Saturday 3.d October 1807.

John Antrobus. } action for £11. 13. 4 for rent on lease. —
Jn. Bte. Marchand }

Vigé for Defdt. — admits debt to be due, but says he has not had the possession of the farm as agreed on — and that Plff has not deducted any thing for the poss. he retains of a part of the property leased — and that buildings not in sufficient repair. Pth. Lonax. No 206.

Ogden. That Defdt has been in poss.n since 1803. & paid rent — as to repairs, Defdt bound to make them — as to Plffs possession say, that he has a right to take possession of a house by the Lease & has allowed a deduction of rent to Defdt —

Vigé. That Defendt is bound to rep. locatives, but not to grosses reparations, which are requisite for security of Defndt grain — the other matters in contest are objects of proof. — Submits that the whole may be ascertained by report of Experts to which Plff refuses to consent — Cur. av. vult. —

Joseph Beaugrand dit Champagne } = Ogden for Plff.
vs. = Ross. for Defdt.
Franc Hyppte. Truscau — } = action de Bornage —

That the antient line of separation is done away & old boundaries not distinguishable — by testimony, that Defdt — is making encroachments on Plff —

Defdt

Defdt. That parties had agreed to draw thier line — Plamondon named — Line drawn by him —

Beaupre another Surveyor — gave opinion that line was insufficient — upon which action is brought — Defdt offered to have line verified, which had been drawn by Plamondon, but would not agree to have a new line drawn — Writ 26 March — Sent. S. April. last —

Pltff. That Pltff understood that Plamondon was sent by Seignior to draw line of division — that he never agreed to it — that it is not correct — nor agreeable to the Old line —

~

Stephen Burroughs. v. Daniel Bacon. — } action for £50 — for value of a pair of horses — Plea — that proof cannot be received because the sum in question is above a hundred livres. —

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Monday 5. Octr. 1807.

Pin
Pin — { En complainte. — hearing on testimony adduced —

Poth. Poss. No. 95. to shew right of action agt. Defdt. even if Propr.

+ That Pltff. never has dispossessed himself under acte made to his mother

No clause in the acte to carry with it a tradition feinte. —

Vigers for Defdt. — on 22d. Octr. last. Pltff made Deed of Retrocession of the Land in question to Defendt. mother —

That Defendt. got the Land from his mother & entered —

Consent of Pltff to Defendt. possession — see testy. of Mathe. —

That Pltff held the Land a titre de Precaire from the time he made over his right to Defdt. mother. — & cannot maintain action — agt. Defendt. altho' he might agt. another Trespasser. —

Pltff says he gives up the point of Donation being made to Defendt. by his mother at a time that she was on her death bed. —

Lacombe. Vo. Proprieté No. 4 —

Rolland for Pltff. That only question is to ascertain whether Pltff was ever out of possession — & not to enquire into validity of Titles on either side. —

Maillet v Guertin & Paequet } On Report — action for cutting wood on Pltff Land. — Damage assessed at 5/— Pltff claims full costs —

Defts — claim costs for defendg this action — which he would not have sustained had the suit been instituted in the Inferior Court —

Stewart v McWhirter } Having been counsel for Pltff in this cause, I declined taking cog. of it —

Tuesday 6th October

Berthelot v Papineau. } On Report —

Pltff. prays homologation —

Defts — That Experts have not reported on the facts submitted to them — but introduce an opinion contrary to the Interlocutor —

Brazeau & Dufresne — v Sanguinet Gar. } action de Bornage — on Report of Surveyor —

Pltff prays homologation of Report —

Defts. prays his Indemnity as Garant —

Garant submits to Defts or Report —

Alexis Guertin :- } On Trial before Jury for Damages for seducing
Nic: Archambault } Plffs Daughter. —

Justinien Grioneard a witness for Plff, says, that his wife is niece of the Plff - Plff says that witness is brought up to prove conversations of Defendt with witness respecting fact charged in the Declaration - Objection to testimony by Defendt on acct of relationship Objection allowed — Quere'l —

The Declaration on oath of the Plaintiffs Daughter taken in april last before The Hon. Mr Justice Ogden after she was brought to bed of the Child offered in testimony - but rejected —

The only testimony of the birth of a child was that given by 2 Witnesses, who said that they understood that Plffs Daughter was brought to bed in february last, —

The Ch. Just. charged Jury to consider circumstances of the proof whether sufficient to charge Defendt as Father of the Child - That as to proof of the birth, it seemed not to be objected to by Defendt but on the contrary admitted that the Child in question was born, & as such should be considered by the Jury -

Verdict for the Plff £10 - & Defendt to be charged with Child - & to pay Costs.

Halsaway
Schutt } on Report.

Pltff. objects to report - as contrary to the evidence laid before the Court - which is the whole evidence in the Cause -

Dftt. claims hom. of Report - That all evidence taken before the Arbitrators not before the Court - The Report agreable to the ~~Report~~ power vested in the Arbitrators /

Wednesday 7th October. -

The King
R. Moodie } on Hab. Corp. Granted at the request of one In Bte Pomainville, detained by Moodie as having been enlisted as a Soldier. //

Moodie's counsel state, that Pomainville after having been enlisted, concealed himself more than four days, which by 66. Sect. of the Mutiny act makes him ipso facto a Soldier. —

Pomainville's counsel - That affidavits of Danbury & Hebert are controverted by Affidavit No. 2. & 3. filed by him, as to the place where enlisting money was paid —

Compare story told by Danbury, respects. his intention to take in Pomainville. /

Danbury's character - not to be credited on oath -

Hebert, not a man to be credited on oath -

The Seminary

Riccardo — 4

For wheat due on Lease— Defendts sets up a demand for work done for Plffs.—

a day allowed parties for proof

Saturday 10th October.

Wylie v. Patterson } on motion by Pltff, that part of Excep. pleaded by Defts be taken off the fyles.

Winklefoss v. Scobel } Plea to Pltffs action - minority - and action brought without Pltff authority -

Pltff replies guilty generally - in order to conclude the pleading

+ the Deft moves that Repn be taken off the fyles as Irregular, and that the Issue be regularly joined by answer to Exception.

~~Winklefoss v. Jackson~~ }

Foisy fils v. Foisy pere } action of acct -

Sum contested 600# no proof made by Defend. of this sum charged in his acct -

Pltf agrees that Judgt. must go for 600# - but says that Defend. shewed a disposition to settle without a Suit

Samozette v. Scott }

&c. Monday 12th October 1807. &c

Dufaut v. Christin — action for amt. of Promissory Note.—
Plea — That land sold by Pltff to Defdt — is mortgaged for a debt due to the Seignior, further a Plea of compensation for articles belonging to Defdt.

Thursday 15th Oct.—

Gallineau v. Perrault — action on deed of Sale — for balance due on purchase money —
Defdt — That it appears there is due by Pltff 800th to N.W. Co which he is bound to discharge, as being a mortgage on the Land —
That as to 900th demanded, says, that he has paid what is due — 2 Receipts of 50 & 60 dollars —

Parties ordered to proceed to proof —

The King vs. Wm Fagan — on Hab. Corp. —
Pris. detained on a charge of "suspicion of forgery" & "of a Petty Larceny" —

The Prisoner's mark made to a Receipt, without a Witness to certify it — quere — how far forgery will apply —

King v. Dunn

The Court were of opinion that there was not sufficient cause of Detention of the Pris.

Decarry v Demers } action agt. Defendt. as Superior of Society of Recollets for work done by Pltff husband at request of Pre Petrimoulx while Superior of that Society for the use of the Convent

upon Defendt. plea — nil. deb. — proof ordered —

Provost v Raymond } action for Injures personnelles —

Dénau v Cuvillier &c } action for Rente & pension. —

Brehaut &c v Durval. } action for price of salt

Friday 16th. Octr.

Clarke, Laudyte. v & Prior oppt. } On opposition — Sale subsequent to Pltff— Judgt. vizt. 29 June last —

+ Stewart v Guy v Pothier — } Quest. on Pltff. motion to examine a Witn. at Makinac to countervail the declaration of Tiers Saisi — Ptff — Poth.

Tres Saisi — makes a distinction when Declaration of Tres Saisi is on oath or not — & that after his oath — deferred to him by Pltff that Pltff cannot be admitted to a further proof, but is bound by that oath —

Objects to the kind of proof, — to what happened 10 or 12 months prior to the attachment — & that Tres Saisi then had property in his hands belonging to Defdt — This fact should have been alledged in the Declaration, to which an answer might have been specifically given —

Paine — Sanderson

Action on Debt contracted in Vermont —
Plea — Discharge by Bankrupt Law of Vermont —
Rep. New Promise subsequent to Discharge —

Defendt New promise inadmissible — in contradiction to Declaration — proof of new undertaking insuff — it only acknowledges the old debt & gave up no right which Defdt had acquired under Bankrupt Law of Vermont — by wch no Exon could go agt his person —

Pltff — That Defdts undertaking is sufficient to give Pltff his Exon agt Defdts person —

1 East. Rep.
7 East. p. 231. Lumbie vs Robertson — agreement by an uncertificated bankrupt to pay Debt — valid —

Defdt — No new promise here — old debt not destroyed by Bankruptcy proceedgs —
1 T. R. p. 715. Burch vs Charlton

Globensky
vs
Brunet

on acknowledgment for wheat —

Defdt — That Defdt. owes nothing to Pltff —

That Pltff by his answers to fact Last. acknowledges that he sold the bon, to one Dorion —

That Defdt. made bon on condition that the amt. should not be called for — & at a time when Defdt. was in a weak state & under Pltffs hands who was his Physician —

That Defendt. is not en demeure, & all that Pltff can have is the wheat & not the money demanded by Pltff —

That bon was given for £40 — which ascertains the value of wheat — & no more ought to be given —

Pltff — That the bon for the wheat is his property & was never sold by him to Dorion — That Defdt. has acknowledged Pltffs debt —

Duffy
&
Levesque
et al —

Vigé — That Pltff has not a right of action for partage & licitation also that Pltff has greatly damaged premises

Poth. Don. p. 2 ch. 5. art. 2. Nos 217. 238. by which Usufructier is bound to make the grosses reparations

That Pltff cannot destroy the right of Don Mutual, by his action —

That heir is not bound to make part: of property from wh. he draws no revenue

Pltff cannot have his action of partage without rendering acct. to heirs —
Den. vs Don. Mutual. No 53

That a general division of the succession cannot be now made

That No Licitation ought be permitted, as Pltff can have the enjoyt only as it now is.—

Pltff. That Incidental Demand incompatible with plea of Exception pleaded by Defdt

That Incid. Dem. cannot set aside the Pltffs. right.—

Turgeon v/ Lefrohon

On Report of arbitrators —

Objection to Report — That Defendt. Witness were not heard —

That there was no proof before Arbitrs. to support Report

Pltffs Action is for the homologation of a Report made under an order of the Superior Court in May last — returnable on 24th June — That Arbitrators did not operate till Septr.

Pltff — That without rule of reference the Report is valid as it appears to have been made by & with the consent of the parties.—

Saturday 17th October.

Poutré
v
Lavoie

action en bornage - brought up by Evocation -

Defr. says, that the line of division is well known for many years. (25) by certain boundaries, which he prays leave to prove by Witnesses.

Plff. That 25 years pass. is no bar to Plff. action -

Lacroix
v
Boucherville

action for Salary as Deputy Grand Voyer -
became claimed during last six months service of Plff

Deft. That he does not owe sum demanded - as at the time the services were done, he was not Gr. Voyer, having been succeeded by Mr Delery.

Woolrich
Charles

action for balr. of acct.

Defr - action premature - Delay to 1st Oct. time of the sum due on that day -

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Laframboise
Paillé -
Charpentier opposr.

On opposition & claim of Charpentier -

Def Quer. whether Plff debt is chargeable to the Community -
That debt in oblign. not same as that referred to in the -
Defendr Inventory -

Dexter
vs
Marmier

action on promy Note
Def.- Prescription -
Pltff - That Note was made at Boston. when the Prescription does not holds -

McFarlane
vs
McGillivray

That in France no security was required by a Curator named by the Judge - a fortiori when named by the persons of relations & friends -

That Defendts have no Interest in raising question of security Uncertain for what purpose or to whom the security shall be given -

Defts - That Defendt. suggest giving security as a necessary precaution for the preservation of the Estate -

McDonald & Co
~
Cuvillier & Co } action by Indorsee agt. Indorsors of Bills returned under Protest. —

~~Jas Dow~~ for
~~Wm Stewart~~
Jas. Dow proves signature of Lymburner & Crawford to the three Bills one of them Lymburner & the other two of Lymburner & Crawford

Ch. Stewart Has seen the bills before, were received by Pltffs from Defendts & money paid for them — was then a Clerk to Pltffs — Bills were bought on ~~Saturday~~ & by Post of Monday after sent to Quebec for Britain — That Mr McDonald went soon after — Mitt. proposed to produce a letter from one Mr Ilworaith in Scotland to Pltffs to shew that a Notice was written respecting the dishonor of the Bills, which letter never arrived in Canada — Objected to by Defendts as an ex parte proceeding & not forming a legal proof — rejected by the Court —

That in the latter end of the year 1803 or beginning of 1804. the Pltffs rec'd no intelligence from Mr McIlworaith respecting these Bills — nor does he recollect that they rec'd such information during 1804 —

John Shuter — That he was present at the house of Pltffs on or about the 1st April 1804 when Defdt Cuvillier came in — McKinstry presented to him — letter he had rec'd respecting a sett of Bills sent to Scotland that Cuvillier read the letter & returned it to McKinstry. and Mitt saw the letter, which is the same now produced —

Saturday 3.d October 1807.

John Antrobus. } action for £11. 13. 4 for rent on lease. —
In B.t v. Marchand }

Vigé for Defd.t — admits debt to be due, but says he has not had the possession of the farm as agreed on — and that Pltff has not deducted any thing for the poss.n he retains of a part of the property leased — and that buildings not in sufficient repair. Poth. Louage. N.o 206.

Ogden. That Defd.t has been in poss.n since 1803. & paid rent — as to repairs, Defd.t bound to make them — as to Pltff possession say, that he has a right to take possession of a house by the Lease & has allowed a deduction of rent to Defd.t —

Vigé. That Defend.t is bound to rep. locatives, but not to grosses reparations, which are requisite for security of Defend.ts grain — The other matters in contest are objects of proof. — Submits that the whole may be ascertained by report of Experts to which Pltff refuses to consent — Cur. adv. vult. —

Joseph Beaugrand dit Champagne v. Frank.n Hyp.t Fuscau — } = Ogden for Pltff. = Ross. for Defd.t = action de Bornage —

That the antient line of separation is done away & old boundaries not distinguishable — by testimony, that Defd.t is making encroachments on Pltff —

Defd.t

Defdt. That parties had agreed to draw this line — Plamondon named — Line drawn by him —

Beaupre another Surveyor gave opinion that line was insufficient — upon which action is brought — Defdt offered to have line verified, which had been drawn by Plamondon, but would not agree to have a new line drawn — Offer 26 March — Sent. 5. April. last —

Pltff. That Pltff understood that Plamondon was sent by Seignior to draw line of division — that he never agreed to it — that it is not correct — nor agreeable to the Old line —

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Stephen Burroughs.
v.
Daniel Bacon. — } action for £50 — for value of a pair of horses — Plea — that proof cannot be received because the sum in question is above a hundred livres. —

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Monday 5. Octr. 1807.

Pltf
vs
Pltf —

Ere complainte. — hearing on testimony adduced —

Poth. Poss. Nº 95. to shew right of action agt Deft. even if Propr

That Pltff. never has dispossessed himself under acte made to his mother

No clause in the acte to carry with it a tradition feinte. —

Vigs. for Deft. — on 22d. Octr. last. Pltff made Deed of Retrocession of the Land in question to Defendr. mother —

That Defendr. got the Land from his mother & entend —

Consent of Pltff to Defendr possession — see testy of Mathe. —

That Pltff held the Land a titre de Precaire from the time he made over his right to Defr. mother. — & cannot maintain action — agt. Defendr although he might agt. another Trespasser. —

Pltff says he gives up the point of Donation being made to Defendr. by his mother at a time that she was on her death bed. —

Lacombe. Vo Propriété Nº 4 —

Rolland for Pltff. That only question is to ascertain whether Pltff was ever out of possession — & not to enquire into validity of Titles on either side. —

Maillet
Guertin
&
Pacquet

On Report — action for cutting wood on Pltff Land. —
Damage assessed at 5/— Pltff claims full cost —
Dfdt — claims cost for defends this action — which he would not
have sustained had the suit been instituted in the Inferior Court —

Stewart
v.
M. White

Having been counsel for Pltff in this cause, I declined taking
cog. of it.

Tuesday 6th. October.

Berthelot
v.
Papineau.

