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February Term 1828.

Monday 4th February

No. 250.
Foucher, Tut
&c
vs
Pothier.

This was an action of tort instituted by the plaintiff as tutor to his daughter one of the heirs of the late Mr Foretier, — against the Defendant, Executor of the last will and testament of the said Foretier, for having maliciously and without Cause, sued out and caused to be executed a process of scellée on the goods and effects of the said late Mr Foretier in the hands and possession of his said heirs. — The action was founded on the principle, that the proceeding by scellée, adopted by the Defendant was not only ill-founded, but malicious, and being an extraordinary course taken by the Defendant to establish a right of possession of the said goods and effects which was contested to him by the said heirs, that therefore damages ought to be allowed according to the circumstances of the Case.

According to general principles, it may be said, that to institute any action without sufficient grounds, or from malicious motives, is a tortious act, as it must always cause a damage more or less to the person called upon to defend it — And accordingly by some provisions of the Roman law

law, the party who lost his Cause, was condemned not only in Costs, but in damages also to his adversary — but this principle was never adopted in France, where the only penalty attached to the loss of a Cause, was the payment of the Costs. —

N. Denis. Vo Depens. §. 1. N. 2.

In cases however where an extraordinary and an unusual remedy has been pursued without sufficient Cause, as by an attachment of the body or goods of a Defendant on mesne process, whereby an injury has accrued beyond the bare expence of defending the suit, damages have been awarded according to the circumstances of the Case, — and according to the circumstances of this Case the Court must be guided in its decision. —

It appeared that on the 20th. October 1814, the late M. Fortier made a holograph Will with two Codicils annexed to it, and afterwards died on the on the 5th. Dec. 1815. — By this will the Testator made a general disposition of all his property among his his children, but under certain restrictions, after bequeathing certain sums of money for charitable & other purposes, and appointed the Defendant and Hugues Heney his executors, and Trustees for certain objects of the will. — On the 14 Dec. 1815 M. Heney renounced to the appointment of Executor & Trustee. Difficulties having accrued between the legatees and the Defendant, now sole executor, as to the mode of executing the will, and making an Inventory of the property and effects left by the deceased, it appeared that on the 23 Jany. 1816, the defendant protested against the Legatees, who had taken possession of all the property and effects left by the deceased, for their refusal to allow him to proceed to make an Inventory thereof

thereof, which the legatees contended he had no right to do, or in any manner to interfere therewith, inasmuchas they were seized of the property left by the deceased as his heirs, and as heirs of their mother, and that they had agreed to divide the same by amicable arrangement among themselves by an act of 12 January 1816. — It also appeared that the legatees, claiming as heirs as aforesaid afterwards made an Inventory of the property and estate left by the deceased, but without the participation of the Defendant, and having announced the Sale of the moveable property, the Defendant in his Capacity of executor complained of this proceeding, as depriving him of his right of possession of the said property for the purposes of executing the will, and thereupon obtained an order for the scellé being put on all the moveable property of the deceased in order to secure the same until his right should be determined. This order was afterwards set aside by the Judgment of the Court of the 19th April 1816 — and in consequence the present action was brought by the plaintiff as representing one of the said legatees. —

There was no evidence to shew that in this proceeding the Defendant was actuated by any malicious motives, but on the contrary that he was guided by the opinion of Counsel, who considered it as a necessary measure, and the only question to be considered was, whether it was without reasonable or probable cause. — There is no doubt, but that the order of scellé may be lawfully had at the instance of

the

O. Denvz^t, V^o Scéllée N°. 17. Rep^re co: V^o p. 140

the executor, to secure the effects of the deceased, and it is very evident that in this case the executor had strong and reasonable grounds for his proceeding.— The Legatees denied his right to his having the possession of the effects, they retained that possession, and had anounced the sale of those effects, which would have concluded all further claim on the part of the executor— It was unknown to the Executor whether any Inventory of them had been made, and it was his duty as Executor to procure this to be done in order to ascertain what the value and amount of these effects were before they were sold, as it might afterwards be too late.— It is true the order for the scellée and proceedings thereon were set aside by the Court, but not on the principle that such order had been illegally obtained, but on the ground that it had become unnecessary in consequence of an Inventory having been made by the legatees, which sufficiently ascertained the nature and extent of the effects left by the deceased — but of this Inventory the Executor had no knowledge, at least, no legal knowledge as it was made without his participation, and it was not in proof before the Court, that at the time of suing out the process of scellée he had any knowledge that the legatees had made such an Inventory— On these grounds therefore it was considered that the Defendant had a reasonable cause for the proceedings he had adopted, and as evidence appeared to shew malice, the action was dismissed with Costs.—

No 1441.

Flaherty. vs Fisher.

This was an action for defamatory words spoken by the Defendant of and concerning the plaintiff — Exception was taken by the Defendant to the sufficiency of the declaration, as it did not state the place where the words were spoken. — And the Court maintained the exception, being of opinion that the locus in quo, must always be stated in the declaration as well in actions of this kind as in every other so as to give the Defendant every means of defence

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No 1329.

McCumming vs Mactier, Jut.

This was an action instituted against the defendant, as widow of the late Peter Pangman, and as Tutrix to the children of her marriage with him, and as such being the heirs and representatives of the said Peter Pangman, on a Contract made between the plaintiff and deceased, whereby he had become bound to pay to the plaintiff a certain annuity during her lifetime. —

To this action the Defendant pleaded in abatement that the proper parties were not before the Court and therefor the action could not be maintained — That the late Mr Pangman before his death made his last will and testament, and therein and thereby named and appointed certain persons for the execution thereof, extending their power beyond the year and day limited by Law and

until

until the full accomplishment of all the objects contained in the said last will and testament— that the said Executors now represent the Estate of the said testator and are by law possessed of all his property and effects, but as they are not made parties to this action the same ought to be dismissed, or at furthest permission given to the plaintiff to put them in suit.—

The Court however dismissed the plea, inasmuchas they considered the action well brought against the Defendants, who by law were the ligal representatives of the deceased, and the plaintiff was not obliged to know, and perhaps had not the means of knowing that the deceased had made a will and appointed Executors— That if the Defendant thought that she could derive any benefit from the Executors being parties in the Cause she was bound to put them in suit, but the plaintiff ought not to be delayed in her remedy from this Cause—

No 579.
Proulx
vs
Bagg
&
Montreal
Bank. opp

On an opposition afin de Conserver.—

An opposition was in this case made by the Bank of Montreal to the paymt of the monies levied at the suit of the plaintiff

plaintiff, on the ground that the defendant being in a state of deconfiture, the opposants were entitled to have a dividend on the said monies paid to them as Creditors of the Defendant.

To this it was objected by the plaintiff that the debt due by the Defendant to the opposants was secured to them by two other persons who were the Cautions of the Defendant for the same and that the oppos ants ought to have alledged the insolvency not only of the Defendant but also of the said Cautions, before they can claim any of the monies here levied which ought to be paid to the Plaintiff, as the more diligent Creditor.

But the Court hild that it was sufficient for the opposants to alledge the insolvency of the principal debtor, to entitle them to this opposition as the insolvency of the common debtor gave a right to all Creditors to claim their dividend of his property — that in this instance it was the duty of the opposants to save as much as possible out of the estate of the insolvent, as well for the benefit of the Caution as their own. — The opposition was therefore maintained. —

Monday 11th. February 1828.

No. 2165.

Chapman
v.
Harrison.

This was an action en declaration d'hypothque

The declaration stated, that by an act or agreement passed before Griffin and his colleague, public Notaries, dated 7th January 1825, between one William Riley, a master mason, of the one part, and Heman Seaver Horatio Dickinson, William Forbes, Jacob Dewitt and Noah Shaw, of the other part, the said William Riley bound and obliged himself to erect and build in the City of Montreal, a certain Church of the dimensions and in the manner in the said Agreement mentioned. That in and by the said agreement the said William Riley was bound and obliged to commence the said building in the month of May 1825, and to complete the same in three months from that date, and in consideration whereof the said Heman Seaver, Horatio Dickinson William Forbes, Jacob Dewitt and Noah Shaw bound and obliged themselves to pay to the said William Riley, the sum of £904 - 6s. the parties binding themselves in the penal sum of £200 - for the fulfillment of their respective undertakings. - That the said plaintiff became a party to the said agreement, as the pleige & Cautionn solidaire of the said William Riley, and bound himself jointly and severally with the said William Riley towards the said Heman Seaver and others aforesaid, for the true and faithful performance by the said William Riley of his said agreement -

That on the 29th June 1825, the said Henry Griffin & his colleague, Notaries, by an act by them made, notified to the said plaintiff, that the said William Riley had commenced the building of the said Church conformably to his said agreement, but that he had since absconded and left off the said building, which

was

was still unfinished, and calling upon the said plaintiff to finish and complete the same as he was bound to do, as being the pleige et Caution of the said William Riley, and protesting against him the said plaintiff for all damages suffered, or thereafter to accrue to the said Heman Seaver and others aforesaid by the default of the said Riley, or of him the said Pluff:

That by a certain other act made and executed before the said Griffin and his Colleague, Notaries, bearing date the 9th Augt 1825, between the said Heman Seaver & others aforesaid, of the One part, and the said plaintiff of the other part, it was covenanted and agreed, that in consequence of the default of the said William Riley, the said plaintiff agreed to pay to the said Heman Seaver & others aforesaid the sum of three hundred pounds, and to be thereupon discharged by them from his undertaking aforesaid under the aforesaid agreement of the 7th Jany 1825, and which said sum of money the said plaintiff did pay to the said Heman Seaver and others aforesaid, who in consequence discharged as well the said William Riley as the said plaintiff from all their obligations aforesaid under and by virtue of the aforesaid agreement of the 7 Jany 1825. and of and from all the stipulations therein contained then and there declaring to have rescinded & annulled the said agreement.—

That by reason of the default of the said William Riley the said plaintiff as his pleige & caution, having become bound to all the obligations of the said Agreement of the 7th Jany 1825, and in consequence bound to pay to the said Heman Seaver & others the aforesaid sum of £300.— and having in consequence of such payment obtained from the said Heman Seaver & others a discharge from the said agreement, and also a discharge in favor of the said Wm Riley,

hath

hath thereby sustained a damage of three hundred pounds which ought to be reimbursed to him by the said William Riley, and hath thereby also acquired a right of mortgage upon the property of the said William Riley for the reimbursement of the said sum of three hundred pounds which he the said William Riley owned and possessed on the said 7th day of Janry 1825 — That the said William Riley having absconded and left the Province, one Robert Yarker was appointed Curator to him as an absentee. — That about the 27th day of January 1826, the said pltff instituted an action agt the said Robert Yarker in his said capacity of Curator, to recover from him the aforesaid sum of £300. — for the causes aforesaid, and on the 20th day of June 1826, obtained Judgment against him for the recovery thereof, with interest thereon from the said 27th day of January 1826, and Costs of Suit taxed at the sum of £12. 5. 6. —

That on the 7th January 1825, the said William Riley was the proprietor and possessor of a certain lot of ground or emplacement situated in the St Lawrence Suburbs, and afterwards on the 5th day of June 1825, sold the same to the said Defendant, by deed passed before Tobin & his colleague public notaries, by virtue whereof the said defendant became proprietor of the said lot of ground and then and there had the possession thereof —

That the said plaintiff by virtue of the premises hath a right to demand that the said lot of ground be declared mortgaged to him for the payment of the aforesaid sum of £300. — with interest and costs as aforesaid, and that the said Defendant be adjudged and condemned to pay to him the said plaintiff the said debt interest and costs, as he the said Defendant now occupies and possesses the said lot of ground, or that he quit and abandon the same in order that it may be sold according to law for the payment and satisfaction of the aforesaid debt interest & costs — all which the said Defend.t refuses — Wherefore &c —

Plea.

Plea. That the allegations contained in the plaintiffs declaration are unfounded in fact and insufficient in law to entitle him to maintain his action aforesaid against the Defendant – and the Replication joins issue on this plea. –

Beaubien for the plaintiff grounded his right of mortgage in this Case on Remisson Tr. de Subrogn ch. 9. Somm. 1. 2. 3. 4. 5. & 6. – The Contract between the parties of 7 Janv 1825 gave the plff a right of mortgage on Riley's property, it was an act of fidejussion, which by law contains a tacit obligation by the Debtor to pay and reimburse the fidejusseur, whatever he may have advanced for him. –

Boston for the Defendt – The plff by his agreement with Seaver & the others, has destroyed the very act under which he now claims a mortgage, he thereby rescinds and annuls it, and cannot now revive it to maintain his present claim. The plaintiff ought to have reserved his right under that agreement, and to have obtained a Subrogation in the rights of the Creditors of Riley to enable him to bring this action – cites. Repre. vo. Subrogation. p. 443. Lacombe. co. vo. No. 10. Pothier Des Hyp. p. 466. – the extinction of the agreement of 7 Janv 1825, is an extinction of all mortgage created thereby – Potts. Obl. No. 280. – No 429. Repre. 16. Vol. p. 443. –

Beaubien in reply – The authorities cited by the defendant do not apply – there are certain cases wherein a Subrogation must be obtained as referred to in Remisson ch. 7. Somm. 61. 62 – but the case in hand is different – The Defendt ought to have stated in his plea, the special ground he now alledges of a want of subrogation to maintain the action –

The Court dismissed the action on the authorities cited by the Defendt – see also Remisson – in Ch. last cited by Plff

—

No. 1210.

Rolland vs Paquin. } This was an action for Lods & Ventes on a deed of sale made by Mr Burns to the Defendant of a certain lot of land in the plaintiffs Seigniory, for and in consideration of a sum of two hundred pounds

pounds, and in lieu of the payment whereof it was stipulated that a rente fonciere non rachetable of twelve pounds to be annually paid, should be created on the land

Rolland for Pltff - This being a sale in consideration of a specific price or sum of money, the lods et ventes are due upon it - but had the sale been made merely in consideration of the rent reserved, he admits that in that case no Lods would be due - there the rente would represent the fond and therefore in law no mutation - This principle seems to admit of no doubt, and is adopted by all the law writers - cites - Poth. Bail à Rente. p. 460 & 461. Nº 1. & 4

Id: Retrait - p. 743. -
Repv. vo Rente. pp. 162. 3.
1 Bourj. - p. 306. -
1 Dumoulin p. 456. tit. 1. Frep. sec. 33. glose 2. Nº 74. 75. 81. 82. 87. -
Fonmaur Nº 324. 535. 537. -
N. Denizt. vo Bail a Rente Nº 5. -
Lauriere on 83 art. Cout.
O. Denizt. vo Rente Nº 14 & vo Lods. Nº 15. -

Bedard for the Defendt - It is a principle that the Bail a rente fonciere creates no Lods & Ventes, when constituted at the time of the alienation. 3 Desp: p. 42. Nº 6. - and if the intention of the parties here evidently appears that the alienation was made in consideration of the rente reserved the words used will be construed by the Court according to this intention, and that such was the intention of the parties here is evident, for the Seller received nothing -

By the Court. - The authorities cited go to establish the right of recovery of Lods & Ventes, on the principle that a sum of money is stipulated as the amount and value of the property sold, although a rente fonciere has been created in lieu of the payment of it, and nothing paid to the Vendor whereas had the Sale been made in consideration of such a rente fonciere, without allusion to price, or sum stipulated as the principal, no lods et ventes would have been due - This is certainly one of the nicest distinctions we meet with in the

French

French law, and would seem to hang more upon the manner in which the Contract is worded, than upon the real merits of the case — it is giving the Notary who draws the instrument the power of throwing lods & Ventes into the lap of the Seignior by the mere phraseology of the deed without departing very materially from the intention of the parties — but the distinction here taken appears to have been adopted as the rule of decision, and we are unable to depart from it. —

Judgt. for the Pleff

No. 42.

Tetro. & Ducharme v. Jodouin & al }

This was an action instituted by Charlotte Tetro dit Ducharme, widow of the late Louis René Provost against the Defendants the Children and representatives of the said Louis René Provost by a former marriage, to rescind and annul a certain deed of donation made by the sd Provost and subsequently ratified by the plaintiff, in favor of the said Children — The declaration stated, that on the 9th August 1813, the said plaintiff intermarried with the said late Louis René Provost — That by their marriage Contract a Community of property was established between them and it was stipulated that a sum of eight hundred livres brought by the pleff to her said husband, should be considered as a propre to her and her heirs, with the usual stipulations as to dower, preciput and payment of debts contracted before marriage, and a donation by her husband of a part d'enfant, in his estate. — That in consequence of the ill-treatment of her said husband the Plaintiff had left him and resided in the house of her father until July 1826, when an accident having befallen ~~the plaintiff~~ her said husband, she returned to his house and rendered him all the services in her power until his death which happened on the 7th July following —

That

That by a deed of donation, made and passed before Panet, N.P. and witnesses on the 12e Sept. 1823, the said Louis René Provost made over all his property to the Children of his first marriage with Marie Louise Quintal, to be equally divided among them, in consideration of a certain rente et pension viagere, and on condition of paying to the plff the aforesaid sum of 800t- stipulated as her propre by her marriage Contract, and also the interest of her dower, and as the plff was not a party to the said deed of donation, her said husband stipulated wt. his S. Children therein, and promised to cause the same to be ratified by the said plaintiff, and thereby authorising her to make such ratification even if he should not be present.— That by an act passed on the 4e Oct. 1823 before the said Panet and his Colleague, Notaries, the said plaintiff under the authority given her in and by the said deed ratified and confirmed the same, and by another act bearing date the same day, Michel Tetro and his wife the father and mother of the said plaintiff, acknowledged to have received on her account and to be paid to her, the above sum of 800t.— That from the time of passing the aforesaid deed of Donation of the 12e Sept. 1823, the said plaintiff was solicited and threatened by her said husband, and by the Defendants to make the above ratification, which she made only from the force violence and threats used towards her by them, and particularly by the threat that she would lose the aforesaid sum of 800t-, as she was at the time in great want and distress.— That the said deed of donation is further null and void in law, because it conveys on the part of the said plaintiff an indirect advantage in favor of her said husband, which is prohibited during marriage.— That the deed of donation is also null and void in law as having been made by her said husband in fraud and Collusion, and in order to deprive the plaintiff not only of her share of the Community, but also of the part and share of the property of her said husband secured to her by her said marriage Contract; and also because the said deed is made in favor of persons incapable and prohibited by law to receive and take the liberality thereby given them.—

That

That the said defendants are now in possession of all the property so given by her said husband and — refuse to deliver up to the plaintiff her said part and share of the said Community and of the property so reserved to her by her said marriage Contract to the damage of the said plaintiff of the sum of £500.— Concluding, that the aforesaid deed of donation be declared null & void for the reasons aforesaid, in so far as regards the said plff, and in consequence that the defendants be held to make an Inventory and to account to the said plff for her half of the said Community and all her rights aforesaid in the property of her said husband, and in — default thereof to pay to the said plff the said sum of £500.— with interest and Costs.—

Plea of Exceptⁿ per: en droit — That the plaintiffs action cannot be maintained in law even if all the allegations contained in the declaration were true.—

2ᵈ That the plff cannot avail herself of any nullity in the said declaration, which has been ratified by her, merely because it contains an indirect advantage in favor of her late husband, such ratification being her own free and voluntary act, no cause of nullity can avail against it

3ᵈ That the plaintiff cannot invoke as a cause of nullity that the donation is made in favor of the children of her husbands first marriage, as no such prohibition exists in favor of the Conjoint ratifying the deed, when there are no children of the second marriage —

4ᵗʰ Because the plaintiff cannot come against her own act by reason of any of the matters stated in her declaration. That if the said ratification was not free and voluntary on her part, she ought to prosecute her action en restitution, but not by a demande en nullité — And for further plea denying all the matters and things alledged in and by the said declaration.—

To this plea the Plaintiff filed a general answer, forming the issue on law and fact between them.—

The parties having been heard on the law, it was

ordered

ordered that they should proceed to make proof, the Court considering the allegations of force and violence alledged in the declaration to compel and induce the Pltff to ratify the deed in question, as a sufficient ground to maintain the action. —

The parties were now heard on the merits

Mr Roi for the plaintiff rested his case principally upon the prohibition contained in the 282. & 283^e. articles of the Custom, contending that the principle therein contained ought to apply whether both parties have children by a former marriage, or only one of them, both being within the reason of the law, as we find by the prohibition to the pupil to make a donation to the child of his Tutor — There are contradictory arrets on the question, those in favor of this action appear to be the best founded - cites. 1 Journal d' aud. 29 Fev. 1628 — & 17. Mars 1631. —

Rolland & Mondelet for Defend^rs The plaintiff has not shewn in evidence that any force or violence was used to compel her to ratify the deed in question — this ratification must therefore be considered as her voluntary act, and the present action be dismissed — In regard of the prohibition contained in the 282 and 283^e. articles of the Custom, it has been held to take effect only where both parties had children of a former marriage, and here the Plaintiff had no such children — cites. Poth. Don. entre vifs. p. 447. 8 — Gr. Com^re on 283e. art. N° 4. Glos unique — Pothier above cited decides the question and shews that the opinion of Lauriere on this article was erroneous. — The action here is not for an Inventory, but en nullité of a deed, and it is only on the principle that the deed is a nullity that an Inventory is demanded — but the Defendants hold no property of their deceased father, nor has the Pltff been able to prove it — cite case of Allard. v. Guertin & al^s. —

The Court dismissed the action on the authorities cited by the Defendants — see also - Arrets de Reglement de Jour p. 152. 3. 4, and arrets there cited. —

Tuesday 19th Febry 1828.

