judgt. thereon

See Nouv. Denizt. Vo Domicile §. 7. No 2. —
1 Pigeau. p. 134 — in notis —
Repertre — Vo Domicile. sec. 5. —

Wednesday 18e Febry 1818

Sauvé
vs.
Vinet. } Action petitre by Pltff as Tutrix to her minor Children — The appointment of Tutrix had been made on the advice of Six relations only, & confirmed by the Judge

Objection was taken by Deft. to Pltff's right to bring an action under such an appointment — But the Court maintained it — & gave Judgt. accordingly — see — Dic. des Arrets. Vo Tuteur. p. 794. No 12, 18. Repre Vo Tuteur. §. 3. p. 318. — Denizt Vo Avis de Parens. No 3. Mêslé. ch. 7. p. 89. 115. — 2 Lamoignon, Arr. Tit. 4. p. 29. — Ferr. Jut. p. 125. p. 3. Sec. 5 —

Friday 20th Febry. 1818.

Courtclée vsn
vs
Gagnier.

This was an action for the exhibition of titles by the Defendant as one of the Censitaires of the Seigniory of Chateauguay to the Plaintiffs as the Seigniouresses thereof.

The Plaintiffs by their declaration concluded to the payment by the defendant of the "ecu et quart d'ecu parisis" for not having exhibited his titles to the plaintiffs of the property held by him in the said Seigniory, and also that he should be held and adjudged to exhibit his said titles within a certain limited time or on default thereof to pay a sum of twenty pounds to the said plaintiffs in form of damages — The defendant made default.

The Court gave Judgment in conformity to the conclusions of the declaration, and adjudged the Defr to pay to the Plaintiffs in form and name of damages a sum of ten pounds in case he should neglect or refuse to exhibit his said titles to the Plaintiffs within fifteen days after service of a copy of the Judgment upon him —

See. Nouv. Denis. Vo — amende art. 8. 2. N. 2 in fine —

Smith. —
vs
Aylwin val
and
M. C. Perrault
Opp.t

On Opposition afin d'annuller. —

The opposition states, that Marie Claire Perrault the wife of the defendant Cuvillier was separated from him as to property by Judgment of this Court of 20.t Oct. 1810 — and that on the 17th day of November following, she by notarial act renounced to the Community which had subsisted between her and her said husband, by means whereof the said Community was by law dissolved from and after the rendering of the said Judg.t of the 20th October 1810. and in consequence whereof, all property and effects afterwards acquired by her became her sole and separate property — That all the goods and effects sized by virtue of the writ of execution sued in this Cause at the Suit of the plaintiff, are the sole and separate property of her the said opposant and were acquired by her since her Separation with the said A. Cuvillier, and were sized in her possession and not in the possession of the said Austin Cuvillier. That the said pltff was well apprized that the said Austin Cuvillier had no moveable property, as appears by the Sheriffs return to a certain writ of Execution sued out by the said pltff, the said return, bearing date 20.t March 1815. —

Plea.

Plea. That the said opposant is not separated as to property with the said Austin Cuvillier her husband, nor can she maintain her present Opposition, as she is not by law sufficiently authorised in this behalf. That the aforesaid Judgt. of 20th Oct. 1810 is null and void as to the Plaintiff and the other Creditors of the said Austin Cuvillier, because the same was obtained by Collusion and without proof, and also because the said Judgment is not final, nor the separation executed as by law required.— That the said renounciation has never been enregistered, (insinuée) nor has the same been brought forward in Court until 1 Febvr. 1817, about Six Years after it is alledged to have been made.— That the said Opposant never made any seizure or Sale of property under the said Judgment, nor any Inventory of her own proper estate, of all which the said Opposant and her said husband have still a common enjoyment.— That the Opposant has made no demand or prosecution for her dot and her other matrimonial rights, and therefore the said Judgment of 20 Octr. 1810 must be hild and considered without effect as to Creditors.

That the effects seized by virtue of the writ of execution sued out in this Cause, were seized in the possession of the said Austin Cuvillier and are his property, & do not belong to the said Opposant.— Replication

Replication — joins issue on the matters of law and fact pleaded by the plaintiff to the oppos^n aforesaid . . —

There was testimony adduced by the parties to shew, that the greater part of the goods and effects seized were at the time in the house occupied by the Opposant, and had been purchased partly at Sales which the Opposant had made herself as an auctioneer and broker, and partly in different Shops in Town subsequent to the year 1810 — That entries were made in her books of acct. she kept according to the purchases so made for her — That on 29 April 1811 an advertisement had been put in the Montreal Gazette, intimating that the Opposant intended to carry on the auctioneering and brokerage business on her own account under the name of Mary. Cuvillier & Co — It was also given in evidence that the Opposant and her said husband had always lived together as usual, and that it was he who generaley conducted the sales at action and managed the business of the Concern —

Beaubien for the Opposant, contended, that all the effects purchased and acquired by the Opposant since the date of the Judgment of

separation

separation, was her sole and separate property and that she was entitled to main-levée on the seizure of them - as the separation and all the consequences are to be reckoned from the date of that Judgt. cites. Fer. Qr. Com. art. 234. p. 367.

Rolland for Plff - The separation set up in this case can be of no effect, having been obtained without any enquête on the facts alledged as the ground work of it - 1 Duplessis. 432. ch. 2. sec. 2 - The only proof offered was the acte d'attermoyement between Austin Cuvillier and his Creditors, which was no proof that the dot, or matrimonial rights of the Opposant were in danger -

That the Renunciation made by the Opposant to the Community, was not followed up by any other act necessary to give it effect, nor was it mentioned in anyway, or produced in Court until February 1817. - That the law required to make the separation effectual, that there should have been an Inventory and Sale of the property and effects of the Community, or a proces verbal of Carence made - also that the dot and matrimonial rights of the Opposant should have been settled and determined, and

a

a judgment rendered thereon - nothing of this has has been done, and the presumption is that the opposant had abandoned the idea of carrying the above judgment into execution —

cites. 1 Bourj. 605. № 4. —
1 Dupl. 433. —
Poth. Comty. № 518. 519. & 523. —
2 Pigeau. 194. 195. —
2 Argou. 213. —
Lacombe. Vo Separation. № 8. —

The presumption in law as well as in fact is that no Separation ever took place between the parties as they still live together, the business is carried on by the husband, and the property must be considered to belong to the husband. 1. Pigeau. 617. but proof of separate property is necessary. 1 Dupl. 433. — 2 Pigeau. 197. — and there is no proof to shew that the effects claimed by the opposant ever belonged to her. —

Beaubien in answer — The Judgment of Separation between the parties was pronounced en connoissance de Cause, and the evidence upon which that Judgment was rendered cannot now be looked into, and if it could, it will be found sufficient. —

That

That there is now before the Court no question touching the property of the Community that heretofore subsisted between the parties, the Opposant claims no part of that Community, but only such property as she has acquired since that Community ceased to exist—

The authorities cited by the plaintiff touching the in-execution of the Judgment do not apply, as the Opposant does not claim any right under that Judgment— her renounciation was a sufficient execution of the judgment as far as was necessary in this Case, as it liberated her from the debts of the Community, nothing more was necessary to be done on her part, as she claimed nothing more— cites. Gr. Comr art. 224. Sourn. 18. §. 2. p. 183—

That the Judgment of separation is finial and decisive in regard of all property to be thereafter acquired by the parties, and it was unnecessary for the Opposant to proceed to ascertain her rights under the said judgment, it would have been an expensive and ridiculous formality, as she had no rights to ascertain, nor did she claim any, nor did there exist any property upon which she could exercise such right— Gr. Comr. art. 224. p. 195.

That

That the insinuation of the Renunciation is not necessary, nor required by law — That as it appears that the goods and chattels of the Defte have been seized and sold, all further proceedings in regard of those goods and chattels to ascertain their number value or extent became unnecessary and as dot, the Opposant never had any claim in this respect, and therefore could not be bound to institute any demand in this respect —

That the proof of the purchase of the goods and chattels sized and claimed by the Opposant is clearly made out — It is proved that the Opposant gave public notice of her entering upon business on her own account and on her own responsibility and that she carried on trade in this way — It does not vary the Case that the Defendant her husband continued to live with her — and she has sufficiently proved that the effects seized are her separate property —

Rolland in reply — There is no proof that any of the articles sized was purchased by the Opposant or even on her account — That every Renunciation ought to be made public, if the parties mean to follow it up, and thereby to intimate to the world the separation which has been obtained — That

the

the non-execution of the Judgt. is proof of Collusion between the parties. — That in order to ascertain that the Defendant had no moveable property a Proces Verbal of Carence must have been made.

The Court were of opinion that the execution of the Judgment of separation between the parties had not been followed up as required by Law That where a Renounciation was made to the Community, it was necessary that this renounciation should be insinuated — and this more — especially in mercantile concerns, where it was necessary to be made known for the benefit of Creditors — and without which it cannot be opposed to Creditors — That when there is no moveable property or effects of the Community, a Proces Verbal de Carence ought to be made, and in fact every step ought to be taken by the wife that can be taken for carrying the Judgment into execution in order to avoid the appearance of Collusion — This has not been done — Upon these grounds therefore the Court dismissed the Opposition with Costs

Denizt. Verb. Renonciation Nº 16 - 136 - 2 Pig. 186.

Ib. p. 194

2 Argou. 213

2 Rouss. de la Dt p. 493.

see Execution forcée

Denizt. Verb. Separation de Nº 42. -

Plenderleath
N. C.^y Burton
and
Tunstall & ux
Oppts

On Opposition afin de conserver

The moyens d'opposition state, That the late Gabriel Christie on the 13 May 1789, made his last Will and Testament by which among other things, he gave & bequeathed to Sarah Christie his daughter, the wife of the Oppt Tunstall, the sum of £2500 Sterling, to be paid to her upon her coming of age or being married.— That the said Gabriel Christie died on the 19th. Janv 1799.— That by a deed of Transaction made and executed at Montreal before Mr Papineau, Notary dated 8 August 1800, to which the said Opposants were parties, it was stipulated that the said sum of £2500 should be vested and secured upon all the property of the said Defendant in this Province the interest thereof to be paid every six months to the said Opposants—

That the said Opposants having by virtue of the said deed become the Creditors of the said Defendants and acquired a mortgage on his property, are founded to have and demand out of the monies arising from the Sale of the real Estate of the Defendants which has been sold under the writ of Venditioni exponas sued out

out in this Cause, the amount of the aforesaid sum of £2500. with interest and Costs. &c

Plea — The defendant for exceptions & defenses to the said Opposition, saith, that by the said deed of Transaction of the 8.r August 1800, the said opposants consented and agreed, that the said sum of £2500 so bequeathed to the Opposant Sarah Christie, should remain vested and secured upon all the property and estate of the said defendant, that the interest thereon should be paid to her every six months during her life time, and after her decease that the capital should be paid to her Children — That by the said deed the Opposants renounced to any right they had to claim any part of the said Capital during the lifetime of the said Sarah Christie. — That by the decret of the said real estate of the Defendant the right of Mortgage of the said Opposants is reserved to them — That the said principal sum of money being thus secured to the children of the said Opposants, they the said Opposants are not entitled to claim the same by this present Opposition, nor to alter the terms and conditions of the said transaction of the 8.r August 1800. —

Replication & answer to exceptions — That notwithstanding the aforesaid deed of transaction the opposants are founded in demanding that the said

said sum of £2500, so bequeathed to the said Sarah Christie, be paid to them the said Opposants, inasmuchas the same is the right and property of the said Sarah Christie, and not of her Children, and by the said deed of transaction the said Opposant never gave up the right to claim and receive the aforesaid sum of money, the intention of the Opposants being, that in case the said sum of money should still be in the hands of the said Defendant at the time of her death, the same should be paid to her Children.— That the said Opposants by consenting that the said sum of money should be so vested and secured on the property of the said Defendant upon her receiving the interest thereof during her lifetime, did not mean or intend thereby to make a donation thereof to her Children, nor has she in effect made such donation to her said Children, who were no parties to the said deed and can draw no benefit therefrom—

That the Consent of the parties plaintiff and Defendant, that the property of the Defendant seized and taken in execution in this Cause, should be sold subject to the payment by the purchaser of the ~~interest~~ on the principal sum of money to the said Sarah during her lifetime, and the principal to her Children after her death, as—

declared

declared by the Judgment of this Court of the 19th October 1816, cannot injure or affect the right of the said Opposants as they were no party to that judgment, nor did they ever acquiesce therein — That the said deed of Transaction can be considered only as a delay given by the Opposants to the said defendant to facilitate him in the payment of the said sum of money in consideration of the security and mortgage granted to the said Opposts for the same — and that by effecting the Sale of the said Real Estate the right of the said Opposants is thereby altered and weakened, whereby they are entitled now to demand the payment of the aforesaid sum of money — and concluding, That it be declared by the Court, that the said deed of Transaction, and also the said Judgment between the said parties plaintiff and defendant, cannot in law prejudice the right of the said Opposants, and in consequence that the Sale and adjudication made to the plaintiff of the property and Estate in question may be set aside in so far as regards the said condition of paying the said sum of £2500 — That the said Opposants be thereupon collocated according to her right of priority of mortgage and be paid the said sum of money with interest & Costs —

The

The clause in the deed of Transaction of the 8th August 1800 touching the money in question, is in the following words —

"Et quant à la somme de deux mille cinq cent
" livres Sterling à chacune d'elles affirants au desir
" du dit Testament, elles consentent et accordent, que
" les dites sommes de £2500 chacune, demeurent
" pareillement assignée et affectée sur tous les biens
" Immeubles situés en cette Province qui appartenoient
" au dit Testateur pour la rente de chacune des
" dites sommes leur être respectivement payée sur le
" pied de Six pour Cent par an par le Receveur et
" administrateur des dits biens en cette Province, en
" deux paiemens egaux de six mois en Six mois, sur
" leur simple recu, pour leur usage et maintien
" particulier leur vie durante, et apres leur décés
" le Capital retournera à leurs enfans respectivement
" &c.a"

The Court were of opinion that the terms of the deed of transaction or agreement of the 8th Augt. 1800 could not be altered, as the stipulations therein contained were legal, and the parties thereto competent to bind themselves for the performance of all those stipulations, That there appeared a sufficient consideration to support the said deed and induce the arrangements thereby made, and until that Deed shall have been rescinded either

either by the act of the parties or by the authority of law, the Court must hold the parties to the performance of it — Opposition dismissed with Costs. —

April Term 1818.

Wednesday 1st April 1818.

Perrault & al'
vs
Martin & al'.

Action by ptffs as payees of a promissory note, against the Defendants as makers

The Plaintiffs are thus stated in the declaration.

Marie Claire Perrault of the City of Montreal in the district of Montreal, wife of Austin Cuvillier Esquire of the same place, and separated from him as to property by judgment of this Court of the 20th October 1810, the said Marie Claire Perrault being a marchande publique; and Jacques Antoine Cartier of the same place, merct, the said Marie Claire Perrault, and the said Jacques Antoine Cartier, being partners carrying on

on trade in the said city of Montreal, under the name of Marie Claire Perrault & Co. Plaintiffs, complain of &c and stating the Note made by the Defendants by which they jointly and severally promised and undertook to pay to the plaintiffs by the name of M. C. Cuvillier & Co the sum of &c

Plea. Non assumpt. and 2d Plea of per. excepn en droit, that the plaintiff Marie Cl. Perrault is not separated from her said husband, nor is she a marchande publique, and therefore cannot ester en Jugement in this Cause. —

Replication & demurrer — joins issue on plea of non assumpt — and answers to the exception peremptre that the same is insufficient and inadmissible inasmuchas the validity of the separation in question does not concern or interest the Defendrs nor can they be admitted to call it in question. Nor can the said Defendants be admitted to plead that the said Marie Claire Perrault is not a marchande publique and does not carry on trade jointly with the said Jacques Antoine Cartier,

inasmuchas

inasmuch as the defendants have undertaken and become bound to the pltffs in that name and capacity.

The parties having been heard on the above exception a day for proof thereon was given by the Court, when the following evidence was adduced

1st Certified Copy of the Judgment of Separation between the Plaintiff Marie Claire Perrault and her husband Austin Cuvillier, of the 20th October 1810.- and renunciation thereupon.-

2d Deposition of Robert Stuart, to prove that the Plaintiffs carry on trade in the City of Montreal as auctioneers and brokers, and Partners under the name or firm of Marie Claire Cuvillier & Co since January 1817. previous to the making of the Note in question.-

The Court considered this proof sufficient to entitle the Plaintiffs to maintain their action - That as the Defendants had contracted with the plaintiffs in the name and capacity in - which they sue, it became immaterial to examine into the validity of the title under which they claimed - and at all events, the Judgt of Separation was sufficient prima facie evidence of an effectual

Separation

separation between the said Marie Claire Perrault and her husband, unless impugned by sufficient evidence to the contrary, which did not appear here That all the Defendants could require was a suffe discharge for the debt he owed to the plaintiff, and this they were enabled to give in the capacity under which they claimed, and under which the Defendt had contracted with them.— The exception was thereupon dismissed.—

Debartzche vs Finlay.— } Action to recover Seigneurial rents and other dues.—

Plea— Nil. deb.—

The Plaintiff having been admitted to examine the defendant upon faits et articles — proposed the following Interrogatories to which a letter was annexed, stated to have been written by the Defendt to Mr Rolland the Plaintiff's attorney, but which had not been filed in the Cause—

Interrog. 1. If it be not true, that the paper writing hereunto annexed, purporting &c.— is of the

the proper handwriting of him the Defendant, and by him written and addressed to the said plaintiff's attorney, in answer to a letter from the pltff's attorney as therein mentioned?—

2. The Defendant being required to look at the plaintiff's exhibit No 1. filed in this Cause — If it be not true, that in the letter by him received from the Plaintiff's attorney in this Cause, was inclosed a copy of the said paper writing or exhibit of the Pltff. No 1. now shewn to him the Defendant — or what other paper, if any, was inclosed in, or forwarded with the said letter by the said Defendant, so received from the plaintiffs attorney?—

3 If it be not true that the several lots of land mentioned and described in the plaintiffs declaration are the same lots of land referred to in the letter or paper writing hereunto annexed, respecting which he the said Defend. has been here above first interrogated?