On Report —
Pltff. prays homologation —

Dfdt — That Experts have not reported on the facts submitted
to them — but introduce an opinion contrary to the Interlocutor —

Brazeau —
&
Dufresne —
v.
Sanguinet Gar.

action de Bornage — on Report of Surveyor —
Pltff prays homologation of Report —
Dfdt. prays his Indemnity as Garant —
Garant submits to Dfdt on Report —

Alexis Guertin :- } On Trial before Jury for Damages for seducing
Nic: Archambault } Plff's Daughter. —

Justinien Grioneard a witness for Plff, says, that his wife is niece of the Plff - Plff says that witness is brought up to prove conversations of Defendt with witness respecting fact charged in the Declaration - Objection to testimony by Defendt on acct of relationship Objection allowed — 2 more'l —

The Declaration on oath of the Plaintiffs Daughter taken in april last before The Hon. Mr Justice Ogden after she was brought to bed of the child offered in testimony - but rejected —

The only testimony of the birth of a child was that given by 2 Witnesses, who said that they understood that Plffs Daughter was brought to bed in february last, —

The Ch. Just. charged Jury to consider circumstances of the proof whether sufficient to charge Defendt as Father of the Child - That as to proof of the birth, it seemed not to be objected to by Defendt but on the contrary admitted that the child in question was born, & as such should be considered by the Jury -

Verdict for the Plff $10 - & Defendt to be charged with Child - & to pay Costs.

Halsaway
Schutt } on Report

Pltff. objects to report - as contrary to the evidence laid before the Court - which is the whole evidence in the Cause -

Dft. claims hom. of Report - That all evidence taken before the Arbitrators not before the Court - The Report agreeable to the ~~Report~~ power vested in the Arbitrators

Wednesday 4th October.

The King
R. Moodie } on Hab. Corp. Granted at the request of one
In Bte Pomainville, detained by Moodie as having
been enlisted as a Soldier

Moodie's counsel state, that Pomainville after having been enlisted, concealed himself more than four days, which by 66. Sect. of the Mutiny act makes him ipso facto a Soldier. -

Pomainville's counsel - That affidavits of Danbury & Hebert are controverted by Affidavit No. 2. & 3. filed by him, as to the place where enlisting money was paid -

Compare story told by Danbury, respects. his intention to take in Pomainville.

Danbury's character - not to be credited on oath -

Hebert, not a man to be credited on oath -

The Seminary

Riccardo — 4 For wheat due on Lease— Defendt sets up a demand for work done for Plffs.—

A day allowed parties for proof

Saturday 10th October.

Wylie
vs
Patterson } on motion by Pltff, that part of Excep. pleaded by Defts be taken off the fyles.

Winkleyer
Scovel } Plea to Pltffs action – minority – and action brought without Pltffs authority –
Pltff replies. guilty generally – in order to conclude the pleading
+ the Deft. moves that Repls be taken off the fyles as Irregular, and that the Issue be regularly joined by answer to Exception.

Winkleyer
Jackson

Foisy jr
Foisy sen } action of acct –
Sum contested 600. no proof made by Deptd. of this sum charged in his acct
Dft agrees that Judgt must go for 600 – but says that Deptd. shewed a disposition to settle without a Suit

Samoyette
Scott

Letter dated 28th January 1804 — part read respecting the noting of Lymburner & Crawford's bills for non-acceptance

Chev. Stewart. That Plff. had no other Bills of Lymburner & Crawford except those mentd — That Plff rec'd a letter from Mr McDonald on 5th May 1804 respecting the protest for non-payt of those bills — letter dated 25 Feby 1804 & written notice given to Defendt on same day 5 May 1804 — Notice proved. The two letters came by the way of the States —

Protests —

Commission Rozaloire. —

Mathew Lymburner's testimony rejected as interested —

Claude Massüe

Geo. Lynes —

Mr Wm Woolsey —

James Dawe.

Defence

Mr Harkness. That the bills pyled were purchased by Defendt from Lymburner & Crawford in Sept 1803, and money was sent by Seguin Courrier for them to Quebec — Knows Ch. Stewart. That on 14th July 1804 a notice was sent from Plff. to Defendt — as Mr Cuvillier said it was — Rec'd no other notice from

from J. Stewart in May 1804 —

Wm. Blackwood. That in Sept. 1803. he bought a Bill from Defendts drawn by L & C. which he sent home — That he had by a letter of 11 Nov. 1803 advice of its non-acceptance on 6th Feb. 1804 — and thereupon sent notice thereof same day to Defendts — That the information he recd. of the dishonor of the above bill was by the English Mail — That the Bill was afterwards paid when it came due —

Saml Gerrard — That he had letters dated in London 29 Oct. 1803 on 4 Feby. 1804, respecting matter about which he had written in Sept. 1803 — That mails must have been made up & come from England in Nov. and Dec. 1803

Andw Carlton purchased Bills from Defts of L & C. on 19 Sept. which were sent home & paid by Mr Crawford on whom they were drawn —

Jn. Gray. Is a Notary & was employed by them to give the notice of 14 Feb. 1805 to Defendts

M'Kenzie
vs
Taylor

Stewart for Defts

1. That it is not alleged that Defts were party to Deed
2. Nor that Deed was carried into effect — by delivery of property —

Judgt dismissing Exceptions

—

Lorisel
vs
Lalande

On objection to regularity of service of Process, the same not having been served on the Defendt living at the distance of 12 leagues from Montreal but four days previous to the return —

Panet for Pltff. argued inconvenience of service by absence of Bailiff, & agreed to give a delay to plead —

The Court were of opinion that the rules of Practice as to service of Process must be strictly complied with and quashed the return —

Monday 8th. February 1808

Baroness of Longueuil
vs.
Prefontaine — } Action for Retrait Conventionnel
Sewell for Plff —

That in 1730 Plff's father made a concession to one of Deft's Predecessors under charge of Retrait Conventionnel — —

Beaubien for Deft —

That Plff's right of action is prescribed — That it is a personal right which last only 30 years — art 120 Coût. That the right not having been exercised in 70 years is now lost —

Sewell — That prescription runs aft. Sept. only from day of Sale — No 611 — Traité de Retrait —

Tuesday 9th February 1808.—

Joseph Ide
vs
John Porteous

On trial by Jury — for damages in a mayhem —
The Jury gave a verdict for £20 — damages for Plff
Porter not guilty —

On Plff. motion to shew Cause why an attach. should not issue agt Defr for attempting to withdraw two witness from giving their testimony in this Cause —

1 Hawk. ch. 21. b. 1. Sec. 15.

4 Bl. 121.

accorded that Witness had not been subponed —
mode of punishment - by attach. —

The Court was of opinion that as witnesses had not been subponed, the Defendr were not liable to attachment for a Contempt, although their conduct may be considered as culpable & making them liable to punishr. —

Wednesday 10 feby. 1808.—

Lacroix rel Exers
v
Simpson — } Dr Excep. —

Osden for Def. That Declaration is insufficient as it does not state that the person of whom they say they are Executors, is dead, nor the day when he died. —

Lacroix for Plff — That he has filed an Extrait Mortuaire of late H. Lacroix, & stated that note was made by Defdt to the late H. Lacroix —

The Exception dismissed. —

Cheshire
v
Ferré — } On Report of Experts —

Two Reports made — one by two of Experts, & the other by third Expert — The Defendt. prays the homologation of the Report of the third Experts, the Plff moves for hom. of that made by the other two —

Sol. Gen. for Defdt. That there is a fatal objection to the Report of 2 Experts, that not conf. to reference, & damages allowed for what has occurred since the action —

That Report of 3d. Expert is correct, that he has viewed the premises & states what acts & alterations were made by Defendt — to shew the conclusions he draws thereon are correct —

That there is an increase of discharge of 49 feet in the works made by Defendt. over that made ~~prior~~ by the old works –

Ross for Plff. says that damages are not granted by the two Experts for any thing after the action –

Kinister. } On Exceptions by Defdt.
Reboe – }
That Plff. a married woman is not authorised to bring this action. –
Plff says that she is sufficiently authorised –

Sentier vs.
St Germain

On Excep. by Defdt that Pltff Attorney is not authorized to bring the Suit —

Dismissed —

Sequin
Meillon

Tuesday 5th April 1808.—

Present
The four Judges.

Brodeur vs Duchenau & Plamondon opt & Brodeur oppt

On sheriffs return—
To ascertain the amount of Capital of a rente viagere upon the Land sold, which had been sold by Sheriff not subject to charge of the rente, & for which Capital the Plff now claims ~~this capital~~ by Opp. a fin de conserver—

Rolland for Plamondon a Creditor by Oblige of Defendt says, that there exists no such thing as the Capital of Rente Viagere— Poth. Constit. de Rente— ch. 8. art. 5— Nº 249.— to shew that the capital is not appreciable. That there are no papers filed to support the Opposition.

Plff— Cites C. Cout. art. 356— That every opp. à fin de charge may be converted into an Oppt. afin de conserver.— Edit 1551 is positive—
That papers filed by Plff in support of the Orginal Cause is sufficient to support the Opposition.—

16th Apl— The Court was of opinion that the principal of the Rente could be claimed, as being a charge upon the land and convertible into an opposition à fin de conserver and ordered that proof shd be made of the amount of the principal, when the parties agreed to draw a Judt of Distribution admitting the claim.—

Sussier
vs
Choquet
&
Sanguinet
Garant

Beaubien for Plff on Garantie —

That Sanguinet sold to Plff the Seigniory of Varennes in which the land in question between Plff and Defdt lies, & warranted it as such. and as Defdt now by his Plea contest this point Sanguinet has thereby become Garant formel of Plff —

Rolland for Garant, say,

That the original action between Plff & Defdr is en damages for a voie de fait, in gh there is no Garantie Dom. liv. 1. tit. 2. Sec. 10. p. 45. Som. 4

That the lopin of land in question is not within the boundaries & limits of the Seigniory of Varennes sold to Plff —

That Defdt sold the Seigniory to Plff according to his titles & the possession he then held, wh the Plff then well knew as he at the time was in possession of it himself.

Beaubien —

That the property of the land is the principal object in question —

That it is stated that Defnd. has possessed the land for two years, & entitled him to a possessory right

That the lot of land in question is within the limits of the Seigniory sold by Garant to Plff—

That the Plff claims that Garant be bound to garantee him agreeable to his possession & titles & cites 2 Judgts. of this Court to shew what kind of possession the Garant had.

8th Ap. The Court gave an Interlocutor ordering proof of the boundaries between the Seigniory of Varennes and that of La Trinité as it stood at the time of sale from Garant to Plff, and also if any and what part of the land in question is included within the limits of the Seigniory of Varennes

Wednesday 6th April 1808.

All the Judges present

Rolland & Billanger

On Exception pleaded by Defendr—

1. That there being two Executors named for the execution of the will, if one only bringing the suit without shewing the reason why the other does not join, the action ought not to stand—

2. as to the right of action of Plff for Lods & Ventes on the deed in question being a Deed of Donation from father to Son—

That it does not appear by this act that Defendt undertook to disburse monies or to pay a Debt for his father, but to acquit a natural Obligation of an annual pension—or aliment to his father— Bends in direct line, no Lods & Vents due

Pothier. Lv. 3. ch. 37. p. 257. & 260

Lacombe. vo Lods & Ventes—

Pothier Traité des Fiefs—p. 2. ch. 1. des mutations par Don.

Ferrière—

Denisart. Lds & Ventes No 86—98—

Rep. de Jur. do— par. 8—

Rolland for Plff— That Plff has sufficiently justified his right to bring action as Sole Executor, by filing the Renunciation of the other in the Cause.—

2. That the Donation in question must from its nature & burden be considered as equipollent to a Sale - it contains charge of payt. of Debts &.

Denisart. Vo Lods & ventes. No 17.-

Bruh. 257. 258 - 261. -

Cout. Vente. No 612. Don. a Rente viagere. No 615.-

~~Don. a Rente~~

Brigé. for Deft. That the authorities cited by Pltff do not apply to the particular case, or to the case of Donation from father to son, but regard a Donation generally, - that the particular case is excluded by the law from payment of Lods & ventes.

Apc. 8r. That Court was of opinion that the Deed of Donation in question did not generate lods & ventes as all Donations from father to son must be considered as family arrangements upon which no Lods & ventes are due, & this notwithstanding the burdens or charges of such Donations - That where such Donation can be considered as a Sale, as if made in consideration of money due from a son to a father or other similar consideration, where money is paid Lods & ventes will be due, but this is not the case in the present Donation being and therefore the Suit was dismissed. -

Cautle. Bourjon on 26th cut. Cout. I. Vol. p. 189. Sec. 2. art. 9. 10. a

See other authorities cited by Deft.

The King
v
Papineau

On Inform. agt Defendt. for refusing to ferry a Courier over the River without reward, founded on 9 Geo. Ch. 10. regulating Post Office —

Vigt for Dft — That Inform. does not set out the St. on which the complaint is founded —

Sol. Gen. That the Stat. forms part of the Law of the land & must be known to the Court —

Cpt 7 The Court dismissed the Exceptions. —

The Kirig
vs
Tavernier } on Inform^n by Sol. Gen^l for Lods & Ventes on a Sheriff's Sale of land in Seignory of Laprairie. —

~~Ross for Def^t~~ Poth. Proc. Civ. Ch. 2. Sec. 7. effet de la Indication to shew that no corporeal tradition is

Bourjon. Vol. 1. p. 183.

Ross for Def^t — Objected that Defend^t never took possession of property sold, & that simple sale without a prise de possession does not give rise to Lods & Ventes —

Resp^n vo Lods & Ventes —

Cites case of Dumont vs Larry —

Denis that Sheriff's Sale operates a tradition to the purchaser —

Sol. Gen. Poth. Pro. Civile — p. 1. Ch. 5. Sec. 2. 3^o. 5^a —

8^a. The Court gave Judg^t for Kirig, as on Sheriff's Sale the Defend^t could not plead a want of possession so long
8^a — as the ~~he remained~~ proprietor —

Dumoulin & Pothier agree that as long as things are entier, & no demand by the Seignior, there is no

Smith. } On Excep. pleaded by Defend^rs that Defendants ~~are~~
v. } ~~an Suit~~ Partners & Pltff has sued ~~but one of them~~ as
Smitter'd } late Copartners —
& }
Garnishees }

That Defend^rs are Bankrupts which dissolved their Partnership & they are sued upon acts done by them as such —

6^th April The Exceptions dismissed —

Friday 8th. April 1808.

The Four Judges present.

The King } Action at Defendt. on Security given by him for
vs. } two persons prosecuted for cutting down timber on
Baker. } Domaine —

Sol. Gen. contends that proofs made at Original Debtor
by Defendt. ought to be received as sufficient without
further proof at Defendt. —

Sewell for Deft. asked

Perry } Action for a Rente Pension viagere —
vs. }
Meloche }

Ross for Deft. ~~states~~ That he has pleaded in bar to
Plffs. action, that it is stated in the Deed that upon
paying a part of the rent on the 8t. January the Deft.
had the rest of the year to pay the remainder, and
therefore the action is premature —

That as to hay, it was due only for use of persons who
went to visit Lee —

The Doctors bill ought not to be paid as Deft. does not
allege he was sick —

Plff. States that what he asks by Decl. is for arrears due in 1807. & for no part which may have become due in 1808

That he has stated sufficiently his demand for the other articles, in a statement given in to which he refers in his Declaration

Tuesday 12.th April 1808

The four Judges present

Ferré vs Dumont } On 2 motions, one by Pliff moving to reject the Incidental demand pleaded by Defend.t on Exception thereto pleaded by Pliff – the other by Defd.t demanding that the Cause be heard on its merits –

Pliff. That Defend.t as heir of Dumont has brought an action agt Pliff for objects contained in his Incid.t demand – and cannot have a second action for same thing.

Defd.t Question whether In. dem.t is of a nature to be set up agt Principal demand – The Princ.l action for repairs made to a house possessed by Defd.t belongs. to the Succession of the late Dumont – That the Inc. dem.t is for the wheat due by Pliff to the late Dumont of whom Defend.t is one of the heirs & therefore entitled to Inc. dem.t? –

Pliff. That action brought agt. Pliff by Hers Dumont is for a debt of Succession, whereas that of Pliff agt. Defd.t is for a personal debt due by Defend.t –

16.th April Judgt. dismissing Incidental demand as bis pet:

Lebouf
vs
Loisel

Action for Interest on sale of Minors property — by authority of Judge —

Defendt. pleads Lesion d'outre moitié — also dol & fraude between the person crying sale of the land & the Plaintiff

Pltff. contends that Defendt. ought not to be admitted to plead Lesion — That the fraude dol alledged by Defendt. has been done away by Deft. having ratified the Deed of sale by long possession & payt. of part of consideration —

That by all the decisions it appears to be the uniform Jurisprudence that the Seller and not the purchaser can be admitted to the benefit of the principle of Lesion d'outre moitié — Contest the opinion of Pothier as being contrary to the decision of the Code & the other Commentators —

Argou. Tom. 2. p. 477. —
Bourjon. 2. vol. tit: 7. art. 124. p. 606.
Denisart. vo Lesion. No 4. 5.
Ferriere Dict: vo Lesion. —
Domat. Cout. Vente. Tit. 2. Sec. 9. art. 1. aux notes. —
Journal des Audiences. Tom. 2. arret 31 Août 1658.
Journal du Palais. Arret. 10 Juillet 1675. reasons fully stated
La loi 2. du Code — De Rescindenda Venditione. —
Practicien de Lange. tom. 1 p. 492. in fine. & 493 in pr.