No. 357.
McNider, Cur
vs
Stevenson
McGill & al
&
Porteous Intervs

This was an action of Revendication, to recover certain goods & merchandises from the Defendants and which had been attached in their hands in order that the plaintiff might be paid in preference to other creditors the amount & value thereof.—

Walker for the Plaintiff— This action is brought against against McGill and others as assignees of the estate and effects of Andrew Porteous, a bankrupt, and against Stevenson the master of the vessel on board of which the goods were shipped and brought to the port at Montreal, in order to stop the said goods in transitu, until the plaintiff shall be paid the value thereof— On the 24 Febry. 1825, Mr Porteous gave an order to certain merchants in Glasgow, now represented by the Pliff as their Curator, for 28 Cases of hats of a particular description to the amount of £741. 10 St. at a credit of seven months— This property was shipped at Glasgow in May 1825, on board the Warner, commanded by the Defendant Stevenson addressed to the sd Porteous at Montreal and invoiced deliverable to his order— Before the hats arrived in Canada Porteous had become insolvent, and on the 30th June 1825 had made a general assignment of all his property to the Defendants McGill & others, as Trustees on behalf of his Creditors— In this assignment no particular reference was had to these hats, which had not then arrived in Canada.— In the month of July after the Warner arrived in Montreal, when these goods then on board were demanded by the plaintiff as representing the Shippers, but the master refused to deliver them, as by the Bill of lading they were deliverable to Porteous or his order, and in consequence he delivered them to the assignees under the order of Porteous— The next day the goods were attached at the instance of the Plaintiff.— The Defendants have separated in their plea— The Master of the vessel says he

received

received the goods to be delivered to the order of Porteous, and that he has complied with this order – The other defendants the Assignees, contend, that as the property passed into Porteous from the Shipment made at Glasgow, they became entitled under the assignment to claim and receive them, as well as under a special assignment made to them by Porteous of the goods in question after their arrival in Canada. – It appears by the evidence adduced in support of this action under the Commission Rogatoire sued out in this Cause, that the Shippers intended to reserve a certain right over the goods they shipped from the circumstance of the Insurance being made at their expence and risk. – The Assignees here stand in the same situation as the bankrupt himself, and can have no better defence to make than he could have – The vendee in case of insolvency cannot under the French law compel the vendor to deliver the goods without payment or security. cites. Repre vo Vente. p. 480. – The Shippers here never manifested any consent to the delivery of the goods to the debtor – and until such delivery was had, both parties may be considered as having a property in the goods so as to exercise their respective rights thereon. That the constructive delivery by shipping does not divest the right of the vendor to arrest the property while in transitu and until it comes into the actual possession of the Vendee. 1 Atk: Rep. 245. Snee & al. v Prescott & al. – This doctrine is also agreeable to what is laid down by the 176e art. of the Custom of Paris – cites also Lickbarrow. v. Masson. 1 H. Bl. Rep. 357. – 7 Taunt. Rep. 169. 2 Bos: & Pull. 257. –

Buchanan for the Defendants – Neither by the law of Canada or of England can the plaintiff recover in the present action – The nature of Stoppage in transitu is not known here – In England the proceeding by attachment is not known, they proceed there by notice to the party only, which we do not recognize here. – The present action is an action of Trover to recover property belonging to the plaintiffs, after the same had been transferred to their debtor and had become his property by the shipment made of it – If there existed any recourse for the plaintiff, it could have been only under a special action on the Case and a statement of the circumstances under which they might had any equitable claim to the property. But had the insolvency of the debtor re-vested the property in the plaintiffs, yet they do not alledge that thereby the Contract of Sale to the debtor was rescinded, nor could it be – 1. Holt on Ships 204. Abbot. 357. Laws on Ch. Parties. 505. & 543. – inasmuch as the consent

of

of both parties is required for this rescision, but in the case of Stoppage in transitu this is not required.—

That the plaintiff in this Case had no right to stop the goods as he was not the vendor, nor his agent, who alone could exercise this right.— That the law of Scotland here ought to regulate the right of the parties, as there the Contract was made, but it has not been proved, nor is the action founded on this principle— the only notice taken of this law is in the answer of the Witnesses to the last interrogatory proposed under the Commission Rogatoire— but this cannot here be taken any notice of, as the Defendants had not the means of cross-examination— but these witnesses do not say that they are acquainted with the law of Scotland nor are they professors of it; if this law is to be relied upon it would have been necessary to have produced and proved a Copy of it. 3 Stark. Ev. 4th. Foreign Judgts. appx. But if this law were proved, and the right of stoppage in transitu given as in England, yet the facts here proved do not shew that the proceeding under that law is by notice as in England whereby the property is revested in the vendor.— It is true, there is a protest here made by a Notary on the Master of the Ship, but we see only a copy of it, and nothing said about the original, this would not be evidence in England- cites. 4 Camp. Rep. 129. Chitty on bills. 405. note (g)— In England the moment the transitus is at an end, the right of stoppage ceases, which was the Case here— The protest was made on the 7th July, and on the 8th the greater part of the goods had been delivered into the Stores of the vendee and his agents— 3. T. Rep. 468. 2 Holt. 211. 227. Abbot. 364. 4 East. 211. Laws. 498. 507.—

The law of Canada is equally unfavorable for the Pltff the goods here sold at a credit of 7 months— By the Roman the rights of vendors are not so favorably received as under the Custom. Dig. liv. 14. tit. 4. law 5. §. 18.— in cases where credit is given to the vendee— and according to Poth. Vente. N°. 18. & N°. 323. credit given transfers the property.— The 176th ~~xxxx~~ article of the Custom, admits that the property was in the vendee, even in case of a sale sans jouer et sans terme, and the 177th art. shews that the creditor can

proceed

proceed only for the recovery of the price and not for the thing itself — here there was no seizure in the hands of third persons under the 77th art. and there can be no revendication of the property on a sale on credit. cites 2 Fer. Gr. Comn p. 1339. & observations of Mr. +++ on do p. 1344 2 Bourg. 689. No 75 — 1 Pigeau. 465. — all the right of the vendor here is confined to a priviledge on the monies arising from the sale of the goods. —

Walker in reply. — The Contract here was made in Scotland, and the laws there as proved must have effect, and a notice to the carrier is sufficient to preserve the priviledge of the vendors, a principle which holds in all commercial concerns throughout Great Britain because the exercise of the right of lien of the vendor is an equitable right, and this notice is sufficient to preserve it — refers to the opinion of Mr Justice Butler in the Case of Lickbarrow v Masson. 2 T. Rep. The law of Scotland is here sufficiently proved in the answer to the general Interrogatory, this besides is the general jurisprudence and required not the setting out the law particularly on the subject. — That the copy of the protest is sufficient proof of a notice under the laws of Canada where the act was made. — That by the laws of this Country this action is founded. cites. 2. Gr. Comn de Ferrier. Somn on 176 & 177 art. of the Custom — These articles refer to cases where the property has actually passed into the hands of the vendee as the more general case, but here the property never passed into his hands and may still be considered in the hands of the vendor — Desp. tit. 1. No 19. — The Civil law principles were greatly modified by the French law, as on default of payment of the price the vendor might resume the property. — By the 177th art. of the Custom the vendor might prevent the sale of the goods until they were paid, or until he had obtained the consent of the other creditors for his preference

on

on the monies arising from the sale — this amounts in substance to the right of stoppage in England as noticed by Mr Justice Butler — But where the goods are still in the hands of the vendee the vendor has the same right of revendication under the 177th as under the 176th art. the object of credit makes no difference as to the right of lien in this Case. Gr. Comre p. 1317. and p. 1339. Nos 4. — The subsequent insolvency of the debtor alters the conditions of the sale as to the credit given and puts the Case as if the vendor had never made such a Contract. Potts. Obl. Nr 230. 1. 2 as to difference between the Condition and the terms of payment and Nr 234 which brings this Case to one of a sale for prompt payment — Repre vo Achat. —

An action to rescind the sale in this case became unnecessary and inapplicable, as this kind of remedy refers to Sales of real estate, or such as have been reduced into writing, but in Commercial and verbal Sales this would be too tedious & ineffectual.

That it is a principle in equity and holds also in law, that he who seeks Justice should himself do Justice — but the Defendants here seek to avoid it, by demanding that the goods in question be delivered up to them without any thing having been paid for them, and without any intention of ever paying for them, beyond such dividend as the Pltff may receive in common with the other creditors — this would be the most manifest injustice — for the Defendants and a few others who are creditors of Mr Porteous in this Country to a small extent of five or six thousand pounds, would thus carry off an unjust proportion of the property of the English and Scotch Creditors, whose debts amount to about Sixty thousand

thousand, and out of whose property alone the means must arise to pay those debts + The Case is not only hard but extraordinary — the bankrupt without means in this Country goes to England and Scotland in the fall 1824, returns to Canada in Spring 1825 with cargoes of goods on credit to the amount of Sixty thousand pounds and upwards, and he scarcely arrives here before the Canada Creditors fall upon him and he is declard a bankrupt, to the surprise of every body and without the most distant intimation given to the English and Scotch creditors, who have no person on the spot to look after their interests, which are thus sacrificed. —

By the Court — This action is instituted by the Plaintiff, as Curator to certain absentees, Messrs Duncan Smith & Co Merchants in Greenock, to recover from the Defendants as assignees of the estate and effects of Andrew Porteous an insolvent debtor, a certain quantity of 28 boxes of hats which were sold and shipped by the said D. Smith & Co to the said Porteous on a seven months credit in the Spring of the year 1825 — Before the goods arrived in Montreal, Mr Porteous had failed and had made an assignment of his property to the Defendants for the benefit of his Creditors — On the arrival of the vessel conveying the goods in question it would seem that the plff had made some Demand of them from the Captain, who refused to deliver them in consequence whereof an attachment was obtained by the plaintiff, under which the goods were seized partly lying on the beach where they had been landed from the vessel, and partly in the Store of the Defendts The plaintiff now contends that these goods ought to be dilivered up to him, and be retained by him until he be paid the amount of the Invoice price

of

of them; and the Defendants on the other hand contend, that the goods having been sold, shipped and delivered, all right of claim and detention on the part of the vendors ceases, as the goods have thereby become the property of the vendee. —

The plaintiff has endeavoured to support his claim here upon the principles which have been adopted in England of the right of a vendor to stop his goods in transitu, in case of the insolvency of the vendee, a right, whose existence is not of very antient date & not created by any positive law, but grounded upon equitable principles, and allowed for the encouragement and protection of trade — He has also relied upon the law of Scotland as the rule of decision in this case, under which he claims this right of stoppage in — transitu, as the law of the Country where the Contract was made, and by which the rights and interests of the parties ought to be governed — But whatever the rights of the parties may be under those laws, we cannot take notice of them in this Case, for had the plaintiff meant to rely upon any law or principle of decision, unknown to the laws of the Country where the action is brought, such law should have been set out in his declaration, as it was a matter upon which issue might have been taken, and in regard of which both parties had a right to adduce evidence — As no — allegation of this kind is contained in the declaration we must have recourse to the laws of the Country to — determine the matters now in contest between the parties. Whatever objections may be made to some parts of the laws of Canada, we must still admit, that in general they are marked with strong principles of equity and Justice and provide as effectual a remedy for an injury as the laws of any other Country — In the particular case

before

before us, it is perhaps fortunate for the plaintiff that his right must be determined by them, for in this instance they carry the right of the vendor over the property sold to the vendee, whether before or after delivery, whether sold for prompt payment or on credit, much further than either the law of England or Scotland on the subject of stoppage in transitu has done, for by the law of these Countries as far as we can see, after the delivery of the goods to the vendee, the remedy of the vendor by stoppage in transitu, ceases. — (Here the Court made some observations on the form of the action instituted by the plaintiff, and on the Danger of borrowing forms from the system of another Country where fiction is often used to try a question of right, when by the laws of this Country, all that was requisite, was merely a clear and concise statement of the Case, so as to bring it within the remedy those laws provided. —)

We must therefore put out of the question all the law and all the arguments used as founded on the rule observed in England touching the stoppage in transitu, as not applicable to the case, and consider it under the laws of this Country. —

The 177e article of the Custom says — "Et neanmoins " encore qu'il eut donné terme, si la Chose se trouve saisie " sur le debiteur par un autre créancier, il peut empecher " la vente, et est preferé sur la chose, aux autres Creanciers". This article supposes, that the goods have come into the hands and possession of the Vendee, and are seized by another Creditor, still in this case the vendor has a right to prevent the sale, and to have a preference on the goods. — The article expresses a case of seizure of the goods by another Creditor, as being the most general occurrence but the principle of it is applicable to all cases, where the vendor runs the risk of losing his property from the inability of the vendee to pay what he owes, and more especially in a case like this of declared bankruptcy

where

where there is neither ability nor intention to pay for the goods, but an attempt to increase the general dividend by throwing them into the same masse with the other property of the debtor. +

It is however contended on the part of the Defendants, that under this article of the custom, the vendor is not entitled to his action en revendication, inasmuchas he had parted with the property, which now belongs to the vendee, and he alone is entitled to derive the benefit that may arise from the sale of the goods, and that all that a vendor can claim who has sold on credit, is a preference on the price, and for this principle Pothier, Pigeau, and Bourjon have been cited — But the plaintiff by his action, concludes for the goods being restored to him, only in case the defendants refuse to pay for them, and this we consider to be within the intention of the law and the justice of the case — The revendication here became necessary to prevent the sale, it was the only course the plaintiff could take, and to claim a right of detention till the goods were paid for, and by this means to give the vendee, or his creditors, all the benefit that might arise by the sale made to the vendee, and the principle cited from the above writers can apply only as to a claim of the vendor to the absolute property in the goods after a sale on credit — this he cannot claim, as the vendee is entitled to reap the benefit of a good bargain if he has made one — but that the vendor is entitled to his action of revendication to preserve the priviledge he here sets up, is evident from the opinions of several writers who have touched upon this point — see Fer: Gr. Comn on 177e art. p 1331. No 4. Louet, lettre P. 19. p. 348. — De Lauriere on the same article — Fer. Pet: Comn art. 177 — Denizt. vo Revendication. No 5. 6. — & Poullain du Parc. — But the best, the most judicious and honest interpretation of this article is to be found in Brodeau who lays down the principle of right in the vendor to attach the goods and prevent the sale of them till

his

his money be paid — without an attachment in the first instance, how is the identity of the goods to be proved, so as to secure a priviledge, even on the produce of the sale, were this alone the object? Had the sale been made without this previous identity being ascertained the priviledge of the vendor was gone — he could in such case claim only as a Common Creditor — but the justice of the claim lies in this, that unless the goods when sold will produce more than their invoice price, it is for the benefit of all parties, that the vendor should have them restored to him; for should they produce less, either from the inattention of the vendor to his interest or other Cause, the vendor is in the first instance entitled to the amount of the Sales, and should that fall short of the Invoice price he will rank as a — Common Creditor on the bankrupt estate for the balance, — which instead of a benefit would prove an injury to that estate by a new claim being thus raised up against it — as the goods however may be disposed of to advantage, the — Assignees are entitled to have them, but this cannot be granted without satisfaction made to the plaintiff, whose — priviledge in this respect we conceive to be well founded.

The Judgment of the Court therefore is that the goods attached be delivered up to the plaintiff in default of the Defendants paying to him the Invoice price thereof within fifteen days — that the Intervention of M. Porteous be dismissed as without interest in the Cause, and that the Captain of the Vessel be discharged from the action and his costs allowed him. —

No 1258.

Barnett val
vr
Harrison

This was an action hypothecaire instituted by the plaintiffs against the Defendant upon the following grounds.— The plaintiffs were Carpenters and joiners, and by their declaration stated, that by an agreement made and entered into by and between them and one William Riley, they undertook to finish and complete all the workmanship in and about a certain house situated on a lot of ground belonging to the said Riley in the St Lawrence Suburbs of Montreal, the said agreement bearing date the first day of May 1823. and to be executed in consideration of a sum of £99. 8. 10½ to be paid to them by the said Riley.— That the said plaintiffs in pursuance of their said agreement finished and completed the said house on the 10th Dec 1823. and thereby acquired a right of mortgage thereon for their security & payment of the aforesaid sum of £99. 8. 10½.— That afterwards on the 25 June 1825, by deed of sale made & executed before Ritchotte and Jobin, public notaries, the said William Riley sold and conveyed the said lot of ground and house to the Defendt who now possesses the same.— That on the 18 day of Febry 1826, the Pltffs prosecuted an action agt the said Riley for the recovery of their demand aforesaid, and obtained Judt in the Court of Kings Bench here for a sum of £67. 9. 2½ with interest and Costs, which still remains due & unpaid— Concluding thereupon that the said lot of ground and house be declared mortgaged to the said pltffs for their demand aforesaid, and the Defendt adjudged to pay the same, or that he quit & deliver up the said lot of ground and house to be sold according to law for the payt & satisfaction of the said debt interest & Costs.—

Plea

Plea. - in nature of a demurrer, denying the truth of the facts stated, and their sufficiency in law to maintain the action - On this Plea issue was taken. -

Boston for the Defendant, contended that the priviledge of the workman could not in this Case attach upon the property in question, as the same had not been exercised with due diligence - that the nature and extent of the plaintiffs demand ag^t. Riley, their debtor had not been ascertained until the Judgt rendered against him on 18 Febry. 1826, long after Riley had sold the house and lot in question to the Defendant. - That from the delay allowed to elapse after the plaintiffs debt became due, before they prosecuted the payment thereof, they appeared to have given a personal Credit to Riley, which cannot now be extended to the property he had before alienated - That in a Case of this kind where a priviledge is claimed, it ought to be prosecuted without delay - so as to prevent fraud and injustice in the case of purchases made by innocent persons. - cits. Poth. 5. vol. p. 453. - Rep^re. v^o. Ouvrier - and D. Denis^t. v^o Privilege. -

Mr Grant for the plffs contended, that although the action was not brought within the year after the work done, yet as the hypothèque did once subsist, the Defend^r ought to have pleaded prescription as it as the only means by which it can be destroyed -

The Court on the authorities cited by the Defend^r dismissed the action - see also Case of Sourdain vs. Melville - in Appeal - Note book. p 273. -

Wednesday 20th Febry 1828.

No 106.

Pothier. vs Eager.

Action to enforce the execution of a Contract of Sale by Pliff to Defendant.

The declaration stated, that by an act passed in the City of Montreal on the 3d day of December 1811, by the late Louis Chaboiller, Notary public, the said act being signed by the plaintiff and the Defendant, but not by the said Notary, nor countersigned by any other Notary and the said Louis Chaboiller having soon afterwards died, the said act remained and was found in his Notariat without being signed or countersigned as aforesaid — That in and by the said act the said Pliff acknowledged to have sold conceded and made over with promise of warranty to the said Defendant then present and accepting thereof, a certain emplacement in the Fief Lagauchetiere, the said emplacement charged with the payment of 7½ Cens et rentes of a Rente fonciere et Seigneuriale, payable annually on the first day of October, the first payment to be made on the first day of October 1812, and to continue annually to be made on that day, and also for and in consideration of the sum of one thousand livres, for which sum the said Defendant constituted a rente of Sixty livres equal to £2.10 Cy to be paid annually on the said first day of October. — That the said plaintiff hath fulfilled all he was bound to do by the said act, but that the said Defendant hath neglected to do and perform what he was bound to do thereby, and hath neglected and refused to pay the aforesaid Cens et rentes as mentioned in the said act. — That the said Defendant now owes fifteen years arrears of the said rente Constituée, making a sum of £37.10. — and also fifteen years arrears of Cens & rentes, being 9/4½ and making in all £37.19.4½ — That the said Defendant hath not complied with the —

stipulation

stipulation in the said act contained, by which he was bound to build a house on the said emplacement in three years from the date thereof, and hath refused to do so, to the damage of the said plaintiff of one hundred pounds. — Concluding — that the aforesaid act may be adjudged to be executed by and between the said parties, that the Defendant be condemned to pay to the plaintiff for the causes aforesaid, the sum of £137.19.4½ also that the Defendant be adjudged to build a house upon the said emplacement in such delay as the Court shall appoint, the whole with interest and costs. —

Plea — 1. Denies all the facts stated in the declaration 2d That the act set forth in the said Declaration is not his, the Defendants, act — 3d That the said act is null and void in law, not having duly executed, according to the intention of the parties, nor was the same ever carried into effect, or accompanied or followed by any tradition of the said emplacement to the said Defendant, and therefore the plff cannot maintain his said action — That the said act was made with a corrupt intention, and in order to induce the Defdt to appear and vote contrary to law at an election for a representative in parliament. —

On hearing on the merits —

M.Roi for the plaintiff stated, that the act declared upon was not perfected as an acte autentique, as the parties thereto intended and expected by going before the notary for the purpose of executing the same, but the said acte, being proved to be in the handwriting of one of the clerks of the late M. Chabrillet, and being found among the minutes of his Notariat which was deposited in the Office of the Prothonotary of this Court, and the signatures of the parties plaintiff and Defendant to the said acte, having been proved, the same is in law to be taken and considered as an acte sous seing privé, and as such equally binding on the parties as if the same had been signed by the Notary and countersigned by his colleague — cites

Poth.

Poth. Obl. Nº 733. & Nº 808. — 1 Bourg: 470. Nº 3. and Repᵉ vº acte. p. 139. —

That the apostille, or note written on the margin of the said acte, although not signed by the parties, may be rejected as not constituting any part of the Contract between the parties, yet will not vitiate the rest of the acte which appears in due form and signed by the parties &c. Repᵉ vº Apostille. —

Boston for the Defendant — The acte produced and proved by the plaintiff, does not come regularly before the Court, it not being a notarial act the Prothonotary cannot legally have the possession of it — It does not appear to have been in the possession of the plaintiff or of the Defendant, nor can we account how it came into the possession of the deceased Notary Chaboillez —

That the plaintiff can maintain no action upon such an instrument, because it carries a contradiction on the face of it, as it purports to be an act executed before a notary, but not signed by any notary, nor is the copy produced conformable to the original —

It was no doubt the intention of the parties to pass an act before a notary, but this not having been done, the intention of the parties not having been carried into effect, the act must be considered as imperfect and not binding on either of them, the presumption that the parties have changed their opinion and departed from their original intention — A Contract of this kind may be made either before a Notary or sous seing privé, but when made sous seing privé, it must be by a double scrit, being the only security the parties have in this Case for the performance of an executory Contract see 1 Bourg: 471. — 1 Pigeau 10. Repᵉ vº Conv: de preuve. p. 57. Poth. Obl. Nº 11. Nouv: Stile des Notᵉˢ 34. Repᵉ vº Notaire, p. 207. Instrucº sur les Conventions. p. 41. — That where there is an Apostille in an acte which the parties refuse

to

to sign, it renders the whole act null, it being a proof that the parties had disagreed and departed from the Contract. Repse vo Double Ecrit. p. 359. 360. 361. — 2 Pigeau 260. N. Denizt. vo Faux. p. 109. —

That the Contract here has never been executed between the parties, there has been no tradition of the property which has always remained in the possession of the Plaintiff. —

Roi in reply, had it been agreed that the act should not be perfect until signed by the Notary this act might be considered as null, but the imperfection of the act here arises from the fault of the Notary only, there being nothing agreed upon or expressed by the parties as to the nullity of the act from the want of the signature of the Notary — nor is it necessary under the circumstances of this Case that it should be double, as the execution of it may be had without this formality — The parties when before the Notary made a valid agreement, this they attested by their signature, and it cannot depend upon the Notary to render that null from any neglect on his part what the parties considered as valid — The act comes regularly before the Courts by the hands of the public Officer who is the depositary of all acts passed by deceased notaries. —

See authorities cited by Plff particularly Repse & a note on it —

The Court considering from the evidence adduced that the act in question had been drawn up by one of the Clerks of the late Mr Chaboillez public Notary, and had been signed by the parties as containing the matter agreed on between them, & that the act had in this state remained in the hands of the said Notary with the intention of the same being perfected by the signature of the Notary, but had been found in an imperfect state in his notarial after his decease, were of opinion that the said acte was binding on the parties as an acte sous seing privé, rejecting the marginal note — Judgt for Plff —

№2485.

