№ 2169
Robert
et
Toupin
et
M.Kenzie
del adjudn

Renusson. Tr. du Douaire. p. 13 in fo. Nº 9.

On fait une autre question — On demande si le mari, n'ayant point d'effets mobiliers et ayant seulement des Immeubles au tems de son mariage, dont il amenublit partie, si l'heritage amenubli sera sujet au Douaire de la femme? La reponse est aisée — premierement si la fem. accepte la Communauté, comme — l'heritage amenubli est entré en la Communauté et que la femme y a moitié, a Cause de la Comté — il est evident, que l'autre moitié n'est point sujet au Douaire de la fem. L'Immeuble du mari qui a été amenubli par le Contrat de mariage a perdu sa qualité d'immeuble à l'egard de la femme, et n'est point sujet au Douaire, de meme que les meubles du mari n'y sont point sujets. — La meme resolution doit avoir lieu quoique la femme renonce à la Communauté car il est egalement veritable de dire que l'Immble amenubli par le Contrat de mariage ne doit point être considéré à l'egard de la femme, comme un Immeuble. — La Convention par laquelle l'heritage a été amenubli, doit être executé soit qu'elle renonce à la Comté soit qu'elle l'accepte

Il ne peut y avoir deux titres lucratifs sur une meme chose —

Id. p. 63. Nº 53 On peut observer avec Lebrun, cinq principaux Cas ou le Douaire n'est pas toujours egale pour la mere et les Enfans. —

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1° Le premier est celui où le pere a ameubli un de ses propres dans son Contrat de mariage; il le donne à la Communauté, et le soustrait au Douaire de sa fem. qui ne peut pas avoir deux titres lucratifs sur une même chose. le Contrat de mariage et la distinction des parties y resistent absolument.— Cependant si les Enfans renoncoient à la Succession de pere et de mere, rien n'empecheroit qu'ils n'eussent leur Douaire sur ce propre, dont l'ameublissement n'etoit fait que pour la Communauté, et ne devoit avoir lieu qu'entre les Contractans.— Il faut dire le Contraire, dit il, plus bas, si les enfans sont heritiers de leur mere, parceque il ne tient qu'a eux, de pouvoir, en acceptant la Comté profiter de l'ameublissement — a plus forte raison si leur mere a survecu et l'a accepté.—

1 Bourj: p. 728 §. 28.— A l'egard de l'Immeuble que le mari a ameubli pour savoir s'il est sujet au Douaire Coutumier — Il y en a qui distinguent; si la femme accepte la Communauté, il n'y est pas sujet, parcequ'alors il est regardé comme Conquet — opinion très juste — mais selon eux, si elle renonce à la Communauté il y est sujet, parcequ'alors, il est regardé comme propre, et il reste tit dans la Succession du mari: mais il vaut mieux dire indistinctement, qu'il n'y est pas sujet par rapport à la fem. car on n'examine que son droit; mais l'acceptation de la Comté leve la dessus toute difficulté, et dans le cas de la renonciation, je pense qu'il reste toujours la force d'une stipulation qui l'en affranchit: Mais par rapport aux Enfans renonçans à la Succession de

de leur pere, j'estime qu'il y est indistinctement sujet, et principalement s'ils sont aussi renonçants à la Succession de leur mere qui avoit accepté la Communauté. — La difference entre eux est entiere Tel Immeuble dans la these generale doit par la Coutume sujet au Douaire Coutumier, par l'ameublissement, par la fiction, que cet Immeuble quoiqu'anterieur au Mariage, seroit regardé comme Conquet de la Communauté — La femme a renoncé a son droit de Douaire sur cet heritage autrement il seroit fait concourir en sa faveur sur un meme objet deux Causes lucratives — renonciation qui n'est pas de la part des Enfans et qui ne peut naitre d'une fiction, d'une — derogation qui leur sont totalement etrangeres lorsqu'ayant renoncé à la Succession de leur mere, ils ne peuvent être tenus de ~~tous~~ ses faits; et qu'étant Douairiers, ils doivent etre saisis, de tout ce que la Coutume assujettit au Douaire +

Duplessis. Tit. Du Douaire p. 240. —

Quid - des heritages que le mari s'est ameubli par le Contrat de Mariage pour les faire entrer en Communauté? Je tiens aussi qu'ils ne sont pas sujets au Douaire, parceque les parties ont suffisamment temoignés qu'ils ne le vouloient pas, quand ils ont fait l'ameublissement, et cela, quoique la femme renonce à la Comm^te et à plus forte raison quand elle l'accepte,

ne

ne pouvant pas avoir deux droits lucratifs sur une meme chose — Mais je les rendrais toujours sujets à l'egard des enfans. —

See also Lebrun Tr. des Successions. p. 392, §. 19. & 20 —
Repre Vo Ameublissement. p. 371. in fine.
Le Maitre —
Lacombe. Vo Douaire. §. 2. No. 7. — infra to Lebrun

Old Denizt. Vo Ameublissement No 3. —

Ainsi le mari peut vendre, aliener & hypothequer les Immeubles de sa femme qui ont été ameublis de la même maniere qu'il peut disposer du mobilier et des Conquets de la Communauté dont il est maitre —

Id. Vo Douaire No. 15.

Remarquons cependant ici, que le Douaire Coutumier ne se prend pas sur les heritages ou rentes du mari ameublis par le Contrat de mariage parceque les heritages ou Rentes ameublis sont reputés conquets relativement à la fem. et que le Douaire Coutumier n'a pas lieu sur cette espece de biens. —

Potb: Tr. du Douaire. — No. 28.

La Coutume par ces termes, que le mari tient et possede, ne comprend que ceux que le mari tient et possede comme propres de Comté. —

A l'egard de ceux que le mari a mis en Communauté par une Convention d'ameublissement, l'effet de cette Convention etant qu'entre les parties contractantes

ces

ces heritages soient regardés comme Conquets, ils ne doivent pas plus être sujets au Douaire Coutumier que les Conquets, qui n'y sont pas sujets. La femme par cette Convention, preferé d'avoir sur ces heritages, le droit de Communauté à celui du Douaire.

N°. 29. Cela est sans difficulté dans le cas auquel la femme accepte la Communauté. Il est evident en ce cas, que la femme ne peut pas avoir tout à la fois sur ces heritages le droit de Comté et le droit du Douaire.