4 If it be not true that he the said Defendant has already paid to the plaintiff in this Cause, Seigneurial dues for the same lots of land, as being possessed by the Defendant?—

The Defendant did not appear to answer to the above interrogatories, and the plaintiff's

counsel

counsel thereupon moved that the said Interrogatories should be taken and considered as acknowledged and admitted, and judgment thereupon rendered in consequence.—

Mr Ross for the Defendant objected to the production of the letter annexed by the plaintiff to the Interrogatories by him proposed to the Defr. inasmuchas the same being in the power and possession of the said Plaintiff had not been produced or filed by him as an exhibit in the Cause, and it was irregular and contrary to the practice of the Court to produce any such paper after the enquete had been closed, or to examine any of the parties thereto — that the said interrogatories were therefor irregular, and the plaintiffs' motion ought not to be granted

Rolland for the Plaintiff, contended that he had a right to examine the Defendant to all the facts contained in the above letter, without having produced it, and the producing of it might serve to refresh the Defendants memory but it did not change the nature of the question

as

as to the right of examining the Defendt on the subject of the contents of that letter, as in this respect there was a material difference as to evidence procured from the mouth of a witness, and, but from the mouth of the party. —

The Court considered the Interrogatories proposed to the Defendant to be of a nature from which no conclusion could be drawn against him in favor of the plaintiff — That the mode of proposing the question by the words — "If it be not true", could not be considered as an interrogation, the word "If", being a conditional conjunction, which supposes something upon which consequences may, or may not arise, but by no means conveys the language of interrogation. — That as the default of a party to answer — to Interrogatories, was attended with serious consequences, and might deprive that party of very essential rights, it became necessary that these Interrogatories should be drawn in the most pointed and clear manner so as to leave no doubt or difficulty as to the conclusion to be drawn where these interrogatories were to be taken

and

and considered as acknowledged and admitted, as otherwise the party proposing such Interrogatories could not expect to reap any benefit therefrom nor would the Court be disposed to grant its aid to facilitate the obtaining of evidence under this mode of proceeding, which ought to be always taken according to the strict letter of the law.

The Court were also inclined to think, that the producing of any written document not filed in the Cause for the purpose of examining any of the parties thereon, was contrary to the rules of practice, inasmuchas every written document to be used in evidence in a Cause, and which was in the possession of the party, ought to be filed, otherwise it cannot be received in evidence.

Upon these grounds the Court rejected the plaintiff's motion to declare the Interrogatories in question acknowledged and admitted by the Defendt, and as there was not sufficient evidence in the Cause to support the plaintiffs demand the action was dismissed, saving his further recourse.

Drean

Drean
v
Fraser.

Action de revendication for sundry goods wares and merchandises.—

Plea. Not guilty, and non detinet— further that the several goods chattels and effects in question are not the property of the Plaintiff—

That the said goods chattels and effects were put into his the said defendants possession as a public auctioneer and broker on or about the 16th. February 1814 by one R. Sherwood, Captain in His Majesty's Service and by one Noah Freer, Prize agent for His Majesty in this Province as being prize goods captured from the Kings Enemies to wit, the Citizens of the United States of America, by a party of His Majesty's Troops, in order that the said goods wares & might be sold and disposed of at public Sale for the benefit of the Captors.—

On this Plea issue was joined by the Plaintiff.

On the 8th. June 1814, the Solicitor General, (Mr Sewell) intervened on behalf of His Majesty, and claimed the said goods chattels and effects as belonging to him, and stated, that on or about the 7th day of Febry 1814, at Madrid a Town within the territory of the United States of America, with the Government of which said Country our Sovereign Lord the King then and long before was and still is at War, the said goods chattels and effects were taken and captured by a detachment of the Troops of our said Lord the King, as good and lawful

prize

prize, the said goods chattels and effects being at that time the property and in the possession of certain persons subjects of the said Government of the United States, and Enemies as aforesaid of our said Lord the King, by reason whereof the said goods chattels and effects became and now are the property of our said Lord the King, and were by order of the Governor in Chief of this Province deposited in the hands of the said Defendant for the purpose of having the same sold — Whereupon prays that Plaintiffs action be dismissed, and that the said goods chattels and effects be adjudged to our Sd. Sovereign Lord the King as his property —

Plea by Deft. denying generally all the allegations contained in the said Intervention —

It appeared in evidence that the goods in question had been purchased by the plaintiff at Montreal in the year 1813, and had been put on board of batteaux and forwarded by him to Upper Canada in October of the same year, — that these batteaux had been surprised and taken by the enemy and carried into Hamilton in the Township of Madrid in the State of New York — those goods were afterwards carried ten or twelve miles into the Country and remained there in the possession of the Americans until the end of January or beginning of February 1814, when they were retaken by one Capt. Rheuben Sherwood of Upper Canada, a Captain in His Majesty's Service, with some Militia

and

and regular troops under his Command – That the Goods, or a part of them were understood at the time to belong to the Plaintiff, who had gone to Hamilton in order to recover them while there, but the Captors refused to deliver them up. That the said goods had been condemned as prize goods in the United States, as was generally understood, and the sale thereof as prize and condemned goods had been publicly advertised in an American paper called the Northern Luminary – such part of the said goods as had remained at Hamilton and had not been recaptured by Capt Sherwood were sold by one Fairbanks, deputy marshal of the district Court. – That it did not appear that the Captain of the American Armed boat which captured the said batteaux had any Commission or authority from the Government of the United States to capture the said batteaux but that the crew of the said Armed boat was composed of about twenty private Citizens and five or six dragoons belonging to a troop of Dragoons then passing through that part of the Country who volunteered to go in the said boat and seize the said batteaux

M^r Ross, Kings Counsel, in support of the Intervention argued, That the goods in question having been captured by the public enemy, having remained in his possession for two months upwards, and having been afterwards re-captured by the Kings Troops, the Plaintiff lost all title thereto and all hope of ever recovering them – The goods were carried <u>infra præsidia</u> of the enemy,

which

which divested the Plaintiff of all title thereto - cites 2 Br. Civ. & Adm. Law. 251. 252. — 2 Doug. 614. — refers also to case. 1 Rob. Adm. Rep. 60. also. 51. & 52. in the note - Case of Countess of Lauderdale. 4 Rob. Adm. Rep. 285. — The owner ought to prove that he was never divested of ~~this~~ property to entitle him to his action Id. p. 286 - 2 Bur. Rep. 690.

Sullivan for Plff, refers to the right of post liminii, when things retaken from the enemy resume their former Condition and return to their original owner. Grot. lib. 3. ch. 16. p. 2 — Vattel. lib. 3. ch. 14. p. 206. 209 — Bynkershoeck — Azuni on Maritime Law. p. 2. ch. 4. art. 5 — There is no general principle of law in cases of recapture which go to exclude the original owner of his property 1 Rob. Adm. Rep. 139. — 2 Bur. 694. Goss & al. v. Withers and Hamilton v. Mendez — Even a Sentence of condemnation will not always operate a forfeiture That goods taken by a highwayman or a Pirate when retaken must be restored to the Owner — cites Vatel. lib. 3. ch. 15. §. 226. 7. 8. 9. — refers to evidence admitted to shew that the persons who captured the plaintiffs goods, were not employed in any public capacity to act against the Kings Subjects, these persons were mere adventurers, and robbers of private property - The Stat. 43. Geo. 3. ch. 66. sec. 41 -

recognizes

recognizes the right of post liminii upon payment of Salvage, which is the utmost that could be claimed of the Plaintiff in this Case — Chitty on the Law of nations cites same Stat. ch. 160 — It is true this Statute applies to Ships and goods taken at Sea, but the same principle ought to apply to goods taken on Land, for the same reason exists in both instances, and the principles of Justice would seem to point this out as a liberal construction of that Statute, and Chitty on Pub. Law p. 16 inclines to this opinion — but in this case the goods were taken on board of boats and vessels, and therefore within the literal interpretation of the above Statute —

Sherwood of counsel for the Pltff — The case cited by the Counsel for the Intervention from 2 Douglass does not apply, as the only question there was — whether the Court of Admiralty had or had not Jurisdiction — This is merely a question of Salvage the Stat. 12. An. St. 2. ch. 18. applies to the dangers of navigation and not to capture by the enemy, but by an equitable construction of this Statute, it has always been extended to subsequent cases of Capture — the Stat. 43. Geo. 3. ch. 66. ought to be construed on the same liberal principle and be made to apply to captures on land as well as at

Sea

Sea.— refers to case cited in Woodeson's Vin. Lec. p. 429. 430. 431. of property captured by the Kings forces which had been taken by Pirates — it must be restored to the Owners — In all cases of Salvage nothing is said about the right of the Crown, — except St. 19. Geo. 3. ch. 67. — and Comy. Dig. Tit. Prerogative (B) 14 which refers to the Statutes on Salvage, cites no case that the Crown has a right or ever claimed the property of the Subject which had been re-captured from the enemy by the Kings Forces — The property in such cases would belong to the Captors and not to the Crown, and this whether captured at Sea or on the land —

The Court now must consider whether the Defendant's plea will justify his detention of the plaintiff's property, he claims no Salvage, which could be his only justification, and the Court can grant none even if the goods should be delivered up to the Plaintiff — The St. 19 Geo. 3. ch 67. applies to Captures from the Kings Enemies, and not to recapture of the property of the Subject.

The

The Court held – that in this Case it appeared the property of the goods in question was in the Crown, as all booty taken from the Enemy by the Kings Troops vests in the Crown – It was not necessary to look into the means by which the Enemy had become possessed of these goods, it was sufficient that they were found in their possession and held by them as their property to entitle the King to claim the same upon their being re-captured from the Enemy, and unless the Plaintiff could have shewn a better right in the goods and sufficient to divest the right of the Crown, he cannot maintain the present action. Now it is evident that the right and power of the Plaintiff over those goods at the time of their re-capture had ceased to exist, and even long before that time – Soon after their capture by the Enemy the Plaintiff followed the goods to Hamilton, and there claimed them – he failed in obtaining them, and this because the Enemy considered them then to be their property – here then was the hope of recovering the goods must have vanished – and subsequent to this, we find the Enemy dealing with them as their own, transporting some of them into the inland parts of the Country for Security, advertising them

for

for sale. after they had been three months in their possession, and actually selling that part which had not been re-captured — Under these circumstances there appears no principle upon which the right of the plaintiff can be maintained

Action dismissed —

See Martin's Law of Nations. book. 8. ch. 3. Sec. 11. p. 298. 299 —

Burlamaqui Prin. Pol. Law. 2. Vol. part. 4. ch. 7. p. 380. Sec. 25 — and also. Sec. 18. p. 379 —

Vattel. B. 3. ch. 13. p 385. §. 196 —
——————— p. 394. §. 209 —

2 Br. Civ. & Adm. Law. ch. 7. p. 267

2 Doug. Rep. 610. Obita opinion of Ld. Mansfield —

Taylor
for

Taylor. —
vs
Surrenburgher } On action of account. —

The matters in dispute in this case had been left to arbitration by the Consent of the parties, and three arbitrators were named by them, any two of whom were competent to give in an award — Two of the said Arbitrators did make their award, but it not appearing thereby that the third Arbitrator had been notified, or had participated in the proceedings and an objection being taken to the award upon that account, the same was set aside, and the Arbitrators were directed to proceed anew after due notice to the parties — The Arbitrators having in consequence assembled under regular notice, and having heard the parties, but without hearing any witnesses, the same two arbitrators again united in opinion, and therein stated that their first award had been regularly made, that all the parties and their witnesses had been heard before them, and this in the presence of the third arbitrator, who differed in opinion from them and refused to sign their award, but that in every respect their proceedings had been regular; that they had again

proceeded

proceeded to hear the parties in the presence of the said arbitrator, but had not heard the witnesses as their evidence had been already given on the former meeting, and that they still continued of the same opinion as they formerly had given, in awarding to the Plaintiff a sum of £32. 8 — The third arbitrator made a separate report, under the last rule of the Court stating that he had refused to join with the other two arbitrators in their award as they had refused to hear the witnesses anew —

The plaintiff now moved that the Interlocutory Judgment setting aside the first award should be rescinded, inasmuchas it now appeared that the grounds upon which the same had been made, were unfounded, and that the Court had been led into an error by the allegations of the Defendant in this behalf, and that thereupon the first award so made and rendered by the said Arbitrators should be homologated and confirmed —

The Court taking into consideration the award of the arbitrators secondly made and the affidavits filed in support of the said Motion granted the same, and gave Judgt for the Plff on the first award. —

Phelps
vs
Conant

On action of revendication for 95 pieces of square oak timber. —

The plaintiff states himself to be of the town of Messina in the County of St. Lawrence in the State of New York, now of the City of Montreal in the district of Montreal in the province of Lower Canada merchant, and complains of George C. Conant late of the town of Lisbon in the said County of St. Lawrence, now of the said City of Montreal, dealer in lumber — For that he the pltff on the 1st June 1814 at Messina aforesaid was possessed of 95 pieces of Squan oak timber containing about 2400 cubic feet of the value of £240, afterwards at Messina aforesaid lost the same, which at Messina aforesaid afterwards on the day &c came to the hands and possession of the Defendant without any legal right &c — and which said square oak timber hath been by the said Defendt brought within the jurisdiction of this Court — Whereupon

Plea — That the Defendant doth not withhold or detain the property of the pltff — that the timber in question never belonged to the pltff, but was and is the property of him the Defendant — That if the plaintiff ever had a possession of the said timber, it was fraudulently

obtained

obtained from persons who had no right therein—
Repication joins issue.—

The facts proved were that the oak timber in question had been cut upon waste lands in the County of St Lawrence in the State of New York by certain persons who sold it to the pltff. the wood was delivered to the plaintiff, paid for by him and marked with his mark — but while at Messina it was seized in consequence of the directions of a Mr Ogden who was stated to be the agent of the persons who were owners of the lands when the said wood had been cut, and the persons who cut the same were prosecuted as trespassers — the wood having been thus taken out of the possession of the pltff, was sold by Mr Ogden to the Defendant who rafted it down to Montreal where it was seized at the suit of the plaintiff in this suit — the prosecution against the persons who had cut the wood, and seemed to be of a criminal nature, failed from want of proof or other Cause —

Sherwood

Sherwood of counsel for the Defendant argued, - This is an action between two citizens of the United States of America - the action is local and not transitory, it is in the nature of an action of trover & conversion, which arises ex delicto, and must be tried where it arises - and according to the principles of the French law suits between Strangers touching acts done by them in their Country, could not be maintained in France - cits Denizt Vo Etranger. No. 23. - and the reason is evident, because the acts done in a foreign Country which by the laws of that Country are legal and sufficient, may be differently considered in this or any different Country, what might justify a man in his own Country may not always justify him in another Country, and it would be dangerous for any man travelling into this country for the purposes of trade or otherwise, if the title to his property which he - acquired in his own Country, or the acts done by him in his own country, were to be contested, tried and adjudged by the laws of this Country - No man would be safe, it would be a bar to national intercourse, friendly or commercial, - but the law is otherwise - cits Denizt Vo Jurisdiction - 3. Bl. Com. as to jurisdiction in local actions -

This

This Court cannot enquire into the validity of the title of the defendant to the timber in question which had come to his possession within the State of New York, that possession ought to be considered as a legal and sufficient title, not liable to discussion in the Courts of this Country – this court cannot judge upon the laws of a foreign Country, nor can they judge that the plaintiff is entitled to the wood in question as being his property, without judging that he had been wrongfully turned out of possession by one Mr Ogden in a foreign Country, which they cannot do – But were the Case within the jurisdiction of this Court, the evidence is insufficient –

Stuart for the Plaintiff – The present action may be assimilated to the English action of Detinue, which is a personal action, and all personal actions are of a transitory nature, except where connected with the realty which is not the Case here – If the Defendant could have set up any title to the timber in question under the laws of the Country where he got the possession of it, he could have pleaded it and proved it, and this Court was bound to have given him all the remedy he was entitled to obtain from those laws – The

Plaintiff

Plaintiff here traces the timber up to a time when he had a better title than the Defendants – this title the Plaintiff has proved, and it was the duty of the Defendt in this Court, as he would have been held in the Courts of New York, to shew a better title than the pltff. has

The Court held that as the action before it, being a personal action, it was transitory and could be brought against the defendant in this Court, and that as the timber in question had been attached under the process of the Court, the parties were entitled to claim its decision as to the right of property therein. That injury and injustice to a great extent would arise, if foreigners bringing property into this Province whether wrongfully or by legal title, could be exonerated from all claim or demand in regard of such property – as it would render the Province the emporium of whatever was acquired by felony or fraud & prove the security against all pursuit – It is consistent with the laws of nations, more particularly of those in commercial intercourse with each other, that they should extend the same protection and relief in regard of the property and persons of the subjects of each other, as such subjects could have by the laws of their respective Countries – And in the case before the Court the Defendant could have had all the benefit of the laws of his Country in

regard

regard of the timber in question, by pleading and proving those laws – this is consistent with the practice of Courts – and if the defendant has not thought fit to do so, we must presume that he could set up no title under those laws to the said timber, but has trusted his case to the laws of the Country where he has brought that timber, according to which and under the evidence adduced, the Court must adjudge the timber to belong to the Plaintiff. –

Dumeril
vs
Cherrier

Action on a promissory note, stated to be lost – also for work & labour &c.

It appeared in evidence that the Plaintiff had agreed to serve as a substitute in the Militia for the Defendant, in consideration of a certain sum of money agreed on between the parties – and for the payment of which some writing in the shape of a promissory Note had been drawn up and signed or acknowledged by the Defendant. To prove this agreement the Plaintiff examined the Defendant on faits & articles, who acknowledged that

that such an agreement had been entered into between him and the plaintiff, for and in consideration of the sum of fifteen pounds, which sum he, the defendant had been always ready and willing to pay to the plaintiff, and had tendered the same to him before the bringing of the present action—

The Plaintiff proceeded to prove by witnesses the services rendered by him for the Defendant as his substitute in the Militia, and a quantum meruit thereupon to the extent of £30—the sum demanded by the declaration—

It was objected on the part of the defendant that as the plaintiff had failed in his proof of the written contract declared upon, he could not be permitted to prove any other Contract, express or tacit between the parties, by verbal testimony as the matter in contest exceeded an hundred livres—

The Court however held, that although the Pltff had failed in his proof on the written Contract, this did not preclude him from going into evidence on the Count contained in his declaration for work and labour, which did not prove a Contract, but

the

the fact of the services rendered by the plaintiff for the Defendant and the value of those services and therfore gave judgment for the thirty pounds on that Count in favor of the pltff. —

Bridge & Penn.
v.
Flynn & ux.