Dawson et al
Ansell —

This was an action of assumpsit on several grounds — The first Count in the declaration was for the amount sales of goods sent by the plaintiffs merchants in London, to the Defendr a trader in Montreal to be sold on their account, for the amount of which the Defendant purchased a bill of Exchange in Montreal on London payable to the plaintiffs, which bill at its maturity was protested for non-payment, and therefore the pltffs conclude for the payment of the amount of sales and the charges accrued about the protesting of this bill —

The second Count was for a bill of exchange drawn by the House of Maitland Gardiner & Auldjo of Montreal on Wm Maitland & Co of London for another sum of money and payable to the Defendr or his order, and by him indorsed to the Plaintiffs this bill was also upon its maturity protested for non-payment, and the Pltffs here conclude for the amount with damages interest and Costs.

The Declaration besides contains the usual money Counts —

The plea to this action was non-assumpsit and want of diligence. —

The facts which appeared in evidence were that the goods were sent by the plaintiffs to the Defendant to be sold on a del Credere Commission and in making up the account sales the Defr charged a Commission of seven and a half ℔ Cent, that is, five per Cent on the sale of the goods and 2℔ for ~~transmissions~~ guaranteeing the Sales, and the balance was the sum for which the

Defr —

Defendant purchased the bill payable to the Plffs as mentioned in the first Count of the declaration

This bill with the other bill which was indorsed by the Defendant were returned to the Agent of the Plaintiffs in Canada in due course on the 19th day of June 1826, but were not accompanied with the protests, in order that the amount might be recovered from the Defendant — The same day or day after the Agent called on the Defendant and shewed him the bills which had been returned dishonoured — the Defendant asked if there were any protests with the bills, the Agent said, that the protests had not been sent, but referred the Defendant to the noting on the bills as the mark of their dishonor — The Defend: then observed that as to the first bill he did not consider himself responsible as it was the amount of Sales made for the Plaintiffs which he had forwarded to them and had not been endorsed by him, and as to the other bill, he would give the Agent an answer in two or three days — And the Agent having again returned to the Defendant to know his determination on the subject, the Defend: told him that he did not consider himself liable to pay the amount, as the protest had not been produced with the bill †—

The evidence given on the Subject of the Commission charged by the Defendant was, that the Custom among Merchants in Montreal, is to charge five ℔ Cent on all foreign goods sent

to

† The Protests were immediately written for & came to hand in Canada in Augt of the same then presented & shewn to Defendt. //

to them for sale here, and two and a half more where the payment of the goods is guaranteed. That it is not usual to guarantee returns or remittances, but where this is done an additional two and a half ℔ Cent would be a reasonable allowance, making on the whole in such a case ten ℔ Cent. —

The Solicitor Genl for the plaintiffs contended that on the first bill, the Defendt although he had not indorsed it, was nevertheless liable for the amount from the extra-commission of seven and a half ℔ Cent, as by this it must be understood that the Defendant guaranteed the bill — That in England the Common Commission for guaranteeing debts on sales of this kind is only four and a half, and payments to be made in England must be governed according to the laws and usages in England, and the Defendt having here charged so extravagant a Commission must be understood to have guaranteed the payment he was remitting — cites Comyn on Cont. 546 — Paley P. & Agt 39. 40. 41 — 1 Burr. Reps. 1077 — That there was suffit diligence done on the bills, that although the protests did not accompany them when they were returned in April 1826, yet they afterwards appeared and are now filed to shew they were made in proper time, and as the bills on the face of them appeared to have been presented and noted, this was a

sufficient

sufficient notice to the Defendant and of diligence on the part of the plaintiffs – cites, Chitty on bills 323.– & 313. 315 – 1 Selw: N P. 312 – Peake's Ev. 80 – and 3 Camp. N. P. Rep. 334 –

Scott for the Defendt – The defence here rests on the want of diligence on the part of the Pltffs – the bills were merely shewn to the Defendt without any protest, it was not even said that they had been protested – Here there was no proof of the presentment and acceptance of the bills – and when payment is refused a protest is necessary as the only and best evidence of that fact – refers to the case cited by Pltffs Counsel of Chaffers & Bell. – It is a point not yet settled in England, but generally held, that where the party is abroad, the only legal notice to be given him of the dishonor of a bill is by the protest – The plaintiffs ought to have put the defendant in a situation of making his demand against the drawers by means of the protest, and had the protest accompanied the bills here, so as to enable the Defendt to make immediate application to the drawers, the bills would have been paid. – As to the first bill the Defendt never undertook to pay for it, or to guarantee it, nor can the Defendant be made responsible for it on the principle that a greater ℔ centage has been charged here than is usual in England on the sale of goods, as the usage and custom of the place where the sale is made must prevail That the Defendant acted as the agent of the plaintiffs in transmitting this bill to them, and having made no additional charge for this beyond the seven & a half ℔ Cent, he cannot be held to warrant the payment of it. –

The Court were of opinion that the Defendant was

not

not liable on the first bill, he appearing to have acted as the agents of the plaintiffs in procuring this bill and transmitting to them the monies he owed them on the Sales made for them. – As to the ℔ centage charged by the Defendant on those Sales there being no agreement between the parties, the usual charges of the place where the Sales were made must necessarily be allowed, and here the appeared sufficient evidence to shew that in Sales of this kind seven and a half was the usual ℔ Centage charged.

As to the notice given to the Defendant on the other bill, the Court thought it sufficient. – That the best and safest Course in all Cases was no doubt to forward the protest with the bill in case of dishonor, it had however been held that notice of this dishonor when given in due time will be sufficient, although the protest be not at the time communicated, and it appears that in this Case there was a sufficient notice given to the Defendant that the bill had been dishonoured – Judgment was therefore entered for the Defendant upon the first bill, and for the Plaintiffs on the Second bill. –

see Robins. v Gibson. 3 Camps. 334. & 1 M. & S. 288.
2 Esp. N.P. Rep. 311. 312.
Posts. Charge. N° 150. –
Chitty on Bills. 217. & cases cited on note (1c)

№ 2292.

Kendall vr Lamb & al

This was an action by the Indorsee of a foreign bill of exchange against the Indorsers, and the defence set up is, want of diligence, on the part of the plaintiffs the holders of the bill, and of due notice by him of the dishonor thereof to the Defendants. — The facts of the Case were these — On the 9th Oct. 1818, Joseph Wedgewood & Co. of Montreal drew a bill of Exchange on Messrs on Messrs Dempsey and Pickard of Liverpool in England, directing them ninety days after sight to pay to the order of Messrs Lamb & Co. the Defendants one hundred and sixty one pounds sixteen shillings and four pence Sterling which bill was afterwards indorsed by the Defendants to the plaintiff Joseph Kendall and transmitted to him at Birmingham in payment of certain goods which he had sold to them. — On the 4th Dec. 1818 the bill was presented to the drawees at Liverpool who refused to accept the same and thereon it was duly protested and notice thereof sent to the Defendts by a letter from the plaintiff which was put into the post Office at Birmingham on the 31st December 1818, inclosing a copy of the protest. — On the 6th March 1819, the bill was again presented for payment, which was also refused, and it was thereupon duly protested, and notice thereof sent to the Defendants by a letter put into the same post office on the 13th March 1819. — Under these facts it has been contended on the part of the Defendants that due notice had not been given, inasmuch as the plaintiffs had allowed twenty seven days to elapse, before sending the letter containing advice

of

of the non-acceptance to the post office at Birmingham. It has however been proved, as well by the evidence in the Cause, as by the written admissions of the parties, that the mail packets sail from England to America the first Wednesday of every month, and that after the protest for non-acceptance of this bill, no packet could have sailed before the 6th January 1819, and that a letter put into the post Office at Birmingham on the 31st Decr was, in the regular course of post, in time to be forwarded by such packet.— On the other hand it has been admitted by the plaintiffs that in Decr 1818, vessels sailed almost every day from — England to the United States of America, and that the average passage to New York from England is about thirty days, and that letters from New York to Montreal in the Course of post, are five days in coming to hand — but although this might have been the Case, the Court was of opinion, and it has been so held in England (2. Hy 13l. Rep. 569. 570.) that the holder of a bill is not bound to send notice of the dishonor thereof through any foreign — channel, but rather by the known and regularly established public Conveyances, whether post or packet ship, and that as the plaintiff availed himself of the first packet which sailed after the protest for non-acceptance at Liverpool, and after he himself had notice thereof at Birmingham, no want of diligence, or of due notice to the Defendants could therefore be imputed to the plaintiff — and therefore Judgment was given for the plaintiff. —

April Term 1828.

Thursday 17th April.

No. 1453.

Smith et al
vs
Brown

This was an action instituted against the Defendant who had been the tutor of the plaintiffs, and during his administration had received sundry sums of money belonging to the Plaintiffs, with part of which it was alledged that the Defendant purchased a house in his own name and the object of this action was to declare the house to be the property of the Plaintiffs, and the Defendant adjudged to quit the same, and to account to the Plffs for the rents and revenues thereof.

To this action the Defendant pleaded an exception peremptoire en droit, that by reasons alledged in the declaration the plffs could not maintain the action. But on the authorities cited by the Plaintiffs counsel the Court over-ruled the exception.

see. Regus D' Antoine. vol. 198. p. 477.
Mesle Inst. p. 609. ch. 16.
Hulot's Dig. 3 vol. p. 497. p. 543. tit. 9
2 Poth. Pand. liv. 26. tit. 9. art 1. p. 198 in fo.

Friday 18 April 1828.

No. 1288.

Dezery.—
v.
Montreal
Water Works

This action was instituted against the Defendants, to compel them to dig up and carry away certain pipes which they had laid down in and upon a certain lot of land belonging to the plaintiff for the purpose of conveying water through and across the said lot, thereby claiming and establishing a right of servitude upon the said lot of land without any title or right thereto, and to the great injury and damage of the plaintiff —

The Defendants pleaded for exception, that the pipes in question were laid down in and upon the said lot of land with the Consent and permission of the lessee of the said plaintiff for and during the space and term of seven years, being the period for which the said lessee was entitled to hold the said lot of land under his said lease, the Defendants denying that they claim or pretend to have any right of servitude upon the said lot of land, or any right to lay the said pipes in and through the same beyond the said term of seven years — and for and during which time only they claim a right to keep and retain the said pipes in through and upon the said lot of land by virtue of the authority and consent aforesaid. —

To this plea the Plaintiffs demurred and after hearing the Court maintained the plea and admitted the parties to make proof thereon, on the principle that as the lessee had the full enjoyment of the lot during his lease, and thereby had a right to dig the soil and to lay pipes therein or thereupon as he might see fit he had a right to give a license to the Defendants to do so — that the claim set up by the Defendants did not amount

amount to a Servitude upon the said lot of ground but merely the right held by the lessee, which could not be so considered. —

No. 1177.

Smith. vs Berichon

This was an action en declaration d'hypothèque

The plaintiff by his declaration stated, that on the 26th day of November 1824, one Amable Thibault and Marie Louise Goyet his wife, by a certain act or deed made and executed before McKay public notary, — purchased and acquired of and from the Defendant a certain lot of land or emplacement therein described, on which sale so made there accrued and became due to the plaintiff as substituted in the rights of the Seignior of the Seigniory of Mille Isles in which the said lot of ground is situated, a sum of 333 livres equal to £13„17„6 Currency for lods et Ventes. That afterwards by a certain deed of transport made and executed before Globensky and his colleague public Notaries, bearing date the 2d day of May 1825 Mr Dumont, Seignior of the said Seigniory of Mille Isles, transferred his right in and to the said sum of money so due by the said Amable Thibault, for a valuable consideration — That the said sum of money being in arrear and unpaid the said Pliff on the 20th day of February 1826 obtained Judgment in this Court against him for the same with interest and costs thereon. — That since the rendering of the said Judgment, vizt. on the 28th day of July 1826, the said Defendant became the owner and proprietor and

and is now in possession of the said lot of land which became and now is mortgaged and bound for the payment to the said plaintiff of his demand aforesaid – Conclusions as in the action en dec. d'hyp^que

Plea. – That the Defendant never sold to the said Thibault the lot of land in question in and by the said act or deed of 26 Novr. 1824, the same containing only a promise to sell which was never executed inasmuchas the said Thibault never fulfilled the conditions upon which the said promise was made, in consequence whereof the said promise was rescinded and annulled by an act of 28 July 1826 and the parties reinstated in their former situation as if no such promise had ever been made. That by law no lods et ventes accrued or became due to the said plaintiff under or by virtue of the aforesaid act or deed of 26 Novr. 1824, and therefore the resiliation of it can create none – That the promise or undertaking of the said Thibault, or his condemnation in this respect could not affect or bind the said lot of land inasmuchas he was not the owner and propietor thereof, and could create no mortgage thereon. –

The replication was general and joining issue on the Plea. –

The deed of the 26e Novr. 1824, contained the follow^g stipulations and expressions – "Fut present Isaac
" Berichon &^ca lequel a promis et promet ceder, abandonner,
" et transporter à Amable Thibault & a son epouse, avec
" garantie de tous troubles generalement quelconques, un
" emplacement sis & situé &^ca autorisant ledit Amable
" Thibault et sa dite epouse à prendre possession du dit
" emplacement

" emplacement et dependances le douze du mois de —
" Decembre prochain. — La presente promesse de Cession
" et abandon ainsi faite &c — au moyen de la somme
" de quatre mille livres, la livre de vingt coppres, à
" compte de quelle somme ledit Isaac Berichon reconnoit
" et confesse avoir recu des dits Amable Thibault et son
" epouse, celle de Cent livres dt. Cours, qui lui a eté compté
" au vu des notaires soussignés, dont quittance d'autant,
" et pour les trois mille neuf cent livres dt. Cours restantes
" les dits Amable Thibault & son epouse ont promis et
" promettent, sous la voie ordinaire de solidité, —
" renonçant au benefice de droit accoutumé, les payer
" et bailler au dit Isaac Berichon, ou à ses hoirs et
" ayants Cause, comme suit, savoir, deux cent livres
" dit Cours le premier Mai prochain, trois cent livres
" dit Cours le premier Mai de l'année suivante, et
" ainsi continuer &ca Il est de convention expresse
" entre les Contractans, et a quoi ledit Isaac Berichon
" s'oblige et promet tant pour lui-meme que pour
" ses hoirs et ayans Cause, de passer titre & Contrat
" de vente du dit emplacement au dit Amable —
" Thibault et son epouse aussitot le second paiement
" fait, savoir le premier Mai 1826, et ce à peine &cu
" Telles sont les Conventions des parties &cu" —

Mr Beaubien for the defendant contended that the above act of 26 Novr. 1824 was merely a promise to sell and conditional and like the sales made à faculté de reméré. created no lods et ventes. — Repn. Vo Lods & Ventes, and That Thibault never having been the proprietaire incommutable of the said lot could not mortgage it. —

Mr

Mr Boston for the pltff on the contrary contended that the acte in question was an actual Sale of the said lot and carried lods & Ventes, — it is not the form of the act, but the legal import of the terms used by which its value and effect is to be determined refers to Rep^re v^o Lods & Ventes. p. 683. where the different kinds of acts are set out which are to be considered as amounting to a sale and conveyance of the property — here possession was to be delivered to the purchaser on a day certain — a part of the purchase money was paid, and term given for the remainder, and it is held, that where the price is agreed on and term given for the payment it operates a Sale of the property and creates Lods et Ventes. Potb. Trip. p/p. 140. 1. 2, & p. 168. — Prudhom. 223. —

The Court held the above act of 26 Nov: 1824 to be a sale and conveyance of the lot of land in question from the Defendant to Thibault and his wife, and thereupon gave Judgment for the Plaintiff. — see above authorities cited by Pltff and also Fonmaur. N° 207. p. 196. —

N°. 1260. —

Mc Grigor
v
Thatcher —

Action for wages —

The declaration is in assumpsit, & states that on the 14th day of February 1828 the Defendant was indebted to the plaintiff in the sum of £172. — for work & labor &c — which he undertook & promised

to

to pay to the Pltff — The declaration also contained a count for a quantum meruit & other money Counts

Plea — That the services set forth in the declaration were not done and performed by the plaintiff one year previous to the institution of the present action but long before and for all which the said Pltff hath been fully paid and satisfied, all which the Defendr is ready to verify on oath, or in such manner as the Court shall require. — And as to any work and labor done and performed by the Pltff for the Defdr within the year and day next before the bringing of the present action, the Defendr pleads non assumpt.

To this plea the Plaintiff demurred, further denying that his demand was prescribed in law, and that the prescription set up by Defendr had been interrupted by the acknowledgment of the Defendr. —

Peck for the plaintiff contended that prescription of the year and day could not be set up against the claim for wages, only in Case the servant had left the employment of his master a year & day before instituting his demand for his wages, but that where the servant remained constantly in the service of his master, as was the Case here, he was entitled to claim three years of his wages. — Repre vo Domestique p. 104 — Lacombe vo Salaires. — Bretonnier, Quest. de Droit. p. 148. Prescripn annale & de Six mois. —

Mr Walker for Defendant, contended that prescripn run against the whole demand of the Pltff, for his wages, whether he remained in the employment of his master or not — cites. art. 127. Coutume —

The

The Court maintained the plea of prescription but inasmuch as interruption had been alledged a day was given to the Pleff to prove his demand see. N. Denizt. Vo. Gages. §. 2. No. 3. – Poth. Obl. No 716.

No. 1271.

McCallum v. Grey. –

This was an action petitoire to recover from the defendant a certain lots of land which the Plaintiff claimed as his property. The nature of the Contest between the parties being sufficiently stated in the Judgment given by the Court, it is here transcribed. –

The court having heard the parties by their counsel, examined the proceedings and the evidence by them respectively adduced, and it appearing to this Court that the defendt. William Grey, had been by the late James McCallum, heretofore the plaintiff in this Cause, sollicited and induced to occupy and possess the lots of land in question, and to cultivate and improve the same, under a promise of the said late James McCallum that he would give and grant to the said William Grey and to his heirs a good and sufficient title and deed of conveyance of the said lots of land, but that the terms and conditions upon which such title & deed of conveyance was to be made and given, had not been proposed by the said late James McCallum, nor any stipulation had by and between the parties in regard thereof. And it further appearing, that the said William Grey did in good faith, and under such assurance on the part of the said late James McCallum, enter upon and take possession of the said lots of land, and

hath

hath since and from the year 1819, with the knowledge and consent of the said late James McCallum, and hath held and occupied the same, and hath made considerable improvements thereon — And considering that by the laws usages and Customs of this Province, and in order to facilitate and encourage the settling and clearing the waste lands held en Fief and Seigniory therein, every subject of His Majesty is entitled to demand & obtain from every or any Seignior, holding waste & ungranted lands in his Seigniory, a lot, or Concession of a portion of such waste and ungranted lands, to be by every such subject, his heirs and assigns held and possessed as his and their own proper estate for ever, upon the condition of cultivating and improving the same, and of paying and allowing to every such Seignior the reasonable usual and ordinary rents, dues, profits & acknowledgments which by the feudal tenures in force in this Province, are paid made and allowed to such Seigniors by their tenants or Censitaires for all such or similar lots of land — The said James McCallum therefore, as Seignior of the said Seigniory of St James, could not, nor can the plaintiffs by reprise d'instance, his legal representatives, maintain the present action to eject and put out the said William Grey from the possession and occupation so by him had and obtained of the said lots of land — but that the said William Grey, under and by virtue of the consent and promise aforesaid of the said late James McCallum and by the possession and occupation aforesaid of him the said William Grey so had and held, he the said William Grey did acquire and now hath a right to retain and possess the said lots of land in the said Seigniory of St James, and to have and obtain, from the said plaintiffs by reprise d'instance, or other legal representatives of the said late James McCallum, a good and sufficient title and deed of Conveyance of the said lots of land to him the said William Grey, his heirs and

assigns

assigns, on condition of paying and allowing to the said plaintiffs by reprise d'instance, or other legal representatives of the said late James M'Callum, being Seignors and proprietors of the said Seigniory of St James, the reasonable, usual and ordinary rents, dues profits and acknowledgments, which by law the said plaintiffs by reprise d'instance, or other the legal representatives of the said late James M'Callum, as Seignors and proprietors as aforesaid, are or may be entitled to claim, demand and have, as the legal consideration for the said lots of land — And it is therefore considered and adjudged that the present action be dismissed with Costs to the said William Grey — saving to the said plaintiffs by reprise d'instce their further recourse as they may be advised —

—

Saturday 19th April 1828.—

No. 1336.—

Gaudrie. } Action to indemnify and save harmless the
Allvoir.— } Plaintiff on a sale made to him

The plaintiff by his declaration stated, that on the 30th day of August 1803, in and by a certain act or deed of sale, executed before Sukin and Delisle public Notaries, the said Defendant sold and conveyed to the said plaintiff, with promise of warranty against all trouble, mortgages and other incumbrances whatsoever, a certain lot of ground mentioned and described in the said declaration, for and in consideration of the sum of one thousand livres, equal to £41.13.4, which said lot of ground the said plaintiff hath since held and possessed as the owner and proprietor thereof.— That notwithstanding the said agreement so contained in the said deed of sale, it now appears that the said lot of ground, at & before the making and executing the said deed of sale, was and still is, mortgaged and hypothecated to the Gentlemen Ecclesiastics of the Seminary of Montreal Seigniors of the Seigniory of Montreal, in divers — Seigniural rights accrued on the said lot of ground amounting to the sum of £11.3.11 Cy. for three several lods et ventes, accrued and become due on three several sales and mutations thereof— by means whereof the said plaintiff is in danger of being troubled and disturbed in the enjoyment and possession of the said lot of ground, and may be compelled to pay the said sum of £11.3.11, or to deliver up the said lot of land to be sold for the payment and satisfaction

of

of the same; the which said sum of money the said Defendant refuses to pay and satisfy to the said Gentlemen Ecclesiastics of the Seminary of Montreal but hath left the same unpaid to the damage of the said plaintiff, twenty pounds.— And thereupon concluding that by the Judgment of the Court the Defendant may be adjudged & condemned to pay to the said Gentlemen Ecclesiastics of the Seminary of Montreal, Seigniors as aforesaid, the said sum of £11. 3. 11, and produce and deliver to the said plaintiff a discharge and release from the same, and on default thereof that the said defendant be condemned to pay to the said plaintiff the said sum of twenty pounds for his damages aforesaid, with interest and Costs.—

Plea — was a defense au fond en droit, or demurrer to the action, that by reason of the matters and allegations contained in the declaration the Pltff could not maintain his action aforesaid against the Defendant — and further denying the truth of the facts in the said declaration alledged.— The Replication joined issue on this plea.—