Mais lorsque la fem. a renoncé à la Comté la Convention l'exclue-t-elle, meme en ce Cas, du droit du Douaire sur les heritages ameublis? Oui, car il suffit, pour qu'elle en soit exclue qu'elle ait preferé au Droit du Douaire, le droit de Communauté sur ces heritages, et qu'elle l'ait eu. Or quoiqu'elle ait renoncé à la Comté il n'en est pas moins vrai qu'elle a eu ce droit de Communauté sur ces heritages. Si elle n'a pas usé de ce droit, il n'a tenu qu'à elle d'en user, et d'accepter la Communauté. La Renon. suppose meme qu'elle a eu ce droit, car on ne peut renoncer à un droit qu'on n'a pas.

N°. 30 Cette disposition de la Coutume de Paris, et des autres Coutumes semblables, cesse, lorsqu'il y a une clause par le Contrat de mariage que ce qui avientra aux Conjoints par Succession, durant le mariage

entrera

entrera en Comté, car quoique tout ce qui est propre de Comté, ne soit pas toujours pour cela sujet au Douaire, on peut neanmoins etablir pour regle generale et qui ne souffre aucune exception, que tout ce qui entre en Communauté n'est jamais sujet au Douaire.

N° 294. Ils (les enfans) en sont privés, lors qu'il est convenu par le Contrat de mariage, que la femme n'aura aucun douaire: Car le Douaire des enfans etant la proprieté des choses dont la femme a la jouissance pour le sien — lors que la femme n'a aucun Douaire, les Enfans ne peuvent en avoir aucun.—

N° 298 On doit donc etablir pour regle generale, qui ne souffre aucune exception, que toutes les choses qui sont sujettes au Douaire Coutumier de la fem. le sont aussi au Douaire Coutumier des Enfans, pour la meme portion quant à laquelle ils le sont à celui de la femme; et toutes celles qui ne sont pas sujettes au Douaire de la femme, ne le sont pas non plus au Douaire des Enfans.—

N° 300. Les biens meubles d'un hom. les propres qu'il a amenbli a sa Communauté, les acquets qu'il a fait depuis qu'il est marié, les biens qui lui sont echus depuis par Succession collaterale, ou de celle de ses enfans, n'etant pas sujets au Douaire de la fem. ils ne doivent pas suivant notre principe être sujet au Douaire des Enfans.—

N° 321 C'est une suite de notre principe que le Douaire

des

des enfans est le meme que celui de la femme dont les enfans ont la proprieté, et la femme l'usufruit. Il ne peut donc consister que dans la proprieté de la meme chose que la fem. a choisi pour son Douaire —

N. Denis.t. v.o — Ameublissement. N.o 6. §8. p. 528.

Dans les memes Coutumes, les heritages — ameublis par le mari, ne sont dans aucun cas sujets au Douaire, soit que la femme accepte la Communauté, soit qu'elle y renonce — La raison est, que la femme ne sauroit acquerir en meme tems sur une chose, deux droits differens, qui s'excluent mutuellement selon les Loix — Duplessis, du Douaire. ch. 1. Sec. 4. pense que les Immeubles — ameublis par le mari doivent etre assujetis au Douaire des Enfans, quoiqu'ils ne le soient pas au Douaire de la femme — Mais cette opinion est contraire aux vrais principes etablis par Pothier dans son traité du Douaire. N.o 28. 298. & Suiv.s —

Id. v.o Douaire §. 4. N.o 8. p. 185.

Meme principe —

Prost de Royer v.o Ameublissement N.o 11. Doriaire Coutumier) p. 587. — 4.e Vol.

Pothier (du Douaire N.o 298 & suiv.ts) & Renusson (du Douaire ch. 3. N.o 108), refusent dans tous les cas, tant à la mere qu'aux enfans, tout douaire, sur l'heritage ameubli. — Leurs principes sont sans doute bien severes, cependant ils paroissent fondés sur cette maxime assez raisonable — On ne sauroit acquerir sur une chose, deux droits, qui par leur nature, sont incompatibles. —

Le Maitre. Tit. 11. Ch. 2. Du Douaire. p. 310

Lorsque la femme a renoncé au Douaire par son Contrat de mariage, les Enfans n'en peuvent prétendre — La Coutume établit le Douaire comme la Communauté, sans retrancher aux Conjoints la faculté d'en disposer autrement — Que le Douaire n'est propre aux Enfans qu'en cas qu'il y en ait un et que si les Conjoints ont le pouvoir de stipuler un Douaire moindre que le Coutumier, ils peuvent bien convenir pour des raisons particulieres, qu'il n'y en aura point du tout. —

Duvals Principes du Droit Coutr. & du Droit Ecrit Tit. Douaire. p 455. —

adds a further reason to the above principle Par la regle, que le Douaire de la mère est le propre des Enfans, et que les Enfans n'ont point Douaire de leur chef, s'il n'est stipulé par la mere. —

Laguerre
vs
Painechaud

In appeal.

To obtain a statement of the pleadings and facts from the record.

The question which arises in this Case, and which has been agitated before this Court, is, Whether the advocate can maintain an action at law against his client for his fees; and whether the appellant in the present case could maintain such action in the Court of K.B. of the Province for his professional services of the appellant rendered to the Respondent, in the prosecution of a plaint by the Respondent before the Court of Quarter Sessions of the Peace. from the said Court of K.B.

This question is of moment, as it regards the profession at large, and having met the decision of the Court of K.B. by which the right of action is denied, this Court has taken some time to consider the question, and to examine the authorities of law on which it rests, in order to determine upon what grounds as they can how far the above decision is well founded

In this Country the profession of the Law may be considered as still in its infancy, and it must be the desire of this Court, and of every Court, to protect and support it, by a due maintainance in all the rights attached to it, that it may attain that rank & stability in Society, to which, when honorably exercised, it is entitled — It must not however be

understood

understood that we can countenance any extravagant claim, or any unjust pretention, which the interest or views of parties may bring before us, for this would be doing an injury not only to the public, but to the profession, and destroy the very basis on which it ought to rest.—

It has been stated, that the present action is prosecuted for a demand not consistent with the duty or honor of the professional character, it being for quoddam honorarium — a thing honorable to accept, but not honorable to demand — a thing, in the nature of a gratuity, depending altogether upon the good feeling of the client, but not to be demanded by the advocate — a thing, given not as a reward for services rendered, but as an acknowledgment for a benefit received — and for this it is said the law gives no action, as there can exist no right to demand that which depends upon the will of another to give.— If the demand is to be considered either as dishonorable in itself, or for a thing depending on the will of the giver, it cannot be expected that this Court should maintain it — if on the contrary the law recognizes the right, it will be the duty of the Court to grant it, for there can be nothing dishonorable in prosecuting a right which the law allows —