Deschamtels
vs
Cartier

action for Promissy Note made in 1782. —
Plea. Prescription —
Reply replies. Interruption — by new undertaking —

The Defendt. says that the proof of Interruption is insufficient

The action dismissed for want of proof

Lange
v
Brisebois } Action agt. Bail to the action –

Defendt. plead that Pltff sued out Capias agt. without sufficient Cause – Caution can plead whatever Excep. the original debtor could have done – & even agt. his consent # vide Poth. Oblig: No. 380 –

Poth. Obl.n 380.

Pltff. that the original Debtor cannot plead this Excep & therefore Defendt. cannot –

16. Ap – The Exception pleaded by Defendt. was dismissed as the Bail cannot be admitted to plead the insufficiency of the principal Debtors arrest which by giving security they are presumed to admit as legal and sufficient –

See. Watkins. v. Parry. Str. 444 –
Haley – v. Fitzgerald Str. 643.

Saturday 16th April 1808

The Three Puisne Judges present.

Gagnon
Gipoulou

Action de partage & bornage. —

Viger for Defdt says that Defendt holds the land for 30 years upwards, and therefore has acquired a title by Prescription — that is since 1775. —

That if there be no right of action for partage there can be none en bornage, as if the land remains undivided to Defdt. his neighbours will be strangers to the Cause —

Quesnel for Pltff.

That there is no Prescription among Co-heirs — cites.

Denisart. Vo Prescription № 92. —
Dto ——— Partage ——— № 14

Cout. art 118 — vol. 2. p. 257. no prescrips. agt. one own title —

That there never was any act of Partage made between parties —
That the parties have always possessed by indivis — and by the acts passed between the parties that they were Coheirs holding in that way —

Bedard for Pltff —

That Vo Dubé by titles filed ought to possess 70 acres Supt but she possesses 94 — & the difference of 24 acres belongs to the other heirs —

That there can be no prescription as pleaded by Gipoulou

nor

nor are there any fixed boundaries within which he has possessed for 30 years —

That there are no acts of partage between the Co-heirs, under which only he could prescribe for any Specific quantity of Land as there can be no prescription among Co-heirs —

Vidé pr Defts That Vve Duké has possessed by titles made to strangers, & fort act produced by her, ~~is~~ of that Kind — That she is ready to have her land bounded agreeable to her titles, but not otherwise —

That for Gipoulon there has been a sufficient separation under the titles filed by Defts. to entitle him to plead the Prescription for the quantity of Land he now holds —

McKenzie
&
Murdele
&
Walker
Gart.

Action en Declaration d'hypothèque —
For payt. of £100 with Interest & Costs on a
Judgment rendered agt the Garant —

Bedard for Defdt — That Defendt has made improvemt
to the value of £100 upon the lot since he possessed
it & paid a rente due to Vve Dubuc, which ought to be
paid before he be held to give up the lot to be sold —

Enc. Juris. Vo Impenses —
Poth. Hyp. Ch. 2. art. 2 § 2. sec. 4 — as to Impenses.
That the impenses were made by the vve & ses of the
Plff, who ought to have given notice to Defdt of this
mortgage —

That Defdt is equally entitled to claim £85 pd by him
to heirs Dubuc as being an older hypothecary Creditor
than Plff, — That before the impenses made on the
lot by the Defdt there arose no rents & profits from
it out of which he could pay this rent —

Ross for Plff. That the authorities cited by Defendt do not
apply nor ought Plff to be bound to reimburse anything
to Defendt — as he paid more to Walker for the lot than
the amount of Plff debt, viz £136 — besides different
rents or burdens to other persons — That act of

Defdt

ought not to prejudice the right of the Plff, nor
ought he to be in a worse situation than he was before
Defdt. built any house on the lot

Roi
vs
Hamilton
&
Cyrus Lee
Levi Willard
Opp.ts

On claim of Oppt. as Servants to Deft. for a privilege on monies levied for their wages—

Parties agreed that the claims be heard before the Judges in vacation & that Judt. be entered as of last day of Term.—

Roi
vs
Paré

Action for damages—

Pltff says he has proved damages on case beyond £5—

Defendt. says, that he had a right to sell wood to people of Chateauguai & Point Claire & to all such as came to purchase of him — & Pltff has not proved that Deft. sold wood to others—

That Pltff ought to be held to pay the witnesses as they have proved nothing for him—

Pltff— says, that deft. was bound to furnish the wood aux premiers eaux du printems, which was passed in Sept.

Grahame
v.
Dunlop.

Action for balance of acct

Pltff says he has proved his demand

Defdt. says he has offered the balance due to Pltff of £34. 14. 3 before action — having pd the rest of Pltff's demand

That he files a receipt of all demands between parties up to its Date — & ought to be charged with nothing prior to it —

Pltff. The Receipt is an error — there being credited to Defdt. a ~~sum~~ sum of £23. 16. 8, without having charged him with 3 barrels of tea sold Defdt. for that sum —

Okeshire
Okéshire }

on the Report of Experts as amended —

Defdt. contends that the Report of one of the Experts Mondelet, should be homologated as being more conformable to the Interlocutory, & that of the other two set aside —

That no facts are stated by 2 Experts upon which they appear to have founded their Judgment —

Monday 18th April 1808.—

Present. Ogden & Reid

Cerat
vs
Gauthier

Action to set aside an act of Transport, the Defdt as having been made without consideration —

Bedard for Pltff — Inst on his motion to reject the testimony of witnesses adduced by Defdt. That the evidence adduced is of acts posterior to the Transport & has no connection to the matter of that transport — besides it is a proof contre le contenu of the Transport — Chaboillez's testimony referred to —

That Defendt on faits & articles, produces an act of he says was admitted as part of the consideration of the transport, but not satisfied with his own statement on oath, he has adduced verbal testimony to prove it — Ant. Badel Dt — Dufort v. Debt —

As to the right of action —

It is proved that Pltff is a man of weak mind — as to proof of want of value of the Transport, Pltff refers to Defendts answers on faits & articles —

That to 3. Interrog. Defdt says. he paid in money — and to the 9th Interrog says. he pd by transfer of a debt —

Poth. Ob. Nos 918. 920. That answers of Party Interrogated cannot make proof for him —

No 112. vent

Pigeau. liv. 2. pte. 2de. tit. 2. Ch. 1. p. 243. — as to right to divide answers of party —

That it does not appear by the quittance given by Defendt to Dufort, that he received the money in the way it ought to have been paid, that is by so much pr by a transport made to him by Pleff — but that he received it himself from Dufort —

That Defendt has given a receipt to Dufort which would destroy the right of Pleff to recover any Debt from Dufort as he gives a discharge to him for the same — That therefor the Defendts answers & the Receipt given by him are at variance —

Ross for Dfdt. That Pleff undertook to pay Dufort's debt to Defendt & gave the Transport in question not having money, upon which Defdt. gave Dufort a Receipt for so much money paid to him —

That Defdt. would not give any other Receipt than that stated on the Obligation of Dufort — & the allegation that he received the money from Dufort — & also the transport in question, & is contradicted by the testimony on oath of Defdt — This would be a fraud of which there is no proof —

That Chaboiller proves a fact of Dufort's presence in his office when Transport was made — & by conversation between Pleff & Dufort that it appeared Pleff was then satisfied with the security he had obtained from Dufort —

That as to the testimony of the other 3 Witnes. Pltff ~~gave them~~ attacked it to shew that there was no room to impute anything unfair to Deft.—

That if Pltff were to prevail in this Cause, Defendt. would lose the sum for wh he gave a Receipt to Dufort, as it was given in consideration of the Transport, & Dufort would now avail himself of it—

Bedard for Pltff. That testy. of Chaboiller proves something contrary to the act of Transport, which is; that it was made for a ~~Debt~~ of Dufort'

That no proof of fraud has been made, but proof only that no consideration was given to Pltff for the Transport

— . June Term 1808. —

Wednesday 1st. June 1808

Present

The Ch. Just. & three puis. Judges

No causes were heard

Thursday 2d. June. —

Present

The Ch. J. & Puisne Judges.

Montarville
v
Goguet — } On Plaintiffs motion for a contrainte against the Defendt. for not having rendered an account to the Pltff in conformity to the Judgt. of

Bender for Defdt. says that no contrainte can be granted in this Case, as in a transaction such as that between the parties, no contrainte lies. —

And of this opinion was the Court.

Langan
McCord } on Defts motion for a Com. Rogatoire in consequence of having lately discovered by a letter from Mr John McKinlay in Scotland that he is a material witness for the Defendt—

Objected that a similar motion was already made and disallowed

Replied that present motion is made upon other grounds and other proofs, to wit the Defendt affidavit

4th The Court dismissed the motion as being only a repetition already made by the Defendt and on hearing dismissed by the Court—

Reynolds vs Pell — } Action for goods sold to Defend.

Defo. pleads prescription of one year to Pltff account & says that by 126. art. of Custom prescrip. of six months will apply as Pltff is a retail merchant — That ordon. of 1785 has not abrogated the article of the Custom, ~~but has~~ nor not done away the law of Prescription, but only regulates the kind of proof to be made —

Pltff replies that by Cout. Paris 8va Edit. p. 300 — this article has been modified by Judgts. in France — That this law does not apply between merchant & merchants —

Institutions Com. par Boucher —

Case of Dumoulin. vs Pelladeau — June 1798 — adjudged that prescription does not apply —

Prescripn. is a presumption of proof of payt. but by laws of England this presumtn. does not begin at the end of one year but at the end of Six years —

Defendt —

Reynolds vs. Hurlbut — } Same case,

Boismier
vs
Robertson
&
Curator Ins
Cause —

on rule sued out calling on the Curator to take up the cause in the place and stead of Defendt. who had been sued but died before the return of the writ of Summons —

Counsel for Curator objects that Curator is irregularly brought into Court, as it cannot be done by Rule, but by writ of Summons —

Olliffe says that it has been the practice to bring in representatives of a dead person by rule —

3. The Court was of opinion that the mode of renewing the instance agt. the Curator was sufficient and granted the motion — It was further observed that the instance, must be considered to commence with the Suit, & therefore liable to a reprise from & after the service of the writ to the final Judgment thereon —

The Court were of opinion that the Curator was bound to take up the instance from the first stage of it until final Judgt — that the instance could be said to commence when the writ of Summons was served on the party, and that as in this case the Summons had been served, the Curator was bound to take up the instance and stood regularly before the Court under the Rule served on him for this purpose.

Oahle
vs
Beck

On Pltff's motion for an Inscription de faux —
on an Exhibit filed by Defendt — & that Defendt
be held to declare whether he will make use of
the exhibit in question. —

Defdt. That Inscripn. de faux as demanded by the
Pltff is irregular, as no Procuration is fyled by the
Attorney making it —
That as there is no Procuration fyled with the Declaration
and therefore the action ought to be dismissed —
Repertre vo Inscrip. de faux — to shew that such Procre is
necessary in the first instance. —
That the action is alone for the falsification and not on the
Obligation, & therefore ought to be dismissed —

Pltff — That action is founded on the Oblign and the
Inscrip. de faux. is only an incident in the Cause, which
does not destroy his action. —

3. That the sommation or motion now made cannot
be considered as the Inscription de faux, which commences
after the party has made his election that he will make
use of the piece agt. which the Inscription en faux is to
be made — cites. Stile du Chatelet —
Ferriere Dict. ve Inscripn en faux. —
Bornier Tit. de faux — Tit. 9. art. 6.
Defendt says that the sommation mentioned was extrajudicial
& not before the Judge — here the application is made to the Court
to obtain an order to compel the party to make his declaration.

The Court was of opinion that as the Attorney had filed no power to warrant the institution of the action it or for as regards the faux it ought not to be allowed

Friday 3. June 1808.—

Present

The Ch. Just. & three Puisne Judges.—

Petition of Mr Dumont—

The Petitioner was one of the Residuary Legatees of the late Mr Dumont of the Seigniory of St Eustache for his natural life with Substitution in favor of the arriere-petits Enfans of the Testator — The Petitioner stated that the mill on the said Seigniory is in a ruinous situation and that he is without means to repair it, and that it will be a material damage to the Estate if not repaired, and therefore prays that he may be permitted to sell and alienate under the opinion of an assemblée de parens & amis part of the Estate substituted sufficient to repair the said mill in a good and sufficient manner—

The Judges were of opinion that the Estate substituted could not be alienated for the reasons stated, considering the will of the Testator as a Law regulating the Settlement thereof—

Winkelfoss
vs
Loedel his wife
&
Blake, Cur. called in to assist Defdts as Her Curator —

On Exception pleaded by the mis en Cause that he cannot be held to plead in the Cause and that he is called in for this purpose only, whereas he can be held to act only as the Conseil of the party —

Mr Sewell — That Curator is bound to plead to the Cause with the minor —

=

Dec. Nouv. Vo Curatelle. §. 3. No 9. —

Le Curateur ne prêtant que son assistance au mineur, il est necessaire que tous les actes de procedure soient faits au nom de ce mineur, comme autorisé par son Curateur — De même les significations de ses adversaires doivent lui être addressées; si elles n'etoient faites qu'au Curateur seul, elles ne seroient pas valables" —

6th The Court was of opinion that the Curator was ~~not properly in that the Curator was~~ not bound to plead, but retained him in the Cause in order to assist the minor. —

Monday 6th June 1808.

Present

The Ch. Just. & three Puisne Justices.

Oakley v Beck — The Court were of opinion that the Attorney prosecuting the Suit not having any power from the Plff cannot support the motion made by him for an inscription en faux.

Finlay v Cuvillier & Trustees — On opposition made by Trustees of the Estate of the Defendt claiming the property seized as belonging to them under an Assignment of the Estate and Effects of the Defendt

Plff. says. that Trustees are mere attornies of Defdt and acting for the benefit of Creditors — That they hold the property on this special trust — and the assignment cannot alter the property. — Nor ought Plff to be bound to a discussion of Defdt before seizing the Real Estate in question —

Trustees — say, that by selling the real Estate in question the Pltff w.d derive a greater benefit than he has stipulated in his Deed, that is, the w.d be entitled to his present Instalment and another Instalment not yet become due by making his opposition for the same —
That the Trustees are now in possession of the property under the assignment, and Pltff could not legally seize the same by the present writ, but ought to have prosecuted their action en — declaration d' hypotheque. —

Adams vs Rice — } action by Indorsee of a Promissory Note at the maker —

Defd. objects to the sufficiency of the return of the Com. Rog. & says, that no legal evidence appears before the Court of its execution —
cites case of Jones. vs Adams.

Pltff cites case of Baker vs Hart, in October last as receiving a Com. Rog. under similar circumstances.

The Court was of opinion that the Evidence taken under the Com: Rog.rs might in an equitable point of view be admitted, particularly as Defd. had not required the examination of any witnesses under that Commission — & therefore admitted the Return & gave Judt. for Pltff —

David
v
Rouville
&
Contra

Trial by Jury —

Action agt. Defdt. for £305. — for goods Sold &c
& other money accounts —

Verdict on the Principal demand for Defendt
and for Mr De Rouville on the Incidental
Demands

Wednesday 8th June 1808.

Present

The Ch. Just. & Puisne Justices

Grignon
Gregors } On action for work done —
Pltff prays Judt. on his proofs

Deft — says, that he has paid Pltff — & produces a receipt which is subsequent to the date ~~laid~~ in the declaration — but alledges that Pltff has gone out of the Declaration by proving work done for the Deft at a date subsequent to the dates laid in the Declaration —

Action dismissed —

Judt. Leger
/ Leger } Question as to Costs —

Action for account at Deft of the property that came to Defendt hands as Tutor to Pltff minor child and parties having now settled all their differences the Pltff claimed her costs on ground that Deft had refused to account as well before as since the Suit commenced —

The Court awarded Costs to Pltff —

Thursday 9th June 1808

a Witness-day.

Friday 10th June 1808

Present

The Chs. Just. & Puisne Justices

Poirrier
v.
Poirrier

Action for Soulte on Deed of Exchange

Defdt. says, that Pltff has made a charge of Interest in order to bring his Suit into this Court— That principal sum due is only 800#— upon which no Interest ought to be allowed, but Pltff dismissed to take his recourse in the Inferior Court— and if this Court do maintain the Suit, that no more Costs ought to be given than in the Inferior Court.