Mr Bibaut for the Defendant contended, that this action could not be maintained, the object of which was that the Defendant should be condemned to pay money to third persons not parties to the suit. That under the clause of warranty in the deed of sale the plaintiff might maintain an action en garantie if troubled, but the Plaintiff does not shew that he has been troubled, and without which after a possession of 25 years the Plaintiff cannot

call

call upon the Defendant to pay a debt due to the Seigniors, for which he cannot be troubled, as they cannot have an hypothecary action after the lapse of ten years possession for any rights due to them prior to the sale to the Plaintiff - cites. Instructions sur les Conventions. p. 31. Lacombe vo Eviction No 7. & 8. Id. vo Prescription No 5. - 1 Vol. Pet. Court. de Fer. p. 48. art. 12 1 Bouy: 293. 4 - Poth. Vente No 1. & 48. -

Sewell for the Pltff - This action is to carry into effect the stipulation contained in the deed of sale made by the Defendant to the plaintiff, by obtaining a discharge from an existing mortgage at the time of the sale, from all which the Defendant warranted the lot of land to be free and clear - This action is recognized and allowed by law. 2 Argou 356. 2 Prost de Royer. 688. - 2 Soulet 230. - Dig. liv. 5. tit. 1 art. 1. - The action en declaration d'hypothequie, the actions Confessoire and negatoire are of a similar description with the present, and may be instituted at anytime where prescription does not intervene, so also the action to preserve a right of mortgage not yet due - Instructions sur les Conven: 265. - So also in the case of a Caution C. Denvt. vo Caution No 29. Poth. Ob. No 441. 2 Argou 372 - 2 Bouy. 434. Tr: de Subrogation. 466. - There is an authority from Poth. in his Cont: Vente No 86 - which is in point. N. Denvt. vo Garantie. - Coll. of reported Cases by Perrault p. 28. 29 - a Judgment rendered in a similar case. -

By the Court - There is no doubt, but the Court is enabled in cases of this discription to grant relief where an injury is likely to arise to either of the parties

parties upon their respective undertakings in a deed of sale— There can be no doubt but that the Defendt is bound to warrant and defend the plaintiff against all mortgages existing on the lot of land in question at the time of sale,— but the action here is of a peculiar description— it claims, that the Defendant be adjudged to pay a sum of money to third persons to discharge a particular mortgage said to exist on the said lot, and in default thereof to pay damages to the pltff— the case therefore rests in a great measure upon the validity of the mortgage thus alledged to exist, as in this case sufficient must be stated in the declaration to shew on what grounds and to what amount the mortgage was created or existed in the same clear and positive manner, as if the action had been instituted by the mortgagees to recover the amount— this constitutes the gravamen of the action, and the conclusions are adapted thereto— but the demand here is not clearly set out and therefore the exception in law raised by the— Defendant will apply— the declaration is not sufficiently descriptive of the nature of the debt or mortgage set out, the payment and discharge whereof is demanded it is merely said, that at the time of the sale to the plaintiff there existed a mortgage on the lot in question in favor of the Seigniors of the Island of Montreal for a sum of £11.. 3.. 11 for lods et Ventes on three different sales and mutations thereof, but when, or on what terms and conditions these Sales and mutations were made, does not appear— Now it is evident that an action for lods et ventes, on three sales or mutations, stated in this vague manner, could not be maintained, and in this case although the Defendant has

not

not set up a plea of prescription, yet this might have been done, had the dates and times of the mutations in question, been sufficiently set out, yet the Court ought to deprive him of the benefit of this defence to a better declaration, and condemn him now to pay a debt which legally he is not bound to pay: and even the consideration that the Contract between the parties here had been made so long ago as the year 1803, would operate as an equitable ground against adjudging the Defendant to discharge a Mortgage for which no demand was made agt the said plaintiff, nor any proceedings had which could constitute any molestation to him in his possession on this head also the Defendant might thus be deprived of a legal ground of defence, had he been called to warrant and defend an action instituted against the plaintiff in this respect upon a mortgage claim of so long standing — We think the action is ill brought and not founded in this shape and we must therefore dismiss it with Costs.—

June Term 1828.

Thursday 12th June.

No 1667.

Ex parte –
On Petition of
Geo: Selby, for a
Decret Volontaire
and
Moffat
vs
Hallowell
Irvine & Co
Selby — } opps

In these Causes united –

On the Petition of George Selby and others a decret volontaire was had of certain property which they had purchased of William Hallowell and wife – The Sheriff having made return to the writ of execution sued out for effecting the decret, with a statement of the amount of the adjudication made to the said Petitioners, George Moffat made his opposition afin de conserver for a mortgage claim on the property so adjudged, of a date anterior to the sale made by Hallowell to Selby – Messrs Irvine M'Naught & Co also put in their opposition for a mortgage debt due them by the said Hallowell, but of a date posterior to that of Moffat – The opposition of Moffat was resisted both by Selby and by Irvine M'naught & Co on the following grounds. –

In the year 1796 William Hallowell went to the United States of America and was there married to Miss Henry, he had his domicile in Montreal in Canada, where he returned immediately after his marriage. – In the year 1820. William Hallowell borrowed a sum of £700 from Mr George Moffat, for which he gave him a notarial obligation. On the 16th Sept. 1824 William Hallowell obtained credit from Irvine M'Naught & Co – for sundry sums of money for the payment whereof William Hallowell and his wife joined in an Obligation before a Notary – and – George and William Selby having paid monies to William Hallowell and his wife on the purchase made from them of the lot of land now sold by decret volontaire, also claimed

by

by opposition in the present instance — The claims of Irvine M'Naught & Co — and of George and Wm Selby were founded on this principle, that as the wife of Wm Hallowell was bound to them for the payment of their respective debts, they were entitled to rank as Creditors of the said William Hallowell from the day of his marriage with his said wife, inasmuchas they claimed under the right of indemnity which the wife was entitled to exercise upon the property of her husband from that day for all debts contracted by her jointly with her said husband, and consequently that the said Opposants were entitled to be collocated and ranked in order upon the monies levied prior to the said George Moffat, who held a mortgage from the said William Hallowell alone. —

The question now agitated between the parties was whether the wife was entitled to any right of indemnity upon the property of her husband, where there was no marriage Contract or Stipulation to this effect, and from what period such right of indemnity should run. — After hearing the parties, the Court gave its opinion as follows. —

According to the principles established by the Custom of Paris, the action of the wife for the remploi des propres, and her action of indemnité, for debts contracted with him during the Community, flow from the same source, and must be governed by the same Rules.

Before the year 1580, when that Custom was reformed, this action of remploi was unknown, the jurisprudence up to that period being, that if the wife consented to the alienation of her propre Estate during coverture, she was presumed to do so from motives of interest and advantage to accrue to her therefrom,

inasmuchas

inasmuchas the Community, in which she had a share, would thereby be benefited — but should this expectation fail, she was nevertheless liable to the consequences of an alienation she had voluntarily made in common with her husband — Whatever disadvantage might accrue to her in this respect, she had no recourse given to her, — hence arose the old maxim — "qu'un mari ne peut se "lever trop matin pour vendre les propres de sa femme".

Inconveniencies and hardships however had been felt in some instances from this general principle of law, from that power and authority which the husband had a right to exercise over the person and property of the wife, and from the means thereby used of creating an indirect advantage in favor of one or other of the parties touching their Community rights, which was contrary to the general spirit of the Custom — And we therefore find, that in some Cases even prior to the reformation of the Custom, a clause was introduced into Marriage Contracts, as a necessary precaution & security for the interest of the parties, stipulating the remploi des propres aliénés, which clause was allowed by the Courts to have its effect, and was considered in principle so just and equitable, as to lead to the adoption of the 232d article of the Custom, as a general rule for regulating the rights of the parties in this respect — This article says — "Si durant "le mariage est vendu aucun heritage ou rente propre "appartenant à l'un ou à l'autre des Conjoints par mariage "ou si ladite rente est rachettée, le prix de la vente ou Rachat "est repris sur les biens de la Communauté au profit de "celui auquel appartenoit l'heritage ou rente, encore "qu'en vendant n'en eut été convenu du remploi ou recompense "et qu'il n'y ait aucune declaration sur ce faite". —

This article established a new principle of jurisprudence in the County, and failed not, as is frequently the Case upon the introduction of a new law, to create new questions and difficulties in the right interpretation of it. — Here we find two questions among the first agitated — First,

— Whether

Whether the marriage Contracts made prior to the reformation of the Custom in which there was no express stipulation of the remploi des propres, the parties might nevertheless take the benefit of the new law? and after some contradictory decisions, it was at last held that in such case, the old rule of law under which the contract was made, should be maintained, and no remploi allowed. — The other question was, whether any mortgage accrued to the wife for this right, and at what period it attached upon the property of the Community, or of the husband for the remploi, whether from the date of the marriage Contract, or from the day of the alienation made of the propre of the party? And we find that for nearly a space of thirty years after the reformation of the Custom, this question was differently decided in the different Courts — some of them allowing it from the one period, and some only from the other, until it was finally settled, that the mortgage should remount, to the date of the marriage Contract, or of the marriage. —

The question of indemnity for debts contracted by the wife jointly with her husband, which prior to the reformation of the Custom was unknown, followed closely after that adopted in regard of the remploi, as founded on the same principle, and growing out of the same rule of law — for it was considered unjust that the wife who renounced to the Community, should nevertheless be held liable to pay the debts of that Comm^ty over which she had no controul, or that she should be made answerable for monies which the husband had received, and of which he disposed as he thought fit. And although this principle of Jurisprudence came to be admitted, where the Indemnity was expressly stipulated in the marriage Contract, yet the same difficulty occurred in regard of the right of mortgage for this Indemnity, as had at first occurred in —

settling

settling the mortgage in the case of the Remploi, that is, whether it should attach from the date of the marriage Contract, or from the date of the obligation entered into by the wife. — The great and strong reasoning against granting the mortgage from the date of the marriage Contract was — that as this article of the Custom is silent on the subject of mortgage, the legal presumption to be taken was, that the general principle of law should prevail, that the first in point of time should be the first in mortgage, and that — until the debt was contracted, the mortgage for the paymt. of it could not exist, and that in the determination of a new question of this kind, reference should be had to the Customary law of the neighbouring Provinces which had adopted any rule of decision on the point, and particularly that of Brittany which had been reformed in the same year with that of Paris, and by which it was expressly provided, that the mortgage of the wife in this Case, should attach only from the date of the obligation, as being the safer and most reasonable principle. — The decisions of the Courts of Paris upon this question of mortgage, as well in regard of the — Remploi, as of the Indemnité, were for many years unsettled and contradictory, but at last this principle was adopted in the Parisian Jurisprudence, to allow to the wife her mortgage, from the date of her marriage Contract, for all the stipulations therein contained. —

The first arret we find on this subject, which was considered as settling this jurisprudence, is the famous Arret de Coignet, as it is called, rendered in the Grande Chambre on the 17e March 1608, referred to by Ferriere in his Grand Comre on the 237e art. of the Custom, but more fully reported by Tronçon, on the 234e art. of the same Custom — he states it thus. — "En la Coutume " de Paris, s'il est stipulé par le Contrat de mariage, que " la future epouse ne sera tenüe ni obligée aux dettes de

" son

" son mari, bien qu'elle s'y fut obligée — l'on a demandé
" de quel effet est cette Convention quand la femme —
" s'oblige avec son mari, et de quel Jour? — Il y a —
" diversité d'arrets, tant il y a d'incertitude à présent
" aux choses jugées. — Jugé par un arret notable de
" l'audience de la Grande Chambre du 17 Mars 1608, pour
" la femme de Coignet, bourgeois de Paris, marchand
" joallier, qu'elle viendroit en ordre d'hypotheque sur
" les biens, tant pour le remplacement de ses deniers
" dotaux, que de ses propres aliénés, pour son acquittement
" des rentes et autres dettes ou elle s'etoit obligée avec son
" mari, du Jour de son Contrat de Mariage — de façon
" que les Creanciers de Coignet aux quels la femme etoit
" obligée, obtinrent la preference d'hypotheque contre les
" Créanciers du dit Coignet, ou il etoit seul obligé, bien que
" plus ancien en hypotheque — La raison du dit arret
" et ce qu'il y a de particulier en icelui, et en son espece,
" est a Cause de la clause expresse qui avoit été en son Contrat
" de mariage, que pour les dettes ou elle auroit parlée,
" elle en auroit recours sur les biens de son mari". +

Subsequent to this arret we find numerous decisions to the same effect, and it soon ceased to be a question of doubt in the Jurisprudence of the Country, as to the right of mortgage of the wife for all the stipulations, + contained in her marriage Contract, and one Writer observes that in consequence it became a matter almost of stile in all the marriage Contracts to insert the stipulation of indemnity in them. —

We come now to the consideration of the question more immediately before us, whether this principle of indemnity in favor of the wife, and the right of mortgage thereon, will attach equally without stipulation in the marriage Contract, or where there is no marriage Contract regulating the rights of the Conjoints in the Commté The question is of importance, and not without difficulty in this Country, where we have not been able to find any decision to guide us, nor time to make research

in

in the records of the Courts established since the year 1663 — We must therefore look at the decisions in the French Courts as well prior as subsequent to this period in order to ascertain, what the law then was, and upon what principles it has finally been settled and established. —

It is evident, from the doubts and difficulties which occurred in allowing to the wife her mortgage for her remploi and indemnité upon the Estate of her husband, even in the case of stipulation in her marriage Contract, that it was not then contemplated that such right could exist, where there was neither stipulation nor marriage Contract. — We ought not therefore to be surprised, when the question did occur, that it should occasion much contest and variety of opinion, being so new and apparently so different from the rule heretofore adopted in regard of the remploi and indemnité, and so contrary to all general principle upon which Mortgage is established; and we consequently find that the decisions of the Courts here also were at variance for many years, until towards the latter part of the Seventeenth Century, when it became a settled principle of decision in the Courts, and of Jurisprudence in the Custom of Paris, that the mortgage for the indemnity of the wife, took place from the date of the marriage Contract, without any express stipulation for such indemnity therein, and where there was no marriage Contract, from the day of the celebration of the marriage.

We will take a short view of those different arrets and decisions, and the opinions of some law writers thereon, in order the better to explain the principle upon which we have formed our opinion upon the question. —

From the best research we have been able to make and the assistance given us by the advocates in the Cause we have been able to find but few arrets applicable to the question, these however we think will be sufficient for our purpose. —

We

We shall first notice the arrets which reject the right of mortgage here claimed — The first we meet with is from Troncon on the 234th article of the Custom where after giving the above arret de Coignet, where the mortgage for the indemnity was allowed in consequence of the stipulation in the marriage Contract — he then goes on to say, "Depuis il a été
" jugé, par arret de l'année 1626 qu'en un Contrat de
" mariage, ou il n'y avoit pareille clause, la femme
" n'auroit hypotheque ~~que~~ sur les biens de son mari,
" que du Jour des Contrats aux quels elle se seroit obligée"

The next is an arret of the 7th Sept 1656 referred to by Ferriere. 3. Gr. Comre p. 424 - and reported in the 1 Journ. d' Aud. liv. 11. ch. 35, thus — "Par arret du 7 Sptre
" 1656, dans l'ordre des biens de M. Pierre le Boucher —
" Tresorier de la Marine, les créanciers de la femme furent
" colloqués du Jour du Contrat de mariage pour les —
" sommes aux quelles, elle doit solidairement obligée
" avec ledit Boucher son mari, en consequence de la —
" clause d'indemnité portée par ledit Contrat de mariage
" auquel Cas seulement, la femme peut pretendre hypotheque
" du Jour de son Contrat de mariage — autrement, l'hypothque
" n'est que du Jour des obligations" —

There is another arret of 21 Augt 1660, reported from the same Journal d' audience, it says, "La
" maxime qui a été etablie, est, qu'à l'egard de la —
" restitution des Conventions matrimoniales, la femme
" doit être colloquée du Jour de son Contrat de mariage,
" mais pour les sommes ou elle se trouve obligée pour
" et avec son mari, elle n'a pas son hypotheque du Jour
" de son Contrat de mariage, mais seulement des Jours
" et dates des Contrats qu'elle a souscrits, ou des sentences
" des condamnations contre elle intervenües" —

The arret cited at the bar, as of 5th Febry 1661, as referred to by Thibault, is mistated — there is no such arret to be found it ought to be 5 Febry 1651, as contained in the same Ch: of the Journal d' Aud: with the last two arrets — but it

does

does not apply to the Case before us.+

We will not here take into account the opinion of Thibault which has been cited to us, because he writes on the Coutume de Bourgogne, any further than this, that he as well as several other writers upon different Customs of France, held the same opinion with the arrets just cited, either from similar principles of decision adopted by those Customs, or from express enactment on the subject; and we must allow that the doctrine of a tacit mortgage for this Indemnity was by many writers on those Customs reprobated as dangerous and inadmissible.+ The opinions of such men and the arrets here cited, might well be considered as sufficient to settle the jurisprudence among us on this point, and so we would think, if no other decisions and authorities of a contrary nature were to be found – these we must also consider +

On the other side of the question we find two arrets cited by Ferriere in his Gr. Comre on the 237th article of the Custom, where after referring to an early arret of the 17 March 1605, which had allowed the right of mortgage from the date of the marriage contract, and which, he says, notwithstanding the subsequent decisions to the Contrary, afterwards became the rule of decision – he adds + "On trouve " entre autres deux arrets qui ont jugé en faveur de " l'hypotheque, quoique par son contrat de mariage " l'hypotheque ne fut point stipulée – le premier est " du 25 Août 1642 en la 5e Chambre des Enquêtes" – The same arret is cited by Mr Lepretre in his arretés p. 51. in these terms + "Jugé, apres avoir demandé " la question aux Chambres, que les heritiers d'une femme " qui s'est obligée conjointement avec son mari, ayant " renoncé à la Communauté, ont indemnité pour la " Somme entiere pour laquelle la femme s'est obligée " contre les heritiers du mari, encore que dans le Contrat

" de

" de mariage, il n'y avoit aucune clause pour —
" l'indemnité de la femme." —

The second arret referred to by Ferrière, and more fully reported by Louet, is of the 7e Septr 1645, it says,

Louet. lettre. R. 30. No. 16. —

" Le meme Jugé pour l'hypotheque de la femme sur
" les biens de son mari, à cause de l'indemnité des dettes
" aux quelles elle s'est obligée pendant la Communauté,
" à laquelle elle renonce, et qu'elle a non seulement action
" mais aussi hypotheque du Jour de son Contrat de
" Mariage, bien que par icelui, il n'y ait aucune —
" stipulation d'acquit, par arret du 7 Septr 1645 — donné
" en la Chambre de l'Edit, au rapport de Mr De Savonnieres
" au profit de Dame Lse Dapchon, veuve de Messire Jean
" Louis Destain"

"Le meme auroit lieu quand bien il n'y auroit point
" de Contrat de Mariage, comme il est notoire, que la
" plus part des personnes rustiques, ou de mediocre condition
" n'en font point, la loi suppleant ce defaut". —

We may also remark here, an arret cited by Brodeau on Louet, lettre F. 17. No 6. of the 17e April 1564, not from any thing determined by that arret, but from the — observations made by Mr Brodeau upon it — The arret is thus stated — "Pareil arret donné en la
" Grande Chambre sur l'instance le 17 Avril 1564, qui
" condamne Don Diegue de Mandosse a decharger et
" acquitter les heritiers de Dame Agnes de la Mothe sa
" femme, de toutes les dettes crées par lui et elle depuis le
" Jour de leur mariage jusqu'à la dissolution d'icelle
" avec depens" — Upon this arret Brodeau observes,
" ce recours pour la veuve ou ses heritiers est solidaire
" et se peut exercer, non seulement sur les biens de la —
" Communauté, mais aussi sur les propres du mari, ou
" ses heritiers; pour lequel recours et indemnité, la veuve
" suivant les derniers arrets, a hypotheque du Jour de
" son Contrat de mariage, soit qu'il contienne la clause

" et

" et stipulation ordinaire, que la femme renonçant à
" la communauté, ne sera tenue des dettes d'icelle, encore
" qu'elle y eut parlé et s'y fut obligée, et en sera acquittée
" par le mari, ou non; bien qu'il ait été autrefois jugé
" par quelques arrets qu'a défaut de stipulation dans
" le contrat de mariage la femme n'a hypothèque,
" que du Jour de l'obligation en laquelle elle est entrée
" avec son mari." This observation of Brodeau is of moment, as he was not only a writer of celebrity, but because he lived about the time when these questions were agitated in the Courts, and died about the year 1650.—

To these decisions or arrets, we will add the opinions of some writers on the point, which — although of later date than the year 1663, yet tend to confirm the correctness of the principle upon which these decisions are founded.—

Lamoignon in his arretés. tit 21. N° 65. p. 128. decides thus, "s'il n'y a pas de contrat de mariage
" l'hypothèque pour les Conventions matrimoniales
" même pour le remploi des propres, et l'indemnité
" des dettes, a lieu du Jour de la benediction nuptiale
" faite publiquement avec les solemnités requises."

By Mr Auzanet's letter to Mr Lamoignon dated 1 Dec. 1669, we are enabled to see at what time these arretis, were settled and composed, as Mr. Auzanet was one of those great lawyers of the day, who assisted upon that occasion, and these arretés come closely to the time when this point was agitated in the Courts.—

Pocquet de Livonniere. Reg. du Droit Fr. ch. 5. Des Hyp: N° 17.— says, "Les femmes ont une hypothèque
" tacite sur les biens de leurs maris, pour la restitution
" de leur dot, pour leurs remplois, pour leur indemnité,

" pour

" pour leur douaire du Jour de leur Contrat de mariage
" passé devant Notaires, s'il y en a, sinon, du Jour de
" la benediction nuptiale."—

Lacombe, v^o Indemnité, says the same—

—Bretonnier. Quest. de Droit. p. 216. v^o Paraphernaux
Hypotheque — after stating the right of mortgage of
the wife on the property of her husband in the Provinces
governed by the Droit Ecrit, he adds — "Il n'en est pas
" de meme dans les Pais Coutumiers, l'hypotheque des
" remplois et indemnités de la femme y a lieu de plein
" droit, et sans stipulation, du Jour du Contrat de mariage."

"Les anciens arrets n'accordoient à la femme cette
" hypotheque tacite que du Jour de l'alienation de
" ses propres, ou des obligations par elle contractées — mais
" la dernier Jurisprudence accorde à la femme une
" hypotheque legale du jour du Contrat de mariage
" pour tous ces objets. — Cette Jurisprudence est
" fondée sur ce que la Coutume de Paris, et les autres
" Coutumes semblables, etablissent le mari chef de la
" femme, la constituant sous sa puissance, et lui
" donnant l'administration de tous ses biens, il a
" paru juste de donner à la femme un recours sur les
" biens de son mari, dans le Cas, ou par un effet de son
" pouvoir, ou de sa mauvaise administration, il lui
" causeroit quelque perte, et comme l'effet doit remonter
" à la Cause, l'hypotheque de l'action de la femme doit
" remonter au principe du pouvoir du mari, qui est
" l'epoque du mariage"

To the opinions of these writers we might add
that of many others, who have explained the
ground and reason why this Jurisprudence ought
necessarily to be admitted as a principle of Customary
law — see LeBrun. liv. 3. ch. 2. dist. 6 N° 1. & N° 4.
3. Fer. Gr. Com^re on 287e art. p. 426. N° 20. in fine & et N° 21.