Let us examine those authorities of law which

are

are applicable to the case, to see how far the demand is founded — In doing this, I shall first mention the authorities from the Civil law, some of which have been noticed in the course of the argument, not that I mean to enter very minutely into the consideration of them, for although they may be considered as bearing in some respects upon the Case, yet we do not adopt them as the ground of our decision ~~and to which I mean~~ — In looking at these authorities, we find, that by the Roman law different principles were adopted at different times, for regulating the honoraire of the advocate — According to what was called the old law, l'ancien droit Romain, the advocates then were not only deprived of any right of action for their Honoraires, but they were forbid to accept or ~~take~~ receive any thing on this account, from their clients. Ne ob causam orandam, pecuniam, penumve accipiant — This was called the Lex Cincia, from the name of the Tribune of the people who proposed it. —

By a subsequent law, the advocates were permitted, after the hearing and Judgt rendered in the Cause, to receive of their clients such Honoraire as they chose to give them — whether in money or other things, and even to take securities for the payment of it — In the time of The Emperor Nero, this was extended ~~this~~ further, and as he allowed the advocates to take their

fees

fees in advance, which was also authorised by subsequent laws, ~~except that~~ they were only forbid to take more than "centum aureos", the Cens sous d'or, in any case.—

In the Digest, we find several extracts, made by the Compilers of that work from the writings of Ulpien, under the title, "De — "Extraordinariis cognitionibus" Liv. 50. Tit. 13.— The most material are the 10e. & 12e. paragraphs of 1er. Law. — The 10e. §. says— That in regard of " the fees of the advocates, the Judge shall take " into consideration the nature & importance of " every Cause, the talents of the orator or advocate " and the local useage of the bar where the Cause " is pleaded." — And by the 12e. §. it is stated, " Where an agreement has been entered into between " the advocate and his client touching a Cause " after it has been heard and determined, it is legal, " and the advocate may demand what is so agreed " provided what is so demanded, does not, with " what he has received, exceed the sum of Centum " aureos." —

— The Code presents to us, three texts or Laws in which mention is made of the Honoraire of the advocate — these are—

Liv. 4. tit. 6. De condictione ob Causam datorum
Liv. 2. Tit. 6. §. 2. De postulando—
Liv. 3. Tit. 1. §. 9. De Judiciis. —

The

The first of these, is but little applicable here and need not be noticed —

The Second, declares null and void every kind of agreement that the advocate might make with his client — which was considered to apply as well to his fees as to every other matter

1. Ravot sur Perrier quest. 177. N°8. p. 364.

The third, is taken from Justinian, where after providing different means for preventing delays in Judicial proceedings, it directs,

" That there shall be paid by the clients who
" have the means, the fees of their advocates,
" and that those clients who refuse to do so
" shall be thereunto constrained by seizure of
" their effects, in order to prevent under a pretence
" of this kind, any procrastination of the cause —

" Honorariis silicet à clientibus qui dare
" possunt divertissimis togatis omnimodo
" præstandis ; et si cessaverint, per executores
" negotiorum exigendis, ne per hujus-modi
" machinationem causæ merita protrahantur." —

In the Novelles, one Law may be cited on this head — it is the 124th ch. 1. although it bears but little on the question — It says, That the parties to the suit, ought at the opening of every Cause to swear, that in order to secure the success thereof, they had neither given, nor promised any thing, nor would give

or

or promise any thing, either to the Judges, or to any other person, their advocates excepted. —

Many of the extracts must be referred to, but these are the most material what ~~These extracts contain nearly the whole of~~ are ~~what is~~ to be found in that body of law, called the Corpus Juris Civilis, in anywise applicable to the question before us — upon these laws and authorities, different constructions and interpretations have been put by different authors; the more general opinion however which has been held thereon, is, that whatever the advocates had a right to stipulate for, or to receive from their clients, they acquired no right of action to compel the payment of what was considered merely an honoraire — But the Court here gives no opinion upon these Laws, because ~~we~~ conceive the Case before us does not rest upon these authorities; ~~as~~ there are others, peculiar to France, which bear more closely upon it, and we must look to the Jurisprudence of that Country so far as it can be considered applicable in this, for the decision of all the Civil rights ~~between~~ of Her Majesty's Subjects ~~in~~ this Country —

Many of the Old French Ordinances ~~made in France~~ which have reference to this question, appear to have been framed upon the contemplation, and with certain modifications of the Civil or Roman Law, some of these I shall consider, because on

or

Nor was it necessary to have adverted to them further than to shew the basis of those opinions which are adverse to the right of the advocate we must look to the Laws of France as applying more properly on this point, and as constituting the Rule of decision of all the Civil rights of the Majesty's Subjects in this Province.

on the just interpretation thereof, the decision of the present question depends —

The first, ~~I shall consider~~ we shall notice is the Ordinance of Philip le Hardi of the 23d Oct. 1274, it directs — "Que les avocats recoivent un Salaire
" proportionné à l'etendue de chaque affaire, et à
" leur experience, de maniere cependant qu'il
" ne s'eleve jamais au-dessus de 30 livres Tournois:
" Ita tamen, quod pro quacumque causa movenda,
" pro tota causa, trigenta librarum Turonensium
" unius advocati salarium non excedat" — and it adds, that the advocates shall bind themselves by oath not to receive anything more, either directly or indirectly, even under pretence of pension, present or gratification of any kind — and it attaches very severe punishment to the infraction of this law —

This ordinance may be considered only as a modification and extension of the Law cited from Ulpien, "de extraordinariis cognitionibus" as by ~~this Ordinance~~ it a maximum is fixed for the fees of the advocate which they ~~could~~ not exceed, if they received more, they were not only liable to be punished, but to restore the overplus — but nothing is here said as to any action which is given to the advocate to exact even what ~~he was~~ so allowed to receive —