On rule to shew Cause why the Judt in this Case should not be arrested &c

The following verdict was returned by the Jury —

"The Jury give a verdict for the plaintiffs,
"(for the sum demanded,) without interest, and
"without taking away the right the Defendants
"might have, to produce in payment of what
"they owe, any receipt or receipts they may hold
"independant of the sum they are credited for." —

Sherwood for the Defendants — The verdict is conditional, it is not final nor sufficient to warrant any judgment thereupon — cites. 5. Com. Dig. Tit. Verdict. 513. 514. — 518. 519. 523. & 525. — also. 2. T. Rep. 281 Jackson. v. Williamson — the verdict cannot now be altered or amended, nor any explanation received respecting it — But the Court may award a

Venire

Venire de novo. and have the Case tried anew, and this will furnish an opportunity to the Defendants of again offering in evidence the receipt produced by them on the former trial, but which was rejected by the Court because it had not been filed — which opinion given by the Court touching the rules of practice ought also to be re-considered. —

Sullivan for the plaintiffs shewed Cause, and contended that there was no repugnancy in the verdict, as what is therein stated in regard of the receipts which the defendant may have, is at most but surplusage and does not vitiate the verdict refers to Com. Dig: tit. Pleader (S.) 26. Raym. Rep. 669. referred to in 13ac. Abt. 2 Sand. Reps. King v. Urlyn 308. — and 1 Tr. per Pais. 315. —

The Court however considered the verdict sufficient, and the additional terms in it regarding the receipts to be mere surplusage — and therefore discharged the Rule —

see 5. Com. Dig: tit. Pleader. S. 28. p. 512
Id. ——— " — S. 40. —
1 Raym. Rep. Palmer. v. Stavely. 669 —
Tr. per Pais. 298 — refers to case in Raymond

Friday 10th April 1818.—

Roi — vs — Perrault val.

On Plaintiffs motion to examine Austin Cuvillier, the husband of Marie Claire Perrault, one of the defendants.—

Roi for Pltff - grounded his application on the principle, that Austin Cuvillier was the person who conducted the affairs and concerns of his wife the Defendant Perrault, and although separated from her as to property, yet as he cannot be a witness in the Cause, injustice may arise to the plaintiff unless the said Austin Cuvillier can be so examined

Beaubien for the Defdts There being no Community between the said Marie Claire Perrault and the said Austin Cuvillier, and having no interest in the Cause, he cannot by his answers bind the said Marie Claire Perrault the Defendant

The Court rejected the motion inasmuches no sufficient ground was stated or shewn from the evidence adduced in the Cause, that Austin Cuvillier the person to be examined was in anywise interested or concerned in the business carried on by the said Defendant his wife, or that he acted for her and conducted that business in her name

The follows. case was judged on 9th. april.

Johnson
vr
Brown

On exception pleaded by Defendant to
sufficiency of the Service of the process —

The action was instituted by the plaintiff
as Seignior of the Seigniory of Argenteuil ag.t
the Defendant as his tenant and censitaire, for
the recovery of certain rights and revenues due to
the Plaintiff as Seignior. — The Defendant has
his domicile in Montreal, where he keeps a Store
and carries on business as a bookseller & printer —
he has also established a paper manufactory on
the Seigniory of Argenteuil, has there built a
dwelling house and ware house for his paper, and
for goods which he sells there — The Defendant —
generally lives here, with a part of his family, and
goes occasionally to Montreal to superintend the
business there — The Defendant was appointed
Inspector of the roads and a Captain of militia
in the said Seigniory, and when there acts as
such — The process in this Case was served upon
the Defendant at his house in Argenteuil, by
leaving the Summons & declaration with one of
his servants, while the Defendant was at Montreal.

Mr

Mr O'Sullivan for the Defend^r contended that this service of process was insufficient, as the domicile of the defendant was at Montreal and not at St. Andrews in the Seignory of Argenteuil – That the domicile at Montreal was the demeure naturel of the Defend^r his residence at St. Andrews only transitory, and cannot constitute a domicile – Admits that Defend^r is a Censitaire of Pluff, but that this does not affect the question as to exploit d'ajournement under the provincial Ord^{ce} of 1785 – refers also to Rep^{re} v^o Domicile. p. 106. – and in case of doubt the first domicil must be preferred 1. Journal du Palais. –

By the Court – There is no doubt a distinction to be taken between Domicile and residence – su 1. Sousse on Tit. 2. art. 3. of Ord^{ce} 1667, where he says – "Il ne faut "pas confondre le domicile avec la residence – on peut être "resident dans un lieu sans y avoir son domicile – Ce "domicile est le lieu ou l'on habite, et ou l'on a etabli sa "demeure ordinaire et permanente – au lieu que la residence "s'entend d'un lieu, ou l'on fait une demeure passagere" &c – see also. 1 Pigeau. p. 133. not (b) – and hence it is said that a man can have but one domicile, although he may have many places of residence – 1 Lamoig^{re} 35.

The Prov. Ord^{ce} of 1785 says, "That the writ of Summons "and declaration shall be served on the Defendant – "personally, or left at his house with some grown person "there belonging to the family." – Two modes of the service of process is here pointed out – one upon the

Defend^r –

Defdt personally, the other at his house, with some one of his family — and by the word house, must be understood his veritable domicile, as laid down by the law.

Fer. Dic. Vº Domicile
Repertoire dº
Lacombe dº
Denizart dº
§. 1. Nº 2 - and
§. 7. Nº 1. —

Here the objection is taken, that the service in this case is neither personal, nor at the domicile, hence it is inferred, that it is no legal service — but we must look a little further into the law and we shall find that service of process at the residence of a party is recognized. —

By the Prov. St. 41. Geo. ch. 7. s. 5 — it is provided that "when the writ of Sumons shall not have been personally served "upon the Defendant, in case of Judgt by default as him "he shall be entitled to the benefit of a re-hearing, upon his "making it appear that the place where the process had "been served, was not his real domicile, or usual or "actual residence" — Here then is recognized a mode of service of process as sufficient, beyond what is limited by the Ordinance of 1785, namely, at the usual, or actual residence. —

The next consideration is, in what manner is process to be served, at the usual or actual residence? Can it be done in the same manner as at the real domicile — that is, by leaving it with a person in that residence — or one of the family — or must it be personal service? — It is not necessary here to give any opinion on the question in general, it is sufficient to observe, that there are circumstances in this particular case, which render the service of the process sufficient. — they are these —

1. The Habitual residence of the Dfdt at Argenteuil for some years past
2. Inhabiting & living in his own house there w[ith] his Servants &c
3. Carrying on trade there under his own particular direction
4. Holding local appointments there — such as Capt. of Militia Inspector of the roads &c —

all

All these are marks of a real domicile — and if the clearest proof had not been made out that the real domicile of the defendant was elsewhere, this would have been sufficient to have constituted it — but what does the law say, with regard to service of process at a residence such as this — it is considered to be a good servic — see Nouv. Denizt. Vo Domicile. No 7. §1. "Nous " croyons cependant qu'il suffit pour la validité de " l'assignation, que le domicile veritable soit apparent, " ainsi, lorsqu'il y a toute apparence qu'une personne " est domiciliée dans un lieu ou elle fait une residence " habituelle, et ou elle est logée dans une maison qui lui " appartient, ou qu'elle tient à loyer — l'assignation donnée " à un pareil domicile sera valable, quoique peut être " on put juger qu'elle avoit son domicile dans un autre " lieu." Jeu

There is besides, a further reason applicable to the present action, why the service of process as made on the defendant here ought to be maintained, the demand being by a Seignior against his Censitaire for seigneurial rights upon the property possessed by the Defr

Pothier, after laying down the general principle that every citation or ajournement must be made to the person or at his domicile, establishes some cases of exception where process may be served at the simple residence & where there exist no domicile, and cites the instance of Seignior & Vassal — see Poth. Proc. Civ, ch. 1. art. 2. Excep. 2. p. 6. — see also Principes des Regles Judiciaires. ch. 29. p. 111. —

The Defendrs motion was therefore dismissed —

Bridge

Bridge & Penn
vs.
Dutelle. } On action of assumpsit for goods &c sold and by the plaintiffs as auctioneers and brokers against the Defendant as a Tavernkeeper.—

The defendant having by his plea concluded to the Country, the plaintiff moved that the Defendant should be held to alter his conclusions in the said plea and to conclude to the Court, inasmuchas the Defendant was a tavernkeeper and not by law entitled to have a trial by Jury.—

Bourré for the Defendant— Contended that a tavernkeeper was a trader in contemplation of law, and the question before the Court regarding the sale of goods by the Plaintiffs as merchants and traders to the Defendant as such tavernkeeper he was therefore entitled to the trial by Jury— That the designation of trader, was to be determined by the nature of the business carried on by the parties, and not by the addition given to them in the declaration as was held by the Court in the Case of Spatz. vs Huntoon. 12 June 1826, where the Court refused to oblige the Defend: to conclude to the Court, although he was stated in the declaration to be a trader and the Plaintiff a furrier—

The

The Court held that the plaintiff's motion must be granted, as the Defendant, merely as a Tavern keeper, could not be considered a merchant or trader in contemplation of the provincial Ordinance of 1785 - They considered this Case to be different from that cited of Spatz v Huntoon, where the parties were rightly considered to be traders, as well from their addition in the declaration, as from the nature of the transaction therein stated -

Tuesday 14th. April 1818.

Pothier, Exer.
vs
Foucher & al.
and
Henry par rep.
d'instance &c

On Defendants motion to reject the faits et articles proposed by the plaintiff, as not pertinent &c

Vigé for Marie Julie Foretier & Marie Amable Foretier, objects to the first nine of the faits et articles in question, as irrelevant and inadmissible inasmuches they tend to prove the writing and signature of the late Pre. Foretier - cites Repr. Vo. preuve 587. - and as to all the other faits et articles except the 11th they are inadmissibles, as they tend to prove the acts done by other persons the Coheirs of the said Marie Julie and Marie Amable Foretier, and not touching personal acts of their own. -

Vigé for Henry & wife - The Defendant Henry has been already examined upon faits et articles by the plaintiff and cannot be examined a Second time, and upon the same Interrogatories -

Mr Lacroix of counsel for Mrs Henry, objects to the Interrogatories proposed to her by the Pltff inasmuchas Mr Bedard, the plaintiffs attorney was

was not authorised to propose any Interrogatories to the said Mrs Heney, the power of Attorney which the said M.r Bedard held from his Client; extending only to the examination of M.r Foucher as the Tutor of the said Mrs Heney, - but as since her marriage with Hugues Heney, the power of her Tutor has ceased, so has the power to examine her under the authority of the former power of attorney become ineffectual —

M.r Bedard of counsel for Duff — In answer to the objections of Marie Julie Foretier and Marie — Annable Foretier — states, that the Interrogatories proposed to them by the Plaintiff are pertinent and admissible, inasmuch as the last Will and testament of the late Pierre Foretier has not been admitted by them but on the contrary contested and in answer to the objections of the said H. Heney and wife, he observes, that the said Hugues Heney since his marriage with the said Leocadie Foucher has assumed a different character as a Defendant in the Cause, and proof made against him — individually and before his marriage, cannot bind him as the husband of the said Leocadie Foucher, nor the rights and interest of the said Leocadie Foucher in the Cause. — And in answer to the objections of the said Leocadie Foucher, now Mrs

Heney

Henry, made by Mr Lacroix as her Counsel, the Plaintiff contends that the objection comes too late as it ought to have been made when he obtained the order for her examination - and further, that the power granted to the Attorney to examine the Tutor of the said Mrs Henry is sufficient in the present instance, as the object in question is still the same. -

The Court rejected such of the faits et articles proposed to Marie Julie Foretier and Marie Amable Foretier, as regarded the acts done by other persons, their coheirs in the Succession of the late Mr Foretier, inasmuch as the answers given cannot bind the said Coheirs who are third persons - They considered the power of attorney given by the Plaintiff to Mr Bedard to examine Mr Foucher, as Tutor to his daughter, not sufficient to authorise the said Counsel to propose faits et articles to Hugues Henry and his wife the daughter of the said Mr Foucher, as the change of condition, changement d'etat, of the said Leocadie Foucher rendered such power of attorney insufficient - And lastly the Court dismissed the motion made by Mr Vizé who was the attorney of Hugues Henry prior to his marriage, the said motion being made for the said Hugues Henry and wife, inasmuch as it appeared that the said Hugues

1. Pigeau 232. 235

Henry

Henry and wife were represented by Mr Lacroix as their attorney in the Cause, and as the Interrog.s proposed to Mr Henry by the plaintiff, respected Mr Henry as the husband of Miss Foucher, and her, as being his wife, and therefore their joint attorney regularly was the person in Court to represent them — and Mr Lacroix was the Counsel who had appeared for them when they were put in the Cause as Defendants in the room and stead of Mr Foucher who had been the Tutor of his said daughter —

Wednesday 15th April 1818.

Macon ... }
t
Dufresne ... }
and
Dufresne opp^t

On an opposition made by the Defendant to an execution sued out by the Plaintiff of his goods & Chattels.

The Opposition was made afin d'annuller and contained the following grounds —

1. That the formalities required by law in making the Seizure had not been observed
2. Two neighbours were not called as Witt to the Seizure
3. No record assisted the bailiff in making the seizure
4. No Gardien appointed to take charge of the effects. —
5. No copy of Proces Verbal of effects seized given to Defendt
6. Promise by Pltff to stay execution till 20th inst.

Bedard for the plaintiff moved, that inasmuch as the aforesaid opposition was irregular and could not be received as one made by the Defendant to stay the Sale of his effects, that the same should be rejected with Costs; without entering upon any discussion of the merits thereof.

Bourré for the Defendant contended, that Defendant had a legal right to make his opposition to the Sale of his effects, where the formalities of law had not been observed in making the seizure thereof — and that in the present instance the formalities had not been observed —

The

The Court considered that oppositions made by a defendant to the Sale of his effects under a Judgment obtained against him, ought not to be permitted, unless strong grounds were shewn for making such Opposition, — That in the present instance the Opposition contained no sufficient ground which ought to be admitted to stay the proceedings and as to the promise of the Pltff not to proceed on the execution before the 20th inst. the Defendt had his remedy, if the Plaintiff has broke his promise in this respect, but not by Opposition —

The Pltffs motion was therefore granted

Vasseur. vr Catudal

On Inscription en faux formed by the Plaintiff to the Testament produced by the Defendant —

The Plaintiff had obtained permission to examine the Defendant upon faits et articles, and the Interrogatories having been communicated to the Defendant, she objected to the pertinency thereof upon the following grounds

1. Because the Inscription en faux in France

was

was a criminal proceeding, in which the faits et articles cannot be admitted —

2d That the faits et articles in question tend to destroy the last will and testament produced by the Defendant should she answer affirmatively thereto, but inasmuch as the said last will and testament regards other persons who have an interest therein, and who are not before this Court, such faits & articles are therefore inadmissible

Bedard for the plaintiff contended that the Inscription en faux in this Country, was received merely as a Civil proceeding, in which the faits & articles ought to be admitted, as no punishment attached to the party answering such faits & articles — That although the last will and testament in question regarded the rights of other persons not before this Court, yet it was not meant that the answers of the Defendant could affect those rights, or bring them in question, they could only affect the rights of the party answering those faits & articles, and as to her only could the last will and Testament in question be declared null and void by the Judgment to be rendered in this Cause —

By the Court — The Inscription en faux in France

was

was always a Criminal proceeding, independant of the Civil remedy to be derived therefrom, and faits et articles were not permitted, that is, they were not allowed to be communicated to the party accused but he was obliged to answer, like every other Criminal, upon Interrogatories put to him instanter without any previous Communication — Nouv. Denizt. Vo. Faits et Articles. §. 1. No. 2. — That in this province, the conclusions adopted on the Inscription en faux were purely Civil, and the Court saw no reason why the same kind of proof by faits et articles ought not to be admitted in this Case as in any other — provided the Interrogatories proposed were not of a nature to draw from the defendant the avowal of any crime punishable by law, or of any act tending to his disgrace, — but as the Interrogatories had not been objected to upon this principle, the Court — admitted them as pertinent and ordered the Defendant to answer thereto. —

1 Pars. Nre. 95.

2 Desp: p. 759. No. 29. — Du. " Faux.

Lacombe, Vo. Interrog. Sur Faits et art. 5 Carpillon. Tit. 10. art. 1. p. 107. No. 15 Borrien on Tit. 10.

The Baroness of Longueuil Vs. Malbout. —

This was an action possessoire which had been instituted by the plaintiff against the Defendant, and in which Judgment had been rendered in favor of the plaintiff — upon this judgment the Pltff sued

sued out a Writ of possession in the ordinary course by virtue whereof the Plaintiff had been put in possession of the premises in question.— The Defendant by his Counsel, Mr Bedard, now moved, that all the proceedings should be set aside under this writ — inasmuchas it had issued irregularly, and contended that by the Provincial Ordinance of 1785. art. 29. 30. the kind of execution therein referred to as applicable to this Case under the law of the Country, could have been granted to the plaintiff only, "par provision. en baillant "caution", according to the Code Civil of 1667. tit. 18. art. 7. which according to the redaction of that Code, has been received and adopted in this Country — That in the present instance the execution in question issued — without any such security having been given, which was irregular — cites. Bornier. on above art. —

Sewell for the pltff — The Article of the Ordinance of 1667. referred to by the Defendant, never had force of law in Canada — and if it did, it could only mean that a provisional execution might be had. "en "matieres sommaires", on giving security, in case of an appeal — But this law, has been abrogated by the Ordinance of 1785, where on an appeal all

all proceedings in the Inferior tribunal are suspended, whether by execution or otherwise, but when no appeal has been made the execution goes in the usual course — That in the present instance the Defendant has entered no appeal from the Judgment rendered in this Cause, and his present motion cannot therefore be received, and it is besides irregular and too late, as the writ of Execution has had its effect, and the plaintiff has been put in — possession of the lot of land in question —

By the Court. — All Judgts as well by the practice of this Court, as under the Ordinance of 1667 are, either Interlocutory, or Final — "definitifs." — Interlocutory Judgts are necessarily provisional, "provisoires", because they direct something to be done, either to forward the progress of the Cause, or to give a temporary relief during its Continuance — Of the first kind are all judgments ordering proof, experts, or any other matter or thing to be done "pour l'instruction de la procedure" — Of the second kind are all judgments granting a provisional allowance, whether of an alimentary nature or otherwise — or of maintaining the party in the possession of the right claimed, or of the object in contest. — And these latter Interlocutory

Judgts

Repertoire de Jur: vo Jugemt p. 631.