Hericourt

Hericourt Vente d'Im. 1 Vol. p. 237 — 2 Ravot sur Perrier p. 304. 305 — Poth. Intr. au 10e Tit. Cout. d'Orl. p. 320. 321 — Id. Communauté. No 763. Renusson des Propres. Ch. 4 Sec. 8. No 18. p. 203 —

We shall content ourselves with citing an Extract from Le Brun, & another from Hericourt —

Le Brun. (loco citato) says "L'indemnité de la femme " est à peu près semblable à l'action de remploi qu'on lui " a donné, et qui tendant à lui faire avoir un recours " contre son mari pour les dettes de la Communauté " aux quelles elle s'est obligée, lui donne lieu comme le " remploi de conserver du bien pour sa subsistence et celle " de sa famille, quand l'état des affaires de son mari " l'oblige de renoncer à la Communauté — Cette Indemnité " est legale comme le Remploi, les arrets ayant jugé " qu'nulement l'article 232 de la Coutume de Paris " a rendu le remploi legal, si l'indemnité n'est " aussi legal, et n'a lieu de plein droit — parceque les " dettes feroient sortir des mains de la femme le bien " qu'elle tacheroit de recouvrer par ses remplois, les " femmes s'obligeant plus aisement qu'elles ne vendent, " et s'obligeant presque toujours à l'instigation de " leurs maris, qui restent saisis des deniers empruntés " comme maitres de la Communauté". —

And No 4 — he says — Sur ces exemples on a établi l'hypothèque de l'indemnité du Jour du contrat de mariage, ou du Jour de la celebration du — mariage quand il n'y a point de Contrat —

Hericourt — observes, "Mais l'hypothèque " tacite, etant une fois admise, sur le fondement " que le mari est administrateur des biens de sa " femme, elle doit avoir lieu le meme Jour pour tout " ce qui depend de l'administration. — Les memes " raisons qui ont engagé le Parlement de Paris de

" donner

" donner une hypotheque à la femme du Jour de
" son Contrat, ou de la celebration du mariage pour
" le remploi des propres aliénés, l'ont aussi determiné
" à lui donner une hypotheque de la même date, pour
" la recompense des dettes qu'elle a contractée avec son
" mari, ou par son autorisation — Car il n'y a pas —
" moins d'inconvenient pour la femme d'engager ses
" propres en contractant des dettes, qu'en alienant
" les fonds".—

If these reasons are recognized as sufficient to create a tacit mortgage in favor of the wife upon the property of the husband, it matters little what the contradictory opinions and arrets of the Courts may have been on the subject, or whether rendered before or since the year 1663, for these reasons were equally just, and equally true, as well before as since that period, and the latter arrets can be considered only as declatory of what the law was, and how it ought to have been administered — if the principles which govern the Remploi and the Indemnité are the same and founded on the 232ᵈ article of the Custom, those principles became as much a part of the law of the land from the day that article was enacted as ~~they~~ at any future period — Whatever variance there may have been in the opinion of the Courts the law is still the same, as is now too well settled to admit of doubt.— Where are we to look for the true principles of the Custom any law of Paris on this point?— Certainly not in the conflicting opinions of the Courts at any particular period for these can establish no certain Jurisprudence (of which we have daily experience) but in that uniform

uniform course of decision which elucidate the grounds and principles upon which it ought always to have stood, and by explaining to us the nature of the respective rights of husband and wife in the Community, as growing out of those articles of the Custom by which the Community is established, and shewing us that the right of indemnity is innate in the Community, is coeval with it, and exists during its continuance.

One of the principal Causes which occasioned so much difficulty on this subject in the Courts of Paris, appears to have arisen from the contradictory opinions of writers upon other Customs which held a different jurisprudence, and which seems to have had a strong influence with those Courts — And after all, the fraud and injustice which this principle of indemnity is supposed to introduce, is but the fraud and injustice which daily arises from not taking that sufficient Security which every man has in his power to exact or obtain — for it was no doubt as much in the power of Mr. Moffat to have obtained the same security for his debt as the other Opposants obtained if he has been satisfied with the lesser Security, he must expect that the better Security must be first satisfied — We would here refer to the observations of the Commentator of Perrier, who wrote on the Custom of Bourgogne, whose disposition on this question was contrary to that of the Custom of Paris — he says — "Sur quoi "il

2 Ravior sur Perrier p. 304. 305. — Quest. 251. —

" il s'eleve une autre difficulté, qui consiste a savoir
" de quel Jour la femme aura son hypotheque sur
" les biens de son mari pour son indemnité? — Sera-
" ce du Jour de son Contrat de mariage, ou du Jour
" de l'obligation contractée? — Brodeau nous —
" apprend que par l'ancienne jurisprudence du —
" Parlement de Paris la femme n'avoit son hypotheque
" que du jour de l'obligation, à moins que dans le
" Contrat de mariage il ne fut stipulé, que cette hypotheque
" pour l'indemnité remonteroit à la date du Contrat
" de mariage, mais que par les arrets plus recents
" cette hypotheque a été donnée à la femme du Jour de
" son Contrat de mariage quoi qu'il n'y eut point de
" clause expresse dans le Contrat" — Voici les
" remarques — Cette jurisprudence me paroit la plus
" saine — et quoique je ne la donne point pour —
" maxime en Bourgogne, je crois que c'est celle qu'on
" y doit suivre, parceque si la femme emprunte
" pendant la Communauté et s'oblige avec son mari
" ou pour lui, le mari, chef de la Communauté en
" profite; c'est un fond qui est entré en cette Societé
" dont il est le maitre absolu — ainsi c'est à lui a la
" rendre utile, et dans le cas ou elle ne l'est pas, la
" femme qui renonce et qui par la Coutume, a droit
" de renoncer, redemande sa dot, et ses propres francs
" de toutes dettes — et à qui forme-t-elle cette demande?
" a son mari, et en vertu de son Contrat de Mariage;
" Donc par cette action le mari est tenu, par la loi du
" Contrat de mariage, sans aucune autre stipulation
" speciale

" Speciale de garantir sa femme et de l'indemniser de la
" perte ou de l'alienation de sa dot et de ses anciens, sur les siens
" propres?— Ceux qui soutiennent le contraire opposent la
" loi 4ª de pignoribus & hypothecis, suivant laquelle, —
" l'hypotheque ne se contracte que par la Convention — mais
" c'est une petition de principe, puisque je pretends, que la
" convention inest, dans le Contrat de mariage; ils opposent
" qu'un mari, qui auroit contracté beaucoup de dettes, pourroit
" faire passer avant ses anciens Créanciers, ceux qui seroient
" posterieurs, et aux quels la femme seroit obligée — Cela est vrai —
" mais cela est juste — Ces derniers Créanciers ont eu la precaution
" de se faire obliger la femme — cette vigilance doit leur servir,
" ils exercent les droits de la femme, ils sont colloqués sur elle:
" Si elle n'eloit point obligée, ne passeroit-elle point avant
" ces Créanciers à la date de son Contrat de mariage? — Quo
" invidia, que ceux qui exercent ses droits fassent valoir la
" meme hypotheque? "—

It must be allowed, that had any new law been made in France, subsequent to the year 1663, affecting this principle or operating a change in the established jurisprudence — prior thereto, we are bound to say, that such change ought not to extend to this Country without special provision to that effect — but we see no new law on the subject, nor any change that can affect the question — It is true there was an Edict made by the King of France in the year 1673 for the enregistration of Mortgages, but this in nowise altered the old nor introduced any new law on the point before us, it merely says, that the wife shall have all her right of mortgage preserved to her without being subject to — registration — had more than this been intended, it would have been expressed in very different language from that contained in the 60th. and 61st. articles of this Edict. — We may however admit with Mr Ferriere that this Edict was the means of hastening the maturity of those principles

upon

upon which the right of Remploi and indemnité now stand, but they were before planted in the legal soil by the 232d article of the Custom, and the fruit they now bear spring from that root. —

Holding therefore that the wife is entitled to her mortgage on the property of the Community, as well as on the property of her husband, from the day of her marriage (there being no marriage Contract) for her indemnity for the debts by her contracted jointly with her husband during her marriage, it next comes to be enquired, to what benefits the parties here are entitled as her creditors, claims her rights under this mortgage? —

In this case the Community between the husband and wife would still appear to subsist, on which account it has been contended, that the wife cannot exercise her right of indemnity, inasmuchas it is only the property of the husband, and not the property of the Community, that is liable thereto, nor can it in either case be exercised be exercised during the existence of the Community. — The authorities of law however clearly show, that the property of the Community is liable to this indemnity — the general language of those authorities, it is true, say, that it is the biens du mari which is so liable, but the property of the Community must be considered in all cases the property of the husband quoad this right, and all other rights of the wife against him, and some of the authorities go so far as to say that this right ought to be exercised first against the property of the Community, before recurring to that of the husband, as distinguished from that of the Community —

Brodeau sur Louet lettre F. 17. No. 7. p. 735.

O. Denizt. vo. Hypothqm No 81. Sec. 5.

If therefore the property of the Community be thus liable it necessarily follows, that when this property is seized and sold, the right may be exercised, otherwise it would be wholly lost — the same as in all other cases, where the right is in danger of being lost, it may be exercised, even before the debt becomes due. —

It

It is however certain that this right of indemnity while the Community subsists, cannot be exercised for the whole of the debt contracted by the wife jointly with her husband, for until she renounces, she is bound for one half of the debts of the Community — Now the Community here would appear still to subsist, and it may continue to subsist and become opulent, and a renunciation thereto may never be made by the wife, in which case her Creditors cannot pretend to more than she herself could claim, that is, her indemnity for one half of the debt so contracted saving her further recourse and that of her Creditors, as she and they may be advised — Admitting therefore the rights of the Creditors of the wife here to this extent upon the facts alledged, the Court admits the parties to the proof of those facts. —

No. 1808.

Ex parte. — On Petition of Meloche, Lal Church-wardens of Lachine

On the petition of the Church wardens of the parish of Lachine, praying that this Court would homologate and confirm an act of deliberation of an assembly of the Church wardens and parishioners of the said parish, augmenting the allowance to be paid by the parishioners for allowing the interment of dead bodies in the Church. —

The Court having in the first instance heard the petitioners ex parte, directed, that public notice should be given at the Church door of the said parish of the above application and that such persons who might have any

reasons

reasons to offer against the said petition should appear before the Court in order to be heard thereon. in consequence whereof, several of the said petitioners appeared and were heard by their counsel. —

Mr Mondelet on behalf of the petitioners, stated that the parishioners were not in this instance, regularly called before the Court for the maintenance of their interests, as a notice published at the church door was not sufficient to call any person before the Court who had any rights to be determined therein. That the demand here is in the nature of a duty or tax on the subject which this Court has no power to impose, and although in France this might have been done, yet under the Constitution of this Country such a duty cannot be imposed in this way — That the exception stated in the Judicature act touching all acts of a legislative nature, necessarily comprehends the present demand, and the exception to this principle is that given by law to the Governor to impose a duty or tax on the parishioners for building or — repairing churches &c — That the act of deliberation here offered cannot bind the parish, because the assemblée was not legally convoked nor after sufficient notice. 1 Rousse Govt des Paroisses. 117. 122. which is particularly necessary in all extraordinary cases like the present. 1 Rousse. 126. —

Mr Bedard for the Petrs In regard of the citation of the parties interested, the Ordinance of 1785, does not require that the Kings writ of Summons should issue in a matter of this kind, for this properly speaking is not a cause, nor was it essentially necessary for the Court in taking cognizance of this

matter

matter to call the parties at all before it, the notice now given, was no doubt intended to give them an opportunity of being heard if they thought fit.—

As to the jurisdiction of the Court in this matter it is established by the Judicature act, it holding in this respect the same power and authority as the Intendant or Superior Council under the French System.— That the Legislature of this Province under our present Constitution have a right only to make laws and regulations in matters of general police and in what regards the whole body of the people, but this is a matter of private right and individual interest of which the Legislature will take no notice, unless thereunto required under peculiar circumstances of hardship or inconvenience against which the law has not sufficiently provided — The imposition here of two hundred livres for every interment to be made in the parish church of Lachine, is more a matter of private interest than of public concern, it is merely settling a quantum meruit for the Church in this particular case.—

That every Corporate body, or Communauté, has a right to make rules and regulations for its own government, and these ought to be confirmed by the Judge in order to give them force and effect Potts. des personnes. p. 629.— O. Denizt. vo Fabrique No. 28. art. 12 of the Reglement there cited.— And the Church Wardens are the persons who are authorised to fix the rate to be paid for burying in the Church Denizt. Vo Sepulture.— were it not so the greatest

inconvinience

inconvenience would arise, because every parishoner has a right to be buried in the Church, and the Church wardens cannot refuse it — the only way to regulate the matter is to impose such a rate of allowance in this case as to check the evil that would arise by permitting so genral a right without restriction — And the marguilliers are the persons the law has empowered to regulate this matter — Jousse. 73. 74. 75.

That the confirmation of the act of deliberation here become necessary to be made by the Court as there were some dissenient voices, and where only one parishoner dissents the confirmation is required. — That in all respects the act of delberation here made, is regular and sufficient.

By the Court. — The question here before the Court, is whether the deliberation of the Church Wardens and parishoners of the parish of St Michel de Sachine, touching an extra allowance to be paid by the parishoners of that parish for the right of interment in the church, can and ought to be homologated and confirmed by this Court, in order to give legal force and effect to that deliberation. —

Church wardens are by law a Corporation, they represent the Fabrique, and although they deal chiefly in matters belonging to the Church, yet they are in all the law books considered as lay Corporations, vested with a temporal right in their offices, and having a special property in the goods belonging to the Church — "En "France les Fabriques sont considerées comme des Corps "laïques, quoiqu'elles participent aux privileges des "Corps ecclesiastiques". — Maillane Dic: Droit-Can: ve Fabrique. p. 349. —

Being

Being an association known and established by law, this Fabrique, or Churchwardens, have a right at their meetings, or assemblées, to form rules and regulations for the management and government of those matters over which they have authority and jurisdiction, and there can be no doubt, but when these rules & regulations are duly made, Courts of Justice will enforce obedience to them. — "Il est encore de la nature des Corps et — " Communautés, que chaque Corps ou Communauté puisse " se faire des Statuts pour sa police et sa discipline, aux quels " tous les membres sont tenus d'obeir, pourvû que ces Statuts " ne contiennent rien de contraire aux lois, la liberté publique " ou à l'interet d'autrui." Potb. Tr. des personnes. ch. 7. 5 vol. p. 629. —

The Churchwardens in this case have settled and determined, by their deliberation of the 5 Sept. 1819. further confirmed by another deliberation of the 30th January 1825, that the rate of burial in the Church of Lachine, should for the reasons they state, be — augmented to 200 livres. — This they had a right to determine, it was a matter within their cognizance as having the charge of the temporal interests of that Church — "C'est aux marguilliers seuls à disposer des " places de sepulture. — Si la sepulture se fait dans " l'eglise, ils sont en droit d'exiger pour cela un " droit au profit de la Fabrique." —

But however rightly the marguilliers may have acted in this respect, can or ought this Court interpose its authority, by confirming their proceedings? — What do the petitioners ask here? — That this Court will homologate and confirm the foregoing act of deliberation of the 5. September 1819, "en forme de " reglement pour ladite Fabrique, ce faisant adjuger " et ordonner qu'elle aura son plein et entier effet, et " qu'elle

"qu'elle sera suivie et executée suivant sa forme et
"teneur".— or in other words, that this Court would
make an "arret de Reglement," in this particular
instance, for the future regulation of the parties, and
to bind their rights in this respect.— This is not an
ordinary proceeding, and the Court must be satisfied
that it possesses the power to frame and confirm rules
and regulations for the general government of
particular societies of men, associated as Corporations
before they can take cognizance of this petition.—
There is no doubt, but that according to the
institution of the Courts under the French Govern^mt
in this Colony, this right was inherent in them, as
a part of that superintending power vested in them
by the Crown, as holding the Supreme Legislative
authority in the State— But under the present
Constitution of the Courts, and the powers vested
in the Judges by the Crown, that of making
rules and regulations for the government of any
portion of His Majesty's Subjects, does not appear
to be vested in the Courts.— The Courts, as now
constituted, are established for the administration
of Justice, properly so understood, that is, to try,
hear and determine all Causes Civil or Criminal,
all matters of private right, or of public injury among
the Kings Subjects, but this cannot imply the right
to make rules and regulations to establish or create
rights not before existing.— This is a power of a
legislative nature which although possessed by the
Courts existing prior to the Conquest of the Country,
was by express words withheld from this Court by Special
enactment— As the King of France held not
only the Executive but the Legislative power of the
State in his own person, so he could communicate

to

to, or permit the exercise of some portion of this power by his Courts, in regulating many inferior matters which might come under their notice in the administration of Justice — hence arose the numerous Arrets de reglements made by the Superior with the intervention of the King's Procureur, which were in truth laws, sous le bon plaisir du Roi, and were followed and observed as such.— "Quoiqu'il soit de principe que le Roi
" seul peut faire des Loix, il est cependant permis aux
" Cour Souperieures de faire des Reglements, sous le
" bon plaisir du Roi, et ils s'executent comme loix
" dans tout le ressort" O. Denz.t. Vo Reglement. No 3.

"Comme il etoit permis aux Juges dans —
" l'Empire Romain de suppléer à ce que les loix —
" avoient omis — de meme il a toujours eté permis
" en France aux Juges Souverains de prononcer des
" decisions solemnelles, de faire des arrets de Reglement
" &ca — Ces arrets ont en consequence une force de loi
" sous le bon plaisir du Souverain, parceque jusqu'a
" ce qu'il ait parlé lui-même, les Cours sont les —
" veritables organes de ses volontés, les fidéles —
" interpretes de ses sentimens". — Prost du Royer Vo Arrets. No 15. Arrets de Reglement. p 678. —

Now according to the Constitution of our Country the King possesses no legislative power, and therefore can communicate none to His Courts of Justice, neither can these Courts exercise such power unless specially authorised so to do.— Thus we confirm rules and regulations of Police made by the magistrates — we make rules and regulations and make tarifs of fees for the different Courts, and in some other instances we confirm the regulations submitted to us — but all this is done by express enactment of the law, by virtue whereof

alone

alone we are warranted to take cognizance of these matters; but without this authority we conceive that in all matters of general regulation touching the rights and interests of the Kings Subjects we have no power either to make such regulations, or to homologate and confirm those made by others, although we hold the right to determine upon the validity of all such regulations when any contest is brought before us by persons claiming the benefit thereof, or who are affected thereby. We must therefore reject the present petition as containing matter not within our competence — although in giving this opinion we are far from thinking that the deliberation of the Marguilliers in this instance may not be legally enforced, — without such confirmation by the Court as that now demanded. —

No. 8.

Ex Parte. —
On Requête of Jos: Girouard for Decret. Volre
Antº & Lalonde oppt
Jos: & Lalonde Intervs

By marriage Contract between Gabriel Lalonde and Ursule Lalonde of the 25 July 1796, the husband put into the Community by ameublissement, two and a half acres of land, and during the Community, the other one half acre was purchased, by which means the whole three acres became a Conquet of the Community. — On the 7th March 1797, Ursule Lalonde died, leaving a Child, Marie Rose Lalonde issue of that marriage. — On the 20 July 1797, this child died. The father Gabriel Lalonde, remained in the possession of the property of the Community, and no Inventory appeared to have been made of it. — By marriage

Contract

contract of the 26 Janv. 1798, the said Gabriel Lalonde again ameublit the whole of the said land and put it into the Community between him and his second wife Rosalie Lefevre. — On the 4th July 1822. the said Gabriel Lalonde died, and in October 1822 his widow and his children as heirs of their deceased father, sold the said land to Joseph Lalonde, the Intervening party; who afterwards on the 17th Nov. 1826, sold it to the petitioner Joseph Girouard — On the decret volontaire of this land by Girouard, Antoine Lalonde the maternal uncle of the said Marie Rose Lalonde, claimed by his opposition, one half of the said land as being the right of the said late Ursule Lalonde in the Community between her and the said Gabriel Lalonde, and to which half the said Opposant as the heir of the said Marie Rose Lalonde, whose property it was as heir to her mother, claims as the heritier quant aux propres maternels of the said Marie Rose Lalonde. Joseph Lalonde intervened on this opposition in order to maintain the sale made by him to Girouard, and also the sale made to him by the widow and Children of the said late Gabriel Lalonde. —

The claim of the opposant is founded on the principle, that the said lot of land so ameubli by the marriage Contract and afterwards purchased by the said late Gabriel Lalonde, became a Conquet of the Communauté and after the death of the said Ursule Lalonde, the one half thereof vested in her daughter as her legal heir, the said Marie Rose Lalonde, and on the death of the said Marie Rose Lalonde, the said half of the said lot of land having been a propre naissant maternel in her person, belonged to the Opposant her maternal uncle, as her nearest heir on the mothers side — The Intervening party on the other hand contended, that the, clause d'ameublissement, being a fiction in law, did not

extend

extend beyond the contracting parties, and therefore that in the succession of the said Marie Rose Lalonde it ceased to operate, and the said lot of land then fell back into the former line of succession as a propre paternel and thereupon again became the property of the said late Gabriel Lalonde on the death of the said Marie Rose Lalonde his daughter. —

The authorities cited on the part of the Opposant, were,

326te. & 329e. articles of the Custom —
Denizt. vo. ameublissement No. 6 & 7.
Pothier Comte. No. 314
Do. Coutume D'Orleans 293 —
1 Bourjon. p. 228 —
Repe. vo. Ameublissement. p. 370. 372.

As to the fiction having ceased, the modern jurisprudence had changed the former decisions —

Poth. Comte. No. 307 & 314
Do. Coub: D'orleans. No. 56. —
Journ: Palais. Janv. 1687. 8. —
Poth. succ. pp. 85. 86. —
Lebrun Comte. p. 144. art. 13. — Id. p. 89. —
2 Prevost de la Janes. p. 59. —
2 Argou. p. 111. —
Poth. propres. p. 276 —
Repe. vo. Propre. p. 28 —
Id — vo. Succession. p. 570. — & 640 —
Id — v. Paterna Paternis. p 605. —

On the part of the Intervening party the following authorities were cited —

Lebrun. Comte. pp. 94 & 97. — & 81 —
Fer. Come. small edit. on 350e. art

To these may be added the following not cited by the Interv. Party — Prost de Royn. vo. ameublissement. p. 580
N. Denizt. vo. ameublisse. S. 8. No 8

Repe

Repre vo ameublissement. p. 370. —
Poth. Comte No 310. & 312.
Royer vo ameublisto p. 578. No 4
Duplessis, Comte p. 360. —
Renusson des Propres. ch. 6. sec 8. No 29 & 30.