The next, we would notice is the Ordre of Charles 7th

of

of the month of April 1453, art. 45. — It is in these words — "Pour obvier aux fraudes, feintes, "et reclemens, que pourraient faire les procureurs, "tant pour le Salaire des avocats, et autres depenses "et mises qui sont a faire pour la deduction des "Causes, et lesquelles depenses desirons être rescindées "et moderées le plus que faire se pourra — Nous "voulons et Ordonnons que un chacun procureur, "soit tenu de bailler et montrer l'etat de ce qu'il "aura reçu de ses parties, en prenant certification et "quittance de tout ce qu'il aura baillé, outre la somme "de 20 Sols Tournois, en faisant foi d'icelles, tant "aux dites parties, qu'à ceux qui taxeront les dits "depens — Et defendons aux dits procureurs qu'ils "ne demandent, exigent ou reçoivent aucune chose "des dites parties, sous couleur de divers dons, ou autres "depenses extraordinaires, qui ne seront necessaires "et justes pour la deduction de la Cause — Et ne "voulons par les parties, ou procureurs, être fait "paiement aux avocats pour ecritures, salvations, ou "contredits, avant la Cause plaidée ou duement "introduite, pour proceder aux dites ecritures et "autres choses necessaires — Et pareillement voulons "et ordonnons les Salaires des dits avocats, tant "pour plaidoyeries, ecritures, qu'autrement, être "reduits à telle moderation et honnêteté, eu egard "aux Ordonnances et Observances anciennes, et "pauvreté de notre pauvre peuple, que nul n'ait "cause de s'en plaindre envers nous, ni notre "dite Cour" —

By

By this Ordre two things are apparent, The one, That the parties were not obliged to pay the advocates their fees in advance, and that the procureurs, or attornies could demand nothing of them under pretence of paying the advocates for writings or pleadings not yet finished — The other — That the advocats in fixing their fees, ought to limit them to a moderate allowance so that no complaint might be made to the King or to his Courts in that respect — But nothing is expressed in this ordance more than in that last ment^d as to a right of action given to the advocate for the recovery of his fees — It may however be said, that where a right to receive fees is given, the action to obtain them must necessarily be given as a legal consequence, as without this remedy the right was imperfect and imcomplete — This interpretation must however be regulated by the other ordinances on this subject —

The next Ordre ~~I~~ we shall mention is that of Blois, of the month of May 1579. art. 161 — it says but little on the subject — and states merely — "Que les avocats & procureurs
" seront tenus signer les deliberations, Inventaires,
" et autres ecritures qu'ils feront pour les parties
" et au-dessous de leurs seings, ecrire & parapher

" de

" de leur main, ce qu'ils auront reçus pour leur
" Salaire, et ce sur peine de Concussion"—

Nothing more positive can be concluded from this Ordre than from the preceding in regard of the right of action of the advocate to recover his fees— The 159e art. of this Ordre says,— "Tous Juges seront tenus d'écrire
" et parapher de leur main tout ce qu'ils
" auront reçu des parties pour epices &c" but it was never understood, that although the Judge had a right to receive this "epices" that he had a right of action to compel the payment of them— and from the wording of this Ordre it would seem that the right of the advocate stood on the same ground—

The Ordre of 1667. tit. 31. art. 10— ~~in treating~~ ~~the~~ merely reiterates the injunctions of the above article of the Ordre de Blois, by saying—
" Que les avocats soient tenus de mettre le
" reçu au bas de leurs écritures"— leaves in all other respects the question as to the right of action as it stood under the Ordre de Blois

As there is nothing to be found in these Ordinances which deviate in any material manner from the provisions of the Civil law—

as ~~not~~

as to the mode and manner by which the advocate might stipulate for, or receive his fees from his client, and as they do not ~~so~~ give in express terms, a right of action to the advocate, some writers have held that ~~they~~ ~~or~~ ~~vary from the Civil law so little~~ ~~either as to the mode and manner by which~~ ~~the advocate might stipulate for, or receive~~ ~~his fees from his Client, they ought to be~~ ought to be interpreted according to the generally received principles of the Civil Law, and that no right of action can be considered as accruing to the advocate thereby — but these Ordinances ought to be interpreted like any Statutory laws, by comparing them with other Ordinances or Statutes made in pari materia, and by considering the decisions of the Courts of Law thereon —

Nos ordonnances

Now there are other Ordinances touching this matter, which may be considered as more favorable to the right claimed by the advocate in this Case, and which in their construction have been more favorably interpreted for him — I would here refer to the Ordre of Louis 12th of the month of June 1510, art. 48. — which is in the following words — " Pour ce que souvent est advenu, que " plusieurs Greffiers, avocats, et procureurs de notre " Royaume, ont long tems attendu a se faire payer " des actes, registres, et grosses des procès par eux " reçus, et ont mis dette sur autre, tellement, que " quelquesfois leur a convenu faire vendre, crier & " subhaster les biens et heritages des parties pour " lesquelles ils avoient reçu lesdits proces, dont ils ont

" été

" eté detraits ; pour a quoi obvier, avons ordonné, et
" ordonnons, que desormais les dits Greffiers ne pourraient
" demander le Salaire a eux dû pour les dits procès par
" eux reçus, sinon qu'ils le demandent trois ans apres
" les dits procès finis — les autres ordonnances de Nos
" dits predecesseurs faites sur moindre tems, demeurant
" en leur forces & Vertu". —

In the first part of this article, the avocats are mentioned and ranked, on the same footing with the procureurs & Greffiers — all are alike supposed to have a right of action for the recovery of their fees or honoraires, and they are all classed together as making a bad use of this right, by delaying their action, and accumulating their demands to the injury of individuals — In the latter part of the article, or what may be considered, the enacting part, the Legislator speaks only of the Greffiers, and it is for them only, that the term of three years is limited, to bring their action, but in regard of the avocats & procureurs, nothing is said — Now this must be either ~~the~~ an omission in the impression of the Ordinance — or it must have been the act and intention of the Legislator. If we consider it as an omission, by inserting the words omitted, the reading would run thus - " Que desormais les dits Greffiers, avocats,
" et procureurs ne pourraient demander le Salaire
" à eux dû, sinon qu'ils le demandent trois ans
" apres les dits proces finis," which would be admitting in very positive terms, that within the period of three years, they had a right to prosecute their action —

If

If on the other hand the impression of this article of the Ordinance be correct, (and in the collections of Neron and Guenois, it is thus printed) in that case we have only to observe, that the Legislator, did not think fit to apply the same remedy in regard of the avocats & procureurs, as in regard of the Greffiers but has left their recourse open for the recovery of their rights, ~~which by this ordinance~~ they are acknowledged to hold.—

But in whatever point of view this may be considered, there is one thing very evident, that this Ordinance puts an interpretation as well upon the Roman Law as upon the preceding Ordinances, much more favorable for the interets of the advocats as it very clearly intimates, that by those laws the advocates had a right to prosecute their action at law for the recovery of their ~~honoraires~~ fees —