Judgt. for Pltff— The Court allowing Interest on the Soulte of 200# from the time it became due.—

Proulx
v
Provendié

Action to compel Defendt to quit Plffs House
& for paymt of rent. &c —

Defdt says, that by his lease he was entitled to three months notice from Plff, if he intended that he should quit at the expiration of it, to wit. on 1st May last, but that no such notice was given till the 23d April — and therefore the Defendt is entitled to hold under the tacit reconduction for another year — cites Poth. Cont. Louage. Nos 342. & 353. —

That as to balance of rent the Defendt paid it before the present suit was returned into Court & files a receipt for same — denies that he owes anything to Plff for keeping his Cow in Cellar. —

Plff replies, that Defendt had notice, & that by his letter to Plff of 24 May last he acknowledges Plff right to take back his house & offers to an increase of rent for a renewal of the lease. —

Action dismissed — the Court being of opinion from the terms of the lease, that Plff was bound to give three months notice to Defendt to quit — & that there was nothing in the Defendts letter which supplied this deficiency — it containing only a proposal to quit the house upon certain terms & conditions of the Plff was not accepted

Rolland v Sarry — } Action by Pliff as Exer of late Mr Dumont, Seigr. &c for recovery of Lods & ventes —

Defr. says, that he made his note for part of the sum demanded, which late Dumont gave up to him & therefore must be considered as paid — this note was made by Mr Dumont himself — proof that it is no fabrication by Defendt — who being now in possession of it, the same is in Law a presumption of payt — pleads also, that by a Clause in the late Mr Dumonts' will all tenants who had not 100£. worth of moveables were exonerated from the payt. of their arrears —

Pliff replies that paper produced by Defr. does not apply to the demand of Pliff & was never given in discharge of the Lods & ventes — That the Clause in the will cannot apply to any person from whom the land may have been transmitted prior to the Defendt acquiring same, but only to Defr. himself, & that he has moveable, of a much greater value than 100£. —

The parties were admitted to make proof that Clement Larrivière the person who made Retrocession sold to Sarry the Defendt, was entitled to this discharge under Mr Dumonts will —

Saturday 11th June 1808

Present

The Ch. Just. & Puisne Just?

M.Cord
v
Langan

Wednesday 15th June 1808

Present.

The Ch. Just. & Three Puis. Justices

Rolland & Exer &c
v
Dequire —

On action as Exer – on Obligation transferred by André Lemer St Germain to the late Mr Dumont –

The Defdt. pleads that he has paid the Obligation by work and labor which he did at the request of the late Mr Dumont, who employed him in this way for the Sole purpose of discharging the said Obligation That there is a balance coming to Defendr for the work so done, for which he sets up an Incidental Demand. —

The Plaintiff, denies that payt. of Obligtn was made by Defdt. in this manner — and as to the Incidental demand says, that it is of an unliquidated nature and cannot by Law be set up as an Incidental demand against that of Plff, which is clear certain & liquidated – Pleads further that all accounts between parties respecting Defdts work & labor done for Mr Dumont have been settled at different times —

The Court sustained the Defendrs plea & demand & ordered parties to proceed to their proofs thereon —

Rolland & Exer
vs
Deblanc &c

On action for Lods & ventes -

The Plaintiff had obtained an Interlocutory order on Defendt. to produce a certain small book or memorandum given by the late Mr Dumont to Defdt. containing the Receipts for monies paid for Rents &c which book being now produced, the Pltff urged that the words "doit ses lods", written therein by the said Dumont and now in the possession of the Defendt was an acknowledgement of a Sale by Defendt, as he could not owe the "lods" without having made a purchase - and that the Defendt being also in possession of the land, the title was thereby compleat -

Defendt says, that if Pltff could be entitled to any action agt him by reason of the lods & ventes claimed it could only be in the inferior Court, because Pltff has not proved a title by purchase made by Defendt or otherwise under qu he can support his demand for Lods & ventes - That book now produced by Defendt cannot be construed into a title, and the Defendts possession of the land for a year without title could not convey the property to him -

Lawrence & Dayton
v.
Blackwood & others
assignees of Cuvillier
& also agt
Austin Cuvillier

Action agt Defendts ~~as assignees of the Estate of Cuvillier a bankrupt~~ to compel them to render an acct of property put into their hands by Cuvillier, a bankrupt.

Defdts say, that they are not liable to account to the Pltffs. — That Defdts are assignees of the Estate of Cuvillier Aylwin & Harkness, by Deed of assignment made by the participation of their Creditors, & as Pltffs are no parties to that Deed, they can have no right of action agt Defdts being strangers to them & to the title under which they hold the property —

Further, that it was necessary that Pltffs should have been first subrogated in the rights of Cuvillier to entitle them to their present action —

Pltffs reply, that as Creditors of Cuvillier they can follow his property wherever it can be found, and that he could not deliver over to the Defendts by collusion or otherwise to the prejudice of Pltffs rights, as nothing but their own act & consent can deprive them of their recourse agt the Defendts while they hold Defdts property to have and receive their dividend & proportion of it — That Pltffs are by Law subrogated in all the rights of Cuvillier, & such subrogation as pleaded by Defendts is wholey unnecessary — cite —

The Court admitted parties to proof of facts alledged in the pleadings, before determining on the Law —

Cerat
v.
Austin

Action agt. Defdt. on penal Stat. of 28 Geo. 3. Ch. 8. for vending medecine &c. without a licence

On the proof, it appeared that medicines had been sold and distributed by a person called Le Docteur living in the parish of St Vincent de Paul, but it was not ascertained that this person was Austin the Defendt in the Cause —

The Court dismissed the action, but considering the nature of the offence, reserved to Pltff his right by a new action —

Olivier
v.
Trudelle
&
Eno opp.

One Trappier, being indebted to Eno the Oppost. in a sum of about 300$ by Promissory Note, dated in 1799 — made a Donation of his Estate to Trudelle the Defendt — and amongst other things charged Trudelle by a clause in the deed to pay to Eno, what he, Trappier, might owe to him, but without specifying the nature of the Debt or the amount of it — The lot of land thus given by Trappier to Trudelle was afterwards seized and sold at the suit of the Pltff for a Debt which the Defendt had afterwards contracted to Pltff — upon the monies arising from this

Sale

Sale Eno claims by his opposition to be collocated as a mortgage Creditor of the Defend^t Trudelle from the day of the date of the Donation so made to him by Frappier, as by that Deed he undertook to pay Eno what was due to him from Frappier.—

The Plff. pleads to this opposition, that Eno never acquired a right of hypotheque on the land so given by Frappier to Eno, as he was no party to that Deed of Donation — nor was his debt, (being a sous seing privé) of a nature to bear a mortgage on the land.—

That the undertaking of the Defd^t in the Deed of Donation was wholly nugatory and void, at least in so far as regarded third persons, because neither the amount nor the nature of the debt due by Frappier to Eno was therein specified — and it would be opening a door to fraud to permit the proof of this debt by any other means than an authentic act bearing mortgage, as a Note of hand such as now produced or any acknowledgement of a debt from Frappier to the Oppos^t could be made at any time under the general words of the deed

of

of the deed of Donation, and the Plaintiffs right now established by a Judgment of this Court be thereby frustrated — Lastly, that Note was prescribed. —

The Court considering that every act or acknowledgment by a person before a Public Notary raises a hypothèque on this Estate in favor of the person for whose benefit such act or acknowledgment is made, were of opinion, that Trudelle by accepting of the Donation made to him by Trappier mortgaged the land thereby given and all his estate generally for the performance of the several stipulations and conditions contained in that Deed — that as it was one of the stipulations in this Deed that Trudelle should pay Trappier's debt to Eno, he thereby became personally bound to do so — and the only enquiry to be made was what was the amount of this debt — which the Court thought the Oppost ought to be admitted to prove, as the note by him produced must be presumed to be legal & valid according to its tenor, and the mere possibility of fraud ought not to preclude the Oppost from this proof, it being of a nature easy to be ascertained — That the Pltff ought to have alledged & proved the existence of fraud between the parties to the

prejudice

prejudice of the Pltffs right — as to the prescription alledged by the Pltff agt. the promissory Note it did not apply, the question being as to the validity & extent of the Defendants acknowledgment contained in the Deed of Donation —

The Pltff having afterwards admitted the signature and date of the promissory Note Judgt. was given collocating the Opposant as a mortgage Creditor on the land Sold from the date of the Deed of Donation to Trudelle the Defendt —

Proulx. — vs — McDonell Curr. of Russel } action for arrears of Constitut paid by Pltff to one Tchenp, which the late R. Russel was bound to pay in lieu & place of Pltff —

Defendt says there is no sufficient proof before the Court of the Constitut, nor of the pays alledged to have been made by Pltff —

The Court on examining the Exhibits filed considered the proofs sufficient & gave Judgt. for Pltff —

Brien
vs
Benoit

On action agt. Defdt to render acct. to Pltff, one of his children, of her share in her mother's Estate now in the possession of Defdt.

The Defendt. pleads that his wife by her last Will & Testament bequeathed the whole of her Estate & effects to him, & therefore he is not liable to account to Pltff.

Pltff says that one of the witnesses who subscribed the last Will & Testament, has not signed his name thereto, but made his mark, declaring that he cannot write, which renders the will void, as both witnesses ought to subscribe and write their names thereto — cites 44. art. Ordce 1735 ~~Cout. Paris A. vol. art. 289. glose 6. Som. 2.~~

~~Bourjon p. 289 n. art. 13.~~

~~Duplessis Traité des Testamens art. 3.~~

Defdt says that Law does not require the signature of two witnesses, cites 289th art. Cout. A. vol. glose 6. Somme 2

Bourjon. 289. art. 13.

Duplessis sur Testamens. art. 3.—

The Court was of opinion that it was not essential for the validity of a Testament that all the witnesses thereto should be able to write and sign their names that in the present instance the will was sufficiently testified by the notary & one witness who had signed their names and the mark of the other witness with the declaration that he could not write — see 2. Fer. Ins. of Justn. p. 285. Dic: Fer. Vo Testament. Bourjon — and even from express words of Decln cited by Pltff of 1735. —

N.o 1.

Note Book.–

from 5.th October 1807 to 1 October 1808.–

1)

Monday 5th October 1807.

Present

all the Judges.

Pin. v Pin. } On action of Complainte. —
Rolland for Pltff.

The Defendt entered upon the land in the poss. of the Pltff without permission and under pretence of being the proprietor did acts of ownership thereon — The Pltff contends that Defdt even if proprietor had no right to come on the land, and that his action therefore lies agt Defendt

Poth. Poss. No. 95.

That although Pltff made an acte of resiliation of the Donation under which he held the land from his mother, yet he has still held the possession, and there is no clause in the act of resiliation that can operate a tradition feinte of the property to Defdt.

Viger for Defendt—

The ~~Defendt~~ Pltff was Donataire of his mother, & being in arrear and unable to pay the alimentary rent due to her made a deed of resiliation of the Donation, upon which the mother made another Donation of the land to her other Son the Defdt — The mother soon after died and the Defendt entered upon the land, with the apparent consent of Pltff — see testy of Mathe — That in law Pltff held land a titre de precaire from the time he made over his right to his mother, & cannot maintain this action agt Defdt although he might agt another trespasser —

Rolland in reply — Only question is to ascertain whether Pltff was ever out of possession, & not the validity of titles on either side. —

10th Oct Judgt condemning Defdt to give up the land to Pltff. —

2)

6th Oct. 1807.

Alexis Guertin
v
Nic. archambault

On trial before a special Jury for damages for seducing the Pltffs daughter, a minor. &c—

Justinien Grouard a witness for the Pltff, says, that his wife is niece to the Pltff — objected to by Defdt — Pltff says that witness is brought up to prove conversations of the Defendt with the witness respecting the fact charged in the declaration — Objection on account of relationship allowed — Quære —

The Declaration on oath of the plaintiffs daughter taken in April last before Mr Justice Ogden, after she was brought to bed, offered in testimony by Pltff — but rejected —

The only testimony of the birth of a child in this case was that given by two witnesses who said that they understood that Pltffs daughter was brought to bed in February last —

The Chief Just. charged the Jury to consider the circumstances and whether the proof was sufficient to charge Defendt as father of the child — That as to proof of the birth it seemed not to be objected to by the Defendt. but on the contrary admitted that the child in question was born in February last, and as such should be considered by the Jury —

The Jury gave a verdict for Pltff for Ten pounds — damages and charged Defendt with maintainance of the child and paymt of Costs.

Saturday 10th October 1807.

Present

All the Judges

Winkelfoos
vs
Mary Loedel
his wife —

Action to obtain a Sep: de corps & de bien pro causa adult.

Ogden for Defdt. moves that the pleading filed by Pltff stiled a "Replication" be ordered to be taken off the files, and Pltff ordered to join issue regularly with Defdt. by filing an answer to the plea of Exception he has made to Pltffs action viz: that Defendt is a minor, and cannot be sued alone — and also that this action is instituted without the Plaintiffs concurrence — but instead of pleading by answer to this Excepn or joining a regular issue the Pltff replies generally that the Defendt is guilty, and takes no notice of the special matter alledged in bar by the Defendant.

Sewell for Pltff. — The matters pleaded by Defdt are not material, and Pltff ought not to be bound to answer thereto, or take any Issue thereon — by law a minor may be impleaded in a Court of Justice for the dol or fraud by him committed & be personally condemned for the same — And as to the action being instituted without the pltffs concurrence, it is idle matter alledged to retard the progress of the Cause & can require no answer. —

Court — were of opinion, that the regularity of pleading required a specific answer from Pltff to the matters alledged by the Defendt — and ordered that the Replication filed by him should be withdrawn and a regular issue joined on the plea. —

4)

Thursday 15th October 1807.

Present

All the Judges.

The King vs Wm Hogan } On Habeas Corpus.—

The prisoner was detained on a charge of suspicion of forgery, and for petty larceny — but

The charge of forgery was for having made a cross at the bottom of a receipt, purporting to be the cross & mark of another person, but without the name or presence of any witness to certify it — quere — how far this may be considered as a forgery of an Instrument —

The Court were of opinion that there was not sufficient matter to charge prisoner with a forgery & admitted him to bail. —

Stewart vs Guy — Pothier, Tiers Saisi. — } The Pltff moved for leave to examine a witness at Mackinac to contradict the Declaration of the Tiers Saisi. & to shew that he had property in his hands belonging to the Defendt — and to ground his application, says, that by Law he is entitled to bring a contrary proof to what a tiers Saisi may allege on oath — cites. Poth. proced. Civ. Edit 12°. 1 vol. p 366. 367.

Bedard for Tiers Saisi, says, — that a distinction must be made, where declaration of the Tiers Saisi is upon oath, & where it is not;

that

5)

that when it is given on oath deferred to him by Pliff, he cannot be admitted to a further proof, but is bound by that oath. — That in this Case if any proof can be admitted it ought to be respecting the property that Tiers Saisi had in his hands at the time of the Saisie arret, and not of the transactions that may have happened at Mackinac or elsewhere ten or twelve months prior to the Saisie when Tiers Saisie may have had property of the Defendr in his hands, but cannot be liable to account for transactions which have happened so long ago, as no man in trade could be safe were he under such restraint in his business — That if Pliff had reason to suppose that property of the Defendr had come to the hands for were retained by the Tiers Saisie in an illegal manner the Pliff ought to have instituted his action agt Tiers Saisie for such property, the which the Tiers Saisie would have had an opportunity to answer and his right fully discussed, but this proceeding by Saisie Arret, the Tiers Saisie may be condemned without any plea or answer appearing, and evidence taken in the Cause without an Issue joined between the parties —

on 19th Octr —

Court gave Judgt that Pliff's motion should be so far granted as to admit evidence to disprove the facts alledged by the Tiers Saisi in his Declaration on oath. —

6)

Paine. vs Sanderson } Action of Indeb: assumpt. on a promissory Note made in the State of Vermont one of the United States of America –

To this action the Defendt. pleads that he lived in s^d State of Vermont and during his residence there he became a bankrupt and assigned his property to his Creditors, by virtue whereof & by the laws of said State his person was discharged from all execution or arrest for the payt. of Pltff debt which he had there contracted, & of all other debts he then owed, & that his present arrest ought to be set aside –

The Plaintiff in his Replication after denying the allegations in the Plea, sets up a new promise, subsequent to the Defendts discharge under the bankrupt law of Vermont. –

Sol. Genl. for Defdt –

The new promise to pay Pltff demand is wholly inadmissible in the manner stated and set forth by the Pltff in his Replication, because it is at variance wt. his Declaration – If Pltff relied upon this promise he ought to have brought his action upon it so as to enable the Defendt. to answer thereto, but by this mode of pleading new matter is introduced in the Replication upon qt. alone the ~~Defendt~~ Pltff now attaches his whole claim agt. Defendt. & prays for Judt thereon without any answer being given thereto by Defendt – and on this account the Pltff ought not to be admitted to prove it –

That

7)

That upon the supposition that the Pltff should be admitted to make proof of what he has stated in his Replication, it only amounts to an acknowledgment of the old debt, which he said he would pay as soon as he could, but by such promise the Defdt cannot be understood to give up any right which he had acquired under the Bankrupt laws of Vermont, by which no Execution or arrest can be sued out agt his person. —

Sewell for Pltff.

The new undertaking of the Defendt as stated in the Replication is sufficient to entitle Pltff to his Execution agt the person of the Defendt — and he cannot set up the discharge he has obtained agt it. —

cites Smith v. Buchanan. 1 East Rep. p. 6

That an agreement by an uncertificated bankrupt to pay a debt is valid — cite 7 East Rep. p. 231. Lundie v. Robertson. —

Sol. Genl in reply.

There is no new debt here — the old debt has not been destroyed by the bankruptcy proceedings. — 1 Term Rep. p. 715. Brick v. Thorland. —

Oct. 19th The Court dismissed the Exception pleaded by Defendt as to the form of the Replication and new matter therein contained, this being the usual mode of pleading in England, where Defdt pleads "non assumpsit infra sex annos" — and upon the testimony adduced, ordered that Defdt should be released from the Capias under which he was held w. Costs — Judgt agt Defendt for Pltffs debt, but that his person shd not be liable to be taken or arrested for it — Costs to Pltff on his Judgt for his debt.