1 Pig. 387. Judgments may be rendred, either upon giving security by some of the parties, or otherwise, according to the Circumstances of the Case, respecting which, there is a variety of rules and directions —

But the present is a final judgment, and the question is, how, and in what manner it ought to be carried into execution, whether, par provision en donnant caution, or otherwise —

The article of the Ordre of 1667. referred to, says that "Les jugemens rendus par nos juges sur la demande "en Complainte et Reintegrandes, seront executés par "provision en donnant Caution" — Under this Ordre according to the 17th & 18th Titles, we find, that the Jugemens definitifs, are of two kinds, as according to some writers — "on peut encore distinguer à "l'egard des jugemens definitifs, ceux qui s'executent "par provision nonobstant l'appel — et ceux, dont "l'appel suspend l'execution" — This Judgment par provision, was intended to further the recourse of the party in whose favour it was given, as by means of the caution, it gave to that party the full benefit of the Judgment in the face of an appeal — The reason of the law in this respect may be learnt out of the Ordre of 1667, and the various regulations made on this head. —

The frequent use of appeals, and the various

jurisdictions

jurisdictions to which these appeals would lie in France, proved injurious to the ends of Justice, and it became necessary to grant a relief against this inconvenience, by allowing, that in certain cases, such as pointed out by the Ordinance of 1667 Judgments might be carried into execution, notwithstanding the appeal, on giving security — This was found so effectual a remedy and so beneficial that an evil of another kind arose out of it — for all the Judgments of the Inferior Courts in every case were declared to be executory "par provision," on giving security — This gave rise to several arrets and regulations, and among others, an arret of 7 Dec. 1689, which states, "fait defenses à tous "les Juges du Ressort d'ordonner l'execution provisoire "de leurs Sentences pendant l'appel, si non dans les "Cas portés par les ordonnances — et à cet effet, que "lorsqu'on prononcera l'execution provisoire d'une "Sentence, la clause, et le motif en seront insérés dans "le Jugement —

2. Couchot. Prac. Un. 430. —

Denizz. verb. Execution Provis.ne § 3. N.o 4. —

Jousse. Tit. 17. art. 17. p. 215. not. 2.

All the authorities on this head clearly shew that the words in the article referred to, "seront executés "par provision en donnant caution" mean only, in such cases where an appeal was instituted from the Judgment, for in such cases only could security

Jer: Dic. v.o Execution Provis de Sentences. —

security be required from the party in whose favor a Judgment had been rendered — Here the Defendt does not bring himself within the meaning of this law by shewing that such appeal has been instituted from the Judgment rendered in this Cause, and therefore his motion cannot be granted. —

Lefevre. —
vs.
Desgroselliers

On Inscription en faux against a testament produced and filed by the Defendant. —

To prove the moyens de faux, the witnesses who were present with the notary at the making of the will were produced by the plaintiff, but he did not examine them touching the execution of the will, but the Defendant upon the cross-examination put questions to them touching that execution, and to shew that every thing had been but regularly done — this was objected to by the Pltff who contended, that the temoins instrumentaires to an act, could never be examined as witnesses upon an inscription en faux against that act, either in support of the act or to invalidate it, because their faith and credit was engaged by signing the act

as

as witnesses thereto and cannot therefor be received to give testimony respecting it — On the other hand the plaintiff produced two witnesses who were relations of the Plaintiff, to shew what passed in the room at the time of making the will, these witnesses happened to be present at the time by chance, and had not been required to attend — The Defendant objected to the competency of these last witnesses on account of such relationship, being within the prohibited degrees, and contended, that although in France the Inscription en faux was a criminal proceeding, in which the relations of the accuser and accused might be examined, yet in this Country the proceeding was admitted merely as it concerned the Civil rights of the parties, and no other evidence ought to be admitted on this point than would be allowed on any other where the Civil rights of the parties were concerned —

The Court, were of opinion that the temoins instrumentaires ought to be admitted as witnesses on the Inscription en faux, as they could not be held to inculpate themselves in any manner and as without their evidence frauds might be committed, and the rights of parties injured without

without the means of relief. That the authorities of law were somewhat contradictory on this point, but in determining it, the Court thought it was safest to lean to the side where the greatest security would be found in admitting the truth of the facts to be made out by these witnesses, where they had a knowledge of them — as to the relations of the Plaintiff, ~~whose evidence was irreconcilable~~ the Court thought they might be admitted ~~to prove~~, because the inscription en faux, although not admitted as a Criminal proceeding, nor the same consequences attach to the parties here as in France, yet to attain the benefit of the Civil remedy, the facts alledged, or the Crime, must be proved as it would have been in France, — without which that benefit would be ineffectual — the same witnesses ought therefore to be admitted to prove this Crime, as would have been received under the antient laws of the Country, and in this respect the relations are competent to be heard —

Dic. des Arrets vo. Preuve-Testament. — 2. Desp. 753. & 757. No. 16. see also. p. 572 No. 3

Rep. vo. Temoin. p 67. —

This question is susceptible of difficulty, and a different opinion might be warranted under the authorities to be found in the law writers — The Inscription en faux in France when admitted in regard of the validity of a will made before a notary and witnesses, both the notary and the witnesses were considered as implicated, and were not

therefore

therefore to be received as witnesses —

see Nouv. Denizt. vo Faux Principal. §. 4. p. 472.
see the reasoning of Mr Seguier, avocat General — where he lays it down that the temoins instrumentaires, cannot be admitted as witnesses, nor their declaration made to other persons — see arret rendered in Feby. 1786, adopting this principle —

Lacombe. vo Temoins — sec. 1. No 1. —

Repo vo cod. — p. 60. —

Decisions de Fromental. vo Testament —

Thursday 16.th April 1818.

Landot
vr
Dugas.

On the defendants motion that all proceedings should be staid until the Costs of a former action should be paid.—

The Court rejected the motion, and held that the defendant had waived his right thereto by pleading to the present action, and further that the application was irregular, as no taxed bill of Costs, nor judgment of the Court respecting the Costs of the former action, was produced.—

Monday 20th April 1818.

M.c Nider & al
vs
Hagar.
and
Bangs. Opp.t

On the Opposition of Bangs for his priviledge on the monies arising from the sale of the lands and tenements of the Defendant for houses built and improvements made thereon as a Carpenter —

Ogden for the Plaintiffs contended, that to entitle the artisan to the priviledge claimed here there ought to have been a devis & marché in writing, and also a proces verbal of Experts of the reception of the work — The artisan must also claim his money and form his demand within the year after the reception of the work — but none of these formalities have been complied with here, and therefore the Opposant cannot obtain the priviledge he claims — refers to Rep.v de Jur. v.o Maconnerie. —

Boston for the Opposant is entitled to the priviledge he claims, without observing any of the formalities in question, which were not always strictly

strictly observed even in France, and never in this Country cites. Denizt. Vo Privilege. No 33 to 42. inclus. — Domat liv. 3. tit. 1. Sec. 5. §. 9. — and the 170th art. of Custom of Paris —

The Court maintained the Opposition, upon the authorities cited, and upon what had been generally considered to be the usage of the Country —

Sanctot vs Dugas

Action of debt on deed of Sale. —

The Defendant pleaded by exception a plea of litispendence, by stating that there was another action depending in this Court between the same parties — and 2dly That the deed on which the action is founded is a nullity, as the Defendant was a minor at the time he executed the same —

Rolland for Plaintiff demurred to this plea, and stated, that the plea of litispendence was insufficiently pleaded, as the Defendant did not therein allege and shew that the Suit pending was for the same object as the present, which is essential for the validity of such a Plea — cites 1 Pigeau 198.

198 — That the plea of minority is also insufficient to bar the Plaintiffs action, as minority will not render the contract between the parties null and void in law, but only voidable upon shewing a sufficient ground for the same such as lesion, or any other sufficient cause, but this the Defendant does not alledge — cites. 2 Argou. 484. Repv. vo. Mineur. and Poth. Oblig. No 52. —

Sherwood for the Defendant contended that the matters pleaded were sufficiently set forth — that the Plea of litispendence contained all the requisite of a good plea — as to the minority, the authorities cited by the pltff did not apply to the Case, as they regarded the cases of moveable property only and not the case of real estate, where lezion was not necessary to be alledged to avoid the contract — minority alone was sufficient — cites. Denizt. vo. Mineur. No 1. & No 8 — Id. vo. Rescision —

Rolland in answer — Lezion must be alledged to entitle the minor to restitution — his acts are not void, but voidable — and therefore it was necessary that the Defendt. should have pleaded lezion and demanded restitution, so as to enable the Court to reinstate the parties to same situation they were in before the Sale made —

The

The Court held the plea to be insufficient upon both points - That upon the plea of litis pendence it was necessary to shew, that the suit pending, was for the same thing and in the same Cause of action as the present - That the acts of a minor are not nulle and void in law, but voidable upon shewing cause or lesion in his contracts - here none is alledged and therefore the Plaintiff must have judgment -

Nouv. Pigeau 1. Vol. 50. & 201.

su Repᵗᵒⁱʳᵉ de Jur. Vᵒ Mineur. p. 519. -
2 Meslé. p. 47. -
Dic. du Digeste Vᵒ Mineur - Nº 9. -
Despeisses. p. A. Tit. 11. Des Restitutions p. 819. Nº 27. -
Dic. de Fer. Vᵒ Mineur. -

Poitras vs Frereau } Val'.

Action Pelitoire. -

Action by the plaintiff as Son and heir of the late Joseph Poitras, and as holding the rights of his three brothers, also heirs of their said father, claims half of a certain emplacement, and of a certain terre à bois, which belonged to the Community that subsisted between the said late Jos. Poitras & Marie Angelique Provost his wife, now also a Defendr in the Cause, which said emplacement and terre

à

a bois, are now in the possession of the said Defendant Fureau — Concludes, that the said Fureau be held and adjudged to abandon and deliver up the said property, and that thereupon the same be divided equally between the said Plaintiff and the said Defendant Provost —

Plea by Fureau — That he holds and possesses the whole of the property in question as the true and lawful owner and proprietor thereof under and by virtue of a certain deed of donation made to him by the said Joseph Poitras and Marie Angelique Provost, his grand father & Grand mother — which said deed of donation was made to him by the said Poitras and wife in the view and contemplation of the marriage of the said defendant with one Marie Amable Brien, in order that the said emplacement and terre à bois should be ameublis and enter into the Community between him the said Defendt and the said Marie Am. Brien — the said deed bearing date the 12th February 1816, at which time he the said Defendt entered upon the possession of the said premises — That afterwards on the same day in the marriage contract made between the said Defendant and the said Marie Amable Brien, the said late

Jos:

Jos. Poitras and Marie Angelique Provost his wife became and were parties thereto, and therein & thereby confirmed the aforesaid deed of Donation with a stipulation that the said emplacement and terre à bois should be ameublis, in favor of the said Marie Amable Brien and the issue of the said marriage — And therefore by virtue of the said deed of donation, & of the said marriage Contract, the said emplacement and lot of land have become and are the property of him the said Defendant —

The Defendant Marie Angelique Provost did not appear. —

Replication — That the deed of donation of the 12th Febvr. 1816 is null and void in law, not having been duly accepted, and the subsequent mention made thereof in the marriage contract between the parties cannot render it valid — And even if the marriage Contract could be considered as giving validity to the donation, yet as this Contract was never enregistered, insinué, it can have no legal effect

It appeared that the donation in question was made by Jos. Poitras and Marie Angelique Provost his wife to Marie Louise Peladeau, wife of François Tureau, who had been absent

from

from the Province for about nineteen years before that time, and to the defendant Toussaint Fereau then a minor and aged about twenty years, son of the said Marie Louise Peladeau and François Fereau — one Joseph, Jean Bte Prevost, Cousin of the said Marie Lse Peladeau and Toussaint Fereau, appearing for and in their name and behalf accepting the said deed of Donation — Marie Louise Peladeau was the Daughter of the Defendant Marie Angelique Prevost by a former marriage

In the marriage contract, bearing date the same day. (12 Feby 1816.) between the Deft. Toussaint Fereau and Marie Annable Brien the said Jos. Poitras and Marie Angelique Prevost his wife were parties thereto, and stipulating for and on behalf of the said Toussaint Fereau, then a minor —

The following is the clause contained in the marriage contract touching the property in question —

"Ceux (les biens) du dit futur epoux, consistant
" dans tout ce qui lui a été donné par ses dits
" Ayeuls en vertu de leur acte de donation, reçu
" de ce jour pardevant les notaires soussignés,

"qui

" qui demeureront par ces presentes ameublis pour
" être confondûs dans la masse de leur dite future
" Communauté — Sous la condition, que si ledit futur
" epoux prédécede ladite future epouse, et qu'à cette
" epoque et sous ladite condition il y ait enfant —
" vivant issu du dit mariage — Car dans le cas —
" contraire, ils sortiront nature de propre à lui, dit
" futur epoux, et aux siens de son coté et ligne —
" ce present ameublissement sous la Condition —
" susdite est ainsi faite pour remplir, et en execution
" d'une des clauses de la donation susdite"

The deed of Donation before mentioned was insinuated (insinué), but not the marriage Contract. —

Rolland for Pluff stated the action to be an action petitoire by Pluff, as representing the heirs of the late Joseph Poitras, in order to recover from the Defendants the undivided moiety of a certain emplacement and lot of land mentioned in the Declaration, held and possessed by the Defendant — That this action will lie for such undivided moiety — cites Poth. Tr. de Prop. N° 291.

Rollin for Defendant — The Defendt holds and possesses the property in question as his own, having acquired the same by legal title from the said late

Joseph

Jos. Poitras and wife as contained in the marriage Contract bearing date 12 feby 1816, which refers to and confirms a deed of donation of the same property made on the same day — That a gift contained in a marriage Contract requires no acceptation to render it valid — and when a donation is made in the direct line, no insinuation is requisite — cites

Dic. Droit. vo Insinuation. —
1. Argou. Donation. 290. — 285. 286.
Pothier Don. entre vifs. p. 90 in 12o. —
1. Riccard Don. 252. —
2. Bouj: p. 132. 133. — 223. —

Rolland for Duff — The acceptation of the donation by Jos. Poitras & wife in favor of the Defdt having been made by the Cousin of the Defendt — on his behalf, is not in law valide, as no person can accept for the minor but his Tutor — Repo vo acceptation. p. 99. — That the marriage Contract refers to the deed of Donation but does not ratify or confirm that deed — That neither of these acts have been insinuated as they ought to have been — there is a Certificate of the Insinuation of the donation, but it is informal, the Certificate of the Prothonotary is no proof of the insinuation, It ought to be a copy of the act as taken from

the

the Register of Insinuations duly certified by the Prothonotary which alone can be legal evidence in this respect — but there is no proof of any kind of the insinuation of the marriage Contract — this as required by the Ordinance of 1539 — It is true that the latter Ordnce of 1731 dispenses with this formality, but this Ordinance forms no part of the law of this Country — and if it did, still it will not apply here for the Donor was not the Grand-father of the Donee, the Defendant, it is true he married the Grand mother of the said Defendant but this does not render the Donor the ascendant en ligne directe of the Donee, — there is no tie of consanguinity between the parties, nor would they be bound in law to provide maintenance for each other —

Riccard. Donn. 1. part. ch. 4. sec. 3. gl. 1. Nos. 1104. — 1105. 1106. —
Lepitre — De l'Insinuation Cont. 1. ch. 44. p. 143 —
2 Bourj. p. 132 & 133. —
Potts. Dor. entre vifs. p. 90. 12°
1. Jour. du Palais p. 429. —
Repse. vo. Ascendans Dec. de Droit de
Repse. vo. Alimens p 320.
1. Decis. p. 313.

The Court on the authorities cited by the Plff considered that the donation in the marriage Contract not being made in the direct line of succession, was liable to enregistration to ensure its validity, and they therefore adjudged the Defendant to deliver up and abandon to the Plff one half of the property in question. —

see also 283. art. Cont.
Repertre vo. Affinité. p. 217. —

Johnson vs Hutchins.

Action for cens et rentes and Lods & ventes by the Plff as Seignior of the Seigniory of Argenteuil against the defendant as one of his Censitaires.

The defendant pleads, that by a certain deed of Sale made on the 3d day of December 1796, by Patrick Murray, Esq. then Seignior of the said Seigniory, to the said Patrick Murray gave, granted and sold to one Jedediah Lane a certain large tract of land in the said Seigniory in consideration of a sum of 1500. dollars, and did by the said deed resign, give up, quit and release to the said Jedediah Lane his heirs & assigns for ever, all the right and pretentions which he the said Patrick Murray might have or be entitled to claim as Seignior, to any mutation, or alienation fine, under the discription of lods et ventes, retrait or otherwise and also the right of toll, commonly called bannalité, and in genral every other right claim and pretention as Seignior over his ter-tenant, except an annual quit rent of one halfpenny for every forty acres of land

aforementioned

mentioned and conveyed by the said deed. — That the lots of land mentioned and described in the said declaration form a part of the aforesaid tract of land so sold conveyed and granted by the said Patrick Murray to the said Jed: Lane, and now held by the said defendant under regular deeds of Conveyance upon the same terms and conditions as to all Seignioral rights as had been granted by the said Patrick Murray to the said Jedediah Lane, and therefor the S. Defendt is not liable to the said plaintiff for any of the objects of his demand aforesaid either the Cens & rentes lods & Ventes or otherwise, save and except the said quit rent of one halfpenny for every 40 acres of the said lots of land so held and possessed by the S. Defendt.