By the Court

For the better decision of this question, we ought first to consider the import of some of the articles of the Custom, which bear upon it —

The 229te article states in what manner the property of the Community is divided upon the dissolution of it by the death of one of the Conjoints. — it runs thus — " apres le trepas de l'un des dits " Conjoints, les biens de ladite Communauté se divisent " en telle maniere, que la moitié en appartient au " survivant, et l'autre moitié aux heritiers du trepassé". —

And the 230te article determines the nature of the property which thus falls to the heir of the deceased and settles the course of succession — " Laquelle " moitié des Conquets advenus aux heritiers du — " trepassé, est le propre heritage des dits heritiers. — " tellement que si les dits heritiers vont de vie a trépas " sans hoirs de leurs Corps, icelle moitié retourne à " leur plus prochain heritier du coté et ligne de celui " du quel leur est advenu ladite moitié — Desquels " biens toutefois, les pere et mere, ayeul ou ayeule, " succedans à leurs enfans, jouiront par usufruit, leur " vie durante, au cas qu'il n'y ait aucuns descendans " de l'acquereur" —

According to the principle here established, the share of the Community, when it is a realty, coming to the child & heir of the deceased conjoint, is a propre naissant in the person of that child, and on his death, goes to the heirs of the father or of the mother

to

to whom such child so succeeded, although not the nearest blood relation — and it is therefore held,

"Que si fils succede à sa mere (as being the Conjoint
" who dies first) en tels biens, et qu'il decede sans enfans
" laissant pour plus proche parent un frère consanguin
" et un Cousin maternel, le Cousin maternel doit être
" preféré au frere consanguin dans la succession de ces
" conquets, lesquels ont été faits propres naissants
" maternels au fils, auquel ils sont echus par la Succession
" de sa mere — ainsi ils doivent retourner à ses heritiers
" maternels" —

Conformable to this article and the decisions thereon we find the same principle further confirmed by the 314th article, which says. — "Les pere et mere jouissent par
" usufruit des biens delaissés par leurs enfans, qui ont été
" acquis par les dits pere et mere, et par le décés de l'un d'eux
" advenus à l'un de leurs dits enfans, encore qu'ils soient
" et ayent été faits propres aux dits enfans — au cas toutesfois
" que les dits enfans decedent sans enfans et descendans d'eux:
" et apres le décés des dits pere et mere qui ont joui des dits
" biens par usufruit, les dits biens retourneront aux plus —
" proches parens des dits enfans, desquels procedent les dits
" biens" —

According to this article, the same principle is held, that the share of the Community, coming to the child as heir of his father or mother, is a propre naissant in the person of that child, and on his death without issue, the property returns to the nearest of kin of the prédecédé to whom such child had succeeded, but not to the Survivor of the father or mother, who can in such case claim only the usufructuary enjoyment during his or her lifetime. —

But it is said, that the ameublissement of a real estate by marriage Contract, is a fiction, and has its effect only between the Contracting parties, but does not extend to the rights of inheritance and Succession, and therefore that

on

on the death of Ursule Lalonde, her husband who had made the ameublissement of the lot of land in question, had a right to take it back and retain it as his own — but this would be evidently unjust and wrong, and would have deprived Marie Rose Lalonde, as heir of her mother of her right and share of the Community which belonged to her mother — the fiction in this Case, would have operated an injury, which cannot be allowed — The only right the husband had in this Case, was, that in making a partage of the Community, he had a right to claim the whole of this lot of land, in order to preserve it for the heirs of his line, but in doing this, he was bound to recompense the heir of Ursule Lalonde by allowing her other property of the Community to the extent in value of the one half of this lot of land, so as to make an equal division of this Community, which property so given in recompense would have fallen under the operation of the above articles of the Custom — but in this Case no Inventory or partage of the Community appears ever to have been made, and had the Survivor meant to claim the benefit of thus taking back his property, it was his duty to have proceeded legally to effect a partage of the Community; but as the Case now stands, he appears to have appropriated the whole Community to himself without any legal formality or recompense, and his Succession must therefore be accountable for the rights which belonged to his Child, Marie Rose Lalonde in that Community. — On this principle we are of opinion that the opposition of Antoine Lalonde is founded and that the Conclusions thereof must be granted to him. —

Fraser. vs Stephenson Tutrix &c &al. and Brown Oppt

On opposition à fin de conserver of John Brown.

The opposant by his moyens d'opposition stated that on the first day of October 1821, the opposant, and the late James Whiteford, (represented by the Defendt.) being merchants and traders, settled their accounts on the mutual dealings and transactions till then had between them, on which settlement of accounts the said James Whiteford was found in arrear and indebted to the said Opposant in a sum of £3050. 2. 8 Cy, which said balance the said James Whiteford at Montreal on the day and year aforesaid undertook and promised to pay to the said Opposant. — That afterwards on the 7th November 1821, by an act passed in the said City of Montreal, before Doucet and his Colleague public Notaries between the said James Whiteford and the said Opposant, it was amongst other things stipulated and agreed, that interest should be annually reckoned and allowed upon their respective accounts, and that as to the balance that might be due by the said James Whiteford to the said Opposant, after receiving a certain sum of money as stated in the said act on his account from Messrs Campbell and Sheppard of Quebec, the said James Whiteford did in and by the said act bind and oblige himself to pay the same to the said Opposant in three equal payments in twelve, eighteen and twenty four months to be reckoned from the date of the said act, with interest — It was further agreed in and by the said act, that in case any difficulty occurred in consequence of any charge made by the said Opposant to make up the balance that might be due to him by the said James Whiteford, such difficulty should

be

be settled and determined by arbitrators to be named by them.— That several sums of money were received by the said Opposant on account of the S^d James Whiteford and some difficulty having accrued between them, as to the balance which the said James Whiteford owed to the said Opposant, on their respective accounts apres. the said Opposant, in order to establish and ascertain the said balance, about the twenty fourth day of July one thous. eight hundred and twenty three, instituted an action in this Court returnable the 1st Oct. 1823.— That upon this action the difficulties aforesaid were left to the decision of Thomas A. Turner and Norman Bethune, arbitrators chosen by the parties. That the said arbitrators by their award determined, that the balance remaining due by the said James Whiteford to the said Opposant amounted to £1164.12.6— That the said James Whiteford died before the award made by the said arbitrators was returned into Court, in— consequence whereof the said Johanna Stevenson his widow and as Tutrix to the minor children of their— marriage, intervened by reprise d'instance as Defendant in the Cause, and afterwards on the 19th October 1825, this Court homologated and confirmed the said award and condemned the said Defendant in her said capacity to pay to the said Opposant the said sum of £1164.12— with interest thereon from the 24th July 1823 until paid, with Costs of Suit taxed at the sum of seventy six pounds four shillings and five pence, making together £1240.16.5

That by virtue of the aforesaid proceedings the said Opposant hath acquired a right of mortgage upon all the real Estate left by the said James Whiteford at the time of his decease, and from and after the date of the aforesaid act of the 7th November 1821, for the payment and satisfaction of the

aforesaid

aforesaid sum of £1240. 16. 5. — Cy, and concludes accordingly. —

The plaintiff for plea to the said moyens d'opposit.n stated by his defenses au fond en droit, that allowing all the matters and things in the said moyens d'opposition to be true, but which he did not admit, yet that the said Opposant was not entitled to the mortgage by him claimed in and upon the real property of the said James Whitford, because he contended, that the aforesaid act or agreement of the 7.th November 1821, stated in the said moyens d'opposition, was null and void and of none effect, and did not create any mortgage in favor of the said Opposant upon the property and estate of the said late James Whitford — And further denying the facts alledged in and by the said moyens d'oppos.n.

The Replication joined issue on the plea. —

The parties having been heard on the matters of law, the Court admitted them to make proof of the facts, before determining thereon — 3d Judg.t of 19 Oct.r 1826. —

The evidence adduced on the part of the Opposant consisted of the above agreement of the 7 Nov.r 1821, the proceedings had on the suit instituted by the Opposant against the late James Whitford including the award of the arbitrators, the accounts between the parties, and lastly the examination or testimony of the two arbitrators Thomas A. Turner, & Norman Bethune, in order to ascertain the fact, that all accounts and transactions between the parties which they examined, and upon which their award was made, took place between the parties prior to the 7.th Nov.r 1821, the date of the aforesaid act or agreement, save and except a sum of ten pounds

paid

paid by the said James Whitford to the said Opposant subsequent to that date.—

The parties were now heard on the merits

Mr Rolland for the pltff— The plaintiff in this case has a mortgage on the property and estate of the late James Whitford duly executed and bearing date the 8 Novr 1821, for a specific sum of money— The opposant claims a prior mortgage by virtue of an act of the 7th Novr 1821 for a debt not liquidated or ascertained— but this act of the 7th Novr is not of that nature or description to create a mortgage, a mortgage must proceed from some cause sufficient to maintain it, now a debt the existence of which is uncertain, can be no cause of mortgage, because if there be no debt there can be no mortgage, and the mortgage can commence only from the time the debt is ascertained— That if doubts have existed in the Case of a Compromis executed before public Notaries whether thereby a mortgage was created, there ought to be stronger doubts in this Case, where there is a mutual promise of mortgage to be ascertained at some future period, at the will of the parties, and to the prejudice of third persons.— As to the action instituted by the Opposant against Whitford, it appears to have no connection with this act of the 7 Novr 1821— on the contrary it is stated in the declaration to be for a debt of the 21 Novr 1822— on this action Arbitrators are named, they make their report in favor of the Opposant but do not by this report say what the debt so due by Whitford was due before or since the 7th Novr 1821— This Report not being clear on this head, the opposant has

brought

brought forward the arbitrators to ascertain the time when the debt was due, and thereby to amend a defect in their award, after it has been homologated in Court — This means the opposant endeavours to establish his mortgage — but this cannot be allowed, as a mortgage cannot be established by the deposition of witnesses, nor can authenticity or validity to such an act be created in this manner — It is besides apparent from the depositions of these arbitrators, that in making their award they were guided by the admissions made by the parties as well as by other testimony — now it is certain that the admisson of a party before an arbitrator cannot create a mortgage to the prejudice of others — Besides it ought to be here considered that the obligation contracted by the parties by this act of the 7th Nov 1821, was to name arbitrators, and not to pay a debt —

Beaubien for the opposant — The principal object of the act of the 7 Novr 1821 consisted of the obligation and undertaking of Whitford to pay a debt he owed to the opposant, and for the payment whereof three different periods were fixed — this created a mortgage on the property of the debtor — the secondary consideration was to establish the quantum of the debt by means of arbitrators in case of difficulty occurring — cits. Lacombe. Vo Hypothèque. sec. 2. No 1. — Domat Liv. 3. tit. 1. Se. 1. & Somme 2. p. 170 — & sec. 3. Somme 26. — It being acknowledged by the Sr Whitford that a debt was due by him to the opposant, this alone is sufficient to constitute the mortgage under the

stipulations

stipulations contained in the said act - cites; 2 Bourg: tit. 6. liv. 6. sec. 3. No 23. p. 535. which is a strong authority in this Case - but this act was sufficient to establish a mortgage without any stipulation to this effect. Poth. Obl. No 131. - And even if the act be considered as a Compromis, it is sufficient to create a mortgage -

The testimony adduced by the Opposant is in compliance with the act of the 7 Novr 1821, which contemplated a further proceeding for ascertaining the debt due to the Opposant, and the debt has been clearly proved to have existed prior to the date of the said act and it is also in evidence that there were no other dealings or transactions between the parties, but those prior to that date, except a small payment of ten pounds made by Whiteford, and which the Opposant here admits -

The Court were of opinion that the principal object of the act of the 7th Novr 1821 was the settlement of the dealings and transactions between the parties and to secure to the Opposant a debt which was acknowledged to be due to the opposant by Whiteford - that on account of the debt so acknowledged to be due provision was made by Whiteford for the payment of one thousand pounds, and a delay for paying the balance in three equal payments of 6, 12, & 24 months. this obligation and undertaking on the part of the S Whiteford was sufficient in any notarial instrument to establish a mortgage on his property - The stipulation in this act for settling any difficulty that might occur touching the balance to be paid, can be considered as merely accessary to the principal engagement,

see 1 Desp. Des Contrats - p. 696.

it

it cannot even be considered as a Compromis, but a promise that the parties would make a compromis in case it became necessary — The action which the opposant instituted against Whitford is of no value here as to the mortgage claimed, because it has no reference to the said act of the 7 Nov. 1821, the only object resulting from that action applicable here is the establishment of the balance due to the opposant, and we think that the Arbitrators might legally be called to explain their report and shew upon what transactions it was founded so as to bring it within the contemplation of the above act — this could create no mortgage, nor was it necessary, as the mortgage existed without it — but was in compliance with the intention and stipulation of the parties to the said act of 7 Nov 1821 — The opposant might in this Case have founded his opposition and claim of mortgage upon the apres cité without reference to any further proceeding by the action and Judgment of Whitford, and on the testimony adduced have shewn the balance due to him and the Plaintiff on his part might have contested this balance and required a new reference to Arbitrators had he found it his interest to do so —

Rep^re + V^o arbitrage p. 546 —
1 Pigeau. 27 — end of last paragraph
4. J. Rep. 146.

Judg^t for the Opposant —

Tuesday

Tuesday 17th June 1828.

J. Holt &c
vs
N. Walker.

The plaintiff sued as well in his own right, as in that of Curator to James Farrar, an absentee, they having heretofore carried on trade, as Copartners at Liverpool, under the firm of Holt and Farrar.— The declaration contains three Counts, the first of which states, That two promissory notes made and signed by Messrs Chinic & Measam of Quebec in favor of Chinic and Duroucl of the same place, and by the latter indorsed to Holt & Farrar, — namely, one for £450.—.— dated 14 Janr. 1826, payable three months after date, the other for £500— of the — same date, payable at four months, were delivered to the Defendant for Collection upon a certain — Commission or reward, he undertaking to use due and proper diligence to collect and recover the same, when the notes respectively became due, and remit the amount to Messrs Holt & Farrar, the plaintiffs, at Liverpool; but that the defendant did not use diligence in collecting the same, whereby the said notes, through the neglect and carlessness of the defendant, became and were wholly lost and of no value — by means whereof &c — The Second Count states the same undertaking, without any mention of Commission or reward, but in all other respects it is similar to the first Count.— The third Count states that the — Defendant undertook to present the notes when due for payment, and to collect and get in the sums due thereon, and to use due precaution &c to secure the liability of the parties thereto, and in failure or — neglect of payment to return the notes to Holt and Farrar, which he, the Defendant neglected to do. — &c

To —

To this action the defendant pleaded. 1st Non assumpt — 2d That the allegations contained in the declaration are untrue and unfounded in fact — 3d That altho' in truth he did receive the two notes in question — from the plaintiffs who requested him to collect and receive the same when due, yet the same were not in fact paid to him by the makers or indorsers thereof although by him duly requested so to do, and that at the times when the said notes severally became due and after protest, the said drawers Chinic & Measam and the indorsers Chinic and Duiouet, became and were embarassed in their circumstances & unable to pay the said Notes, and therefore requested further delay or time to make payment thereof, and the said Defendant being then and there assured, and — having reason to expect that by granting the delay required they would be enabled to pay, afterwards on the offer of the said makers and indorsers to — renew the said notes by four others, he the Deft did then and there agree to and did receive from them four several notes all dated at Quebec 17th May 1826 and made by the said Chinic & Measam in favor of Chinic and Duiouet and by the latter indorsed to the plaintiffs, to secure the payment of the said two notes with the interest Costs and — charges accrued thereon, namely two notes for £202 - each, payable on the 17 June and 17 July following — one other for £253. 15. payable on the 17th August, and the last for £306. payable the 16th Sept.r and upon receipt of these last notes, the two first were delivered up to the makers & Indorsers — That afterwards when the said four notes became

respectively

BIBLIOTHEQUE DU BARREAU DE MONTREAL

respectively payable, they were presented for payment to the makers thereof, who refused payment, and thereupon the said notes were protested, and a demand of payment likewise made on the indorsers Chinie & Quirouet who also refused to pay, and the Defendt. avers, that when the said four notes respectively became payable, the said makers and indorsers continued to be embarassed in their circumstances and unable to pay their Creditors and have become bankrupts, and the said four notes remain unpaid and concludes by averring, that he has always been and is now ready to deliver to the plaintiffs the said four notes, and brings the same into Court ready to be so delivered.—

The Replications and answers to these several pleas are general.—

Under these issues, the parties have proceeded to the adduction of evidence, and have been thereon fully heard by their counsel, and the Case now stands for the Judgment of the Court.—

By the Court—

This is an action by principals against their agent, complaining of negligence and want of diligence on the part of the latter, whereby as it is alledged in the declaration, the two promissory notes in question, whereof the plaintiffs were the holders and indorsees, and which they left with the defendant for collection, were wholly lost and became of no value.— The three Counts in the declaration contain two different species of action, the One founded on the Contrat de louage,

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the other on the Contrat de mandat; for in the first Count it is stated, that the services were to be performed for a certain Commission or reward, — whereas in the second and third Counts, such — allegations are omitted, and this constitutes the — essential difference between the two Contracts — But upon duly weighing and considering the evidence the Court is of opinion that in the present Case, the agency and undertaking of the Defendant was strictly gratuitous, and therefore the Contract between the parties being that of Mandat, no other — responsibility can attach to the defendant than what arises from the law governing that particular Contract — It is true that the plaintiffs have by — several Witnesses proved that among merchants a Commission is usually charged and paid upon the collecting of monies, but it is on the other — hand likewise proved, that such services are also frequently performed by one Merchant for another in a friendly way and without reward, and — when it is considered that in the receipt given for the notes and by which it was undertaken to remit the amount thereof, when collected, to the plaintiffs at Liverpool, no mention is made of any deduction therefrom on the score of Commission, also the fact that the plaintiffs had a general agent in — Montreal to whom they had confided the whole of their business except the two notes in question, the declaration of Farrar, one of the plaintiffs that he did not wish, for reasons best known to himself to hand the notes over to such general agent, — likewise the intimacy which had subsisted between

Farrar

Farrar and the defendant, and the circumstances attending the delivery of those particular notes in the absence of the Defendant to his Clerk, the understanding of the clerk at the time, and the subsequent declaration of the Defendant after he had seen the plaintiff Farrar, whom he met on the way between Montreal & New York that no Commission was to be charged, and this at a period when such a declaration was not liable to any suspicion, it having been made against his own interest, inasmuchas at the time he could not have anticipated any difficulty in obtaining the amount of the notes when due, and having also been made when the defendant first became acquainted with and acquiesced in the act of his clerk in the undertaking to collect the said notes, from all these, and from the complexion of the whole Case and the evidence adduced we have considered that in the total absence of any direct or positive evidence that a Commission was to be paid to or received by the defendant, the fair presumption arising from all the facts before us, is, that none was to have been paid or received, and as such the transaction must be viewed by the Court in regard to the extent of the defendants responsibility therein incurred.— Now the distinction made in the English books between the mandatary with, and the one without recompense, is founded on sound principles of reason, for he who takes a reward for his services holds himself out as a person qualified and capable to perform the work he undertakes, and if he proves otherwise, he has in so far as his capacity & knowledge are concerned, deceived the person who employs him, and prevented him from resorting to one of greater capacity and knowledge, whereas he, who not seeking

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to be employed, but merely acquiesces in the request of a friend and acts gratuitously, holds out no false colours, and indeed can have no interest in deceiving, inasmuchas he gains nothing, but on the contrary exposes himself to trouble and labor, and therefore under such circumstances, it has been deemed just not to make the Mandatary answerable for any loss or injury, merely arising from any error in Judgment or incapacity on his part — and such we consider the situation of the present Defendant — but though such be the case, it does not follow that he was by law exempt from all obligation, his promise to collect must be complied with, and having received the notes for that purpose, he was bound to demand payment of the drawers and indorsers thereof, and certainly became liable for any loss that might accrue from his omission to do so; but from the testimony before us, it does not appear that any such omission can fairly be imputed to the Defendant, on the contrary he appears to have been animated with a degree of Zeal and attention to the interest of his principals sufficient to satisfy any reasonable mind, that there was every sincere wish on his part to consult and promote that interest, even in an engagement which may be said to have been forced upon him, or from which in its origin he had not an opportunity to decline — no particular instructions had been left with the defendants Clerk by Mr Farrar as to the mode of collecting the money due on the notes, except the general one, that the defendant was to act in regard to the notes, as if they were owned by himself; he therefore, it appears, on being informed, that the first note which had been passed through

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the Bank of Montreal for collection, had been dishonored, applies to the general agent of the plaintiffs at Montreal for advice, and through him obtains such information, as could be collected, in a correspondence with a confidential friend of Mr Farrar's at Quebec, and which induced him previous to the second note becoming due, to go to Quebec, where the makers and indorsers of the notes resided, and there having in vain applied to the makers thereof for payment, and even for part payment, which they declared was not in their power at the moment to make, and the indorsers Chinic and Duvernet on application likewise made to them by the defendant having declined paying the notes on the ground that they had indorsed them for the accommodation of the drawers Chinic & Measam, and they alone should pay them, under all these circumstances the defendant, having advised with his friends, was induced to comply with the request of the makers of the notes, and take four others in lieu thereof at one, two, three, and four months, with the same indorsers, it is however true, that upon the examination of Martin Chinic, a witness for the plaintiffs, and one of the indorsers, he declares that no application was made to Chinic and Duvernet for payment of the notes, that he never to his knowledge saw the defendant and does not know him, yet in this respect his memory appears to have failed him, for he is contradicted by the more positive testimony of Alexander Madden a disinterested witness, who says, that he accompanied the defendant to the Counting house of the indorsers Chinic & Duvernet. when the defendant stated to Mr Chinic that the notes were due and demanded payment thereof, and that thereon, the answer as before mentioned, was received

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that Chinic and Measam must take up the notes themselves as it was a business between them and Mr Farrars and that although they, Chinic and Durouet had indorsed the notes, they had no interest therein.— It is therefore apparent, taking into consideration the embarassements both of the drawers and indorsers, the danger of pressing them at an unfavorable moment, and the hopes held out that they would be able to make the payment required if delay could be obtained, that the defendt throughout the transaction appears to have acted with the greatest good faith, and although he may have erred in judgment, he seems to have done, what under all the circumstances, he thought, and was even advised, would be most for the interest of his Constituents — it is not, that he has omitted to perform what was essentially incumbent upon him in regard to his undertaking, but that in such performance, he might perhaps have acted more judiciously, as things have since turned out, but because he has not exercised a better judgment than he was capable of, and did not foresee results — we cannot on that account say, that he, not being a hired agent, or one from the nature of whose business (he being a Watchmaker and Jeweller, and so described in the Decln) the necessary knowledge must be presumed against him, for the conducting such special agency, ought to be considered as responsible for any loss arising from the subsequent bankruptcy of the makers and indorsers of the notes — Nor is it clear from the evidence before us, that any determined loss has actually accrued — the witnesses generally speak of the insolvency of the drawers and indorsers, while it appears that the holder of a note of the same drawers and indorsers, and in all respects similarly situated as those in question in this cause, has since the institution thereof received from the indorsers