8)

Surgeon
vs
Leprohon
Cur. &c. —

On report of Arbitrators —

Panet for Pltff, prays the homologn of same & Judt thereon agt the Deft.

Bedard for Defdt — States several objections to the report

1. The Defendt witnesses were not heard by the arbitrators. —

2. There was no proof given before Arbitrators to support the award they have made in favor of the Pltff.

3. That the Report was made in consequence of an Interlocutory order of the Inferior Court in a Cause between the parties, and the arbitrators having awarded damages to the Pltff much beyond the competence of the Inferior Court, the Pltff discontinued his action in that Court and instituted the present action on the report in order to have it confirmed here — That the Interlocutory order under which the Arbitrators acted was made in May last ordering them to report to the Court on the 24th June following, but the Arbitrators did not take cognizance of the matter till after the 24th June nor make their report before the months of September after — That the said Report is therefore wholly null & void & cannot be confirmed by this Court —

Panet for Pltff — says, that without any rule of reference the Report is valid, as it appears to have been made by the Consent of the parties —

20. The action was dismissed as altogether irregular and ill founded the Report not being regularly made nor regularly brought before the Court. —

9)

Saturday 17th October 1807.—

Dexter vs Marmier.— } Action on promissory Note, dated at Boston
Defendt. pleads that the Note is prescribed under the Provl. Stat. of 34. Geo. 3. ch. 2.—

Plaintiff replies that the Note was made by Defendt. at Boston in the United States of America, & that the lex loci where the note was made must be adopted as to the rights of the parties thereon, according to which no prescription such as pleaded by the Defendt can take effect.—

The Court ordered parties to proceed to make proof of the facts by them respectively alledged.—

McFarlane. Curr vs North West Co } On action by Pltff as Curator to the Estate of a deceased person to recover from the Defendants the amount of wages due to the deceased who was one of their Clerks in the Indian Country—

Ross for Defendt. says, that Defendt. have paid monies due to the deceased into Court, but suggests by this plea the propriety that the Court should require that the Curator should give security to pay the said monies to the legitimate heirs of the deceased, and as a reason for requiring such security states that the

10)

the Plaintiff is a man possessed of no property, and in case of his death or other accident the money might be lost to the said heirs—

Sol. Genl. for Pltff

That in France where a Curator was named by a Judge, no Security was required of him for the execution of his office, and a fortiori it ought not to be required where that Curator is named by the relations & friends of the decared—

That the Defendts have no interest in raising this question respecting Security, as they will be fully exonerated by the discharge of the pltff and the Judgt of this Court—

That the nature of the Security to be given is wholly uncertain, either as to its extent, the terms & conditions, and to whom, it shall be given—

19th Oct.

The Court under the circumstances of the case ordered the Pltff to give Security duly to represent the monies in question when thereunto by law required, before he should receive the same.—

February Term 1808.—

Wednesday 3d Febry. 1808.—

Present
All the Judges.

Lawrence & Dayton
vs
Cuvillier Aylwin & Harkness as Copartners — & agt
Blackwood Davis & Dow as Trustees to their Estate

The Pltffs. were Creditors of Austin Cuvillier by Judgt and instituted the present action agt the Trustees of his Estate in order to have a dividend out, by requiring them to render an acct of that Estate; by mistake however the Pltffs stated themselves to be Creditors of Cuvillier Aylwin & Harkness instead of Austin Cuvillier individually and made them parties to the Suit.— The Plaintiffs Counsel now moved to discontinue as to Aylwin & Harkness & to proceed in the Suit as it would then stand agt Cuvillier only.

Cites —
Seldon's Prac. on amendment after plea.—
Harrison's Chancery practice—
Repertoire de Juris prudce vo—

Ross. for Defts objected that such Discontinuance could not be made as it be varying the nature of the action.—

4th. The Court were of opinion that the motion could not be granted, as part of an entire right of action cannot be discontinued without affecting the whole.— and here it would be permitting a new action to arise out of such discontinuance

12)

Paine — vs Sanderson —

On motion of Defendts counsel for a distraction of Costs —

In last October Term the Defendt got costs on a plea of Exceptions set up by his Counsel, but in the further prosecution of the Cause the Pltff recovered Judgt ag't the Defendt for a large sum of money and Costs —

Sol. Genl for Defdt —

The Sol. Genl now moves that his costs upon the above Exception may be adjudged to him, and that there can be no compensation allowed with the subsequent adjudged to Pltff cite. — Denizart. ve Distraction. — No. 5. —

Repertoire ve Id. — p. 731. —

Sewell for Pltff

The present motion comes too late, the Cause being now determined and no longer in the power of the Court — cites cases of Girard ve Bouthillier. June Term 1804. — a Case was also cited on part of Pltff to shew that a motion similar to the present had been granted — Cire ve Martin —

On 4th. Pothier. Cont. de Mandat § 5. p. 904, is clear that ye Costs are the right of the attorney in the Cause, and that they cannot be compensated with other Costs allowed to the party — The Repr de Juris. on this head is also express — And the Court was of opinion that the motion should be granted — That the attorney can at any time apply for the distraction of Costs previous to the suing out of Execution in the Cause —

13)

Winkelfoos.— v Leodel— his wife } Action of sep. de corps & de biens.—

Ogden for Defdt.

To the present action the Defendt has pleaded two exceptions.—

1st That she is a minor and cannot defend her rights alone in a Court of Justice—

2. That present action has been instituted without the authority or consent of the pltff,

On first point— says, that the law is express that a minor cannot plead nor be impleaded in a Court of Justice without the assistance of a Tutor or Curator.—

Cites.— art. 239. Cout. de Paris.—
Just. Instit. liv. 1. tit. 23. p. 373.—
Ib. —— —— —— p. 355.—
Traité de minorité. p. 10. 22. 214.—

On second point— all suits cannot be instituted by an attorney without special power, nor can all acts be done by him in a suit instituted — That present action is of a special nature and requires a special power — That in this Cause neither power of nor other consent was given by the pltff to institute this action.—

Sewell for the Pltff.—

That as Defendt could sufficiently consent to marriage she must be considered as sufficiently authorised to do every act respecting it. cites Domat.—

That by the present action the Defendt is

accused

accused of a delit, in which action no plea of minority can be admitted. — vid. Polh: traité d'Oblig: N° 120. — That Defend: must be presumed to be authorised by the Pltff for the defence of the present action, as by initiating the action himself agt her, it implies his giving to her a sufficient authority to defend it. —

4to Febs —

The Court were of opinion, that as Defend: had alledged and proved her minority, she be permitted to proceed to the appointment of a Curator to assist her in the defence of the action — and on her default that the Pltff be authorised to do it for her. — The second head of Exception dismissed. —

15)

Thursday 4th Febv. 1808.—

Present
All the Judges.—

Mervieux v Chalifoux } On action hypothecaire — also for damages for waste on land mortgaged, & for monies had & received for Plff. — Hearing on Exceptions pleaded by Defendr —

Bedard for Defdt. —

The Pltff has improperly joined two different kinds of demand in the present action which are incompatible viz.t the action hypothecaire, and the action personnelle. — The action hypoth. does not regard the person of a defendt. as he may be discharged upon abandoning the property mortgaged, and he ought not to be held on another and separate action upon which costs may be given against him. — cites. Poth. Traité d'hyp. 159. 160. —

Vigé for Pltff.

The Defendant has converted to his own use part of the property mortgaged, by carrying off some of the buildings which were erected thereon, & for which Pltff is entitled to his recourse agt. Defdt., as it diminishes the value of his pledge & security for his debt, and there is in law no incompatibility in joining these two demands. —

On 10th Febv. — The Court. — as the action contains three separate demands of different natures, viz.t 1. Action en declaration d'hypotheque. — 2°. Damages for waste on the property mortgaged — and 3° — to account for monies Defdt. received from Pltffs vendee — were of opinion that these demands cannot be joined in the same action — Action dismissed. —

16)

Dumont
vs
Rochon et al.

On action to rescind a Deed of Donation—
Hearing on Exception pleaded by Defts—

Bedard for Defts—

The Plaintiff sues as heir of his late father - but by last will & Testament of the late M^r Dumont the Pltff is entitled to hold and take the Estate of Mille Isles as a legatee, which quality he has accepted and now holds the said Estate under that will and cannot therefore claim any thing therein as heir — for no man can be heir and legatee of same person —

That Rochon is sued as sole marguillier en charge of the parish of S^te Eustache, and as such representing the Fabrique of that parish, whereas it is notorious that there are three others who ought to have been joined with him —

Rollard for Pltff. —

That the last will and testament of the late Dumont gives to Pltff no more than he would have been entitled to claim as heir, it only limits his right in the property by making it subject to a substitution, which cannot preclude the Pltff from claiming as heir of his late father —

That Rochon is alone marguillier en charge, & liable to be sued as such - cites. Lacombe. v^o Marguillier. —

Bedard in reply - Cites an arret of 17 Mars 16. —
That Pltff is legataire, and cannot claim as heir by Substitution cites Pothr. Substitution. 332. —

19^th. Feb^y. Plea of Exceptions dismissed. —

17)

Loisel vs Lalande } On objection to the regularity of service of process, the same not having been served on the Defendt., who lives at the distance of twelve leagues from Montreal, only four days previous to the return.-

Parret for Pltff. argued the inconvenience of service by reason of the absence of the bailiff - that as Defendt had appeared in Court no inconvenience could now arise to him by not having received the process five days instead of four prior to the return, and agreed to give Defendt a greater extension of rule to plead.-

But Defendt refusing to accede to this proposition, the Court were of opinion, that the rules of practice touching the service of process must be strictly adhered to, and therefore quashed the return.-

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Monday 8th Febvt 1808

Present

All the Judges.

Madle De Longueuil.- vs Fournier & Defontaine } Action on Retrait Conventionnel stipulated in the Deed of Concession of the lot of land in question.-

Sewell for Pltff. states, that in the year 1730 the Pltffs father gave a deed of Concession or Grant en roture of the lot of land in question to the Defendts predecessors, and amongst other rights

18)

rights it was stipulated that upon every Sale or alienation of the said lot or part of it the Grantor & his heirs should have the right and preference to take and enter upon the part so sold upon paying the price of the Sale and loyaux Coûts — That part of the said lot of land has been lately sold to Defendt who now holds the same and refuses to acknowledge Pltffs right to demand and have the same by virtue of the said clause of Retrait Conventionnel stipulated in the deed of Concession — Now produces Deed and prays Judt on offers he has made to pay purchase money & loyaux Coûts. —

Beaubien for the Defendt.—

That the Pltffs right of action under the Retrait Conventionnel is prescribed.— That it is a personal right which lasts only 30 years from the day of the Contract, & being an extraordinary burden on the land of Defdt he is liberated therefrom by the non-exercise of that right during the space of 30 years — Cites art. 120. Cout. de Paris — and the Commentary on it as decisive as Pltff right of action — inasmuch as the deed of Concession in question was made upwards of Seventy years ago, since which time the right now claimed has never been exercised —

Sewell for the Pltff

The prescription pleaded by Defendt runs only from the day of Sale of the land, and not from the day of the original agreement — cites Pothr. traité de Retrait. Nº 611. —

Cur. advs. vult. —

and —

19)

and on 20. October 1808 — gave Judgt. for the Pltff —

It is clear from all the authorities that the right of Retrait Conventionnel, or faculté de racheter, the property sold, when stipulated to be made at all times without restriction, or quand on le voudra, is prescribed by thirty years, being a personal right from which the party bound may liberate himself by that lapse of time — But if the right of Retrait depend upon any condition or restriction which suspends its operation, the prescription in that case ought to be reckoned from the time that such restriction is removed or from the time when the party had the free exercise of the right against which the prescription is admitted, and not from the date of the Contract in which such right of retrait is stipulated — The following authorities confirm this principle —

Repertre de Jurisp.ce v.o Prescription p. 322.

Repertre vo Prescription p. 340. No 9. 10. —
The Condition suspends the operation of Prescription. —

D. Espeisses. 1 Vol. p. 799 No 35. —
Lacombe. mat. Civle. Vo Prescription. No 12. —
The prescription does not run agt the right to do a thing, until the time for doing it shall have arrived. —

Pothier. Traité d'Oblign. No 679
The prescription does not begin to run but from the day that the Creditor could have brought his action for the right. —

—— Contrat de bail a Rente. p. 530. No 205. —
Introduct.n to 14e Title of Cout. d'Orleans. art. 3. No 37 } Same principle —

Traité des Retraits № 561. 562.-

In Retrait Conventionnel & feodal, where a condition suspends the operation of the Sale, neither can be exercised till the Condition happen-

Ib.- Ib. № 570

Distinction between Retrait Conventionnel, & Remére

Prat. des Terriers. Tom. I. p. 714. on quest. 16th.-

1 Bail a Cens & la Convention ne font que la même acte.-
2 Ce droit est inherent, & du même Substance du titre de Concession.-
3 Un Tenancier ne peut prescrire contre son titre.-
4. La reunion au domaine du Seigr est toujours favorable

Dictre des arrets. vo Faculté de Rachat. Tit. Prescription.-

Quand la faculté de racheter, est de l'essence du Contrat comme en Constitution de Rente à prix d'argent, la faculté ne peut etre prescrite même par Cent ans - cites. arret du - Parlt de Paris 13 Mars 1547.-

See also what is said respecting the arret cited by Henrys & mentioned in Glosel. № 16 on Art. 120. Cout. Paris.

On 15th Oct. 1808- The Court gave Judgt for Pltff.-

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21)

Tuesday 9th Febry 1808.

Present

All the Judges.

Joseph Ide. v John Porter } On trial before a Sp. Jury for damages for an assault & Mayhem Verdict for Pltff. £20 damages & Costs – Porter not guilty. –

Sol. Genl for Pltff

Moved for a rule on the defendants to shew Cause why an attachment should not issue agt them, for attempting to prevent two of Pltffs witnesses from coming forward to give evidence in this Cause – That witnesses had not at the time been subponad, but the Defendants knew they were persons whom the Pltff intended to subpona + cites. 1 Hawk. Pl. C. cs. 21. b. 1. Sec. 16 –
4 Black. Com. p. 121. –

That such conduct on the part of the Defendts is a contempt towards the Court for which the only mode of punishment is by attachment.

The Court were of opinion, that as the Witnesses had not been subponad, the Defendts were not liable to an attachmt for a Contempt – although their Conduct was culpable and liable to punishment in another manner.

April Term 1808.

Tuesday 5th April 1808

Present

All the Judges.

Brodeur
v
Duchenau
&
Plamondon Oppt
also
Brodeur the Pltff
Oppost

On Sheriffs return to Exon sued out agt the lands and tenements of the Defendt.

The Pltff had obtained Judgt for the arrears of a Rente et pension due to him by the Defdt. in consequence of which the Defendts land was sold, but the Pltff not having made any opposition to the Sale afin de charge, for the continuance of the rent, he now made his opposition afin de conserver for the Capital of that rent.

Rolland for Plamondon the other Creditor of the Defendt objects to this opposition, and says, that there exists no such thing as the Capital of a rente viagere it being a thing not appreciable. cites. Poth. Constitn de rente. ch. 8. art. 5. № 249.

Pltff. cites Qr. Commn on art. 356. — that every opposition afin de charge can be converted into an opposition afin de conserver — Edit of 1551. is positive.

The

on 16th. The Court were of opinion the principal of the Rente could be claimed as being a charge upon the land, and convertible into an opposition afin de conserver — and ordered proof to be made of the amount of the principal, when the parties agreed to draw a Judgt. of Distribution admitting the claim. —

Lussier. —
vs
Choquet. —
&
Sanguinet.
Garant —

Or action en garantie between Pltff who called in Sanguinet as his Garant —

Sanguinet sold the Seigniory of Varennes to the Pltff, in which the lot of land in contest between the Pltff and Defendt is said to lie, or as more particularly stated, to be within the arriere-fief de Bloil and to be en domaine or ungranted land — the defendt by his plea contests the right of property of the Pltff, and claims the lot of land as his own property — upon this Plea the Plaintiff calls in — Sanguinet from whom he purchased, as his garant formel to warrant what he had so sold. —

Rolland for the Garant — says, That the Pltffs action agt. Defdt. is for a trespass, or voie de fait, in cutting down wood on his Pltffs prooperty, in wch action there can be no demand en garantie. cites. Dom. liv. 1. tit. 2. Sec. 10. p. 45. Som. 4. —

That the lot of land in dispute between Pltff & Defendt is not comprehended within the boundaries of the Seigniory of Varennes wch Gart. sold to Pltff. — That Sanguinet sold

P.

said Seigniory to Pltff according to his titles and the possession he held at the time, which Pltff well knew, as he was himself in the possession of the Sd Seigy at the time of the Sale—

Beaubien for Pltff.