Replication — The deed of Sale made and executed by and between the said Patrick Murray and the said J. Lane, is null and void in law — the said Patrick Murray not being warranted by law to make the same, nor could he as Seignior divest himself of any part or parcel of the said Seigniory in an uncultivated state (en bois de bout) for any sum or sums of money, as he the said Patrick Murray as Seignior as aforesaid was bound by the laws of the land, to grant and concede every part

and

and parcel of the said Seigniory for an annual ground rent, (a titre de Cens et rentes Seigneuriels) and for the ordinary and usual Seigneurial rents and profits — Nor could he the said patrick Murray, by the said deed change the tenure of the said Seigniory or of any part thereof, or resign, release or give up his pretentions as Seignior to any — alienation or mutation fine, lods et ventes, rebrat or otherwise, or to the toll called bannalité, or to any other right as Seignior as aforesaid. — That even if the aforesaid deed of Sale were valid in all its parts, yet the Plaintiff would be still entitled to his action and demand aforesaid, because he saith, that on the 19th day of March 1807, the said Seigniory was seized and taken in execution by the Sheriff of this district, under a Writ of execution sued out at the instance of the said plaintiff, and was afterwards adjudged to the said plaintiff on the 21 November following, with all the rights of Cens et rentes, lods et ventes, and other Seigneural rights thereunto belonging, according to the original deed of Concession from the Crown, which sale and adjudication so made of the said Seigniory to the said plaintiff, destroyed any right of exemption

which

which the defendant can now have or claim to be exempted from such Seigniorial rights now demanded by the said plaintiff in and by his declaration aforesaid. —

On the 18th Oct. 1816 — The Court after hearing the parties, made an Interlocutory, ordering that the Defendant should exhibit his titles to the Plaintiff of the several lots of land held by the Defendant in the said Seigniory, for such further proceedings thereon as to justice should appertain —

The defendant having complied with this — Interlocutory, the Plaintiff thereupon proceeded to — make proof of the quantum of the Cens & rentes paid by the adjoining lands to those possessed by the said Defendant, and now prayed judgment against the Defendant for such Cens et rentes. —

The Defendant observed, that by his title deed, and more especially by the title deed given by the said Patrick Murray to the said Jedediah Lane, the said Cens et rentes are limited to one Sol for every forty acres which deed must bind the present plaintiff in regard of the said Cens & Rentes. — That the quotité of the Cens being matter of Convention, ought in this case

to

to be limited to the sum agreed on by the deed of Sale from Murray to Lane — And although the Pltff has become the purchaser of the said Seigniory by decret, yet this does not affect the nature of the title held by the Censitaire, nor did it require that the defendant in this Case should have made any opposition, to be exonerated from the rights now claimed by the Plaintiff in regard of the quantum of Cens — It was understood that the estate was sold subject to the droit de Cens, this was never contested by the Defendant, but in regard of the quotité de Cens, he contends that it must be regulated by the deeds and titles which he has produced. — A Seignior cannot exonerate his Censitaire from the payment of Cens, because upon it is founded the right of Lods & Ventes, but he may diminish this Cens to the lowest extent, and even below the sum here stipulated of one Sol for every 40 acres. —

The Court held that the plaintiff could not be bound by the deed which Patrick Murray the former Seignior had made to Jed. Lane, because it purported to be an alienation of the lands of the Seigniory by a title incompatible with the

nature

nature of feodal tenure, and not in the power of a Seignior to grant in such manner as to bind the Fief or Seigniory —

That the Seignior was bound in all grants and alienations made by him whether in Fief, or in roture to retain "la foi entiere, et quelque droit Seigneurial "et domaniale sur ce qu'il aliene", that is, that the property or estate granted should be considered as holding of and depending upon the fief from which the Domain of it has been detached, and the purchaser bound as the vassal of that fief -

3. Potts. 306. Fief.

That the sale in question is made without retaining any "droit Seigneurial" upon the property sold, on the contrary it expressly relieves and discharges the purchaser from all Seigneurial rights & claims and retains merely what is called a "Cens", of one Sol for every forty aens of the land sold — now it is the peculiar quality of a Cens, to generate lods et ventes, which is a "droit Seigneurial", and this peculiar quality would have attached to the Cens so reserved in this Case, had it not been expressly stipulated, that no such right as that of "Lods "et-ventes", should attach to, or be claimed upon the property so alienated — The

retaining

retaining therefore the nominal sum of one Sols for every 40 acres as a Cens, without the right of lods & Ventes thereon can be considered only as a mere rente fonciere, but not Seigneurial" and the retention of a "rente fonciere" "ne represente point une retention dominii Civilis". —

Nouv. Denizt. Vo Bail à Rente

5 Pothi. 306

This therefore is a demembrement de fief "sans retenir la foi entiere et quelque droit "Seigneurial & domanial sur ce qui est aliéné" — it is tant amount to a free and common Soccage tenure, which cannot be set up against any but the person granting it, the maxim being "nulle terre sans Seigneur, a maxim which this would be wholly set aside if the title of the Defendant could avail him against the Claim of the present Plaintiff — but as this title is contrary to law the Plaintiff cannot be bound by it, and as to him it must be considered as no title whatever, and he is therefore founded in demanding that the lots of land in question should be liable and bound to pay the same annual rents and Seigneurial revenues as the other lands adjoining thereto in the said Seigniory — and the Court gave Judgment accordingly. —

art 51. Cout. Paris.

Beauprés. vs. Gosselin. and Dugas. Opp^{t}.

In this case the plaintiff had obtained Judgment against the Defendant for the balance due on a certain Notarial Obligation bearing date the 26th January 1814, in which Anne Dugas the wife of the Defendant had bound herself jointly and severally with him for the payt of the debt therein mentioned — Upon this Judg^{t} the Plaintiff sued out execution against the lands and tenements of the Defendant, which were in consequence seized and taken in execution by the Sheriff — The said Anne Dugas put in her opposition afin de charge, claiming, that in as much as the lands and tenements seized were bound and mortgaged to her for her Dower and preciput as stipulated by her marriage Contract with the said Defendant, that therefore the said lands and tenements should be sold subject to the payment of such Dower and preciput when they should take effect —

To this the Plaintiff answered that the Opposant was not entitled to her said opposition

afin

affin de charge, in asmuchas she was jointly bound with the said defendant for the payment of the debt in question, she cannot thus set up any right of mortgage she may have upon the premises in question to the prejudice of the aforesaid demand of the said plaintiff — And of this opinion was the Court, and dismissed the opposition —

Bangs — } Action of assumpsit on a bon
v. } and on the money Counts. —
Berthelet }

The declaration stated, that on 8 Janv. 1814, the defendant made his certain bon or acknowledg^t in writing, his own proper hand being thereunto set and subscribed, and then and there delivered the same to the said Plaintiff, and which said bon the Defendant acknowledged and confessed to be good to the said Plaintiff for fifty dollars, equal to twelve pounds ten shillings. —

There were other money counts in the declaration.

To this action the Defendant pleaded Non-assumpsit,

also

also that the bon in question if ever it was made by the Defendant, was made and given without consideration — also that it was made and given for an illegal consideration namely for money won at play —

Issue having been joined on this plea, the parties went to proof thereon, when the evidence adduced by the Pltff was limited to the proof of the defendants hand writing which was strongly contested, and upon this evidence the Plaintiff rested the Case and demanded Judgment

The Court was of opinion that no sufficient evidence had been adduced to support the action, that as the bon or acknowledgment signed by the defendant did not bear to have been made for any value or consideration, it was necessary that some value or consideration should have been proved to support the demand — but it was not here alledged in the declaration that the bon had been made for any value or consideration and proof of that fact could not therefor be admitted on the first Count of the declaration, and to support either of the other Counts such consideration was essentially necessary to be proved, as the bare signing of such a writing as this bon did not imply consideration, nor raise any assumpsit on the part of the Defendant — Action dismissed —

See Case Sutherland. Vs. Martin — 20 April 1814 and authorities there cited —

Longuefosse
v.
Montresor

Action of Assumpsit on bills of Exchange

While the defendant was Captain of His Majestys Ship "Cydnus", the following bill of exchange was drawn by his order, and for the recovery of which, the present action was partly instituted as it formed the third Count in the Plaintiffs declaration —

£690. 15. 9. —

H. M. S. Cydnus. Havanah
7 March 1815. —

At thirty days sight, this my second of Exchange (first and third of the same tenor and date not paid) please to pay to Mr L. De Coussin or his order the sum of six hundred and ninety pounds fifteen shillings and nine pence Sterling, value — received in live Oxen, vegetables, and fodder, for the use of H. M. S. Cydnus, and fleet under the Command of Vice-Admiral Sir Alexr. Cochrane &c &c &c — Her vouchers to be transmitted by

Gentlemen

Your obed. Servt
J. S. Willcocks. Purser.

To the Commissioners for victualling H. M. N.
London

I do hereby certify that this bill is drawn for the service above mentioned and by my order. —

H. Montresor. Captain —

The

The third count in the declaration was for the recovery against the Defendant, for the damages, charges and expences accruing from the non-acceptance of the said bill when presented — the fourth & fifth Counts, for money lent & advanced, and an account stated

To the third Count the Defendant pleaded Specially that the above bill had been ordered by him as Captain of His Majesty's Ship Cydnus, to be drawn by the Purser of that Ship and for articles furnished for the use of His Majesty's Ships of war, and that he the said Defendt was not by reason thereof bound in his own private name and capacity to pay to the Pltff the sum of money by him demanded in and by the said third Count of his declaration

cites Case of M'Beath. v. Haldimand

Stuart for the Pltff. This case is distinguishable from that of public Officers in general, as the bill in question carries a private responsibility on the face of it, by its being a negotiable Instrument, and drawn by the special order of the Defendant — The Plaintiff as Indorsee of that Instrument can know the Obligation of the Defendant only from the Contents of the Instrument itself, the particular forms adopted by the public — Offices in England for drawing their bills, cannot be known nor attended to by persons in foreign Countries, nor are they bound to know, what is,

or

is or is not a good bill in this respect.— The purser in this case must be considered as the servant or agent of the Defendant and acknowledged by him as such — The bill in question is a negotiable paper sent abroad in the world by the Defendant, and liability must attach to him thereon, unless he can shew that by law he is exonerated —

The Court held, that as the tenor of the bill in question evidently shewed, that it had not been drawn by the Defendant on his own account, but as a public Officer, and for the public service, he could not be held as personally responsible to the Plaintiff for the damages & charges accrued by the non-acceptance thereof — The Court therefore dismissed the Plaintiff's action on the third Count in the declaration —

The Attorney General — Tetro vr & ab.

On Information agt the Defendts as Debtors to the Crown, for damages, on breach of Contract. —

Mr Ross, Kings Counsel, states, that the Information has been filed by him, under instructions from the attorney General, and that as Kings Counsel he has signed the Information, as having a right to institute this proceeding in his own right and capacity of Kings Counsel. —

Stuart for the Defendants, excepted to the Information and stated, that the same was irregular, as on the face of it, it was stated, that the Kinz is represented by Mr Ross, Kings Counsel — That the title of Kings Counsel was merely honorary and as such gave right of precedence at the Bar, but it gave no right to represent the Kinz in his Courts — The appointment of Kings Counsel creates no Office, nor is any duty attached to it — And no person can represent the Kinz in His Courts but the attorney General, and in his absence, the Solicitor General — In this case the information is stated to be filed by Mr Ross the Kings Counsel as representing the attorney General, which representative character cannot be admitted — cites. 4. Bur. Rep. — 2553. — That the conclusions of the Information are also irregular, in demanding payment to be made to

to the Attorney General in the name and behalf of the King.—

Ross for the Informant, contends, that as Kings Counsel, he has a right to act for the King, under the Commission he holds, and to represent the Attorney General in all matters where the interests of the Crown are concerned, without any particular authority or instruction from the Attorney General in this respect States the authority also granted to him by letter from the Governor General Sir John Sherbrooke, directing said Counsel to watch over and conduct the interests of the Crown in this district— That the Defendants cannot contest the right of prosecuting the present Information in this manner, as this is a matter which interests only the Crown, & it does not contest this right, but acknowledges it—

Stuart in reply— The defendants contend, that M^r Ross as Kings Counsel has no more right to represent the Attorney General in this instance than he has a right to represent the Crown directly— Now the situation of Kings Counsel confers no right of representation of the Crown, it confers no office, nor any right whatever beyond that of honorary distinction at the Bar

June Term 1818.

Tuesday 9th June.

Mallet. v. Richard } The defendant was sued by the name of "John Richard", and the plaintiff finding that this was incorrect, now moved that he might be permitted to amend his declaration, by changing the defendant's name to "John Richard Hay"

Vigé for Defendt stated, that both the declt and writ were wrong, and although amendments were allowed to a considerable extent in the declaration and pleadings, yet this was never extended to the writ — and how the amending the declaration without amending the writ also would be of no avail.—

The

The Court however held that the proceeding was irregular in suing out process against the Defendt by the name of Richard only, and that the proposed amendment would not cure the defect, — Motion rejected —

Brown vs Lay — and Ogden & al Purchasers &c

On the plaintiffs motion that the several lots of land adjudged to the purchasers on the Sale & adjudication thereof under the writ of execution sued out in this Cause, might be re-sold at their folle-enchere, as they had neglected and refused to pay the purchase money of such lots so adjudged to them. —

Gale, one of the said purchasers, stated to the Court, that there was a conflict of Jurisdiction between this Court and the Court at Three — Rivers in regard of the Township of Eli, where the lands in question are situated, as under the process of the Court of Three Rivers sundry lots of land in the said township have been seized and taken in execution as being within that district,

the

the purchasers therefore of the lots in question on the Sale made by the Sheriff of this district of Montreal are not secure in paying their money until the fact of Jurisdiction shall have been settled — nor ought the purchasers to be bound to go to the expense of ascertaining this fact, as they ought to obtain a sufficient title from the Sheriff for the money they pay to him for the same — Or the Plaintiff at whose instance the seizure and Sale of the said lots of land has been made ought to be held to give security to warrant the deed so to be given by the said Sheriff —

Ogden for himself and Ross — for Mr Davis also purchasers of some of the said lots, joined in offering the same reasons to the Court —

Beaubien for the plaintiff — There is nothing before the Court to shew that the lands in question are out of the district of Montreal, the presumption is otherwise, that had the said lots of land been in the district of Three Rivers the Sheriff of the district of Montreal would not have seized and sold them — The allegations by the purchasers to

the

the contrary can be of no avail, and certainly not without proof, and according to the general principle whoever advances a fact must prove it

The Court admitted the parties generally to make proof on the fact alledged, but held the Plaintiff as garant for the validity of the proceedings touching the Sale, was bound to shew that the lands in question were within the Jurisdiction of the Court —

Vente d'Im. par Hericourt. ch. 12. Som. 10. p. 292.

Wednesday 10th June. 1818.

Plenderleaths. vs. Burton. and Plenderleaths. Appt.

In the execution sued out by the plaintiff against the lands and tenements of the Defendant it was directed, that the same should be sold subject to the payment of ten thousand pounds by the purchaser to the heirs of Sarah and Catharine Christie, and during the livis of the said Sarah & Catharine that such purchaser should pay to them the interest on that sum of money. — The Sheriff made his return to the Court that he had sold a certain Seignory belonging to the Defendant subject to the above charge, and had further levied thereon a sum of £ and for his fees charged poundage as well upon the above sum of ten thousand pounds, as upon the sum of £ he had actually levied — and thereupon stated the balance remaining in his hands after deducting such poundage which he held ready to pay as the Court should direct —

Mr Bedard for the plaintiff now moved, that the

the Sheriff should be held to alter his return, and to bring into Court the sum of £300 retained by him for his poundage &c. on the sum of £10,000, inasmuch as he has no right to retain the same. &c.

Gale on behalf of the pltff stated, - that there are two conditions requisite to entitle the Sheriff to his poundage - viz., an actual sale, and payment of money - Here there has been a sale, but no payment of money in so far as regards the £10,000, in regard of it, there could be no payment, as it was only a charge upon the land, put upon it, either by the order of the Court, or by the act of the parties and not by the Sheriff - poundage is allowed only upon money levied, and in this case the Sheriff can have no claim to poundage upon a sum which has not been levied - for when a land is sold subject to incumbrances, these incumbrances cannot be considered as any part of the thing sold upon which poundage can be granted -

Stuart for the Sheriff. - The demand for an amendment of the Sheriffs return, can never be admitted but at the request of the Sheriff himself or by his consent - the return here is sufficient and in conformity to the Kings writ - if it be

false

false, an action on that account will lie agt. him and if he does not return all the money levied, an attachment will lie against him — The merits of the question agitated between the parties cannot therefore come regularly before the Court upon this motion. —

That even on the merits of the Case if they can be considered the motion is irregular and without grounds — There has been a Sale in this Case and money levied — and the Sale must be considered to comprehend the amount of the charge, as well as the surplus of the money received by the Sheriff — it is not necessary that money levied should be in the actual possession of the Sheriff, as "levied" ought to be considered as meaning, "made", "raised", and "effected", under his Sale — this is a fictitious means of raising the money, like a "possessio brevis manus" of an estate sold without giving the corporeal possession — The advertisement here may have been framed so as to oust the Sheriff of his fees, and if admitted here, the Office of Sheriff will be materially affected by it, as estates may hereafter be sold subject to mortgage claims, instead of being sold in a way to require the payment of the money to the Sheriff. —

Bedard for Plff in reply. — The Sheriff as an Officer

officer of this Court, is bound by its orders, and subject to its decisions — as to the amendment in question it is not material, nor very necessary, — provided the Sheriff be bound to bring into Court the monies which he appears to have received, and to have in his hands. — It is not the Sale of the estate alone, but the recovery and receipt of the money for which it is sold, that gives a right to poundage — Here the Sheriff could not receive the ten thousand pounds, it was contrary to the — injunctions of the writ and the nature of the Sale, and therefore cannot claim poundage upon monies he never received, as well might he claim poundage where the purchase money has not been paid by the neglect or refusal of the purchaser —

By the Court. — By the Provincial Ordinance of 25.° of the King. Ch. 2. Sec. 35.th it is directed, "that "on every execution the Sheriff shall be allowed all "his disbursements, and shall be authorised to "charge over and above at the rate of two and an "half per Cent, to be deducted out of the monies "he levies." which applies as well to the Sales of real estate as of moveables, and the question here is, what has the Sheriff levied under the

writ

writ of execution sued out in this Cause? — Now it is evident that the sum of ten thousand pounds which was a burden or charge imposed on the estate, was not a sum to be levied, it was a sum reserved and respecting which there was no contest, nor any authority given to levy it — It would seem to be the intention of the above Ordinance, that the fees of the Sheriff are to be allowed only on the monies he actually receives; — the words, "deducted out of the "monies he levies" must imply that monies have been received, before deductions can be made, and if no monies are levied, no poundage is due — The Court is therefore of opinion that no poundage was due to the Sheriff on the above sum of ten thousand pounds, and that the present motion must be granted. That all questions of this kind touching the fees of the Officers of the Court are determinable upon motion — Comy. Dig. Vo Viscount. F. 2. p. 406. — Infas v. Parker 1 Wm. 2 East. Rep. 411. King v. Palmer.