To corroborate this interpretation of the above Ordinance, we may refer to an Ordre of Francis 1st of October 1535. made it is true for Provence, ~~but whose provisions are of that general nature as to be considered as applicable to the whole Kingdom~~, In this Ordre there is an article, the 13th of the 18e Chap., which renews with some modifications the above Ordre of Lewis 12th and in which the advocates are expressly named — It is in these words — " Et quant aux Salaires ~~et~~ vacations des dits greffiers, ils n'en pourront faire ~~la~~ demande ou poursuite apres un an " d'iceux Salaires reservés; et le semblable des " avocats

* but which may be considered as having a reference to other & former Ordinances on the same subject in force throughout the King dom *

" avocats, procureurs, Commissaires, notaires, —
" Sergens ou autres Officiers et praticiens. — Et si ne
" pourront les vivans demander arrerages de leurs
" pensions de plus de trois ans passés, eu egard au tems
" de leurs demandes — et au regard des heritiers des
" trepassés, ils seront tenus d'en faire demande dans
" l'an du trépas, et s'ils attendent plus d'un an,
" ils n'en pourront faire poursuite que de deux ans,
" et s'ils attendent deux ans, ils n'en pourront faire
" poursuite que d'un an — et s'ils attendent autres
" trois ans, ils n'en pourront jamais faire poursuite" —

The expressions ~~isothois Ordonnance~~ here are too — positive to leave room for doubt, and we find that according to the terms thereof, actions were instituted and maintained by advocates for their fees, as may be seen by the arrets of the Parliament of Aix. — But even before the time of Louis 12th and Franc. 1er we are told that under the Ordre of Philip Le Hardi of the 23d Oct 1274, the Courts made no difficulty to recognize the agreements made between the advocates and their clients in regard of their fees (although this was considered to be contrary to the Roman Law), and even to allow actions to be instituted by the advocates against their clients for those fees, which they had not taken the precaution to regulate by express agreement. Beaumanoir, in his Coutumes de Beauvoisis ch. 5. expresses himself to this effect —

"Li

"Li avocats par notre Coutume, peuvent prendre
" de la partie pour qui ils plaident, le salaire —
" convenancé, ne mes (pourvu) que ils ne passent
" pour une querelle (un proces) 30 livres, par —
" l'etablissement de Notre Roi Philippe — Et si
" il ne font point de marché à cheux (avec eux)
" pour qui il plaident, et doivent être payé par
" journées, selone che que il le vaut, et selon leur
" état, et che que la querelle est grande ou petite;
" car il n'est pas raison que un avocat qui va à
" un cheval doive avoir aussi grand journée, comme
" chil qui va à deux chevaux &c — Et quand plet
" est entre l'avocat et chely pour qui il a pledé,
" pour che que il ne se peut accorder don salaire
" qui ne fut pas convenancé, estimation doit être
" faite par le Juge selone ché que il voit que
" raison est."

In following up the opinions which have been held and the decisions which have been given on these laws and Ordinances, we may mark the following —

Dumoulin in his Commentary on the Regle de Chancellerie — "De veresimili notitia", No 53. says, that Jacques Mareshal, an advocate in the time of Chas 7th Chas 8th & Louis 12th obtained by arret of the Parlt of Paris, a condemnation against his client for 60 livres parisis, for drawing up a Memoir in a matter of small moment, but in which the Sieurs

of

of the advocate was conspicuous — "habita ratione
" non ad brevem, sed ad doctam et resolutariam
" scripturam, modumque litis, et eminentem scientiam
" advocati". — which shews not only the right of
action, but also the principle of decision which
was adopted in the Case —

Brodeau on the 125 — art. of the Custom of Paris
2 vol. p. 194. № 6. of the Sommaire — lays it down
that the advocate can maintain his action in this
Case — he says — "Il est bien vrai, que des actions
" de cette qualité, "quo verecundiam pulsant", ne
" sont pas bien frequentes en ce Parlement, ce
" neanmoins, elles ont été reçues par deux arrets
" celebres." — which he cites —

Fer. Gr. Com^r Tit. de Prescription. som^re 2. № 25.
p. 295. holds the same opinion, and refers to the
same decisions —

Brillon. Dic. des arrets. v^o "Avocat" on head
(Honoraires des Avocats) says — "C'est contre toutes
" les regles qu'on pretend que les avocats n'ont
" point d'action pour leurs honoraires — elle est
" etablie par les Loix et les Ordonnances, par le
" sentiment des Docteurs, et par les arrets —"
and gives a number of Cases where decisions
have been had —

"Il est vrai, qu'il n'est pas agréable à un
" avocat de demander en Justice ses honoraires,
" mais il est encore plus indigne aux parties qui
" ont profité de ses soins et de ses veilles, de lui
" refuser la recompense qui lui est dûe —"

Bruneau

Bruneau in his Tr. des Criées p. 360. & suiv. says,
" Tout judicieux lecteur conviendra avec moi d'un
" principe certain, que tout travail merite paiement,
" c'est pourquoi la reconnoissance qui est due aux
" avocats pour leurs peines, et le soin qu'ils
" apportent à soutenir, ou à defendre leurs cliens,
" est qualifié d'honoraires — C'est le caractere qui
" lui est donné par nos Loix, en joignant ~~l'honnêteté~~
" l'honnête à l'utile, afin de marquer que les
" avantages et le gain qui se rencontrent dans une
" belle et si noble profession, n'ont rien de mercenaire
" etant inseparables de l'honneur que les Loix proposent
" aux avocats pour recompense "—

p. 363. " L'on dit, qu'encore bien, qu'un avocat ne
" soit pas obligé de donner son ministere, neanmoins
" il n'a point d'action en Justice pour son paiemt—
" et qu'il n'y seroit pas recevable — Je repond
" à cette objection, que je ne sais pas comment on
" la peut proposer, car jusqu'à present, je n'ai
" pas vû de loi, ni d'ordonnance, ou cela soit ecrit,
" ainsi elle tombe d'elle meme, s'il est vrai que les
" offices que rend l'avocat à son client meritent
" retribution, suivant le principe — "que tout service
" merite recompense". — Il est certain, que lorsque
" le client ne fait pas ce qu'il doit, l'on est en droit
" de lui demander et de le contraindre au paiement
" de meme que pour ses autres dettes — L'on ne
" sauroit me montrer en aucun endroit que
" l'action soit deniée en Justice à un avocat."