The question before the Court is to ascertain the right of property - and the action is brought in such way as to settle that point — The Pltff admits on the face of his declaration that the Defdt has been in possn for two years, which precludes all right of an action of simple trespass or voie de fait, as by that admission the right of possn is in the Defendt. The Pltff also prays that property may be restored to him as belonging to him and Defdt ejected therefrom — That the lot of land in question is within the limits of the Estate sold by Garant to Pltff, of which Garant actually had or claimed a right of possession and property agreeable to the titles he communicated to Pltff at the time of Sale, two of which he now ~~[illegible]~~ refers to, being two Judgts of this Court. That therefore Garant ought to be held to take fait & Cause for Pltff. —

On 8th April — Court gave an Interlocutory order directing proof to be made of the boundary line between the arriere fief de Beloil and the Fief La Trinité, as it stood at the time of the Sale from the Garant to the Pltff, and also if any and what part of the lot of land in dispute be included within the limits of the said Seigniory of Varennes. —

Wednesday 6th. April 1808.

Present

All the Judges.

Rolland, Exer
vs
Bellanger

On Exceptions pleaded by Defendt. to Pltff. action—

Viger for Defendt—

That the late Mr Dumont by his last will & Testament named and appointed two Executors for the execution thereof, but that only one of them, the Pltff Rolland, brings the present action in his own name, without stating or shewing any cause or reason why the other Executor does not join in the action with him — that the action so brought is irregular and ought to be dismissed —

That the Plaintiffs demand for Lods & Ventes upon the Deed of Donation in question is wholly unfounded, inasmuches the said deed was made by a father to his Son, upon which no Lods & ventes can accrue to the Seignior — That it does not appear that this act of Donation was made in consideration of the Son's undertaking to pay the debts of his father or otherwise disbursing money on his acct. which might be considered as the price of the land, but to acquit a natural obligation, that of providing and paying an annual rent or aliments for a parent — That on all mutations of property in the direct line no Lods et Ventes are due — cits —

Prudhomme. liv. 3. ch. 37, p. 257. & 260. —
Lacombe — vo Lods & ventes. —
Pothier. — des Fiefs. — p. 2. ch 1. des mutations par Donation. —
Denis art. vo Lods & Ventes No 86. & 98. —
Repertoire. vo Id. — par. 8. —

Rolland

Rolland for Pltff:-

That Pltff has sufficiently justified his right to bring the present action alone, by filing the renonciation of Mr Bellefeuille the other Executor, in the Cause.-

That the Donation in question must from its nature and the burdens attached to it be considered as equivalent to a Sale of the property - as it contains a stipulation for payt. of certain debts of the donors, and also the annual payt. of a pension alimentaire equal to the value of the land - cites

Denisart. vo Lods & Ventes. No 17.-
Prudhom. p. 257. 258 - and 261.-
Poth. Cont. Vente. No 612 -
Id. Donation a rente Viagere - No 615.-

Vigier, in reply, says. that the authorities cited by the Pltff do not apply to this particular case, nor to the Case of a Donation from father to Son, but regard Donations in the abstract - That the particular case of Donation from father to Son is excluded by laws from payt of Lods & Ventes.-

On 8th. April - The Court were of opinion, that the deed of Donation in question did not generate Lods & ventes, as all donations from father to son must be considered as family arrangements upon which no lods & ventes are due, and this notwithstanding the burdens attached to such Donations - That where such Donations can be considered as a Sale, as if made for consideration of money due from a father to a Son, or other Similar consideration where the value

is

is paid, Lods & ventes will be due, but this not appearing to be the case in the present instance — the Suit was — dismissed. —

The authorities upon q^t this Judg^t is founded are those cited by Defend^t. — see also. 1 Bourjon. p. 189. sec. 2. art. 9. 10. —

Dominus Rex vs Papineau. — On Information by Sol. Gen^l ag^t Defend^t being a ferryman for refusing to ferry the Courier over the river without reward, founded on St. 9. An. ch. 10. regulating the Post Office

Viger for Defd^t excepts to the Information as insufficient inasmuches it does not set forth the law or Statute on which it is founded. —

Sol. Gen^l The Stat. upon q^t the prosecution is founded forms part of the law of the land and must be known to the Court as such, being a pub. Stat. —

On 7^th April. — The Court dismissed the Exception. —

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29)

Dominus Rex
vr
Tavernier

On Information by the Sol. Genl. agt. Defdt. for lods et ventes upon his purchase at the Sheriffs Sale of a land in the Seigniory of Laprairie.—

Ross for Defdt. pleads that Defendt. is not liable to pay lods & ventes upon this purchase, as the Sale was never followed by a tradition of the property, nor has the Defendt. yet obtained the possession thereof, without qe no right to demand lods & ventes accrues — cites

Repertre vo Lods & Ventes

Dumont
Tarn — } Judgts. of this Court —

That Sheriffs sale does not operate such tradition to the purchaser as can give rise to Lods.—

Sol. Genl. The effect of the adjudication on a Sheriff's sale renders corporeal tradition unnecessary. — cites.

Poth: proc. Cw. ch. 2. Sec. 7. — p. 254.

1 Borjeau. p. 183 —

On 8th April. The Court gave Judgt. for the King, as on a Sale by the Sheriff the defendt. could not plead a want of possession so long as he remained proprietor under that Sale.—

Tuesday 12th. April 1808.—

Present

All the Judges.—

Férré v Dumont } On two motions, one made by Pltff for rejecting the Incidental demand pleaded by the defdt. — the other by the defendt. praying that Cause be heard on the merits—

Sol. Genl. for Pltff.

The Defdt. as heir of the late Mr Dumont has brought an action agt. Pltff for the same matters contained in his Incidental demand, which cannot therefore be admitted, as it would be granting two actions for the same thing.

Rolland for Defdt.

The only point to be considered is whether the Incidental demand is of a nature to be set up agt. the principal demand— The principal demand is for repairs made to a house which belongs to the Estate of the late Mr Dumont, and the Incidental demand is for wheat which Pltff owed to the same Estate, of. Defendt. now holds as heir and therefore entitled to make his said demand.—

Sol. Genl. in reply, says, that action agt. Dumont is for a debt he owes personally to Pltff, but the Incidental demand is for a debt due to the heirs of late Mr Dumont, who are not all represented by Defendt— who have already brought their action for it.—

On 16th. April. The Court dismissed the Incidental demand as irregular & being bis. pos.—

Lebouf vs Loisel — } Action for recovery of Interest stipulated on the Sale of minors property under an assemblée de parens. —

Viger for Defendt pleads, lesion d'outre moitié on the Sale — also that there was dol & fraude between the person who adjudged the land at the time of the Sale and the Pltff — of which facts Defdt prays that he may be admitted to make proof. —

Pltff — contends, that Defendt ought not to be admitted to plead lesion d'outre moitié — That the Sale was a public one at the Church door & the Defendt as highest bidder became the purchaser — that in Sales so made, no plea of lesion d'outre moitié can be admitted more than in Sales by Decret, the same reason existing as to both, — that they are made openly and by autorité de Justice. — That Defendt has waived all right to complain of fraud in the Sale if any ever existed having for a considerable time been in possession of the land and paid part of the purchase money — That the weight of legal decision seems to incline to this Jurisprudence, that the Vendor only, but not the Vendee, can be admitted to plead the lesion d'outre moitié That Pothier is of a different opinion, but Pltff, says, that opinion is ill-founded and contrary to the decision of the Code & other writers — cites —

Argou. tom. 2. p. 477. —
2. Borjeon. tit. 7. art. 124. p. 606. —
Denisart. vo Lesion. No 4. 5. —
Domat. Cont. Vente. Tit. 2e. sec. 9 art. 1. ans notes. —
Journal des audiences. tom. 2e. — arrt. 31 daût 1658. —
Journal du palais — arrt. 10 Juillet 1675 — reasons fully stated
La Loi 2o du Code — De Rescindenda Venditione. —
Practicien de Lange. tom 1. p. 492. in fine — & 493 in pr. —

On 20th The Court admitted Defdt, to make proof of the lesion & dol complained — being of opinion, notwithstanding the authorities cited by Pltff, that the purchaser as well as the Seller was entitled to the benefit of the plea of lesion d'outre moitié de juste prix. —

Lange.
v.
Brisebois.

On action agt. Defendt who had become Special bail for Pltffs debtor.—

Defendt by exception pleads, that Pltff sued out the Writ of Capias irregularly agt the principal debtor, and without sufficient cause, and that therefore this action should be dismissed, as Dfts in principal action was entitled to his discharge on the Ca. ad. resp. cites. Poth. Traité Obl. No 380. That the Caution can plead whatever exception the Original debtor could have done, and even agt his consent. —

Pltff. The giving bail to the action admits the legality of the arrest, and the original debtor could not afterwards been admitted to contest it —

On 16th Apl

The Exception was dismissed, the Court being of opinion that the bail cannot be admitted to plead the insufficient of the arrest, as by the Security they give they are presumed to admit it as legal and sufficient. —

See cases — Watkins v. Parry. Ste. 444.
Haley — v Fitzgerald. Ib. 643. —

Saturday 16th. April 1808.

The Ch. Just. absent. –

Gagnon. v. Gipoulou. } Action ag^{t} Defend^{t} as a co-heir, for a partage & bornage.

Viger for Defd^{t} says, That he has held the land, whereof the partage & bornage is demanded for 30 years and upwards and has acquired a title by prescription thereto. – That if there be no right of action en partage, there can be none in bornage for if the land remains undivided as being the property of the Defend^{t}, it will not be consistent with the description given of it by Pltff, nor within the metes & bounds he sets out.

Quesnel for Pltff.

There is no prescription among Coheirs, so long as the Joint property has not been divided. – cites. –

Denisart v^{o} Prescription. N^{o} 92. –
D^{o} — v^{o} Partage — N^{o} 14. –
Gr. Com. art. 118. p. 257. – according to which last authority no one can prescribe ag^{t} his own title. —

That there never was any act de partage made between the parties who have always possessed by indivis, which has also been recognized by several acts passed between the parties. –

That V^{ve} Dubé, according to the titles filed ought to possess only Seventy acres of the land in Superficial measure, whereas she possesses 94 – the difference of 24 acres being the property of the other heirs. – That there can be no prescription as pleaded by Gipoulou, nor are there any fixed boundaries within which he has possessed for 30 years. That there are no acts of partage between the parties, under which only they could prescribe ag^{t} one another for any specific quantity.

Vigé

Vigé for Defdt. in reply says,- That the Vve Dubé has possessed by titles made to Strangers- that she is willing to have her land bounded agreeable to those titles, but not otherwise.— That there has been a sufficient partage with Gipoulon even according to titles fyled by Pltffs. to entitle him to set up a right by prescrip- for the land he now holds.—

On 20th. June 1808- The Court admitted parties, by their Interlocutor, to make proof of the facts stated in the pleadings and ordered a plan & survey to be made of the lands respecting which the Contest was—

35

McKenzie
vs
Wurdele
& Walker Gar.

On action en Declaration d'hypothèque - on a Judgt obtained by Pltff agt Walker the Garant in consequence of which the property he sold to Defendt became mortgaged

Bedard for Defdt

That since the defendts purchase of the lot in question he has made improvements thereon to the value of £1000, and paid the rente due to Widow Dubuc - which improvements and rente should be reimbursed to him before he be bound to abandon the premises to be sold for payt of Pltffs debt. - cites. -

Ency. de Jurisp. vo Impenses. -

Pothier. traité des Hyp. ch. 2. art. 2. § 2. sec. 4.

That the improvements made on the lot were done with the knowledge of Pltff, who ought to have given notice to Defendt of his mortgage

That Defendt has paid £85 - since his occupation to the widow & heirs Dubuc, who is an older hypothecary creditor than the Pltff, & he ought therefore to be reimbursed the amount, as before the improvements Defendt put on the lot, it was not in a situate to yield any rents or profits out of which he could pay the said Rente.

Ross for Pltff. The authorities cited by the Defdt do not apply That Defendt paid much more to Walker for the lot than the amount of the Pltffs mortgage, besides obliging himself to pay certain other burdens - That before Defendt made any improvements on the lot, it was more than sufficient to have satisfied the Pltffs claim, and the Defendt by making improvements thereon ought not to injure the right of the Pltff, who cannot be compelled to pay for such improvements. -

On 20 June - Judgt for Pltff. -

Monday 18th April 1808.

Present

Ogden & Reid – Justices. –

Cerat vs Gauthier – } Action to set aside an act of transfer of a Debt ~~from~~ owing to Pltff, which he made to Defendt. & which he now alledges to have been made without consideration.

Bedard for Pltff.

The debt which was assigned by the Pltff to Defendt. was secured on real property to Pltff as bailleur de fond of a house he sold, and in making the transfer he expected to receive an equivalent – But Defendt. in this has deceived the Pltff by transferring to him a debt of one Ant. Badel & Dufort, which is of no value, and at best very doubtful, and by his artful contrivances has prevailed on Pltff to exonerate him the Defendt. from all recourse, & to look to Dufort alone –

The Pltff is a man of weak mind, and it was difficult to obtain direct proof of the means qu. may have been used by ~~Pltff~~ Defr. to persuade Pltff to enter into the transaction – on this account faits & articles became necessary to be submitted to ~~Defendt.~~ Pltff to ascertain in qu. manner and upon consideration the transfer in question was made – and although ~~Pltff~~ Defendt. has given some evasive answers, yet by comparing them together enough will appear to support the Pltff's action –

The Defendt. in his answer to the third Interrogt says

that

that he paid money to the Pltff as the consideration for which the assignment was made — this corresponds with the words of the act, but in his answer to the 9th Interrog[s] he says, the consideration was, "the payment of a debt which was owing to him by Dufort — which answers are contradictory and neither ought to be believed and besides the answers of a party on faits & articles cannot make proof for him. — cites. Polls. tr. d' Oblig[n] — N° 918. 920. That on the Contrary the answers of the party may be divided and that received which makes agt him. — cites. Pigeau. Proc. Civ. liv. 2. part. 2. tit. 2. ch. 1. p. 243. —

The Defdt. alledges in his answers that Pltff agreed to pay the debt Dufort owed s[r] Defend[t] and gave the assignment for this purpose — but it does not appear from the quittance given by Defdt at the time, that he received the paym[t] in this way, but it is therein stated, that he the Defendt received the amount of the debt from Dufort himself — Such a receipt given by the Defend[t] is not only contrary to the matter of fact, but will prevent any recovery of the debt from Dufort by the Pltff, as it operates a discharge to him. Such contradictions shew the fraudulent dealing of the Defend[t] and that the transaction was without value —

Ross for Defdt —

No fraud has been proved agt the defendt The Pltff has garbled the Defend[ts] answers to the Interrog[s] in an improper manner wt a view to extract some proof agt him — but he has failed even here — The merits of the Case depend upon a matter of fact — the undertaking of the Pltff to pay to the Defend[t] the

Debt

debt which Dufort owed the Defendt — Now this clearly proved by Defendts answers, that Pltff did undertake to pay this debt, but not having money he gave the Defendt the assignment in question, in consequence of which assignment which Defendt looked upon as a Satisfaction of the debt he gave a receipt to Dufort as if the same had been paid by him — The Defendt was not privy to the transactions between Pltff & Dufort, nor did he enquire into the reasons which induced Pltff to pay Dufort's debt to him the Defendt and therefore upon receiving that debt, he conceived he was bound to give a Discharge to the Debtor, which he did in the manner stated —

In 20th April — The action was dismissed, the Pltff not having made sufficient proof of his allegations to warrant a rescision of the assignment made by him to Defts —

June Term 1808.

Thursday 2. June 1808.

Present

All the Judges.

M.c Cord v Langan.

The Defdt. had in the course of last Term moved for a Commission Rogatoire to examine Mr John M.c Kindlay a witness residing in Scotland under an affidavit of the defendt. counsel, stating s.d M.c Kindlay to be a necessary witness for Pltff. This motion was rejected. The Defendt. now again moved for another Com.n Rog.y to examine the said M.c Kindlay residing in Scotland, in consequence of having lately discovered by a letter from him, supported by the affidavit of the Defendt. that said M.c Kindlay was an essential & necessary witness for him.

The Pltff objected to the motion, stating that a similar made had already been made by Defendt. and adjudged upon, and that a second motion for the same thing after having been refused by the Court, ought not to be allowed.

The Defendt. replies that the present motion is made upon other grounds & other proofs than the former, particularly Defdts affidavit.

2dly The Court rejected the motion, as being only a repetition of that already adjudged upon.