Hammond
vs.
Wilson.
&
and
Contra.

On action of assumpsit for work and labour as a Carpenter & Joiner

To this action an Incidental demand was set up, for boarding the Journymen employed by the Plaintiff about the building of a house for the Defendant, the work in question, and as there was no written evidence to shew that the Plaintiff had agreed to pay the board wages of his said Journymen, an objection was taken to the admissibility of verbal testimony on this head —

The Court however were of opinion to admit the verbal testimony, considering this case as one of the exceptions to the law requiring written evidence of the agreement — Serp. Tit. 20. art. 2 Code Civ. p. 319. № 6. — Jousse on same art. — & on art. 4 of same title — Poth. Obl. № 809.

Monday 15th. June 1818.

The King
vs.
Cuthbert. &c.

On Certiorari. —

On conviction before The Hon. James Cuthbert, as Justice of the Peace, in September 1815, of one Basile Cournoyer de Grand champs for not having performed his share of labour on the public highway. — The objection taken, was to the regularity of the proceedings before the Justice, as he had refused to hear the witnesses produced by the Defendant to shew that he was not resident within the limits pointed out by the Proces Verbal of the Grand Voyer, and therefore not bound to do the work in question.

L. M. Vigé for Cournoyer — The persons resident between the River Lachaloupe and Berthier, are the only persons bound to maintain the road in question, as stated in the Proces Verbal of the Grand Voyer, and the Defendant Cournoyer has no land nor does he reside within those limits — This was the defence made by the Defendant on the prosecution before the Justice, and witnesses were adduced to prove it, but the Justice after entering upon this evidence on behalf of the Defendt. afterwards refused to receive or continue the same, and thereupon convicted the defendant of the complaint made against him — refers to the facts as stated in the record of the Conviction.

Mr

Mr Ogden for the Magistrate – The facts stated on the Conviction do not warrant the allegations of the Defendant – The evidence offered before the magistrate on the part of the Defendant was inadmissible and the magistrate therefore did right to reject it – a Judgment had already been given on the same point against one of the Defendants neighbours, and it was therefore improper to admit evidence to controvert what had been so settled –

The Court were of opinion, that as the Justice had admitted the Defendant to go into evidence upon his defence, he ought to have received all the evidence the Defendant had to offer on that Subject, and to have judged of its sufficiency afterwards – they therefore directed, that the proceedings should be sent back to the Justice to enquire the same by hearing the Defendt witnesses –

See C. J. Reps. 330. King v. Inh. of Bramley

Thursday 18th June 1818.—

Hodgson v. Park.— } Action of assumpsit on promissory note. The note was made in the usual form, and stated to be for value received.— On plea of non-assumpsit & no value the Defendant contended that the Plaintiff was bound to shew that value had been given for the note,— that this was the affirmative and ought to be proved by the Plaintiff wherever it was called in question— cites. Comyn on Contracts p. 8.— and Bangs. v. Berthelet. in april last— Here no value has been proved, and the bare mention on the face of the note, that it was made for value received is not sufficient.—

Ogden for Plff contended that it was not necessary that Plff should prove value where it was expressed in the note, but the person alledging the Contrary must prove it— cites Chitty on bills. p. 84. 85. 121. 393.— 13 Bull. N. P. 275.— 1 Str. Reps. 674.— Prov. St. 34. Geo. III. Sec. 3.—

The Court held, that as between the immediate parties to the note, stated to have been given for value received, consideration must be presumed, and it is

is therefore incumbent upon the person who alledgis the want of it, to substantiate that allegation by legal evidence - That as the Defend had made no such proof in this Case, Judgt was therefore given for the plff

see Evan's Essays - p. 150. -
Fell on Garantie . p. 4. Nº 8. q. 10
2 Evans' Pothier - p. 25.
Prov. St. 34. Geo. 3. ch. 2. -

Henshaw vs Fowke. - and Gregory & al Intervs -

On the Intervention and claim of Gregory & al' -

In this Case an attachment or Saisie arret had been sued out by the plaintiff against the goods and chattels of the Defendant by virtue whereof - certain quantities of goods and merchandises had been attached and seized as belonging to the Defend and in his possession

The Intervening parties, merchants in London claimed the said goods and merchandises as their property, and as having been entrusted to the Defendant to sell for them -

Upon

Upon this claim and Intervention issue was taken by the plaintiff, denying the facts therein stated, and also contesting the sufficiency of the Intervention.

To support their claim the Intervening parties examined the Defendant upon faits et articles, who by his answers admitted the property of the goods to be in the said Intervening parties - and upon this proof they claimed that the said goods should be delivered up to them. -

Stuart for Pltff. The Intervening parties cannot obtain the delivery of the goods in question under the present Intervention, because they do not demand that the attachment be set aside, and therefor the property they now claim cannot be delivered up to them so long as the attachment subsists. - The evidence adduced is besides insufficient to support the claim of the Intervening party, as the answers of the Defendant upon faits & articles cannot be received as evidence against the plaintiff - The Defendant is no party to the issue formed between the plaintiff and the Intervening parties, and as the answers of a party on faits & articles make only against himself, no conclusion can be drawn from the answers of the Defendant here against the Pltff

And of this opinion was the Court and dismissed the Intervention -

Sauvé & al
vs
Trottier.

Action ex empto. —

This was an action instituted by Esther Sauvé dit Laplante, widow and Commune en biens with the late Hyacinthe Dubois, now deceased, and by Antoine Dubois, Jean Bapte Dubois & others, the children and heirs of the said late Hyacinthe Dubois, to recover from the Defendant a certain sum of £42. 15. 9, for the principal and interest thereon stipulated to be paid by the Defendant to the said late Hyacinthe Dubois, in consequence of a certain sale and conveyance of a lot of land made by him to the said Defendant as mentioned and set forth in the Deed of Sale of 27th March 1804. —

The Defendant pleaded payment, and to prove the same, examined the plaintiff Esther Sauvé upon faits et articles, touching her knowledge of the payments made by the defendant to the late Hyacinthe Dubois and on his account, and the acknowledgments made by him to this effect — The said Esther Sauvé acknowledged in her answers that payments had been made by the Defendant to the late Hyacinthe Dubois and on his account, sufficient to extinguish the amount of the present demand, and thereupon the Defendant prayed that the action aforesaid of the said Plaintiffs should be dismissed, contending that the answers

answers of the said Esther Sauvé ought in this respect to bind the other plaintiffs who are the heirs of the said late Hyacinthe Dubois, and as such bound and liable to all his acts and acknowledgments — cita Sepulchre p. 100. —

Rolland for the Plaintiffs on the other hand contended that the answers of the widow could not bind the other heirs of her late husband as their interests were separate and distinct from hers although originating in the same cause — and of this opinion was the Court, and dismissed the action in so far as regarded the demand of the said Esther Sauvé, but gave judgment against the Defendant in favor of the other Plaintiffs for their share and proportion of the sum demanded as heirs of their said late father —

see. — Poth. Obl. № 773 — in. 12

Saturday 20th. June 1818.

Jossey. vs. Thompson.

This was an action instituted by the Plaintiff to recover from the Defendant the value of a horse hired to him by the plaintiff to make a certain Journey on horseback, and which horse the Defendant had not returned, but brought back the bridle saddle and shoes, stating that the horse had been taken by some disorder on the road and had died —

L. M. Vigé for the Defendant contended, that as the Plaintiff had not shewn any fault or negligence in the Defendant, he ought to be discharged from the action, as this was not to be presumed of the Defendt. who by shewing that the horse was dead was thereby exonerated from returning him or paying the value

Grant for the Plff on the Contrary, contended, that as the horse was in the charge and custody of the Defdt he was bound to take the same care of him as a careful person would do of his own property, and to account by what accident or other Cause the horse died, otherwise the presumption of law is against the Defendant.

The Court held that the Defendt was bound to justify from what Cause the horse died, and to exculpate himself from all imputation of blame as to want of care, or ill-usage of the horse — and thereupon gave Judgt. for the Plaintiff

su Poth. Louage. Nº 199. —

Vasseur vs Catudal } On Inscription en faux a Et. a Wile —

In this case the Court admitted the temoins Instrumentaires to the will, to give evidence on the moyens de faux, according to the principle adopted in the Case of Lefevre dal. v Desgroseliers 15. April. 1818 —

On Petition — of Dame Therese Coutelé } Sothers. — —

This was a petition presented by the Sours Grises, Seigniouresses of the Seigniory of Chateauguai, praying that they might be authorised by the Court to make and perfect a livre Terrier of the said Seigniory — But the Court rejected the petition, as by the Prov. Stat. 48. Geo. 3. ch. 5. this power is vested in the Governor.

Bangs & al. } vs. Levesque }

On action en revendication for two Trucks.—

It appeared that the Defendant was a Tavernkeeper at when the plaintiffs, on their way from and to Upper Canada occasionally stopped and had obtained refreshments for themselves and hay for their horses, for some part of which they were still indebted to the Defendant— The Plaintiffs were Carters and employed in the transport of goods from Lower to Upper Canada, and upon one occasion left on a vacant spot near to the Defendants house the two trucks in question, as it was not convenient for them to bring them along with them to Montreal— The trucks remained in this situation all winter, and until the Spring 1816 when the plaintiffs sent people to bring them down to Montreal, but were prevented by the Defendant, who had removed the Trucks into his Yard and refused to let the Plaintiffs have them until they should settle their account with him— Upon a second application to the Defendant it appeared that he had agreed to send the Trucks to Lachine by the first conveyance, but this not having been done, and the Defendant afterwards refusing to part with the Trucks till his account was paid, the present action was brought.—

Vigé for the defendant contended, that he was entitled to retain the possession of the trucks until the

the Plaintiffs who were travellers and had been supplied by him with provisions for themselves and their horses had paid for what they had so received, this was the privilege of the hotelier - cites. Denizt. Vo Hotelier. No 10. Dic. de Droit. Vo Hotelier - and art. 175. Cout. Paris. un —

Boston for Pltffs contended - That the 175. art. of the Custom gives the right to Inn-keepers to retain the goods of their guests for the "depens d'hotelage," but this article applies only to the hotelier, and not to the Defendant who was a mere "Cabaretier", and kept a grog shop. - That if the defendant was entitled to any privilege it could extend only to the horses for which the hay was furnished and not to the articles in question - and it does not appear that these trucks were ever put under the charge or custody of the Defendant, they were never left with him as a security for his bill, and he never pretended to have any claim thereto till the Spring follows,

The Court held that the Defendant was not entitled to any privilege upon the trucks in question, nor was he authorised to with-hold them when demanded, because it did not appear that they had ever been put into the charge, custody or keeping of the Defendant, so as to be considered as, "biens hôtelés," and therefore had they been stolen or injured the Defendant could not have been liable - It is true the Defendant, at some period after the departure of the Pltffs from his house, removed these trucks into his yard, but this was done without the knowledge or consent of the Plaintiffs and he cannot derive any benefit therefrom - Judt for Pltff - Fer. on 175 art. Cout. Glos. un. No 10. in fine -

Gray. — vs Rivers }

Action for recovery of £75. for three months house rent, from 1 Febr to 1 May 1818, on a Verbal lease for three years from 1 May 1817. to 1 May 1820 —

The declaration contained conclusions. 1st for the payment of the rent demanded — and 2d that the defendant should be held and bound to keep up and maintain the house in question in good order and repair and furnish it with sufficient moveables and furniture for the Security of the rent until the expiration of the said lease —

The plea contained a general denegation of the Plaintiff's demand. —

The Plaintiff having filed an account of sundry goods and merchandises which he had purchased from the defendant, which account is in the hand writing of the Defendant, and on the Credit side of which the following Items are stated to be credit of the Plaintiff

" 1817
" May. 1. By rent of house from 30 Octr to 1 May £60. —
" Feb. 21. By dr from 1 May 1817 to 1 Febr 1818 at £300 p an. — — — — 225. —
" 20 Febr 1818. " Recd pay to " Chas Rivers —

The Plaintiff offered this as a commencement de preuve par ecrit", and thereupon moved that he

should

should be admitted to make proof of the Lease for the three years as stated in his declaration — cits. Gr. Comm, art. 171. № 36. 37. — Poth. Obl. № 801 & seq. —

Stuart for the Defend^t contended that this could not be considered as a Commencement de preuve par ecrit," as to the extent of the lease, it was too vague and uncertain to be admitted as any proof upon this point, and if at all admitted could only extend to the term of One Year. —

The Court was of Opinion with the Defend^t and rejected the verbal testimony offered

October Term 1818.

Saturday 3.d October

French v Conant } Action of assumpsit for board & lodging. In this Case the Plaintiff sued out an attachment against the goods chattels and effects of the defendant grounded upon the following affidavit.—

"William French of Saint Hyacinthe in the
" district of Montreal, Inn-keeper, the plaintiff in this cause
" being duly sworn, deposeth and saith, that Levi Conant
" now or lately of the same place Mill-wright, is justly
" indebted to him the deponent in the sum of thirty five
" pounds, current money of this Province, due to him the Pltff
" for board and lodging and materials found and provided,
" no part whereof the said Defendant hath yet paid or
" offered or tendered to pay to him the plaintiff.— And
" this deponent further deposeth and saith, that the said
" Defendant doth suddenly intend to depart from this
" Province with an intent to defraud his creditors, and that
" without the benefit of a writ of attachment, to attach the
" estate debts and effects, he the deponent doth verily believe
" that he shall lose his debt or sustain damage."

Stuart

Stuart for the Defendant obtained a rule on the Pltff to shew cause why the writ of attachment sued out by him should not be set aside with Costs as having irregularly and improvidently issued inasmuchas no legal or sufficient affidavit to justify the issuing of the said Writ had been made. and the following grounds were stated by the Defendant—

1. Because the affidavit is made in a cause which had no existence at the time — .

2. Because the affidavit does not shew a legal ground of action, inasmuchas it is not said that the board and lodging and materials in question were found, and provided by the Plaintiff for the Defendant—

3. Because the Affidavit does not claim an attachment against the estate debts and effects of the Defendant as by law is required, —

Boston for Pltff shewed Cause and stated, that the affidavit was sufficient in all respects and agreeable to law and the practice of the Court—

The Court considered the affidavit sufficient on the first objection, the title of the Cause was immaterial as the parties were sufficiently described without inserting the title of the Cause which might be omitted altogether 1 Tidd. Prac. 156.7.

That

That it was not requisite that the Cause of action should be stated or sworn to in the affidavit, it being sufficient that a debt was sworn to — 8. T. Rep. 338. Ord^{a} 1785 — And lastly that the praying of an attachment against the goods chattels & effects of the Defendant was not a material part of the affidavit, —

The Rule to shew Cause was therefore discharged with Costs. —

French v Fidget } On action of assumpsit for board and lodging. —

In this case the plaintiff sued out an attachment against the goods chattels and effects of the Defendant, and also a Capias ad respond^{m} against his person, upon the following affidavit.

William French of S^{t} Hyacinthe in the district of Montreal, Inn-keeper, the plaintiff in this Cause, being duly sworn deposeth and saith that Joseph Fidget now or lately of the same place labourer, the said Defendant is personally indebted to him this deponent in the sum of twenty pounds Current money of this province for board and lodging and necessaries furnished and provided for him

and

and at his special instance and request; no part whereof, he the said Joseph Fidgit hath yet paid. And this deponent further deposeth and saith, that he the said defendant doth suddenly intend to depart, and is now immediately about to leave this Province, whereby without the benefit as well of a Capias to take and detain his body, as a writ of attachment to attach his estate debts and effects, he the deponent doth verily believe he will lose his said debt and be deprived of his remedy agst him the said Defendant."—

Stuart for the Defendant obtained a rule on the plaintiff to shew Cause, why the said writ of attachment and Capias ad respondendum should not be quashed, inasmuch as the said writs of attachment and Capias ad resp: have been illegally irregularly and improvidently issued and for that no legal or sufficient affidavit was made to justify the issuing of the said writs, or either of them — and for that the said writs have been illegally sued out at the instance of the same Pltff at the same time for the recovery of the same debt and are altogether illegal. —

Boston for the pltff shewed Cause and stated that the affidavit in question contained all the necessary requisites under the law for obtaining

as

as well the writ of Attachment as the writ of Capias. That both these writs may be obtained at the same time, by the Ordinance, as every party entitled to use the Contrainte against his debtor, may cumulate the same by law, and in a Case similar to the present it has been so settled by this Court in the Case of Henshaw. v. — Fowke, where the double writ was allowed. —

Stuart in answer. The Plaintiff has cumulated two remedies — he cannot have both — he ought to have made his election — but to obtain these two remedies only one affidavit has been made, whereas by law there ought to have been two — and in the affidavit which has been made the language of the law has not been followed to entitle the Plaintiff to — either of the said remedies —

The Court were of opinion that the Plaintiff could by law use the double proceeding by attachment and by Capias against his debtor, where the requirements of the law were observed — That to obtain both these writs it did not appear absolutely necessary that there should be two affidavits, if all the requisites for obtaining these writs were contained in one and the same affidavit — and accordingly it appeared that the affidavit in question contained every requisite to entitle the plaintiff to the writ of Cap: ad resp: but in regard of the writ of Attachment agt

the

the goods chattels and effects of the Defendant some essential words required by law, appeared to be wanting, viz^t — that the Defendant, doth suddenly intend to depart from the Province, "with "an intent to defraud his Creditor or Creditors", and therefore that writ of attachment ought not to have been granted. — The Court therefore discharged the Rule in regard of the Capias, but made it absolute as to the writ of attachment. —

M^cKay
v
St Germain

On action d'injure, for defamatory words spoken by the Defendant. —

Plea — justified the words, by stating, that the Plaintiff acted as a sort of a clerk to a certain Small Court held by Justices of the Peace, and under colour of authority exacts and takes fees and emoluments not allowed by law, and any words that may have been spoken by him the Defendant, related wholly to the plaintiff's exactions as such clerk and not in the manner alledged by the s^d Pl^ff,

Further — That Defendant is a Justice of the Peace and on the 4^th June last at the place mentioned in the plaintiff's declaration, the plaintiff made use of cutain scandalous words of and concerning the Defendant &c — which words will more than

compensate

compensate for any thing alledged by the Defend^t of and concerning the said plaintiff on the said 4^th June last—

These pleas were demurred to by the Plaintiff as insufficient and inadmissible — 1^st because Justification cannot be admitted as a sufficient answer to an action d'injure. Dareau. p. 19. 456. 458. — and 2^dly as to plea of Compensation, it is not sufficiently stated, because not alledged that at the time of the speaking of the defamatory words in question by the Defendant, he the Plaintiff made use of other defamatory words of and concerning the Defendant, that although the words are charged to have been spoken by the Plaintiff on the same day, viz^t. 4^th June, yet non constat, but it might have been long before or after the speaking of the words in question by the Defendant, and therefore no Compensation —

Rep^re V^o Injure. p. 237. —

The Court were of opinion with the Plaintiff and rejected the pleas so pleaded by the Defend^t.