Many more authorities might be cited,
from the French Writers ——————— to

to the same effect, some of them nearly down to the time of the late Revolution, all of which agree in admitting that this right of action does exist, but add, that it cannot now be exercised by any advocate, not from any legal disability in him, or by any decision of the Courts, but from a private regulation adopted by the Corps of advocates and professional men attached to the Courts of the Parliament of Paris, who ~~voted~~ in order to raise the honor of the profession above all mercenary views, ~~beyond the views of pecuniary recompense~~, had determined, that any advocate of their body who shall bring an action in a Court of Justice for his fees, shall be struck from the list of advocates practising in those Courts — as a matter of private regulation, this may have been very laudable, and may have contributed much to maintain the honorable character of the profession. for it is possible, that the love of gain may predominate over honorable feelings and degrade the noble efforts of the profession to the low estimate of a hireling reward; but this cannot be urged in a Court of Justice as a ground to deprive the advocate of a legal right. if he will forego the odium attached to a demand of this kind, it is not for the Court to enter into the private views or regulations of the profession in this respect, nor to refuse on that account what the law allows — There is no instance shewn, nor can be shewn,

where

where the Parliament of Paris ever refused to the advocate his right of action, because he thereby incurred the Censure of the profession, we even see the contrary to be the case, as cited in the Rep^re ~~de~~ — "Ainsi etoit

" il de regle constante que tout avocat au
" Parlement de Paris, qui demandoit ses honoraires
" en Justice, encourrait ipso facto, la radiation
" du Tableau — mais le Parlement ne statuoit
" pas moins sur la demande". —

But whatever may have been the Cause, or the effect of such a regulation, adopted by the advocates of the Parliament of Paris, we do not see that it can be noticed by the Courts in this Country — if the profession here (but) have any regulations on this subject, ~~of~~ which the Court knows nothing, they will enforce them in such way as shall best secure the honor of that profession, we can determine only upon what the Law requires —

It is true indeed, that if we were to ~~bargain~~ adopt the principle of decision in England on this point we must confirm the Judgment rendered in the Cause, because there no action can be maintained by the ~~professional man~~ advocate for his fees — In that Country ~~they have adopted the general doctrine of the Roman Law~~ the doctrine of the Civil Law on this point would seem to prevail — It is not for this Court

2 Conyus on Courts. p. 278.

to

~~to blame the principle~~ — But here, although the Roman Law may be usefully employed, in the absence of other authorities, yet it must be silent when the law of the Country speaks, and ~~has~~, the French Ordinances, with their equitable interpretation by the Courts of Law must guide us in our decision — We hope the honor of the profession will not be ~~affected~~ by it, ~~if it is~~ but should this be the case, we trust there is sufficient of honorable feeling in that profession to correct the evil. —

№ 1988.

Hart
vs
Bouron

On question how far the Cessionaire of a debt with guarantee & stipulation of fournir & faire valoir by the Cedant, is answerable in case of the subsequent insolvency of the Debtor. —

Fer. Gr. Comme art. 108. §. 2. De la Garantie. №24. & 25.

Pour ce qui est de l'autre question, savoir, si le Cedant est tenu de l'insolvabilité survenu au debiteur apres le transport — Il est sans doute que le Cedant n'en est pas tenu au cas d'une simple dette personelle, mais seulement au cas d'une rente cedée et transportée — La raison est, qu'en une simple dette, le debiteur etant solvable lors du transport, le Cessionaire doit s'imputer d'avoir permis qu'il devint insolvable, en ne le contraignant pas au — payement — il n'en est pas de meme d'une rente dont le rachat ne depend pas du — Creancier, mais seulement du debiteur — et comme il peut arriver dans la suite que le debiteur devienne insolvable par la perte de ses biens ou par la diminution de leur valeur, le — Cessionaire en vertu de la clause susdite peut s'adresser au Cedant apres discussion dans quelque tems que ce soit, a l'exemple du fidejusseur qui est toujours tenu de l'insolvabilité du debiteur. —

Dic: Ferrière. V° Garantie.

La troisieme clause — la promesse de fournir et faire valoir la chose cedée, — auquel cas le cedant est tenu, tant de l'insolvabilité du debiteur au tems du Contrat, que de l'insolvabilité qui lui est survenüe apres le Contrat lorsqu'il s'agit du Contrat de vente, ou de transport d'une rente — Mais quand il s'agit du — transport d'une simple dette personnelle, le cedant n'est tenu que de l'insolvabilité du — debiteur au tems du Contrat, et non de celle qui lui seroit survenüe

1 Despresses. Des Contrats. part. 1. Sect. 5. N°. 20. p. 58.

La garantie de fournir et faire valoir, emporte la garantie de l'insolvabilité du debiteur de la rente même pour l'avenir, et oblige neanmoins le Cessionaire à la discussion. — Cette clause a le même effet en Cession de somme — exizible in diem, ou sous Condition — Mais la même clause etant apposée dans la Cession d'une dette purement exizible, elle n'emporte que la garantie de l'insolvabilité du debiteur lors de la Cession. —

Lacombe, V° "Garantie". —

La clause de fournir et faire valoir, emporte la garantie de l'insolvabilité à venir de la rente. Loys. ch. 4. N°. 7. & 8. mais requiert discussion N° 13 & 22. de meme en Cession de dettes in diem, sous Condition. Loys. ch. 5. N°. 4. — Mais si la dette est pure et sans condition, cette clause n'emporte que la — garantie de l'insolvabilité lors de la Cession — c'est la faute du Cessionaire de n'avoir pas fait payer le debiteur, quand il en avoit le moyen. Loys. ch. 5. N° 3. —

The following authorities would incline to favor the right of the Cessionnaire

Repse. Vo. Garant. p. 722. — does not make the distinction between a Rente and an ordinary debt, but says generally — La promesse de garantir, fournir & faire valoir rend le Cedant garant de l'insolvabilité presente du debiteur, et de celle qui peut arriver dans la suite — mais le cessionnaire ne peut exercer son recours contre le cedant, qu'apres avoir discuté les biens du debiteur, & prouvé son insolvabilité. — Le Cessionnaire est même obligé, nonobstant la promesse de garantir, fournir & faire valoir, de faire les poursuites necessaires pour etre payé; de sorte, que s'il laisse prescrire — s'il manque de s'opposer au decret d'un immeuble — ou au sceau d'un office, sur le prix desquels il auroit eté mis utilement en ordre, et par ce moyen payé de sa dette, il ne peut plus revenir contre son — garant, parceque en effet, la dette est alors perdüe par la negligence du Cessionnaire, plutot que par l'insolvabilité du debiteur —