Chinic

Chinic and Quirouet, eighteen shillings in the pound nor does it even appear that this has been paid upon the condition of a discharge, or that such Creditor will not eventually receive the full amount of the note he holds; we have therefore no certain evidence of loss, and this is one of those actions in which loss cannot be presumed but must be substantially proved, for it is the amount of the loss alone that the plaintiffs can recover, and this therefore should have been correctly ascertained, otherwise it would be placing the defendant quoad the plaintiffs in the situation of the debtors of the notes, which cannot be done unless a total loss had accrued and the liability of the Defendant established. — The Court would further observe that the Defendant was not specially authorised or directed to institute any action, and if he had, he might probably have made himself liable for the costs of such action, security for which the defendants might have claimed, for the third Count in the declaration alledges, that the notes if not paid were to be returned to the plaintiffs, which would imply, that no authority to sue was intended to have been given, and it may be added, that if they had been returned, it is fair to presume that the plaintiffs would not have been in a better situation — the taking of fresh notes was nothing more than a delay granted which would at any rate would have occured, without having been so given, and which, although the Defend^{r} was not expressly authorised to grant, yet as he was to act with respect to the notes, as he would with his own, it might have facilitated the object of the agency, by enabling the makers of the notes to pay off the same more easily, the delay therefore thus granted has not probably been the Cause of any loss to the plaintiffs, nor could it have operated to prevent the immediate recourse

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of the plaintiffs for the recovery of the debt, in the event of the bankruptcy during such delay, and indeed if the plaintiffs had been unwilling to ratify the act of their agent on the ground that he had exceeded his authority there was nothing to prevent their suing & recovering on the original notes.— It however certainly does appear, that one of the new notes so taken was not protested, and that due notice thereof was not given to the indorsers in consequence of a mistake in sending the wrong note to Dubee for collection, when one of them was nearly due, but of this we can take no notice in the present action, the plaintiffs not making this a specific ground of damage, or in any manner declaring thereon, and not having assumed or approved the new notes so taken, we are therefore not now called upon to give any opinion upon the effect of this mistake, nor how far the Defendant may have become responsible for any loss thereon accrued, as the declaration complains only of a want of diligence in collecting the two original notes, it is true that one of the latter was not protested nor any notice given to the indorsers, but the necessity of such protest and notice was obviated and rendered immaterial by the new notes taken, on which the liability of the indorsers was preserved by their new indorsation.— These notes therefore having been taken at a period, when from the representation of the drawers of the notes, and from the opinion of others, there was a reasonable prospect of their being able to pay the same when due, as the season of their business was then coming on, their total inability to pay any thing on account, and the refusal of the indorsers to take up or satisfy the notes, which would have rendered necessary an action at law to compel such payment, and which in the event might have operated injuriously to the plaintiffs, had

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it been instituted, all these considerations, with others before noticed, we conceive fully exonerate the Defendt from the charge of neglect and carlessness and want of diligence in regard to the two notes, as having therein acted according to the best of his judgment, and done that which he and others whose advice he took, thought best for the interest of the plaintiffs, and therefore the Defendant cannot under all the circumstances be considered liable for any loss which the plaintiffs may have suffered, and which may have arisen from the subsequent insolvency of the makers and indorsers of the notes.— The present decision we consider as supported by the opinion of Mr Pothier in Traité du Contrat de Mandat N°49. wherein treating of the extent of responsibility of the mandatary, he observes, — "On doit aussi avoir
" egard aux circonstances — si un mandataire peu
" habile, bien loin de s'offrir de lui-meme, a cédé aux
" instances d'un ami pour se charger d'une affaire
" que son ami ne pouvoit faire ni par lui-même, ni
" par d'autres, ne connoissant personne qui voulut
" s'en charger, on ne doit pas dans ces circonstances
" exiger de ce mandataire d'autre habileté et d'autre
" diligence, que celle dont il est capable" — The same principle is laid down in the Répertoire tit. "Faute", p. 298. 1re Col.—

This Case although not exactly similar to that stated by Pothier is evidently within the spirit of this latter, and entitled to the same equitable — modification — The engagement was originally with the Clerk of the defendant, on whose enquiry, why Mr Farrar did not give over the notes to his — general agent, the answer of the latter was, that he

had

had not done so for reasons best known to himself, and to do with the notes as with his own.—

The principles of the English law we consider to be the same as those of the French law in regard to the responsibility of agents, and we think the Case cited from 1. H. Bl. Rep. 161. Shiells v Blackburn, may be referred to in support of the present Judgment.—

Action dismissed with Costs.

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October Term 1828.

Saturday 18th October.

No 1222.
Dorions.-
Foretier.-

Action for the recovery of Lods & Ventes.-

The plaintiff prosecuted in the rights of Mr Dumont, Seignior of the Seigniory of Mille Isles, and stated - That by a deed of donation made and executed before Girouard and his colleague, public notaries, dated 25 Sept. 1820, the defendant made a ~~deed of~~ donation to - Joseph Daout and Magdeleine Foretier his wife, the Son in law and daughter of the donor of a certain lot of land in - the said Seigniory, and of which the donees obtained the immediate possession.- That the said donation was made for and in consideration of a certain rente et pension viagere to be paid by the said donees to the said donor.- That afterwards by an act passed on the 10th day of November 1827, the said deed of donation was rescinded and annulled by and between the parties, and the donees thereby discharged from the payment of the said rente et pension viagere in future.- That the Defendant having again re-entered upon the possession of the said lot of land, has in consequence promised and undertaken to pay to the said D'aout and wife a sum of four hundred livres, for the improvements by them made on the said lot of land during their occupation thereof.- That upon the said deed of resiliation there is due to the said Seignior for his lods et ventes, for all the charges and burthens imposed in and by the same and by the said deed of donation, including the said sum of four hundred livres, a sum of eight hundred & eighty four livres eighteen Sols.-

concludes

concludes for the payment of a sum of 693.^{rs} equal to £28..17.5 with interest and costs. —

Plea. — That the plaintiff cannot maintain his action.
1st Because no lods et Ventes are due on the deed of resiliation in question, it not being a sale, nor equivalent to a sale. —
2. That the donation made by the defendant to his daughter creates no lods et Ventes, the property given being sujet à rapport in the succession of the donor. —
3. That neither the deed of donation, nor the resiliation thereof bear lods et Ventes. —
4. That the resiliation of an act which created no lods et ventes, cannot generate any. —
5. That the only lods et Ventes the plaintiff could claim, would be on the sum of 400 livres before mentioned, making thirty three livres seven sols, which the Defend^t tendered to the pliff before the bringing of the present action. —

The Replication joins issue. —

The parties having been heard on the law, the Court held that in an act of this description made between the father and child no lods et ventes were due to the Seignior being considered in law as so much given to the child en avancement d'hoirie. Boutarie. Lods & Ventes. p. 153. N° 10. N. Denis^t — V^o accommodement de famille. p. 19. 20. & 21 — cites Poth. Cout. d'Orl: p. 29. & 110. — 1. Henris. p. 764 — arret du 12 Mai 1631 — This question has been so often decided in this Court that it ceases to create any doubt or difficulty — That the original transaction between the parties not creating any lods et ventes, neither would the resiliation of it, were it not that something new appears in the act of resiliation, beyond the mere rescinding the original deed of donation, namely the pay^t of four hundred livres by the defendant to the donees for their improvements, this is a new and different consideration, and upon this sum the pliff is intitled to his Lods & Ventes — Parties admitted to make proof. —

No. 1516.
Smith & al
vs
McGill & al

This was an action instituted by the plaintiffs merchants in Glasgow against the Defendants, assignees and Trustees of the estate and effects of Andrew Porteous, merchant of Montreal, for the benefit of his creditors, claiming the proceeds of sundry cases of hats which had been sold and shipped by the plaintiffs at Glasgow to the said Porteous on a seven months credit — After the goods were shipped and before they arrived at Quebec, Porteous was declared a bankrupt and made an assignment of his estate and effects to the Defendants, who in consequence thereof obtained possession of these hats and caused them to be sold at public audion — The present action was brought on the principle that the plaintiffs as vendors had a right of priviledge and preference on the monies arising from the sale of these hats, the same as they would have had upon the hats themselves had they been found in the hands of the Bankrupt or of the Defendants —

The Defendants by their plea contested this priviledge and the parties being now heard on the merits, Mr Walker for the plaintiffs cited the following authorities from which he contended that the priviledge he here claimed was well founded, inasmuch as the plaintiffs could not be considered to have divested themselves of their property under circumstances of which they were wholly unacquainted, and which would have entitled them to retain it until paid for. —

Fer. Gr. Comre on 176e & 177e art. Cout. p. 1317. 1325 & 1329. also p. 1355. — 1318. 1319. 1331. 1344 —

Loiseau de Officiis — 3 liv. ch. 8. No 15. —

Tronçon on 176e art. Coutume. —

Louet, lettre P. 19. No 1. 5. 6. 19. 23. —

Bacquet, Justice — p. 344. —

That the only difference between this case, and that formerly adjudged against the Defendants, is that the

the property here came to the hands of the Defendants and was by them converted into money before the pltffs could exercise their claim upon it, and on that account where there has been no laches on the part of the pltffs the value of the hats should stand in lieu of them. —

Scott for the Defendants — This was a sale on credit, and the pltffs as well as all other creditors run the risk as to the solvency of their debtor to whom they have given credit — That in this case the plaintiffs would have had no claim or priviledge on the goods, and still less on the proceeds of them — Fer. Gr. Comr. on 176 art. Cont. p. 1326. —

Mr Buchanan on same side cited. 1 Bacq. p. 379. ch. 21 No 409. Dr. de Justice. —

The court held that the action could not be maintained, that the priviledge of the Creditor either under the 176th or the 177th article of the Custom attached only where the property had not changed its nature or form in such way, that it could not be identified from the moment this change took place the right of priviledge ceased — That all the authorities of law were to this effect, and under no known principle could the priviledge of the pltffs here attach upon the monies arising from the sale of the hats, however favorable in other respects their claim might be — Action dismissed. —

No. 1500.
Alger.
vs
Sanborn

Action to recover a debt due to Pltff by a Succession purchased by the Defendant

The

The declaration stated, that on the 24th day of June 1825, one Daniel Bean of Meredith in the County of Strafford and State of New Hampshire, one of the United States of North America, being the Attorney duly authorised of Samuel Burnham of Moultonborough in the said County and State, the lawful heir of Samuel Burnham his son, in his life time of Montreal, blacksmith, having taken communication of the Inventory of the property and estate of the said late Samuel Burnham made before Sobin and his Colleague public notaries and considering the difficulties of collecting the debts due to the said Estate, and the delays and expences to be met with in settling the affairs of the said Estate, in his capacity of Attorney as aforesaid, did in and by a certain act or deed of transfer and assignment made and executed before the said Notaries, bearing date the said 24th day of June 1824, sell, assign, transfer and set over into Smith Sanborn, the Defendant, all and singular the goods and Chattels, lands & tenements, real and personal, moveable and immoveable, estates and property, rights, titles, interest, and demands whatsoever and wheresoever belonging to the Estate of the said late Samuel Burnham, and also all & every such sum and sums of money, debts, rents, goods and chattels, dues, duties, claims and demands whatsoever which were then or should thereafter become due, owing, or payable to the said estate of the said late Samuel Burnham, for him the said Smith Sanborn, to have and to hold, use and dispose of as his own property forever — the said David Bean, in his capacity aforesaid, subrogating the said Smith Sanborn, in all the rights, priviledges and mortgages of and belonging to the said Samuel Burnham, in

his

his capacity of lawful heir of the said late Samuel Burnham his son — The said transfer & assignment thus made, for and in consideration of the sum of two hundred and twenty five pounds Current money of Lower Canada.—

That afterwards on the 25th day of June 1827, the said Plaintiff, obtained Judgment in the Court of Kings Bench at Montreal against one Joshua Smith as Curator to the said Estate and Succession of the said late Samuel Burnham for a sum of £10 " 5 " — due by the note of the said late Samuel Burnham in favor of one Jonathan Childs, and by the said Childs indorsed to the said Plaintiff, and also for the sum of £1 " 5 " 8 for costs, making together the sum of £11 " 10 " 8 Current money aforesaid, which Judgmt still remains unpaid.— That on the said Judgment the plaintiff sued out execution upon which a return of nulla bona was made, by means whereof a further expence of seven shillings and one penny was incurred By means of all which said premises the said Defendant hath become bound and liable to pay to the said Plff the sum of £11. 17. 9, the amount of the said Debt and costs, but which the Defendt refuses — Wherefore

The Defendant demurred to the declaration — and the plaintiff joined on the demurrer.—

The parties being now heard thereon, Mr Buchanan for the Defendant, contended, that the Plaintiffs declaration was insufficient and could not be maintained — That it was necessary for the plaintiff to have stated therein the nature of the debt which was due to him by the late Samuel Burnham, inasmuch as the Judgment referred to, was not rendered against him, nor against his legal heir, but against a Curator — But that there is no law to support this action even if it were regularly brought,

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the authority referred to in Le Brun in favor of this action is merely a loose opinion held by him, as being the most convenient course to be followed, but this opinion is not founded on any arret, nor any principle of Customary law, he has had recourse to the civil law as the ground of his opinion, but he has mis-cited it, and therefore his opinion can have no weight — The law cited by him is from the Code lib. 2. tit. 3. l. 2, but is totally different from what Le Brun has stated it — The law cited from lib. 4. tit 39. l. 1 & 2, is contradicted by the following law — The Civil law writers agree in saying that the Creditor has not a direct action against the purchaser of a Succession, but against the heir who still remains liable for the debts although he has sold the Succession to another. cits. Godefroi notes on l. 1. Cod: lib. 4. tit. 39 — and on l. 2. Cod. lib. 2. tit. 3. — Cujacius on l. 1. Cod. lib. 4. tit. 39. — Huberus prolections on Pandects lib. 18. tit. 4. p. 588. and arret there cited — Perezius Prolections on Code, lib. 4. tit. 39. N°. 6. — There never was any privity of Contract between the Creditor and the purchaser of the Estate, and therefore no obligation nor right of action. Potts. Pand: Just: lib. 50, tit. 17. § 1097 and note 6. gives this very law, and lays it down differently from what he does in his traité de Succ^ns — D'argentré — in Consuetud. Brit. art. 219. p. 643 — says the Creditor has not the direct action in this case — The 334. art. of the Custom settles the manner in which heirs are bound to pay the debts of a Succession — Fer. Gr. Com^re on art. 334 — vol. 4. p. 1029. 1031. 1009. — and Vol. 2. p. 146. — he says the purchaser of the succession is not liable to the creditor for the debts of the succession. and Fer. Dic. de Droit. v^o Vente de Succession — The heir continues liable to the Creditor, and unless the

purchaser

purchaser consent no action can be brought against him — There may be many means of defence against an action of this kind which may be within the knowledge of the heir which cannot be known to the purchaser, besides the great inconvenience to accrue to him by being thus exposed to be called upon. —

Mr Day for the plaintiff, in answer — The nature of the plaintiffs debt is sufficiently set out in the declaration, it shews not only the Judgt rendered against the Curator, but the nature of the debt on which that Judgment was founded. — That the present action is well founded against the Defendant even according to the opinion of many Civil law writers Poth. Pand. lib. 18. tit. 4. l. 1re says, that he who purchases a Succession, purchases it with all its burthens — Corp: Jur. Civ. liv. 18. tit. 4. l. 2. §. 9. the same law. §. 17 & 18. — even the debt of the heir is reserved to him against the Succession when he sells it — So far the Roman law which however ought not to be admitted as a Rule of decision here as it stood in the time of Justinian but as it was received and administered in France. 1 Domat. p. 350. part. 2. book 1. tit. 1. sec. 13. says, that the purchaser of a succession, holds the place of the heir and bound to bear the same burthens — Poth. Vente. № 529. Repre vo Droits Successifs. p. 550. — Poth. Suc. ch. 5. p. 576. en 12o and p. 246 en 4to — N. Denizt 4e vol. p. 392 vo Cession de droits successifs — Lebrun p. 638. & Gp. Comre p. 1009. art. 334 № 3. — If a succession could be sold without the responsibility of paying the debts, Creditors might be deprived of their right as the heir might be insufficient or evade Justice — The very deed under which the Defendant purchased here

here shews the conditions on which the sale was made and the Defendants liability. — That all the proceedings had agt the Curator of the late S. Burnham were regular, and when an heir is an absentee, a Curator must be appointed to him for the validity of the proceedings — cites Domat, as above. N° 8. —

Mr Buchanan in reply, — maintains the opinion he first urged that the Civil law quoted by the French authors do not bear them out in the principle that an action like this can be maintained — The texts cited from the Code — De Pactis. lib. 2. tit. 3 & lib. 4. tit. 39. 1° & 2° law do not apply — This law applies to the Fisc only and not to individuals — refers to the opinion of several Commentators — cites, Cujas, Mornac, D'Argentre & others — The heir by his act could not give a greater right to the creditors than they had before — one man cannot stipulate for another — no man acquire but by a contract to which he is a party. — The authority cited from the Gr. Comre 4 vol. p. 1009 does not go the length contended for by the plaintiff — see 2 vol. p. 116. where the principle is clearly laid down and in conformity to the citation from the Civil law — Dic. Droit. Vo Vente de Succe — But there is a defect in the declaration which cannot be cured, the Cause of action against the Curator should have been stated as the grounds of this action and not the Judgment so as to give the Defendant an opportunity to answer thereto. —

The Court was of opinion that the action could not be maintained, on two grounds — the first, because a direct action is not given to the Creditor against the purchaser of a Succession the same as against the heir, that the principle must be admitted that the

Civil

Civil law ought not to be adopted as a rule of decision any further than as acknowledged and received in France, but in following this principle in this case the laws of the two Countries do not appear variant — The principle in the Civil law from all the authors cited is, that the heir still continues liable to the creditors notwithstanding he has sold the Succession, and although he may have his recourse against the purchaser in case he be sued for a debt of the Succession, still he cannot shake off his responsibility to the Creditors — another principle is that the purchaser of the Succession is liable to pay the debts of the Succession and to exonerate the heir, unless there be express stipulation to the Contrary, but in case of being sued by the Creditors he may avail himself of the exception here as to their right of him — Now it appears to the Court that all the French writers, with few exceptions agree with these principles — M. Lebrun is the only one who says that a personal action will lie of the purchaser by the Creditor, but as has been well observed he founds his opinion upon wrong interpretation of the Civil Law, and it seems rather singular that no arret has been produced to shew that this principle was ever acted on in France. The authority cited from N. Denizt. Vo. Cession de Droits Successifs. § 3. N°. 3. — should seem to admit a right of action by the Creditor against the purchaser but on a very different ground from that held by Lebrun for the contrary it inclines to the principle of the Civil Law — it says — "ils (les Créanciers) peuvent même
" s'addresser directement au Cessionnaire, parceq'étant
" Créanciers du Cedant, ils peuvent comme exerceant ses
" droits, poursuivre le Cessionnaire" — This however

only

only shews, that where the Creditor exercises the right of action which the heir has agt the purchaser he can bring such action agt him, which is indirectly denying to the Creditor the right to bring the action in his own ~~right~~ name alone, and as the heir has a right of action agt the purchaser to be relieved from any debt of the Succession so the Creditor may be subrogated in the rights of the heir for this purpose — But the great principle of law which operates against this action is, that no man can bind another, nor be bound, by a contract to which he is not a party, nor can one mem stipulate for another — where there is no privity of contract there is neither action or obligation — If this principle apply here, and we see reason to doubt it — how could the contract of sale to the Defendt bind him towards the Creditors, third parties, but not parties to that contract? — the action on this ground must fail — The other ground is that the Pltff has brought his action on a Judgt obtained against a Curator to the Estate of the late Samuel Burnham two years after the heir of the deceased had sold the Succession to the Defendant — this Judgment was irregularly obtained — for at the time, that is in June 1826, the succession of the late Samuel Burnham did not exist, it could not be represented by a Curator, it had passed by operation of law into the person of the heir, who alone became the responsible person for the debts of the deceased, and the Judgment ought to have been obtained agt him or agt the Curator as representing him so as to give legal effect

to

to the present action — or the action ought to have been brought upon the debt as it originally stood agt. the said late Burnham — Action dismissed —

Dominus Rex vs Vaughan

On certiorari —

This writ was sued out by one Aron Martindale in order to bring before the Court a conviction had against him before Clerk. R. Vaughan Esquire, Justice of the Peace for the Township of Stanbridge at the instance of Jeremy Drew, road surveyor or overseer for the said Township, for not making the necessary repairs upon the highway, and for not making the front-road across lot No 8. in the fourth range of lots in the said township —

Mr O'Sullivan for Martindale contended that the conviction ought to be quashed inasmuchas he was not bound to make any part of the front road on the said lot No 8 — That although he was the proprietor and occupier of the easterly part of the said lot No 8, yet that such part of the said lot did not in part or in the whole adjoin, or in any manner touch the said front road, and therefore he was not liable to make or keep in repair any part of the said front road, according to the Prov. Stat. 36. Geo. 3. ch. 9 sec. 3 —

But the held the Conviction right; That the duty and obligation of making the front road — adjoining any lot of land, did not attach merely to that portion of soil which touched the road, but to the whole lot; the intention of the law being that wherever a front road adjoined any part of a lot it

it was to be considered a front road for the whole lot, and all proprietors and occupiers of such lot bound to discharge their respective shares of duty attached to the lot in making and keeping in repair such front road —

No. 993.