Monday 5th October 1818.—

Whitcombe vr Curtis—

In the entering up of the Judgment in this cause on the the Prothonotary had committed a misteke by entering the title of the Cause variant from that stated in the declaration— and the Counsel for the plaintiff having now moved that this error should be corrected, it was suggested how far the Court could amend any of its proceedings had in a former Term.—

But the Court were of opinion that they possessed this authority, over errors and misprisions of their clerks, otherwise the greatest injustice might arise to Suitors, and therefore granted the motion—

see. Tomlin's Law Dic. Vo Amendment.
Gilb. H. C. P. 110.
4 Maul. & Selw. Rep. 94. Usher & al: vr Dansey & al:—
Dic. de Ferriere. Vo Erreur de Cacul.

Drean

Drean
vs
Munn

Action of assumpsit on Promissory note

On the 29th March 1815, one Brown drew a bill of exchange at Montreal on Messrs Drummonds bankers in London in favor of the plaintiff for £150 Sterl payable at 20 days sight — this bill was indorsed by the Defendant Munn — It was first protested for non-acceptance, and afterwards on the 10 Octr. 1815 was protested for non-payment — This bill had been indorsed by the Plaintiff to one Stuart Mollan at New York who transmitted the bill to England and to whom it was afterwards returned under protest. The parties, plaintiff and Defendant happening to be at New York when the bill was returned, a suit was commenced in the name of Mollan against the Defendant Munn as the Indorser of the Bill, for the amount thereof and the damages thereon at 20 ₰ cent Cent which is allowed by the Laws of the State of New York upon bills returning dishonoured, which sum the Defendant had refused to pay, considering himself liable only to the damages allowed by the laws of the place where the bill was drawn, namely ten ₰ Cent. After the Defendant had been arrested however, in order to avoid going to Gaol, as it was late at night, and he had no person to bail him,

he

he agreed after some discussion to give the promissory note upon which the present action is brought for the whole amount of Mollan's demand & Costs — this note was indorsed by Mollan to the Plaintiff The note was stated in the Declaration to have been dated and to bear date at New York on the 10th day of February 1816, and to have been indorsed to the Plaintiff on the 20th May 1816 —

The Plea set up to this action was 1st Duress — that Defendant had been by collusion between said Stuart Mollan and the plaintiff illegally arrested and by them held in duress and constraint until he made the note of hand in question — 2d That Defendant received no consideration for the said note, particularly in regard of the twenty p Cent damages which he contended he was not bound to pay — and 3d That there was a variance between the note laid in the declaration and that produced in evidence — the note laid in the declaration being stated to be made on the 10th February 1816 that produced in evidence appearing to be dated on the 16th Febry. 1816 —

The Court charged the Jury, that if they found from the evidence adduced that undue means had

had been used under the arrest of the Defendant at New York to compel him to sign the note in question, they ought in that case to find for the Defendant, but that the giving of the note in order to compromise the demand, although the Defendant was under arrest at the time, was not of itself a sufficient ground to set it aside, as Mollan had evidently a legal demand against the Defendant, and if it had been otherwise the Defendant had the means of contesting it in the Courts of that Country, as to the want of consideration, by reason of the demand of twenty per Cent damages on the protested bill, the Court were of opinion that the Defendant was liable to the damages allowed by the Laws of the State of New York when the Bill had been negotiated, and to prevent this the Defendant ought either to have restricted the negotiability of the Note to the Country where it was drawn, or limited the damages in case of dishonor to what was allowed by the laws of that Country, if he meant not to be liable for more. That a bill of Exchange is negotiable all over the world without this restraint, and in case

of

of dishonor the parties thereto are liable to the damages accrued at each place and Country where it has been negotiated — were it otherwise injustice and inconvenience would arise, as a bill negotiated under the laws of one Country would be liable to be governed by the laws of another, and it would besides throw a degree of discredit on bills of exchange, and restrain their original purpose of negotiability, were such impediments countenanced, and more particularly in the dealings and transactions between this Country and the United States much of which is transacted by means of bills and paper — referred to Case determined in England of a bill drawn in London on Paris which could not be forwarded in the direct course, but was sent by the way of ~~Hamburgh~~ Amsterdam and there negotiated, and on the dishonor of the bill it was adjudged that the damages at ~~Hamburgh~~ Amsterdam although greater than usual at London or Paris, were due to the holder — As to the variance between the note laid in the declaration and that produced in evidence, it did not seem founded, nor did the objection appear to be

Mellish & al. v. Simeon — 2 H. Bl. 378.

of

of weight, but they would have the note before them to examine how far such variance existed.—

The Jury returned a verdict for the plaintiff

The Defendant now moved for a new Trial on the grounds, that the verdict had been rendered without legal evidence and was contrary to law, also by mis-direction of the Court.—

Boston for Defend.— There was no evidence before the Jury of the note stated in the declaration, but another and different note was produced to them — the note stated in the declaration is dated the 10th. Febry. 1816 — that given in evidence was dated 16th. Feby. 1816 — this is a fatal variance — 1 Str. R. 22.— Esp. N. P. 136.— Kyd on Bills. 187. Chitty on Dr. 365.— Com. Dig. Tit. Pleader C. 19. Pothier. Cont. Change. No. 30. & 39.—

There is also a variance between the date of the Indorsement on the said note as laid in the declaration, and that given in evidence — it is stated in the declaration to have been made on the 20th. May 1816, that proved to have been made was on the 10th. March 1816, this is also a fatal variance. Kyd. 191. Chitty. 303. Esp. 138. Bull. N. P. 139. Chitty on Pleads 374 to 376.— Camp. N. P. 75.—

The Court charged the Jury, that the date of the note

Note was immaterial, and directed the attention of the Jury to the questions of duress and want of consideration set up in defence – whereas the date of the note constitutes a material part of the defence.

The sum awarded by the Jury is greater than can be supported by the evidence. –

Sherwood for Plff – From the nature of the grounds stated by the Defendant, his present motion ought to have been for a Judgment in nature of a non-suit, and not for a new trial. –

As to the date of the note, it tallies with the declaration and has been found by the Jury to bear date the 10th March 1816 – but had it been on the 16th March, this was of no importance on the money Counts. – cites. Bull. N. P. 129. 2. T. R. 370. – 1 Esp. N. P. 140. – That the sum awarded by the Jury is not greater than was made out by the evidence now apparent on the record

Ross in reply – The date of every contract must be correctly set out in the declaration, otherwise it cannot be received in evidence. –

Here then was a misdirection – that the date was immaterial, and this is a sufficient ground for a new Trial – 1 Raym. 735. Bull. N. P. 145. –

The

The money counts cannot be supported by insufficient evidence on the Special Contract. Burn's Dig. Tit. Evidence. p 158. — 1 T. Reps. 656. Green. v. Bennet. — 4 T. Rep. 752. Wilson. v. Rastall. —

It was necessary in this Case that the Court should have charged the Jury to examine whether the date of the note given in evidence before them corresponded with that laid in the declaration, because it was a point in defence, and a point on which the attention of the Jury seems not to have been occupied, as they were more particularly directed to attend to the other parts of the defence. —

1. Chitty on Pleads. 303 to 308. —

The Court admitted the principle, that a promissory note and every other Contract ought to stated according to its legal import and date, otherwise that a variance would be fatal — but the question here before the Jury was whether the note produced in evidence was dated on the 10th or on the 16th February 1816, and to this object their attention was sufficiently directed It is true the Court did not think it necessary to say much upon this subject, because upon the face of it the note was plainly and visibly dated on the 10th Febry. 1816 — and the Jury have found accordingly. The Defendant seems to have been led into an error on this point from the evidence adduced in the Cause

from

from which it would appear that the transactions upon which this note was given took place on the 16th February, and therefore it was an error in stating the note to have been made on the 10th but admitting the fact to be so the plaintiff was bound to describe the instrument according to the date it bore on the face of it, otherwise he would have committed the error with which the Defendant charges him — In regard of the Indorsment, the case is somewhat different — the indorsment is stated to have been made on the 20th May 1816, the indorsment proved as written on the note is on the 10th March 1816, and this at first blush, would appear to carry with it that variance complained of, but a distinction is to be taken, where the declaration states, that on such a day, the defendant drew a bill of exchange, or made his indorsment thereon, without alledging, "that it bore date on that day", the day in the declaration is in that case immaterial, as in cases of assumpsit (a) — but where the day of making the bill or indorsment is stated, and is further described as, "bearing date the same day and year aforesaid", there the date is material as forming a substantial and descriptive part of the instrument — Here the Indorsement is stated to have been made on the 20th May 1816 but

Coxon v. Lyon York Lent assizes 1810 — 2 Camps. 307 Chitty. 531. note 6.)

Case before Ld Ellenborough 1809. 2 Camps. 308.

1 Camps. 139. Young & al. v. Wright

(a) see 1 Camps. 139. Young & al. v. Wright

but it is not said to bear date on that day, and therfore the day of the making of that Indorsment, whether on the 10th March or on the 20th May, became wholly immaterial, and no variance — The verdict therfore can be supported without having recourse to the money Counts, which could not have supported the action, as a promissory note is evidence on the money Counts only as between the original parties to it — As to the amount of damages awarded by the Jury, it seems supported by the evidence adduced — Motion for new Trial rejected

1 Camp. N.P. 175. Waynam v. Bend.

Hutchison v. Lester Taylor & Co. —

Action of Assumpsit —

The first Count in the declaration was for £1342. 8. 2 for goods sold and delivered —

The 2d for a quantum mer. — and the 3d on an insimul comput. —

Plea — Non-assumpst and for Special matter states, that the goods in question were purchased by the Defendants as agents of one Henry Wilcox and were paid for to the plaintiffs by two promissory notes made by the said Henry Wilcox to the said Defendants and by them indorsed to the said

Pltffs

Plaintiff, and which Notes the said plaintiff received in payment of the said goods.—

2d. Payment.—

The Replication joined issue.—

It appeared in evidence, that the goods were sold by the plaintiff to the Defendants on their own personal credit and not on the credit of Wilcox; that after the Sale and delivery of the goods, the Defendants gave the plaintiff in payment thereof, two promissory notes, drawn by the said Wilcox in their favor and by them indorsed to the plaintiff, both bearing date the 28th. Octr. 1817, and payable, one in four, the other in Six months, for the entire amount of the said goods, and received from the plaintiff the following receipt—

Messrs Lester Taylor & Co.—
for Mr. Wilcox
Dr. to Wm. Hutchison

1817.
Octr. 28. To Goods & invoice delivd. £1342. 8. 2

Recd. the amount by two Notes indorsed by Messrs Lester Taylor & Co. at four & Six months— for Wm. Hutchison.
Robert Coleman

On

On the 4th March 1818, the first note was protested for non-payment, and the protest duly notified to the Defendants - the process in this Cause was afterwards sued out and served on the 30th March 1818.

Ogden for the Defendants contended that the Plaintiff had no right of action against them for goods sold and delivered, as that Contract was at an end and discharged in consequence of the Plaintiffs having received two promissory notes in payment for the goods - That at all events the plaintiff ought to have tendered the notes to the Defendants before bringing the present action, - there appears no diligence done for the recovery of these notes from Wilcox, nor have the notes been delivered back to the Defendants to enable them to do diligence thereon - the action must therefore be dismissed - Objects to the irregular mode of introducing one of the notes and protest in evidence by the hands of Plaintiffs Clerk, as the same ought to have been filed as an exhibit in the Cause -

O'Sullivan for Plff. The promissory notes in question are waste paper and of no value, they were taken conditionally, that is, upon the supposition that

that they were good, the Plaintiff has shewn a sufficient diligence thereon, by the protest and note he has produced, and therefore he is entitled to recur to the original contract between the parties. cits. Bull. N.P. 272. 5 T.R. 482. 13 Bayley on Bills. 6 T. Rep. 52. 139. — ex parte Dixon. 8 T. Rep. 451. — 2 Chitty on Pleads. 454. in notis. —

That the Plaintiff had a right to fyle the note and protest with his replication, but not being in the possession of the Plaintiff, it was competent for the person in whose possession they were to produce them in evidence. —

The Court were of opinion that the action could not be maintained, that from the nature of the transaction between the parties it was premature for the Plaintiff having accepted two promissory notes one payable at four and the other at Six months, he could not recur to the original agreemt — so long as there remained a delay unexpired on the Special contract — which would extend to Six months from the 28th October 1817. That although the Special contract had failed in part, yet this would not entitle the plaintiff to a recovery for that part on the Original agreement which was entire, (a) and if any remedy could have been had upon this

part

(a) For he cannot make a man liable to two actions, when by the Contract he is liable but to one. — 1. Raym. Rep. 360. Hawkins. v. Cardy.

part- it could only be upon the breach of the Special contract — But could the action have been maintained the Plaintiff was bound to Shew a diligence to procure the payment of the notes in question, this he has not done, because the evidence on this point comes irregularly before the Court and must be rejected — The notes were in the possession of the Plaintiff. and ought to have been filed as exhibits in the Cause — ✠

Action dismissed. —

see. 6. T. Reps. 52. —
4. East. Rep. 147. Mussen. v. Price
3. Bos. & Pull. 582. Dutton. v Solomonson
1 New. Rep. 330. Brooke & al. v. White.
Bayley on bills. 166. —

✠ There was a very material point in the Case, but it was not touched upon by the Counsel, and therefor the Court gave no opinion, viz^t- whether under the law of the Country there was not a novation of the Pltff's debt-, by the receipt he gave for the value of the goods Sold — see also. L^d Alvanley's opinion & doubts — on a case by no means so strong. 3. Bos & Pull. p. 586 —

Saturday 10th October 1818.

Bennet v. Collier. — Action by the plaintiff, a Cabinet maker for the recovery of sundry articles of furniture made and delivered by him to the Defendt a School-master. — Held, that the parties were not entitled to a trial by Jury. —

Monday 12th. October 1818.

Arnoldi
v.
Brown
Cur. &c.

On action for recovery of Consultation fees, attendances and medicines furnished by the plaintiff as a Physician, Surgeon and Apothecary. —

Stuart for the Defendant contended, that the charges made by the plaintiff were exhorbitant, and arbitrarily made and could not be allowed by the court. — That it was necessary that some principle should be adopted by the Court to regulate these charges — as a quantum valebant, the intrinsic value only of the medicines administered should be considered, because the additional charge of a physician's fee for his skill or advice, cannot be recovered in a Court of Justice — at all events the opinions of medical men upon this matter ought not to be admitted as the rule for setting the question, because they are all interested, and by this means would have it in their power to lay the public under the most unlimited contributions. —

Bourré for the Plaintiff. The same principle ought to be adopted in this case as in every other

where

where a quantum meruit for services performed is to be ascertained, which is, by a reference to persons having a knowledge of the science trade or mystery in question, and are qualified to appreciate the value of those services – This is not a new question it has been already settled by the Court in the case of Arnoldi. vs Perranet, where medical men were appointed to examine and report upon the nature and value of the plaintiffs charges –

The Court were of opinion, that the nature of the charges was such that medical men only were the competent judges thereof, and that there was no other means of ascertaining the nature and value of the services performed by the Plff but through their opinion, and ordered that Experts, being medical characters, should be named by the parties for this purpose. –

see. Arrets de Fromental. Vo Medecins. –
Nouv. Deniz.t Vo Chirurgien. No 11. –
Id. ——— Vo Honor.e des avocats Vo No 3.

Charles

Charles. —
vr
Bull. —
and
Gordon &
al: Gardiens

The Plaintiff in this Cause obtained a rule on the Gardiens to shew Cause, why they should not be contraints par corps to pay the amount of the plaintiff's debt and Costs, inasmuch as they had failed to represent and produce the goods and effects which had been seized and taken in execution as belonging to the Defendant, and had been committed to the charge and Custody of the said gardiens. —

Ogden for the Gardiens, stated, that they were ready to pay the value of the articles which had been committed to their charge, namely the Cows, the Swine, and hay, but that they were not liable to pay the amount of the plaintiff's debt because they had not represented the said Cattle &c — nor any thing more than the value of the articles which had been committed to their charge. — cits. Nouv. Denis. v° Gardien. § 4. № 5.

And of this opinion was the Court and ordered that the parties should make proof of the value of those articles —

See Denis. v°. Gardien. № 15. —

Patterson
vs
Leblanc
&
Leduc Opp^t

On opposition à fin de conserver for house rent, and also for privilege on the proceeds of the moveable of the Defendant sold under the writ of Execution sued out in this Cause.—

Boston for the plaintiff contended that the Opposant as Landlord had no privilege for his house rent, when he allowed the moveables and effects of his tenant be sold under execution.—

Desrivieres for the Opposant, where the claim for the privilidge is founded on a written lease between the parties, as is the case here the privilidge holds notwithstanding the Sale of the Defendants effects.—cites. Rep^r de Jur. v^o Bail. p. 22.—

But the Court were of opinion that the opposant was not entitled to his privilege after the effects of the tenant had been sold by execution—and therefore dismissed that part of the Opposition.—

see Poth. Cont: Louage. N^o 229.—
Id — — N^o 265.

Jacobs. v Foisy.