Few the instances are cited, in which neglect may be imputed to the Cessionnaire —

so says. Denizart —

N. Denizt. Vo. Cession. §. 3. Nº 6. p. 379. — La garantie de fait, avec promesse de fournir & faire valoir, comprend non seulement la — solvabilité actuelle, mais encore la solvabilité future du debiteur. — Car des que le Cedant promet de faire valoir, c'est qu'il s'engage de faire en sorte que le debiteur le paye — et en se soumettant à la fournir il promet de la payer, si ce Debiteur n'y satisfait pas. —

Par

Par cette garantie le Cedant se rend Caution simple du debiteur —

Le Cessionnaire ne peut exercer cette garantie, si c'est par son fait qu'un le Debiteur est devenu — insolvable à son egard, comme si ce Debiteur ayant des Cautions ou des debiteurs solidaires, le Cessionnaire les a déchargé, ou quelques uns d'eux du Cautionnement, ou de la solidité. — Cela a lieu, meme lorsqu'il n'y a que de la negligence par exemple, si le Cessionnaire a laissé perir les hypotheques, ou autres suretés qu'il avoit sur les biens du debiteur. —

Poth. Vente n°. 565.

Makes nearly the same observation, he says, Il faut aussi que ce soit sans le fait, ni la faute de l'acheteur que la rente vendue soit devenue — caduque — si dont l'acheteur a des-obligé quelqu'un des Debiteurs ou Cautions de la rente, s'il a libéré quelques hypotheques, il ne pourra exercer l'action de garantie contre le vendeur — He says the same thing — s'il a laissé prescrire des hypotheques soit par le laps de tems, soit en manquant de — s'opposer aux decrets des biens hypothequés. —

2. Argou. 387.

Le Cessionnaire est même obligé nonobstant la promesse de garantie, fournir & faire valoir, & faire les poursuites necessaires pour être payé, de sorte que s'il laisse prescrire, s'il manque de s'opposer au decret d'un immeuble ou au Sceau d'un Office sur le prix desquels il auroit été mis utilement en ordre, & par ce moyen payé de sa dette, il ne peut plus revenir contre son garant, parcequ'en effet, la Dette n'est pas tant perdue par l'insolvabilité du Debiteur que par la negligence du Cessionnaire. —

1. Arretés de Lamoignon
Tit. 22. Des Transports
№ 11. p. 140

Si outre la clause de garantie, le cedant s'est obligé de fournir et faire valoir la dette active mobiliaire, ou la rente par lui cedée, il demeure garant de l'insolvabilité du débiteur, supposé même qu'elle soit survenüe depuis le transport. —

№ 2098.

Fabrique de Laprairie
v.
Jerome Longtin

On question, whether a grant by the Curé & Churchwardens of a pew in the church to a man & his family à perpetuité can be revoked.—

1 Arrets de Louet
Lettr. E. 9. p. 679

Jugé au rapport de Mr Le Pelletier, en la premiere chambre des Enquêtes le 22 Mai 1574. Monsieur Prevost, President, que les bancs et les places dans les Eglises ne se pouvoient bailler à perpetuité, ni à une famille pour en jouir à perpetuité, mais que telles places étoient pures personnelles, et le don d'icelles resolu par le décés de la personne à laquelle la place avoit été concedée; etant en la liberté des marguilliers ou Procureurs de Fabrique d'en disposer apres à leur volonté, n'y ayant aux dites Eglises qu'une place affectée aux Laïcs, qui aille à l'heritier ou successeur, qui est celle du Patron ou Fondateur; Ce qui a favorablement depuis été etendu à ceux qui ont fait bâtir dans les Eglises, des Chapelles, à fund amentis, & dotées pour la celebration de quelque Service.—

1 Marechal. D. Hm p. 278.

After this arrêt, the annotator says, Encore que les bancs et places des Eglises ne soient pas hereditaires, neanmoins les veuves, enfans et heritiers de ceux à qui elles ont été concedées, ont accoutumés d'etre conservés en la possession d'icelles moyennant une reconnoissance qu'ils font à l'Oeuvre & Fabrique de l'Eglise, et d'etre preferé à tous ceux qui les demandent.— And cites several arrets by which this preference was allowed.—

Le Marechal Dr: Hon. ch. 2. p. 286.

La clause dans la Concession que le banc appartiendra à tous les heritiers & descendans de celui auquel la Concession est faite, ou même à celui qui sera proprietaire de la maison qu'il a dans la paroisse, est nulle; neanmoins elle est tolerée à cause du profit que l'Eglise en retire. —

Dic. Des arrêts Vo Banc Heredetaires - No 8. —

Il a été jugé par arrêt du Parlement de Rouen, que les bancs étant sacrés, ils ne pouvoient être concedés aux paroissiens, qu'aux leurs — autrement on seroit introduire une Seigneurie et proprieté des choses Ecclesiastiques contre la dis position des Loix Canoniques et Civiles —

Hericourt - Lois Eccles: de Franc - C. 10. No 13. —

Ceux qui n'ont pas le droit d'avoir un Banc dans le Chœur doivent s'adresser aux Marguilliers et aux Curés pour avoir une place dans le Nef pour eux et pour leur famille — Cette Concession se fait moyennant une somme que celui à qui le Banc est accordé paye à l'Eglise — Elle n'est que pour sa vie — mais apres sa mort, ses enfans, ou ses heritiers sont preferés à tous les autres, en offrant autant que les etrangers qui demandent la place.

Lacombe Jurisp. Canon. Vo Droits. Hon. Sec. 6. No 5

La Concession de Banc est toujours revocquables, en rendant l'argent avant d'oter le Banc, suivant Loyseau. No 68. —

Regulierement, Concession de Banc n'est qu'a vie et ne peut être faite à une famille, ni a perpetuité — But a preference is given to the widow & Children —

Dict. de Droit Canonique de M. Durand de Maillane v° Banc dans les Eglises. p. 433

Nous avons dit plus haut que la possession sans titre ne suffit pas a un particulier pour avoir droit de Banc dans une eglise, au moins en Pays Coutumier — nous ajouterons que la Concession d'un Banc faite par les marguilliers est toujours revocable en rendant le prix — elle est même toujours personnelle quand elle seroit conçue en ces termes, "pour en jouir a perpetuité" — La veuve, les enfans, ou les heritiers n'ont que l'avantage d'etre preferés, en faisant un nouveau don à la Fabrique cité Henricourt. —

see also Sousse, Traité du Gouvernement Spirituel & temporel des paroisses. p. 56. 57. —

Code des Curés 3 Vol. p. 619.