40)

Reynolds v. Pells. — Action for goods sold to Defdt. —

The Defendt. pleads prescription to Pltff's demand under 126th art. of the Custom, according to wch no merchts selling goods by retail, like the Pltff, can have an action for the recovery thereof after Six months from the delivery of the article. — That the Ordinc. of 1785 has not abrogated this article of the Custom nor altered the law of prescription but only regulated the kind of proof to be made in mercantile transactions. —

Pltff replies — That the 126th art. of the Custom has been modified by Judgts given in the Courts in France — cites 8e Edit. Cout. Paris by Ferriere. p. 300. — And between Merchant & merchant this article does not apply — cites. Instit. Commercle de Boucher. — That it has been adjudged in this Court, that prescription in case like the present does not apply — cites Dumoulin. vs. Pelladeau June Term 1798. — That prescription carries with it the presumption of payment, but by laws of England this presumption does not begin at the end of one year but at the end of Six. —

Reynolds vs. Hurlbut — Same Case. —

44

Boismier v. Robertson & Sutherland Curator, mis en Cause

On rule sued out by Pltff on the Curator to shew Cause why this action should not be carried on agt him as representing the Estate of the deceased P. Robertson the Defendr on whom the writ of Summons had been served during his life time, but had deceased before the return of the writ into Court.—

The Counsel for the Curator objected to his being held to answer upon a rule nisi, that he cannot be considered as legally before the Court as he ought to have been brought in by writ of Summons. That as to the proceedings being continued agt him in this Cause he says, there is no Cause before the Court the Defendr having never been brought into the Court — his death prior to the return prevented the possibility of a return being made — that therefore there could be no reprise d'instance agt the Curator, if there was no instance that could be renewed.—

The Pltff answers, that the practice in this Court has been to bring in the representatives of a deceased person by rule — That by the service of process the right of Pltff commences agt Defendt & his death ought not to injure that right.—

On the 3d June —

The Court were of opinion that the Curator was regularly before the Court, and was by law bound to take up the instance from the first stage of it until final Judgt — that the instance must be considered to commence with the service of the mesne Process — and it appearing that Defendt had been regularly summoned it was ordered that Curator be made a party to the Suit to answer thereto.—

42)

Oahle
vs
Beek –

On Pltffs motion for an Inscription de faux on an Exhibit filed by Pltff himself, and in his declaration alledged to have been falsified by Defendt – the Pltff now praying that Defendt be held to declare whether he will make use of the exhibit in question. –

Sol. Genl for Defdt –

That the motion is irregular, as there appears no procuration to the attorney making it – That the Pltffs action is for an Inscription de faux & the conclusions of his Declaration tend to the rejection of the exhibit in question, and therefore the Procuration warranting such proceedings should have been filed with the declaration – That the action appearing to be grounded on the falsification of this Exhibit, and not on the Obligation, ought therefore to be dismissed – cites. Repertre vo Inscripn de faux. –

Bedard for Pltff –

The Pltffs action is founded on the Defendrs obligation to the Pltff, the demand for the Inscription de faux is only an incident in the Cause, which might be taken out of the Declaration without destroying Pltffs action. – That the motion now made, or sommation to the party to declare whether he intends to make use of the piece in question, cannot be considered as an inscription en faux, which can commence only after the party has made his election and declared that he will make use of the piece at. qr. the inscription en faux is to be made – cites –

Stile du Chatelet – by Gamet.
Ferriere. Dict. de droit. vo Inscription en faux.
Bornier. Tit. de faux. tit. 9. art. 6. –

Sol. Genl –

Sol. Genl in reply says, that the sommation in France was extrajudicial and not by order of the Judge, — here the application is made to the Court to obtain an order to compel the party to make his declaration, for doing of which the attorney must have a special power from his client —

On 6th June —

The Court were of opinion, that as the Pltff by his declaration had taken conclusions for an Inscription en faux on the Exhibit in question, it was necessary that the attorney should have filed with his Declaration a sufficient procuration for warranting such conclusions, but as this had not been done, it was adjudged that so much of the said Declaration as regarded the said Inscription en faux should be considered as irregularly before the Court — and that Pltff take nothing by his motion —

Friday 3d June 1808.

Present

All the Judges.

Petition of Mr Dumont

Mr Dumont presented a petition to the Judges stating that the late Mr Dumont his father by his last will and testament had devised to him the enjoyment during his life time of the Estate and Seigniory of St Eustache, with substitution in favor of his great

his great grand children — That the banal Mill on the said Estate was in a ruinous situation and required immediate repairs which the Petitioner had not the means to make, — That it is of great moment to all parties, and to the tenants on the said Estate that such repairs should be made, to effect which he prayed that by means of the opinion of an assemblée de parens he might be authorised to sell and alienate part of the said Seignory and thereby raise sufficient to make the said repairs —

The Judges were of opinion that the Estate substituted could not be alienated for the reasons stated, as they considered the will of the Testator to be a law which regulated the Settlement of the Estate —

Wirklefoss vs Loedel his wife and Blake as Curator, mis en Cause

On exception pleaded by the mis en Cause, that he cannot be held to plead to this action, being called in only as Curateur or Conseil to the Defendt a minor, that Pltff improperly demands that he shall plead to the action —

Mr Sewell for the Pltff

The Curator ought to plead with the Defendt who is a minor and all the proceedings in the Cause ought to be in his name — without which they will be irregular. — cites. Denizart. vo Curatelle. §. 3. No 9. —

The Court were of opinion that the Curator was not bound to plead, but retained him in the Cause in order to assist the minor in such proceedings as might be had therein. —

45

Monday 6th. June. 1808.

Present

All the Judges.

Finlay
vs
Cuvillier
&
Blackwood &
others Trustees
Oppts

The Pltff under the execution sued out by him on his Judgt. seized a certain lot of ground & a house in the City of Montreal which the Defendt. had previously assigned to Trustees for the benefit of his Creditors – The Trustees came in by Opposition and claimed the property under the deed of assignment. –

Sewell for Pltff.

The Pltff is the bailleur de fond of the property in question and as such has a preferable right to any other Creditor – That Trustees are the mere attornies of the Defendt. & acting for the benefit of Creditors, they hold the property on this special trust and the assignment does alter the property – That Pltff ought not to be bound to a discussion of the Defendt before seizing the said lot & house. –

Ross for Trustees –

By selling the real estate in question immediately the Pltff would derive a greater benefit than he has stipulated in his deed of Sale to Deffts., as he would be entitled to that part of the purchase money he now prosecutes for and also another instalment not yet due, as upon the Sale of the house he would come in by opposition for the whole – That by virtue of the assignment the Trustees are now in possession of the said house

and

and lot, and therefore could not be ~~taken~~ in Execution under the present writ – That Pltff can have right agt the Trustees but by his action en declaration d'hypothèque. –

Adams
vs
Rice –

Action by Indorsee of a promissory note against the maker. –

The Defendt objects to the sufficiency of the return of the Commission Rogatoire, and says, that no legal evidence appears before the Court of its execution, as the Commissioners have not made any return upon the Commission to that effect cites case of Jones. vs Adams. –

The Pltff replies, that the depositions of the Witnesses appear to have been regularly taken & by the Commissioners certified to have been sworn to before them, which contained the substantial part of the execution of the writ, it ought to be received cited

case

47)

case of Baker. v. Hart, in Octobr Term last, where the Court received the the Com. Rogr under similar circumstances.—

The Court were of opinion that the depositions taken under the Com. Rogr might in an equitable point of view be received, particularly as the Defendant had not required the examination of any witnesses under that Commission. The return was therefore admitted and Judt given for Plff

Friday 10th June 1808.—

Present
all the Judges.

Poirrier
v
Poirrier

Judt 20s Sum for £12.6.8 with Int. on £8.6.8—

18)

Proulx
v
Provencher

Action for house rent, and to compel Defendt. to quit Pltffs house. —

Defendt. says, that by his lease he was entitled to three months notice from Pltff. if he meant that Defendt. should quit at the expiration of it, viz. on 1st May last, but that no such notice was given till the 23. April last which was too late, and therefore Defendt. is entitled to hold under the tacit reconduction for another year. — cites. Pothier, Cont. Louange Nos 342. & 353. — That as to the balance of house rent claimed by Pltffs action the Defendt. paid it before the suit was returned into Court, and files a receipt for same. —

Pltff. replies, that Defendant had sufficient notice to quit and that by his letter to the Pltff dated 24 May last, he acknowledges the Pltffs right to enter on the possession of the house, and even offers an increase of rent for a renewal of the lease —

The action was dismissed — The Court being of opinion from the terms of the lease that the Pltff was bound to give three months notice to Defendt. to quit which he had not done — that there was nothing in the defendts letter to the Pltff to supply this defficiency, it containing only a proposal for quitting upon certain terms and conditions which the Pltff never accepted. —

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No. 55.

Rolland vs Larry —

On action by Pltff as Exer of the last will and testament of the late Mr Dumont, Seignior of St Eustache, for Lods & ventes &c —

The Defendt says, that he made his note for part of the sum demanded which the late Mr Dumont gave up to him, and must therefore be considered as paid — The note is in the handwriting of Mr Dumont and the presumption in law is that it is paied — That by a clause in the last will and testament of the said late Mr Dumont, it is directed that such of his tenants owning him rents &c as are not possessed of moveable property to the amount of an hundred livres shall be exonerated from the payment of such rents — and that part of the lods & ventes demanded by the present action arose from the purchase of one Clement Lariviere of the land now held by Defendt that said Clement Lariviere comes within the munificent intentions of Mr Dumont's will he not being possessed of moveable property to the above amount of One hund. livres, & therefore so much of the present demand as respects the lods & ventes on that purchase ought to be discharged —

Pltff — replies, that the paper produced by the Defendt does not apply to the present demand and was never given in discharge of the same — That Defendt is not entitled to invoke the late Mr Dumonts will in discharge of any part of the present demand, as he is not within the conditions of it, being a rich man & possessed of moveable property much beyond an hund. livres — That he cannot invoke S. will to discharge the lods due by Clement, as the Defendt is alone responsible to Pltff for same —

The parties admitted to make proof that Clement Lariviere was entitled to a discharge of his lods & ventes under Mr Dumonts will. —

50)

Saturday 11th June 1808.

Present.

All the Judges.

M.Cord. v Langan & Griffin & wife

On action to rescind several deeds & Contracts—

The Pltff being possessed of real property in this district made a lease thereof for several years to Daniel Sutherland and Robert Griffin - and being about to leave the Province he appointed the Defendt his attorney, to recover & pay debts due to & by him - During the Pltffs absence the Defendt received the rents from Sutherland & Griffin & applied same towards payt of some small debts owing by Pltff - he even obtained a concession of an adjoining lot of ground for the behoof & in the name of the Pltff, qr Pltff confirmed, as under the power given to Deft he had not authority to buy nor sell any property for Pltff - In all these transactions the Defendt stiled himself the attorney of the Pltff - There were mortgages on the Pltffs property which it was his interest and wish to satisfy, but great difficulties occurred for want of means in the Pltff to effect it - By the correspondence between the parties it would appear that many plans were proposed for raising money to pay off the mortgages upon the suggestion of the Defendt that there was reason to apprehend the sale of the Pltffs farm by some of the Mortgagees - There was amongst other debts, one due to John Forsyth & Jno Richardson as representing the late Montreal Distillery Company for £400

upon

upon an Obligation bearing Interest — this obligation the Defdt offered to take up provided the Pltff would reimburse him the money in a twelve month, as his affairs he said would not allow him to be longer out of the money, and in the mean time he took up the Obligation on giving his note payable in one twelve month for the principal only — an offer was made to repay this money to Defdt within the twelve month, but he refused to accept of it — The Defendt at time of giving his note to the Trustees for the Distillery Company, obtained a regular transfer and assignment of it in his own name as well for the principal as the interest it contained — Upon this assignment the Defendt instituted an action agt the Pltff while absent and obtained a Jud[gt] thereon, upon which he sued out Execution and seized the farm in question which was sold by the Sheriff, and the Defendt became the purchaser at a great undervalue — about three months after the Defendt sold the premises he had so purchased to Robert Griffin one of the Pltffs lessees for nearly double the sum he paid for it at the Sheriff Sale — The present action is brought to set aside and rescind the whole of the above deeds & transactions & to restore Pltffs Estate to him, upon paying to Defendt what he had advanced to Forsyth & Richardson on the above Obligation —

Sewell for Pltff.

1. The purchase of the obligation made by the Defendt of Forsyth & Richardson ought to be considered in law as made for the Pltff and therefore the Defdt was bound to hold it for him as being the Pltff property from the day it was bargained for by the said

Defdt

Defendt — and the Pltff having as far as in him lay, performed his part of the Contract by acquiescing thereto and by the offer of reimbursement, is therefore fully entitled to all the benefits arising therefrom — and the same should be considered as paid and satisfied from the date of said offer, which payment is again offered by the present action

Pothier Contrat de Mandat. Nº 58. 59. 60. —
Id. — Du quasi Cont. Negt. Gestor. Nº 167. 178. 179. 188. 199. —
Id. — Traité des Obligs — Nº 75. —
Id — Traité de la possession Nº 52. 53. 59. 60. & 33. —
Fonblanque on Equity. vol. 1. p. 194. 383. —
Powell on Contracts — — vol. 1. p 334 & 371. —
Id — — vol. 2. p. 21. 22. 55. 56. 272. —
Atkins Rep. 2. vol. p 545. — Blanford v. Marlborough
Id — 3. vol. p 446. Trayford v. Bochem. —
Vezey's Rep. 2. vol. p. 280. Pickering v L. Stamford. —

2. The Defendt having given his note in lieu of Pltff obligation for the amount of the sum bargained for — and the accepting of such note by the agent of the Distillery Company for the same being a new security, should be considered as a compleat novation of, and totally destroying such obligation, the transfer and subrogation to the Defts not having been made for 13 months after. —

Domat. liv. 3. tit. 1. sec. 6. art. 9 & 10. —
Id. — — sec. 7. art. 2. 3. 4
Institutions Commerciales par Boucher. Nº 66. Note. D. art. Novation. —

Pothier

Pothier, traité des Oblig^{s} - N^{os} 554. 561. 562. 563. —

3^{d}. That the defend^{t} although bound to hold the said Obligation for Pltff, did procure a transfer of the same to be made to him in his own name, which transfer he fraudulently imposed on the Court, and obtained Judg^{t} and execution thereon — without giving security according to the Ordinance of 1785, which Judg^{t} so obtained, ought to be cancelled and set aside — For which reason, and also because the obtaining of the transfer of the Pltff^{s} Obligation by the Defend^{t} and all his following acts to the Sheriff's sale, and to the Sales to Mary Griffin, were one continued series of fraud forming in the whole but one compleat act. — The said Sheriffs Sale and deed to Mary Griffin should also be declared null and set aside

Fonblanque on Equity. 1 vol. p. 20. 128. 129. —
2^{d}. Vezey's Rep. p. 150. Chesterfield. v^{s} Jansen. —
2^{d}. Atkins — p. 561. Tyrrel v. Hope. —
1 Peere Williams - p. 240. Broderick. v. Broderick. —
3 do — p. 131. Osmond v Fitzroy. —
Pothier traité des oblig^{s} partie 4. ch. 3. Sec. 3. Cas 1er N^{o} 6. —
Domat. liv. 4. Sec. 1. art. 3. des rescisions. —
Roberts on fraudulent Conveyances p. 520. 521. 528. 589. 590. —
Ordin^{ce} of Province 1785. ch. 2. Sec. 2.

4. That the Defendant could not legally demand more than he actually paid or was to pay for the Pltff obligation, even had he not purchased for Pltff. and was bound to accept the offer made by Josiah Bleakley to reimburse him the sum advanced for Pltff obligation to the Trustees of the Montreal Distillery Company —

Fonblanque

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Toublanque on Equity. 2e vol. p. 191.
3 Peere Williams' Reports. p. 251. Robertson v. Lett —
Pothier Cont. de Vente Nº 590. 596. —
Ib. traité des oblig. — Nº 499. — 500.

5th That the Defendt. being the respondents attorney and having the full administration of the Pltffs affairs, could not become the purchaser or adjudicataire at the Sheriffs Sale, of any part of the estate of which he had the administration & with the management whereof he was entrusted, and in consequence the Sale made to him is null. —

Pothier. Cont. Vente Nº 13. —
Domat. liv. 1. tit. 2. sec. 8. art. 2. Contrat de Vente —
Repertoire de Jurisprudence p. 479. vo Vente —
Decisions Nouvelles. vol. 10. vo acquereur. p. 248. —
Toublanque. 2e vol. p. 191.
1 Vez. q. anno 1747. Whelpdale v Cookson
8 Vez. p. 337. 353. Exparté — James. —
3. Bro. Rep. p. 120
1 Vez. Jr p. 215 — } Crawe. v Ballard —
3 Vez. Jr p. 170 — Ld. Cranstown. v Johnston. —
Repertoire de Juris p. 248.. vo nullité. —
Dict. de Jurisprudence. p 218. vo nullité. —
Pothier Cont. Mandat. Nº 159. 160. 166. —

6th The Defendt. being the attorney of the Pltff and Administrator of his property could not alienate the same without a special power for that purpose.

Pothier

Pothier. Cont. Mandat. Nº 159. 160. 166 –

Domat. liv. 1. tit. 15. Sec. 3. art. 11

Repertre de Jurisprud. vo procuration p. 710 –

Lacombe – Met. Civile – vo Procureur p. 1. Sec. 3. Nº 11 to 13 –

Id. — — — p. 1. Sec. 2. Nº 9. –

Pothier. traité de propriété Nº 218. 219. 244. 277.