Action for arrears of a Rente foncière. —

The declaration stated, that by act passed before Mr Badeau, Notary public and witnesses on the 4th day of March 1782, Joseph Boucher de Niverville, Seignor in part of the Seigniory of Chambly, and Marie Josephe Chatelain his wife, conveyed, transferred and made over to one Francois Lemaitre Duaime, the right in a banal Mill which the said said De Niverville had in his share of the said Seigniory of Chambly, containing one league and thirty nine arpents in front by one league in depth, the tenants of which said part of the said Seigniory at the two extremities, were on the north-east side, Joseph Lafleur and on the South-west side Jean Baptiste Menard — also four and a half acres in front upon the domain, by the same depth, with all the rights and priviledges of the grantors. — and for the purpose of enabling the said Duaime to erect a mill, the said De Niverville and wife did by the same act or deed give and grant to him the said Duaime a mill seat on the rivulet called Massé, of four acres in superficies, including the said rivulet, upon which the said Duaime bound and obliged himself to erect a mill. — That in and by the same act or deed the said De Niverville and wife did further grant to the said Duaime a lot of land situate in the said Seigniory of three acres in front by 24 acres in depth, at the distance of about three or four acres from the said Mill seat, which said lot of land was considered to be annexed to the said

Mill

mill, and not to be sold without the express consent of the said Grantors, to be held and enjoyed by the said Duaime his heirs and assigns, with all the rights privileges and enjoyments therein of the said Grantors, and as if they themselves had built the mill, and without right to any other person to build any other mill in the said part of the said Seigniory. Which said Cession and Conveyance was made subject to the payment by the said Duaime his heirs and assigns of 5 Sols of Cens, carrying Lods et Ventes, as well upon the said mill as upon the said lot of land; And further that the said Franc. L. Duaime his heirs and assigns should be held and bound to pay yearly and every year to the said grantors the quantity of 125 minots of good wheat, the first payment to be made on the first day of June of the year then next ensuing, and so to continue in perpetuity, with right however to the said Duaime his heirs and assigns, to redeem the said rent of 125 minots of wheat on paying to the said grantors their heirs or assigns the sum of ten thousand livres in one and the same payment. — That in consequence of the said Deed the said Duaime took possession of the said lot of ground and property granted to him and built a mill thereon, and held and enjoyed the same in conformity to the said deed.

That on the 9th Oct. 1785, the late Claude Foisy,

the

the father of the Defendant, acquired all the rights of the said Duaime in the said property and entered into the possession thereof and thereby became bound and liable to all the obligations of the said Quaime —

That on the decease of the said Claude Foisy, the Defendt his son and heir, took possession of the said lot of land and mill, and now still holds and enjoys the same

That by act or deed of the 24 May 1793 the said De Niverville sold and transferred all his right title and interest in and to the said part of the said Seigniory to the said plaintiff, including the said lot of land and mill, and also the said annual rent of 125 bushels of wheat. — That since the first day of June 1793, to the first day of June 1817, the said plaintiff hath held received and enjoyed the said annual rent of 125 bushels of wheat, which has been paid to him as well by the said Claude Foisy as by the said Defendant since his decease —

That on 1st June 1818 there became due and in arrear one year of the said rent of 125 bushels of wheat, which the Defendant now refuses to pay to the said pltff. — Concludes that the Defendant be adjudged to pay the same, or on default thereof a sum of £46. 17. 6. with interest and Costs. —

Plea. 1. Nil debet. — 2d That the facts and law stated in the declaration are unfounded & insufficient

to

to maintain the action. — and 3dly That on the 29th May 1817, the defendant made a tender to the Plaintiff of the sum of ten thousand livres in order to redeem the said rent and be exonerated therefrom in future, according to the terms of the aforesaid deed of grant, which tender was refused by the said Plaintiff, and now again tenders the same and brings the money here into Court — and prays &c

Replication, and answer to exception —

1st Joins issue on the 1st and 2d pleas. —

3dly That Defendant is not entitled to redeem the rent in question, the faculté de rachat thereof having become prescribed in law at and before the tender made by the Defendant, by the lapse of upwards of thirty years from the time of passing the said act or deed of the 4th March 1782. —

4thly That the tender made by the Defendant is insufficient, even if he had been entitled to redeem the said rente, the said Defendant not having consigned the money, but retained the same in his own hands — Wherefore &c

On hearing on the exception of Prescription raised by the Plaintiff in his answer to the Defendants plea, Mr Stuart for the Defendant argued, that by the deed of 4 March 1782, the Defendant had the power

of

of liberating himself from the principal of the rente on paying a certain sum of ten thousand livres, this right the defendant has pleaded with a tender of that sum, but it has been objected to by the plaintiff on the principle that a thirty years prescription hath accrued against the Defendant and he cannot now liberate himself — This Rente is the same as any other rente Constituée, and the right of the debtor to liberate himself cannot be denied, if it was contemplated by the Contract — cites. Repr. de Jur. Vo Prescription. p. 322. — Prescription does not hold against the person who seeks to relieve himself from any onerous obligation — cites case from De Charnage. Tr. des Prescriptions. p. 96.7. where the action and exception arise on the same Contract they preserve each other — that the Plaintiffs plea of prescription ought therefore to be dismissed Rolland for Pltff. — This is not a Rente Constituée but a rente fonciere. — The Contrat de bail d'heritage was made in 1782, and the action is instituted at one of the representatives of the original Grantee. This is a bail d'heritage, charged with the payment of an annual rente à perpetuité, redeemable on payment of a sum of ten thousand livres, but as no time was fixed for this redemption, the right of exercising the same was prescribed by a lapse of thirty years from the date of the said bail d'heritage. — There is a difference between a Rente Constituée and a

Rente

Rente foncière — the latter being imposed upon the alienation of a real estate — the former where a rente itself is sold, or appointed to represent a sum of money. see 1 Bourg. 305. 6 — Observation of Henrys thereon — Poth. Constit. de Rente. No 1. Repse vo Rente Foncière — as to the definition of this rente refers to 120e art. Coutume Paris — and as to right of prescription — Poth. Bail a Rente No 74. 75. 78 — also. No 21. & 23. —

That the tender made by the Defendant, even in the case of a Rente Constituée, is insufficient in the manner pleaded by him — for on the 29e May 1817 the sum of 10,000 livres was not a sufficient tender, as then was the rente of a year due besides of which no tender was made — and to entitle the Defendant to the benefit of the tender he should have deposited the money in some public office, for by retaining the money in his own possession he can derive no benefit from the tender — Poth. Obl. No 572. and 780 — 1 Pigeau. 435. Poth. Constit. de Rente. No 203. 208. 212. — cites Case of J. Bte Noll. v. Delery. in Oct Term 1813, where action was brought to foreclose the Defendant of the faculté de rachat, which had not been exercised within the time limited, but which by law the Defendant could have exercised for thirty years if no previous foreclosure was had — 5 Journal d'Aud. p. 403. — arrêt du 11 Août — The tender ought to have been renewed by the plea, so as to give the plaintiff the right of taking the money

up

if he should see fit – but as the Case now stands the plaintiff is deprived of this option, which he ought to have enjoyed in a tender regularly made, the presumption – therefore is that the Defendant had changed his opinion and did not mean to make any tender. – There was a tender afterwards made on the 1st. Oct instant, but was too late, and could never apply to a rent become due on 1 June 1817. ca

Stuart in reply – The Contract in question is not a bail a rente, nor a rente foncière; but contains a Sale and assignment of a certain incorporeal right in consideration of a sum of money – The terms of this Contract shew no droit foncière in the grantors, and the reservation of the rente, is the Consideration of the Cession – which the grantor made – refers to distinctions laid down by Ferriere in his Parfait Notaire, between the Rente foncière and the Rente constituée – When no time is limited for the redemption of any burden, it is competent to the person bound to exonerate himself at all times until a foreclosure takes place – That the tender made here is sufficient – there is no Office of Consignation in this Country – and therefore a tender to the Creditor has always been held sufficient to

put

put him en demeure — This tender so made was renewed on the 1 Oct. inst. and the plea to the action also mentions it. —

The Court were of opinion that this was a Rente foncière, and not a Rente Constituée and therefore that the right of redemption pleaded by the Defendant was prescribed by a lapse of thirty years from the date of the Original Contract — Judgt. for Plff. —

See authorities cited by Plaintiff also. Nouv. Denis. Vo Bail a Rente §. 1. No 5. —

Friday 16th October 1818.—

Guy.— vs. Rivers

Action for recovery of House Rent.—

The plaintiff having proved the occupation by the Defendant of the house in question for three quarters, now moved that that he might be permitted to prove by Witnesses, the price, or rent which the defendant promised to pay for the said house.— cites. 2 Gr. Comm. art. 161. p. 1053.— 1. Jousse on art 41. Tit. 20. Ordre 1667. p. 259.—

But the Court rejected the motion, considering such testimony inadmissible.—

Monday 19th October 1818.

Porteous val' v Mathwin

Action of assumpsit on promissory note

The defendant pleaded by exception à la forme, that the Defendant had been improperly sued by the Stile and addition of a merchant, whereas he was not a merchant but an Inspector of wood and timber.—

Beaubien for Pltff contended that the exception in manner as pleaded was insufficient— and further that at the time of the Contract in question the Defendant was a merchant.—

The court considered the matter pleaded not to be an exception à la forme, and therefore dismissed it—

Foucher.
vs
Pothier.
&
Henry, Plff
par rep: d'Inst^r

to the faits & articles proposed to him by the Defend^t.

On the defendants motion to declare the answers of Henry # the plaintiff par reprise d'instance, not pertinent and — thereupon rejected, and the said Henry held by Contrainte par Corps, to answer over to the said faits et articles. —

Bedard & Stuart in support of the motion. The answers of the said plaintiff are evasive, and contain more of a reasoning why he ought not to be held to answer to the said faits & articles, such — conduct after the said faits et articles have been declared pertinent and the said plaintiff ordered to answer thereto, is a contempt of the Court — he ought in this respect to be compared to a Witness and liable to the same penalties on refusing to answer pertinently to a question, — and although there be no positive rule established on this Subject, yet it being within the power of the Court to controul the conduct of the party, where any thing is to be done which is essential to the ends of Justice in a Cause, the Plff in this case therefore ought to be considered as in contempt until he shall have answered — pertinently to the said faits & articles. —

Lacroix

Lacroix for Pluff.- The contrainte asked for by the defendant cannot be granted, as the law does not warrant it, all that the Defendt can obtain, if the Plaintiff refuse to answer, or answers irrelevantly to the question, is to have the faits et articles declared and taken as acknowledged and confessed by the Plaintiff - cites. 1 Pigeau 241. 244. a

And of this Opinion was the Court, and rejected that part of the Defendants motion in regard of the Contrainte, and granted the rest. see Poth. Proc. Civ. -

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Campbell vs Cooper. a

Action of assumpsit on a promissory note.

In this case the Defendant was arrested on a writ of Ca. ad resp. on the Plaintiffs affidavit that he was about to leave the Province, upon a demand founded on a promissory note which was not at the time due, having still some weeks to run. -

Mr O'Sullivan appeared for the Defendt but filed no plea, and now upon the hearing

ex

ex parte, contended that the action was pre-
mature, and that the Plaintiff had no right
of action against the Defendant until the note
in question had become due.— That although the
Defendant has left the Province since the —
institution of the action, yet this circumstance
cannot be brought in aid of the Plaintiff's —
proceedings, it was a posterior fact and the Court
cannot consider it of any weight.—

Grant for Pltff. The action is founded on
the fraudulent conduct of the Defendant, who
with a view to defraud the plaintiff and his
other creditors, sold off his property and was about
to leave the Province when he was arrested by the
Plaintiff— these were fraudulent acts on the
part of the Defendant and justify the proceedings
of the Plaintiff, and now entitle him to his judgmt
against the Defendant.—

The Court were of opinion that the facts
proved against the Defendant shewed a —
fraudulent intention on his part, and therefore
the Plaintiff was justified to prosecute the recovery
of his debt, although the delay granted for
the

the payment of it had not yet expired, and therefore gave Judgt for the Plaintiff.—

see Poth. Obl. Nº 234.—

Fr. Gr.-Comr art. 160. p1003. remarques

The King
v.
Stibbins.—

On Certiorari.—

On the Defendants motion to quash the Certiorari as having issued improvidently.—

Rolland for the Prosr The return is irregular— The writ itself insufficient, as a part of it has been omitted, and does not as it now stands, require the removal of any proceedings.— The security given is not conformable to the Stat. 5. Geo. 2. ch. 19. §. 2, which requires that the party convicted shall become bound to the Prosecutor in £50- with two sufficient securities- but the party convicted has not become bound at all, nor any security given in the sum of £50- there being only two securities given in the sum of £25- each, which is not conformable to the Statute.— 1. Wms Justice. 370.

Grant for Defendr The writ has been complied with by the Justices, who made their return thereto with all the proceedings annexed, the objection therefore

to

to the sufficiency of the writ comes too late after it has had its execution. That the Security given by the Defendant is conformable to the Statute and for the sum required, as two persons have entered into a recognizance for the sum of £25- each, which is conformable to the Spirit of the Statute. a Hands Prac.

The Court however considered the Security as insufficient, not being made in conformity to the Statute, and as the decisions on the question were pointed, they were of opinion to quash the writ, but by consent of the parties, allowed the Case to Stand over. see. S. T. Reps. 281.- and 8 T. Reps. 217. a

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Baroness of Longueuil - vs - Naulet. et al

This was an action en Complainte et reintegrande, and the Plaintiff had recovered Judgment and possession was awarded to her. with damages & Costs. a

Upon this Judgment the Plaintiff sued out a writ of possession bearing date 14th June 1817.- On the same day the Defendant sivica a notice in the form of a notarial protest, that he quit and gave up the lot of land in question to the Plaintiff, without incurring further expence, protesting against whatever might be done to the Contrary - this notice and protest was

signified

signified to the Plaintiff, by leaving a copy thereof at the her usual place of residence.— The Shriff notwithstanding proceeded to put the writ in execution by delivering over the possession of the lot of land in question to the Plaintiff.—

The Plaintiff now obtained a rule upon the Defdt to shew cause, why an execution or writ of fi. fa. should not be granted to her, to levy of the goods and chattels of the Defendant, as well the damages and costs awarded to her by the aforesaid Judgment, as the costs accrued upon the writ of possession.—

Bedard for the Defendant, for cause, stated, that since the rendering of the Judgment, the Defendant has by an act in due form signified to the Plaintiff, that he had abandoned and given up the possession of the lot of land in question and that he was ready to pay the costs — this act was signified to the Plaintiff before the writ of possn was put in execution and even before it was delivered to the Shriff to be executed — all costs therefore which have accrued since the signification of the said act, must be at the charge of the plaintiff, as since that time the Defendant has ceased to possess the property in question

Sewell for the Plaintiff in answer, the Court cannot admit the make proof of any fact in the face of the Shriff's return, which shews that the Defendant was in possession of the property when the writ of possession

was

was executed, and was put out of that possession by force. —

The Court were of opinion that the plaintiff was not bound to take notice of the notification and protest made by the Defendant, as it could not be considered a legal and sufficient abandonnement of the lot of land in question — that the Plaintiff was interested to have the Judgment against the Defendant duly executed and to have a legal and sufficient proof of this execution which could be best effected by the proper Officer the Sheriff who had been charged therewith — The Court were also of opinion that had the offers made by the Defendant to quit and abandon the land in question been valid and sufficient, they ought to have been notified to the Sheriff so as to stay the effect of the execution

Rule absolute. —

Segris & Segris

On the plaintiffs motion to be allowed to appear and amend his answer to one of the Interrogatories proposed to him by the Defendant, by adding certain words thereto which he alledged to have been omitted by the Prothonotary in reducing his answers to the said Interrogatories. —

The

The Court were of opinion that the plaintiff must join his affidavit with his motion, in which he must state, that the omission to be corrected arose from the act of the prothonotary in reducing the answer of the Plaintiff to writing, and that the words he now wishes to add, formed at the time part of his answer to the said Interrogatory.

Conroy vs. Chaboillez vs. Boudria.

This was an action to compel the Defendant to specific performance of his Contract, by receiving from the Plaintiff a deed of Sale of a certain lot of land which had been exposed to sale at public auction, and which had been adjudged to the Defendant as the last and highest bidder.

The Defendant was examined on faits & articles there being no written evidence of the Sale, and by his answers admitted the Sale, and that he had become the purchaser for the sum specified - but contended that he was not bound to the servitude of a ditch or water course adjoining the said lot.

In consequence of these answers the Plaintiff moved to be permitted to prove the Conditions of the Sale by verbal evidence, as all the material facts

of

of the Case had been admitted by the Defendant.

The Defendant on the Contrary contended that this was a verbal Sale which could not be carried into execution - Dervx. Vo Vente. No 38. - Potb. C. Vente. and therefore the proof the Conditions of the Sale by verbal testimony could be of no avail, even if admitted -

But the Court were of opinion that where the material facts of the Contract between the parties are apparent, verbal testimony ought to be admitted to complete the evidence thereof. - and that a verbal Contract was susceptible of a specific performance in regard of a Sale of real property, where the property was in the possession of the party - see Can. Bourassa. v. Derrau. - here the difficulty was less, because the property was in the hands of the Plaintiff who tendered a - conveyance thereof to the Defendant -

The Court therefore admitted the verbal testimony, and on the evidence adduced, adjudged Defendant to receive a deed of Sale & Conveyance of the lot of land in question according to the terms of the Sale. -

Tuesday 20th October 1818.

Mercier v. Lemai.

Action for goods sold &c.

The Defendant was stiled by the Declaration, a blacksmith — To this the Defdt pleaded an exception à la forme, that Defendant was not a blacksmith, but a merchant —

This the Court held insufficient as not being matter of an exception à la forme, — and therefore dismissed the plea. — sa. Portious. v. Mathurin — of 19th —

Yule v Pardy and Contra

Action for goods sold & delivered

Plea — non-assumpt — & Incidental demand for attendances & medicines furnished and provided as a Physician & apothecary —

Plea of Exception — Incidental demand inadmissible by law, as being wholly unconnected with the principal demand —

Plea over-ruled by the Court — as every Incidental demande of a similar nature and tending to the same conclusion & satisfaction as the principal demand

cau

can be formed by a Defendeur. –

sur. Deriv.t Vo Reconvention –

De Laurier. on 106e art. Coutume –

Observations of Lecamus on 106e art.