Calton ... v. Murdock ... } Action of debt on deed of Sale. —

The declaration stated that on the 14th June 1825. by a certain deed or instrument executed before Mondelet and another public notaries, the plaintiff sold, transferred and made over to the Defendant present and accepting, one hundred acres more or less in superficies, being part and parcel of those four tracts of land situate lying and being in the Township of Hinchinbrook in the district of Montreal known by lots number sixteen and seventeen in the fourth and fifth ranges of lots in the said township — which said sale was made for and in consideration of the sum of Six hundred and ninety seven dollars, equal to one hundred and seventy four pounds five shillings, of which one hundred pounds were paid at the time of passing the said deed, and it was agreed that the balance should be paid in the following manner, vizt. twenty five pounds on the first day of Septr 1826 — twenty five pounds on the first day of October 1827, and the remainder in the course of the month of December 1828 with interest on the whole — Concludes for the two first of these payments due in Septr 1826, for which Pltff had formerly obtained a Judgt. and also for the payt. due in Octr 1827 & that Defendt. be held by Ca: ad resp: —

The Defendant pleaded by exception peremptoire en droit that for the sum of twenty five pounds for which the Pltff had obtained Judgment heretofore agt. the Curator representing the

the defendant, he the said pltff could not maintain the present action—

That the pretended instrument declared on by the said plaintiff, is not the deed of him the said defendant

And for defence au fond en droit, pleads that the matters and things set forth in the declaration are not sufficient to entitle the pltff to have and maintain his action aforesaid against him the Defendant— and lastly that the said Defendant is not indebted to the Plaintiff in manner and form &c—

On this plea issue was joined by the Replication, and the parties were now heard on the matters of law

Mr Sewell for the Defendt.— The Count in the declaration founded a Judgment heretofore rendered, which is still in force and may be executed is irregular, as the execution only of that Judgment could be demanded.— The Defendant has also pleaded, non est factum, because the title set out in the declaration is not a sufficient title and conveyance of the lot of land in question to the Defendant— the said lot of land lies in the Township of Hinchinbrook, and is held in free and common Soccage, and a conveyance thereof by an act before a Notary is no legal conveyance to the Defendt. The Stat of 6. Geo. 4. ch. 59. sec. 8, has changed the whole system with regard to lands of this description, and no other course or remedy can now be had but according to the laws of England— That according to these laws, a deed of conveyance of a real Estate can be made only by sealing and delivery, and without which it is void.—

Mondelet for Pltff. The Statute referred to by the Defendt is a new law introduced into the Country subsequent to the making of the deed of Sale in question to the Defendant, and therefore the antient laws of the Country will apply.— It is not consistent with the due interpretation of a Statute to give it a retroactive effect— The Stat. 31 Geo. 3. has a reference to the institutions of the Country in regard of the lands in free and

common

common soccage – The Canada tenure act refers only to the effect and not to the form of the acts to be passed in regard of these lands. – That in this Case there is sufficient in the obligation made by the defendant to compel him to pay the money now demanded without enquiring into the nature or sufficiency of the title to the land. – If there has been any error in regard of the form of Conveyance it has been the common error of the parties and of the whole Country as all free and common soccage lands have hitherto been conveyed in this manner – this common error must have the effect of law. Repn vo Erreur – Denvt. vo Erreur – and Denvt. vo Testament cites an instance where a Notary made a Testament out of his Jurisdiction which however was confirmed, from the general belief and error that he was within his jurisdiction – 1 Mornac. tit. 6. p. 906. –

The Court dismissed the exception and matters of law pleaded by the Defendant, first in regard of the Judgt heretofore obtained by the plaintiff, inasmuch as the present proceeding by Capias, was in the nature of an execution upon that Judgment against the body of the Defendant. – In regard of the title to the lot of land in question the Court did not in this case conceive it necessary to enquire into it, as this was an action for the recovery of a personal debt on a Contract, and all the enquiry here necessary was whether enough was stated in the declaration to maintain this demand, and the Court thought there was – That if the Defendant considered the title he had obtained from the plaintiff to be insufficient, he might pursue his remedy to get a better title. –

No. 1320. –
Dubord. –
v
Donegani. –

Action for a malicious arrest and prosecution

The plaintiff by his declaration stated, that he had been wrongfully maliciously and without any probable

cause

cause arrested by this body on the affidavit of the Defend^t that the plaintiff was indebted to him and was about to leave the province — whereas in truth and in fact he was not indebted to the Defendant in any sum of money whatever, and therefore praying damages. —

The Defend^t for exception pleaded, that the Plaintiff could not maintain his action inasmuch as he did not state in and by his declaration, that the action and demand of the said Defendant which had been so made and instituted against the plaintiff had been adjudged upon or in anywise determined — and upon this exception the Court dismissed the action. —

No 1433.

Franks. — v — Parker.

This was an action of trespass for encroaching on the plaintiffs farm and erecting a fence thereon. —

The matters in dispute between the parties having been submitted to arbitration, the arbitrators made their award whereby they found that no trespass had been committed by the Defendant. — After the award was returned and published in Court the plaintiff moved to discontinue the Cause on payment of Costs — But to this the Defend^t objected contending that as the matters in contest had been examined and determined by arbitrators named by the parties he was entitled to have the Judgment of the Court thereon, so as to foreclose the Plaintiff from bringing another action for the same object, and if the plaintiff was allowed to discontinue the Cause now, he could immediately institute another in hopes of better success. — The Court considered that the Defendant had acquired such an interest in the award of the Arbitrators as to entitle him to the Judgment of the Court, and therefore thought that the discontinuance ought not to be allowed in this form but if the pltff would alter the motion, & put it in the nature of a retraxit, & acquiese in the award of the arbitrators, it might be granted — and to this the parties consented. —

Monday 20th October 1828.—

No. 837.
Hays & al'.—
v.
Lacroix.—

Action by the plaintiffs as Executors of the last will and testament of the late David David, on a promissory note made by the Defendant to the said D. David for a sum of £ the said note, bearing date the 7th March 1822.—

Plea— That the note is prescribed in law— that Defdt owes nothing to the plaintiffs in their said capacity— that he has paid and satisfied the said note, which he offers to justify on oath.—

Replicn That although the note is prescribed, yet the Defendant hath not bona fide paid and satisfied the same.—

The Defendant on his oath declared,— "Qu'il a
" payé la somme de £37.10. cours actuel à feu David David,
" dans son bureau à Montreal en deduction du billet par
" lui consenti le 7 Mars 1822, filé en cette cause, et ce vers le
" milieu d'Avril 1822, quelques semaines apres avoir—
" consenti ledit billet, et qu'il a eté plusieurs fois pour payer
" la balance audit feu David David, ledit feu David
" David ayant promis d'indosser la somme ci-dessus
" mentionnée, payée, et qu'il a offert de payer la balance
" à un des Demandeurs, Moses Judah Hays, longtems
" avant l'institution de cette action, au commencement de
" l'année 1827, ou vers la fin de l'année 1826, avec les interets
" qui pourroient etre dus sur ladite balance.— Et declare
" ne rien devoir de plus que la balance ci-dessus mentionnée
" qu'il a toujours eté pret de payer".—

Mr Sollr. General for the plaintiffs, contended that they were entitled to Judgment for the whole amount of the Note against the Defendant— That the Defendant

by

by pleading the plea of prescription, is bound to comply with all the requisites of the law to entitle him to the benefit of that plea - he must affirm on oath what he has pleaded, that he has paid and satisfied the note - But the defendant here does not say that he has paid and satisfied the note, he says that he has only paid a part of it - this is proving only a partial payment and admits the legal validity and existence of the note - in this case the plea of the Defendant is not supported, the proof is not applicable to it -

But the Court held that the plaintiffs could obtain Judgment only for the balance acknowledged to be due on the note - that where a bona fide payment appeared to have been made either as to the whole or only of a part of the Note, the Defendt was entitled to take the benefit of it on this plea, as much as if he had pleaded payment and proved it by any other course. -

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No 1370.

Davi & ux
vs
Sanborn et al.

This was an action en restitution instituted by the plaintiffs Alexis Davi and Esther Laforce his wife, in order to be reinstated in their rights and to set aside a certain deed of sale and conveyance made on 21 Janv 1824 by the Defendant Smith Sanborn to one Michel Bellisle and the said Esther Laforce, then his wife, and a minor, and also a certain act of transport mentioned in the said deed of sale - After the death of her first husband, Michel Bilisle, the said Esther

Laforce

Laforce renounced, as well for herself as for the minor children of her marriage with the deceased to the Community that had subsisted between her and her said husband.— The present action was instituted on the principle of lesion in the Sale so made by Sanborn to Belisle and Esther Laforce, and was brought against the said Smith Sanborn and against Horatio Gates & Company to whom Smith Sanborn had made a transfer of the rights which he had acquired from the said Michel Belisle and Esther Laforce in consequence of the said deed of Sale —

To this action the Defendants pleaded for exception that the same could not be maintained inasmuchas the heirs or legal representatives of the said Michel Belisle who was a party to the said deed of Sale of the 21 January 1824, had not been made parties to this suit, and who were materially interested in the contest now raised by the said plaintiff — On this plea issue was taken by the plaintiffs, and the parties were now heard thereon.—

Buchanan for the Defendants — This action cannot be maintained unless all the parties interested are before the Court — there Belisle was a party to the original Contract, he was at the time the husband of the plaintiff Esther Laforce, and his representatives are materially interested in the Suit — Dig. liv. 4. tit. 4. l. 13. and liv. 42. tit 1. l. 47. the Prator never set aside any instrument unless all the parties were called before him — Bouchel.

Tresor

Tresor du dr. Fr. v° Restitution part. 3. ch. 4 — Meslé Minorité. ch. 14. N° 5. p. 486. & p. 142 — here the Court cannot decree an entire restitution as some of the parties to the Contract are not before it. —

Mr L. M. Vigé for Pleff. stated, that all the parties with whom the plaintiffs could have any contest were before the Court, and if the Defendants have any right of recourse to claim against the heirs of Belisle, it is their duty to put them in suit —

The Court was of opinion that the exception pleaded by the Defendants ought to be maintained that restitution was putting the parties to an act or deed in the same state and situation as they were in before the passing such act or deed — a part of the Judgt. in this Case is — "toutes choses doivent
Lange — "etre remises en l'etat qu'elles etoient avant l'acte —
"les parties se doivent restituer reciproquement ce —
"qu'elles ont recu l'une de l'autre" — this cannot be done for the parties are not here — We see also in the form given of the Lettres de rescision, that
Repre — it was required of the Judge that he should hear all the parties before adjudging on the Case — It was the duty of the plaintiffs here to have put the heirs of Belisle in suit, as they were apprized of his being a party to the deed in question

action dismissed, saving recourse

No. 346.
Gates & al
Millar & al

The plaintiffs as assignees and trustees of the Estate, debts and effects of Messieurs Maitland Garden and Auldjo in trust for the benefit of the Creditors of the latter have brought this action to recover from the Defendants a large sum of money as due by them to that insolvent Firm, and as one of the debts so assigned to the plaintiffs in their capacity of Trustees.— To this action a defense au fond en droit and three pleas of exception have been put in by the Defendants similar in every respect to those submitted in the case of McNider and others assignees of the Bankrupt firm of Alexander and Lawrence Glass vs Gardiner, and upon which after due consideration judgment was rendered in this Court on the 19th Oct. 1826.— It is upon the sufficiency of the above pleas, that the parties in this cause have been heard and the Court thus a second time called upon a second time to adjudge thereon.— Under these exceptions and the defense au fond en droit, it has been principally urged, that the assignment to and the appointment of the Plaintiffs as Trustees, was illegal and null, the formalities required by law not having been thereon observed, such as due notification to, and the consent of a majority of the Creditors, and the homologation in a Court of Justice of the deed of Assignment to, & appointment of the Pffs as Trustees, and that the plaintiffs could not in their assumed quality maintain this action; that at most they could be considered only in the light of agents and could not therefore sue in their own names, but in those of the Insolvent firm their constituents who were the only true proprietors of the debt claimed— and lastly that the assignment had not been notified to the Defendants.—

Upon reconsideration we are not disposed to think that the opinion we held in the former case should in any respect be departed from, and we shall therefore

therefore in this as in all ~~former~~ similar cases adhere to the principles whereon the decision in the case of McNider & others assignees against Gardiner was given — we should think it enough to say on the present occasion, if we did not find, that assignments of the nature of the present frequently come before us and appear to have been adopted in this Country in the supposed absence of any positive or express bankrupt law, and as it appears to have been resorted to as well for the security of the Creditors as for the relief of the unfortunate and insolvent debtors we deem it right to remove all doubts in respect of such assignments, again to express our decided opinion, that the same are in respect to the persons whose debts are thereby assigned, perfectly legal and do not require any of the formalities insisted upon by the Defendants to render them valid — they are made for beneficial and good purposes, and like any other assignment or transport, vest the debt thereby transferred in the assignee, who may thereon bring an action either in his own name or in that of the assignor — Jacomb. vs Transport № 5. — Of an assignment so made, none but the Creditors of the Insolvent debtors could complain for if made in fraud or to the injury of any one or more Creditors, there can be no doubt but that on their complaint, an act so infected, would like any other fraudulent act be set aside and rescinded, but he whose debt has been so transferred cannot object to the assignment he can have but one legitimate object, that of obtaining a valid acquittance on payment of what he owes, and this no doubt could be given him by the assignees the plaintiffs in this cause, to whom the debt might have been assigned purely and simply without express mention of its being assigned for the benefit of the Creditors of the assignor, of which transfer it would not be competent to the debtor to

complain

complain, whatever the Creditors of the assignor might have to urge against it, they taking the legal steps for that purpose – quoad therefore the person whose debt is transferred the assignment is valid, and whatever objections the Creditors not parties to the act might have, the debtor could not – excepte le droit d'autrui, particularly of those who it may be presumed are alive to their interests, and who by their silence evince that they have no ground of complaint, but rather acquiesce in an assignment made for the general benefit of themselves and all the other Creditors of the Bankrupt, and even with regard to the Creditors, Denizart observes, "Si par les circonstances particulieres du fait, la Cession dont "se plaignent les Créanciers, ne leur causoit aucun prejudice "elle cesseroit par la même d'être fait en fraude de leurs droits "d'être frauduleuse – faute d'interêt ils seroient non recevables "a en demander la revocation – Vo. Fraude relativement aux "Créanciers. No. 9. §. 2." With regard to the last objection, we have always held, that the want of notification was no bar to an action brought upon an ordinary transport or assignment of a debt, where the same still remains due and entire, and has not been attached by any third person, much less ought it to apply in the case of a general assignment made by a debtor to Trustees for the benefit of his Creditors, where it may fairly be presumed, public notice of such assignment would be given, nor giving full scope to the rule of law, transport ne saisit que du jour qu'il a été signifié, do we see any just cause to extend it so far, as urged by the defendant, for every debtor is bound to seek and satisfy his Creditor, and if he had done so, he would have there been notified of the transfer of the debt to another, or if not so notified, he might then with safety pay his original Creditor, whose receipt would be his discharge, he ought not to expect to be in a better situation

from

from the circumstance of the debt being assigned, and there can be little doubt, that his original Creditor might have sued him without any previous demand or notification upon the principle before alluded to — At the same time as this Court has a discretionary power in regard to Costs a party defendant who may appear in good faith and who admitting the debt and always ready to pay it, may have been improperly surprised by an action the Court might according to Circumstances either grant or withold costs as might appear just —

This Judgt. was given on Monday 13th. Octr. 1828. –

No. 1707.

Mactier v. Lacombe & ux. –

The Defendants in this Case were Canadians and born of Canadian parents, and having been brought into Court by a writ of Summons in the English language, they obtained a rule on the plaintiff to shew Cause why this process should not be quashed, not being in their language. – The Court having heard the parties on this rule, now gave Judgment as follows. –

The question now brought before the Court is considered of importance, as affecting a matter of right claimed by a large portion of His Majesty's Subjects in this province, that of being sued in the Courts of Civil Judicature by process in the French language, a right which, it is contended, has been confirmed to them by the laws and constitution granted to them, as the Canadian or new Subjects of the King. – To determine this question we must look back to the time of the Conquest of the Country, at which time it is well known, that the language of the Country, and that used in all the Courts, was the French language. – By the Capitulation of the Country which was made to General Amherst at Montreal in the year 17 it was among other things conceded to the Canadian people, that their property with some reservations, and the Civil rights should be preserved to them. – That after the peace in the year 1763,+ whereby amongst other things, it was directed that Justice should be administered in the Colony according to the laws of England, as far as circumstances would permit; – this however in no

+ a System of Civil Governt. was established in this Province, under the Kings Proclamation of the 7th. Octr. 1763.

nowise affected the Civil rights of the people, being intended as a temporary regulation until more effectual provision should be made, and in regard of the language, we find that although in the Superior Courts the proceedings were in English, yet in the inferior tribunals established throughout the Country, the proceedings were in French from the necessity of the case. —

By the British Statute of the 14th Geo. 3. ch. 83. a Constitution and System of government was finally established for the Colony, and from it are derived all those Civil rights, which the Inhabitants thereof, or the Canadian Subjects of the King can claim at the present day. — By this Statute, the whole System of Government established under the Kings proclamation in 1763, is set aside and annulled, and it is provided, that all His Majesty's Canadian Subjects within the Province of Quebec, with the exception of the Religious orders and Communities, should hold and enjoy their property and possessions, together with all Customs and usages relative thereto, and all other their Civil rights in as large, ample and beneficial manner as if the said proclamation &c had never been made; and that in all matters of controversy relative to property and civil rights, resort should be had to the laws of Canada as the rule in the decision of the same — and all Causes that should thereafter be instituted in any of the Courts of Justice to be appointed within and for the said province by His Majesty, his heirs, or Successors, should with respect to such property and rights be determined agreeably to the said laws and Customs of Canada. —

These large and comprehensive expressions as to the usages and Civil rights of the people of this Colony

under

under the description of Canadian Subjects, and the rule by which all contests in respect of them are to be determined, cannot leave any doubt as to the question of language, which we must necessarily consider as a Civil right of the people, for in the preservation of their laws, usages and Customs, their language was impliedly and necessarily preserved; and being now a point of controversy to be determined, as to the language in which a Canadian Subject is to be sued in a Court of Justice in this Country, which he claims as right under the laws usages and Customs of his Country, by what rule or principle of law is this point to be determined? — Not by the Law and practice in England, nor in any of His Majestys Colonies — but by that rule which is prescribed to us by the above Statute, that is, by the peculiar system of laws observed and confirmed to the Canadian people — And by the laws, usages and Customs in Canada, the exploit calling a defendant into a Court of Justice to answer to any demand there made against him, had always been, and has continued to be in the language of his Country, the French language. But it has been argued, that the language of the Sovereign, as being the language of the realm, ought to prevail and be observed in all his Courts, as well in this Colony as in England, as he is not bound by the above Statute to administer Justice in the French language, and that in all his Courts held under his authority, all his Subjects without distinction are and ought to be held to answer to all writs and processes in his name and in his language — To a certain extent this is true, the King is not bound by any act of Parliament unless specially named, nor is he bound

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in his communications made to his Subjects, to use any other language than that of the Empire; but this is not strictly speaking the question here — A writ of summons sued out at the instance and expence of a party for instituting an action in a Court of Justice cannot be considered as bringing into operation any of the Royal rights or prerogatives of the Crown, this on the contrary is the right of the Subject who demands it, and is used by him as the means given him by law to bring his adversary before a Court of Justice — the rights of the Crown in this respect yield to the convenience of the people and every man is entitled to have a writ in the King's name on paying for it — this is a Civil right, and is a part of the administration of Justice, which the King has pledged himself to maintain for the benefit of his people — the mode and manner of granting such writs may be a matter of regulation in the Courts in as far as is consistent with their authority, but the right to obtain them cannot be denied. —

The interpretation that was put upon this Constitutional act of the 14th Geo. 3. when it was first established and carried into execution in this Country, shews under what impressions the authorities of the day considered it — The French as well as the English language was used in all the Courts of Justice in the Colony — in every suit where a Canadian was sued, the language of the record was in French, a practice which generally holds at the present day — there were also Canadian Officers appointed in all the Courts for keeping and making up those records, and every thing seemed to indicate that there existed but one opinion on the Subject of the French language being so far recognized in all matters where the Canadian Subject was interested. —

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In the year 1785, we find an ordinance made and passed by the Governor and Legislative Council, which more immediately touches this question, whether that Ordinance was made to settle any doubt that had arisen does not appear, but serves to shew the impressions of the Legislature at the time; It being found necessary to — establish a mode of trial by Jury, and otherwise to — determine the course of proceeding in the Civil Courts of Judicature, it was by this Ordinance provided and enacted, consistently with what had theretofore been the practice, that every writ of Summons should be in the language of the Defendant, alluding to the two — descriptions of subjects in the Country, the Canadian or new subjects of His Majesty and British born subjects, as it was a matter settled that both the French & English language were recognized and used in all the Courts of the Country, so it was found necessary to regulate the mode and manner in which they were to be used in this respect, — And that this Ordinance was made in confirmation of what had been considered as following up the intentions of the British Statute, we have only to look a little further at the 9th Section of the above Ordinance to see in what manner Juries are to be composed for the — trial of Causes between Canadian and other Subjects of the King, and between the parties when they were both Canadians. — The 36th Section of this ordinance provides also for the writs of Summons in the Courts of Inferior Jurisdiction, being made in the language of the Defendt. —

— We see a further recognition of the French language in some of the proceedings of the Criminal Courts — by the Ordinance of 27 Geo. 3. it is directed that one half at — least of the Jurors shall be competently skilled in the language of the defence, be the same French or English.

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The French as well as the English language has always been used in all public acts and proceedings as well by the Legislative bodies as by the Judicature of the Country, and the necessity of this is too apparent, putting aside entirely all question of right. — Had the right here claimed been a — a matter of doubt, it is not easily accounted for that no question had heretofore occurred that would have called for a decision upon it, we have however been able to find none, nor any thing satisfactory on this head beyond vague report. —

It has also been argued that the provincial Statute of 41 Geo: 3. ch. 7. has repealed the Ordinance of 1785 in reg and of the writ of Summons being made out in the language of the Defendant, and that it may now be sued out at the will of a plaintiff in the English language in all Cases — But this by no means so clear — for although the words used in this Statute, the above clause in the Ordinance would appear to be repealed, yet it does not appear that this was the intention of the Legislature, as the question of language was not in contemplation what the legislature then had in view, was to remove the obstructions and delays which were created from the necessity of attending the Judge to get this order for suing out a Summons — nor can it be presumed that it was the intention of the Legislature to take away an existing right, established under the Constitutional Act of the Country, by such doubtful uncertain words as those in the said provincial Statute, and therefore according to all just and legal interpretation we must say that this was not the intention —

It has been further argued that the use of the French language in our Courts, was allowed for the benefit only of such of the Canadians as came under the King's dominions at the time of the Conquest, but that this — cannot apply to those who have been born since, as they

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are as much British born subjects as those of England or Ireland, and no distinction ought now to be made or allowed. — But the distinction here made of Canadians born before or since the Conquest is no where to be met with — the Statute of the 14 Geo: 3 — makes use of the words "all His Majesty's Canadian Subjects within the "Province" &c which must refer not only to those of that day, but to their posterity also, in regard of the rights thereby secured to them — the distinction is sufficiently marked between Canadian and British born subjects, both by the above Statute, and by the subsequent Ordinances. (a distinction perhaps at this day to be regretted) to shew that in regard of the rights of the former, the antient laws, usages and Customs of the Country, must form the rule of decision, and according to that rule we are bound to — determine, that the Canadian is entitled to be called into Court by a Summons in his own language, and by no other. —

Rule absolute for quashing the process. —