7. That Defendant as administrator of the Pltffs Estate being incapable of becoming the purchaser at the Sheriffs Sale, and not having a special power for the purpose could not give a title to Mary Griffin to the said Estate nor to any part thereof even supposing that Mary Griffin and Robert Griffin were acquereurs de bonne foi, which they were not –

Pothier traité de propriété. Nº 218. 219. 244. 277. –
Id – traité de Vente — Nº 270. 272. 273. 325. –
Domat. liv. 3. tit. 7. Sec. 3. art. 3. de la possession. –
Powell on Contracts. 1 vol. p. 152. –

8tte That Robert and Mary Griffin the other Defendrs having had a perfect knowledge of all the proceedings on the part of the Defr Langan with respect to the property of the Pltff, and the administration he had thereof, cannot be considered as bona fide purchasers thereof but are positively acquereurs de mauvaise foi, or purchasers with notice –

Pothier traité de la prescrip^{n} Nº 28. 29. 34 –
Id — — — Possession Nº 9. 17. –
Domat. liv. 1. tit, 18. Sect. 1. art. 9 & 13 – vices des conventions. –
Repertoire de Jurisp^{ce} vo Ignorance. p. 4
Id — — — vo Ignorance de droit. p. 6. 7 41. –
Id. — — vo possession. p. 202. 207.

Fonblanque

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Toublanque on Equity. 2 vol. p. 155.—
5 Verey, Jun. p. 213. Debouchout. v. Goldsmid
10 Vesey Jun. p. 310. Mortlock v. Buller.—
3. Atkins. p. 134 Dormer v. Fortescue.—

Wednesday 15th June 1808.

Present

All the Judges

Rolland, Exer &ca v. Deguire. &ca

On action as Exer of late Mr Dumont, for amount of an Obligation made by Defendt. to André Lemer St Germain & by him transferred to late Mr Dumont —

The Defendt. pleads that he has paid the Obligation by work and labor which he performed at the request of the late Mr Dumont, who employed him in this way as being the sole means the Defendt. had of discharging the sd. Obligation That in consequence of the work and labor so done there is a balance due to Defendt. after discharging the Obligation for which balance he sets up an Incidental demand. —

The Pltff denies that the Obligation was ever paid or discharged in the manner pleaded by Defendt — And as to the Incidental demand he says, that it is of an unliquidated nature, and cannot by law be set up as a plea to the action nor as an Incidental demand against that of the Pltff, which is clear and liquidated — Further that all accounts between Defdt. and the late Mr Dumont have been settled at different times. —

The Court sustained the Defendt. plea & Incidental Demand and ordered the parties to proceed to their proofs thereon. &ca

60)

Rolland Ecr
v
Leblanc —

On action for Lods & Ventes. —

The Pltff not having proof of a Sale to Defendt by a deed in writing upon which part of the lods & ventes in question became due, obtained a rule on Defendt to produce a certain small book or memorandum given to him by the late Mr Dumont, containing the receipts for the monies the Defendt paid annually for rents — which book being now produced, there appeared that after making of the last receipt the two words following were added — "doit ses lods" which words being in the hand writing of the late Mr Dumont and now in the possession of the Defendt, was an acknowledgment that lods were due and that a Sale must have been made to the Defendt to create such lods — and further that the Defendt being in the actual possession of the land a title must be presumed to be in him to the property —

The Defdt says, that if Pltff has any action agt him for lods & ventes it ought to have been made in the Inferior Courts as Pltff has not supported his demand before this Court nor made out a title in Defendt by purchase of lands in question — That the memorandum book now produced cannot be considered as a title, and the Defendts possession of the land for a year without a title cannot convey the property to him. a

On 16th — The Court considering that Pltff had not made suffe proof of Defendt purchase gave Judgt agt. Defdt for only 128th & costs as in the Inferior Court. —

64)

Lawrence & Dayton
v.
Blackwood & others
assignees of Cuvillier
& A. Cuvillier

Action by Pltffs as creditors of Austin Cuvillier to compel Defendts as Trustees to his Estate, to render an account of the property put into their hands by Cuvillier an Insolvent Debtor

The Defendants were not sued as Trustees, but as individuals into whose hands property belonging to the Defendt Cuvillier had come. —

Ross for the Defendts — says, that they are not liable to account to the Pltffs. — That Defendts are assignees of the Estates of Cuvillier Aylwin & Starkness as well as of Austin Cuvillier, by virtue of a deed of assignment made with the participation of their Creditors, and as the Pltffs are no parties to that deed they can have no right of action agt Defendts who are strangers to them and to the title under which they hold the property assigned to them. That it was necessary that Pltffs should have been first subrogated in the rights of Austin Cuvillier to entitle them to any action agt Defendts touching his property they now hold.

Sol. Genl for Pltffs. That Pltffs as Creditors of Austin Cuvillier can follow his property wherever it can be found and that Cuvillier cannot by collusion or any other means deliver over his property to be held by the Defendts to the prejudice of the Plaintiffs rights, and nothing but Pltffs'

cut

act or consent can deprive them of their recourse agt the Defendts while they hold Cuvillier's property, to obtain a dividend out of it.— That the Pltffs are by law subrogated in all the rights of Cuvillier their debtor, and no further subrogation is necessary to entitle them to the present action—

The Court admitted the parties to make proof of the facts alledged in the pleadings before determining on the law.—

Olivier. vs Trudelle — Ero Oppt—

One Frappier, being indebted to Ero the Oppt— in a sum of 300ff by promissory Note dated in 1799, made a Donation of his Estate to the Defendt Trudelle, and amongst other things charged Trudelle by a clause in the deed to pay to Ero what he, Frappier might then owe him, but without specifying the nature of the debt, or the amount of it.— The lot of land thus given by Frappier to Trudelle was afterwards seized and sold at the suit of the Pltff for a debt which Defendt had afterwards contracted to Pltff—

Upon the monies arising from this Sale Ero claims by his opposition to be collocated as a mortgage Creditor of

the Defendt. Trudelle from the date of the deed of Donation made to him by Frappier, as by that deed the said Defendt. undertook to pay Eno what he the said Frappier then owed him.—

The Plff pleads to this Opposition that Eno never acquired a right of hypothèque on the land so given by Frappier to Trudelle, as the said Eno was no party to the deed of Donation, nor was the debt due by Frappier to the opposant of a nature to bear a mortgage upon the land being upon an acte sous seing privé.— That the undertaking of the defendt as stipulated in the said Deed, to pay what Frappier might owe to the Opposant, was wholly nugatory and void, at least in so far as regarded third persons, because neither the amount, nor the nature of the debt was ascertained, and it would be opening a door to fraud to permit the proof of this debt by any other means than an authentic act bearing a mortgage, as a promissory note such as now produced, or any acknowledgment of a debt from Frappier to Eno could be made at any time and to any amount under the general words of the deed of Donation, whereby the right of the Plff, established by a Judgt. of this Court would be frustrated.— That the Note under which the Opposant claims was prescribed by law and could have no action thereon at. any of the parties

The

The Court considering that every act or acknowledgment made by any person before a public notary, raises a hypotheque on his estate in favor of the person for whose benefit such act or acknowledgment is made, were of opinion that Trudelle by accepting the Donation made to him by Trappier, mortgaged the land thereby given and all his estate generally for the performance of the several stipulations and conditions contained in that deed.— That as it was one of the stipulations in the said deed that the defendant Trudelle should pay Trappier's debt to Eno, the said Defend.t thereby became personally bound to do so, and the only enquiry to be made was to ascertain the amount of this debt, which the Court thought the Oppos.t ought to be admitted to do, as the note he has produced in support of his claim must be presumed to be fairly made and valid according to its tenor, no actual fraud being alledged agt. it, and the mere possibility of fraud ought not to preclude the oppos.t from such proof, as it is of a nature easily to be made.— That the Pltff ought to have alledged and proved the existence of fraud between the parties to the note to the prejudice of the Pltf.s right.— As to the prescription alledged by the Pltff agt. the promissory

note

Note, it did not apply, as the question turned wholly upon the validity and extent of the defendant's obligation to pay the Opposants' debt under the terms of the deed of Donation,

The Pltff having afterwards admitted the signature and date of the promissory Note, Judgt. was given collocating the Opposant as a mortgage Creditor on the defendants land sold by the Sheriff, from the date of the deed of Donation from Trappier to the Defendt. —

Brien v Benoit

On action agt. Defendt to render acct. to Pltff, one of his children of her share in her mother's Estate in the Community that subsisted between her and the defendt and which is now held and retained by sd Defendt —

The Defendt. pleads, that he is not liable to account to Pltff for any part of the said Community, as his said wife by her last will and testament duly made and executed, bequeathed the whole of the sd Community to him the Deft. as by law she had a right. —

The Pltff replies, that the last will and testament produced is not sufficient to bar him of his right, as the same has not been executed according to the forms required by law, one of the subscribing witness instead of ~~writing~~ his name

having

having only made his mark thereto, declaring that he could not write, which renders the will void, as both the witnesses ought to subscribe and write their names thereto. cites. 44. art. Ordce 1735.—

The Defendt. says, that the signature of both Witnesses to the will is not necessary, it being sufficiently executed by the signature of one and the declaration of the other that he cannot write.— cites—

289th art. Cout. glose 6t. Somre 2d.
Bourjon on 289th art. Cout. art. 13.—
Duplessis on Testaments. art. 3d. —

The Court were of opinion that it was not essential to the validity of a will, that all the witnesses thereto should be able to write and subscribe their names to it.— That the will was sufficiently authentic by the signature of the Notary and one of the Witnesses and the mark of the other with his declaration that he could not write —

Authorities referred to were —

2. Ferr. Instit. p. 285
Dic. Ferriere — vo Testament —
Bourjeon — and even ordce of 1735 cited by Pltff

67

Fowler — vs — Elderkin — Ferguson & Gilman opp.

On the oppositions of Ferguson & Gilman claiming a preference, by virtue of their respective mortgages, on the monies levied by the Sheriff on the Defend.ts lands —

On the defend.t Elderkin sold a lot of land to the Opposant Ferguson for a sum of £25. — After this Sale the Pltff Fowler obtained Judg.t agt. the s. defend.t — and under the execution he sued out thereon, seized the same lot of land as the property of the defend.t — Ferguson put in his — opposition afin d'annuller and claimed the lot of land as his property under the above Sale, but not having been able to substantiate his right to the land for want of a prise de possession under the said Sale, his Opposition was dismissed and the land ordered to be sold — The above lot of land & several others the property of the Defend.t having been sold, Ferguson now made his Opposition afin de conserver, and claimed a right to be collocated on the proceeds of the said Sale as a mortgage Creditor of the defend.t from the date of the deed of Sale made to him, being a notarial deed —

The Pltff and the Opposant Gilman who were Creditors of defendant by Judg.t subsequent to the date of the above Sale to Ferguson, contended that Ferguson had no right to any of the monies levied by the Sheriff, as he could have no recourse or right of action whatever agt the defend.t Elderkin, the prise de possess" being an act which depended on Ferguson himself, and it was his

was his own laches, not the fault of the defendt if s. Ferguson did not exercise his right in such manner as to secure the property of the lot of land in question — That upon the supposition that Ferguson might have a recourse agt Elderkin for the money advanced in consideration of the above Sale, yet he could not exercise it to the prejudice of third persons nor come in upon the monies levied to the exclusion of the Pltff who was a Judgment Creditor of the defendt —

The Court were of opinion that Ferguson did acquire a mortgage on the property of Elderkin by virtue of the Deed of Sale, which Sale not having been carried into effect Ferguson was entitled to recover back the monies he had paid on the faith thereof, and to be collocated as a Creditor on the monies levied from the day of the date of the said deed of Sale — And a Judgt of Distribution was drawn up accordingly —

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Rice
vs
Taylor
&
Odell Opp^ts

On opposition to Sale of a horse seized under the execution sued out in this Cause, as being the property of the Opp^ts

It appeared from the testimony adduced by the parties that the defend^t had purchased a horse, but not having money to pay for him, the Opp^t Odell joined in a promissory note for the pay^t and as a security to Odell in case he should be called upon to pay the note, the horse was put into his possession to keep until the defend^t should have discharged the note - But it did not appear clearly, whether the horse seized and claimed was the same which the defend^t had so purchased, nor was it ascertained in whose possession the horse was, at the time of the seizure, either by the Sheriff's return, or the testimony adduced -

It was therefore ordered by the Court that the return of the Sheriff upon the writ of Execution respecting the seizure of the said horse, should be amended, by stating in whose possession he was at the time of such seizure, and also the color of the horse so as to ascertain his identity. -

Poutré
vr
Lavoie

On an action en bornage — question respecting the competency of certain witnesses produced by Defend.

This action was instituted against the Defends as Churchwardens of the parish of Blairfindie, in order to settle the line of division between the Pltff. land and the Church lands which were contiguous to each other, and the Defendts having produced some of the parishioners of the said parish, to prove an antient line of division between the said lands, they were objected to by the Pltff as interested in the Cause, as the Church lands were the property of the parishioners —

The Court were of opinion that the interest of the witnesses was not so immediate as to render them incompetent* — but upon considering the great contrariety in the testimony adduced, they ordered a Survey and plan to be made of the premises in contest, pointing out the old fences & boundary marks and the present state of the lands, so as to apply the testimony with more precision.

* See Peake's Evid. p. 149.—

71

Deroches
v
Desroches

This action was instituted agt the defendt for a thousand livres stipulated to be paid by the defendt to the Pltff, in a certain deed of Donation —

To this action the defendt pleaded that he is not indebted to the Pltff in the sum demanded — That Pltff has not by his declaration given credit to Defendt for a sum of 700ℓ paid to him long before the institution of the present action, which ought to have been prosecuted for the remaining sum of 300ℓ which Defendt acknowledges to owe — That no costs ought to be allowed to pltff, as by his demand for 1000ℓ instead of 300ℓ which was all that he could claim, he has compelled the defendt to appear to the action and make a defence thereto so as to avoid a condemnation for the whole sum of 1000ℓ, which he would not have done had the Pltff limited his action to the 300ℓ —

The Pltff acknowledges having received the 700ℓ prior to the institution of the present action, but says, he is not bound by the forms of proceeding to give any credit to the Defendt, who ought to attend to his own interests — That he acquainted Defendt that although the sum demanded was 1000ℓ yet that he never meant to take Judgt for more than was really due, and if he had the defendt was not without a remedy.

The Court gave Judgt for 300ℓ agt the Defendt with the costs as in a cause under £30 Stg —

72)

Lacombe
v
Lucoigne
Curator.
&
Divers Oppˢ

The opposants claimed to be paid by preference out of the proceeds of a certain quantity of wood seized and sold by the Pltff, as being the property of the defendt, they, the Opposants, being the persons who had been employed in cutting down and transporting the said wood to the Defendt house —

The Pltff objected to the privilege claimed by the said Opposants, as they had not identified the wood sold to be the same they had cut for Defendt and further that the opposants by delivering the wood to Defendt had lost their privilege, as they thereby consented to give a credit for the payt of it. —

It appearing to the Court from the testimony adduced, that the wood was sufficiently identified, and they were of opinion that the privilege of the opposants did attach thereon for the pay[t] of their labor, as they had done no act which could be considered as a waiver of that privilege — but there not being sufficient proof to ascertain the exact amount for which the opposants were entitled, the Court under the circumstances of the Case admitted the opposants to their oaths to establish this point — and ordered a Dist[n] of Distribution to be made out in consequence. —

73)

Gray Freeman & Co
v.
Mary Corry & Co
&
Jn.o Blackwood Jr.
Opp.t

On question, whether an Obligation, or right of mortgage for the security and payment of a Sum of money, be itself susceptible of a mortgage, so as to give a preference by hypothegue, to the monies secured thereby.—

The Defendants Mary Corry & Co were Creditors of Francis Badgley by a Notarial obligation for £3000— This sum the Pltffs as Creditors by Judgt. of the said Defendts claimed by their action to be paid over to them in part payt. of their Judgt.— The Opposant John Blackwood who was also a Creditor of the said Defendants by a prior Judgt to that obtained by the said Pltffs came in and claimed a preference to the monies due by Badgley, upon the principle that his Judgt. operating a mortgage upon all the Defendants property took effect upon this Obligation, which was a droit d'hypotheque belonging to the said Defendts upon all the Estate of their debtor Badgley— In support of this doctrine the opinion of Pothier in his traité d'hypotheque was chiefly relied on, where he says, that a "droit d'hypotheque est lui même susceptible d'hypothe" #

also. Denizart vo. Hypotheque Sec. 4. Nos. 1. 2. 3. p. 774

But the Court were of a different opinion principally upon the following authorities.—

Coût. Paris. art. 89. glos. 1. tom. 4. & 5. Obligation cannot be considered as an immoveable
~~= Poth. Oeu. Post.~~

The hypotheque raised by the Obligation is only an accessary to it

Dup. droits Incorp. traité 7. tit. 1.er art. 89. Observ.n Seconde—
Poth. Oeu. post. tom. 6. p. 646.—

A créance with a right of mortgage is considered as moveable & as such enters into the Community — see Poth. traité de la Com. No. 76. 7.e regle —

The opinion of Pigeau in his procedure Civile, upon the question "Si les créanciers hypothecaires doivent etre colloqués par ordre "d'hypotheque ou seulement par contribution quand il ne s'agit que "d'une somme mobiliaire", is full and decisive of the point contrary to the opinion of Pothier, the falsity of which in this instance he very clearly exposes — see Pigeau. proc. Civ. liv. 2°. p. 4. de l'execution des Jugemens - tit. 2 ch. 3. p. 822. 823. 824 ——