Arret de la Cour du Parlement, du 12 Mars 1765 — In which the nullity of the alienation a perpetuité of the Banc d'Eglise, is recognized and confirmed — and it is ordered that no Concession be made but for the life of the occupant & during his residence in the parish. —

№ 1430.

Auger. a
Piette & al.

On question touching the Insinuation of the Don mutuel, in a marriage Contract whether the want of Insinuation renders it void, or merely voidable, so as to require a demand being made for this purpose or a plea, alledging the insufficiency of the Stipulation from this defect. —

The 284e art. of the Custom seems express in this respect - it says - "un don mutuel de soi ne "saisit, ains est sujet à delivrance. — Et pour être "valable, doit être insinuée dans les quatre mois "du Jour du Contrat, et l'Insinuation faite par "l'un deux vaut pour tous deux. — Apres laquelle "insinuation, ledit Don Mutuel n'est revocable, "si non du consentement des deux Conjoints." —

By the ordinance of Franc. 1st in the year 1539. art. 132 directs — "Nous voulons que toutes — "Donations qui seront faites ci-apres, par et entre "nos sujets, soient enregistrées et insinuées en "Nos Cours et Jurisdictions ordinaires des parties "et des choses données, autrement seront reputées "nulles, et ne commenceront à avoir leur effet "que du jour de l'Insinuation." —

The Ordonnance de Moulins, of the year 1566. art. 58, says, "à faute de ladte insinuation seront & "demeureront les Donations nulles & de nul effet et "valeur, tant pour le regard du Créancier que de "l'heritier du donnant." —

Fer Gr. Comm.
on art. 284. Glos. 2
№18 – in fin p. 1600.

Puisque l'ordonnance a ordonné l'insinuation tant en faveur des heritiers que des Créanciers, on ne voit pas qu'il y ait lieu de s'en ecarter, soit qu'il y ait des Créanciers auxquels ils soient joints ou non, puisque l'ordonnance est sans distinction. —

Id. №19.

Il est vrai que l'insinuation a eté introduite principalement en faveur des Créanciers et des heritiers, mais comme l'Ordonnance prononce la nullité des donations faute d'insinuation, on peut dire que le defaut d'Insinuation, peut être opposée par tous ceux qui ont interet. —

№23.

Les Ordonnances faites touchant l'Insinuation ne distinguent personne, obligeant generalement tous les Donateurs, sur peine de nullité, d'insinuer les donations qui leur sont faites – et partant, il semble qu'il n'y ait personne qui s'en puisse exempter. —

Id. p. 1615.

Henry the 2d. made ~~another~~ Declaration in Febry 1549. in order to interpret and leave no doubt as to the extent and application of the article 132 of the Ordre of 1539 — it is in these terms — "As regard de
" l'article 132, faisant mention des insinuations et
" enregistrement des Donations, Declarons et ordonnons
" que sous le nom de Donations, seront comprises et
" sujettes à insinuation les Donations faites en traité
" de mariage, & autres donations faites entre vifs, combien
" qu'elles ne soient simples, ains remuneratoires, ou
" autrement causées. &c —

But as this Declaration did not clear up all the

Doubts

which had arisen in regard of certain kinds of Donations entre vifs, which, it was pretended were not subject to insinuation, The Ordonnance de Moulins, which was made in the year 1566, directs, by the 58e article, — "Pour oter à l'avenir
" toutes occasions de fraudes et de doutes qui pourroient
" être mûs entre nos Sujets pour l'insinuation des
" Donations faites entre vifs, mutuelles, reciproques,
" onereuses, en faveur de mariage et autres, de quelque
" forme ou qualité qu'elles soient, faites entre vifs, —
" comme dit est, seront insinuées et enregistrées és
" Greffes de nos Sieges ordinaires de l'assiette des
" choses données, et de la demeurance des parties &c — It
" then goes on to say — autrement et à faute de lad^te
" Insinuation, seront et demeureront les Donations
" nulles et de nul effet & valeur, tant pour le regard
" du créancier que de l'heritier du donnant." &c

—

1. Duplessis. Tr. des Don: entre vifs & Testamentaires — Ch. 3. Sec. 2. p. 560. —

La neuvieme Condition est, que le don mutuel doit être insinué dans les quatre mois, et l'Insinuation faite à la requete de l'un, vaut pour tous les deux, il peut toutesfois etre insinué en quelque tems que ce soit apres les quatre mois, mais il faut que ce soit du vivant des deux conjoints, autrement il seroit nul. —

—

1. Louet. Letr. D. N°4. p. 412. —

See also the terms of the "Declaration du Roi, du 17 Fevrier 1731 — the art. 19 & 20 — are express as to Donations in marriage Contracts. —

Denis. V°. Nullité

N°. 2. 3. 4.

On distingue deux sortes de nullités dans les Conventions et dans les Contrats — 1°. Celles qui sont établis par les Coutumes et par les Ordonnances, et celles qui suivant notre usage, ne rendent pas les actes et les Contrats nuls de plein droit, mais donnent seulement ouverture à les faire anéantir et rescinder par la voie de la restitution en entier. —

Les nullités de la premiere espece sont nommées nullités d'Ordonnance — Quand un acte en est infecté, elles le rendent nul de plein droit — Il suffit en ce cas d'alleguer la nullité pour la faire prononcer, sans qu'il soit necessaire d'obtenir des lettres de Rescision. —

Du nombre des actes infectés de ces nullités sont les Contrats usuraires — les obligations passées par les femmes en puissance de mari sans autorisation — les donations, qui ne sont ni acceptées, ni insinuées. —

It is however said, N°. 15. — Les nullités d'Ordre peuvent être opposées par forme d'exception, sans qu'il soit besoin de lettres de rescision — mais on ne peut les opposer, que lorsque les choses sont encore entieres. — Si par example, on avoit signifié des défenses, ou des fins de non-recevoir sur le fond d'une demande formée sur un exploit nul — on ne pourroit plus opposer la nullité; elle seroit couverte par la circonstance des moyens fournis au fond. Voyez l'arrêt du 12 Mai 1707, rapporté au Journal des Audiences. Tom. 5. liv. 7. ch. 19. —

See also. Rep^re vo Nullité. p. 249. 250 —
2. Jousse Just. Cr. p. 26. 27. N^o 57. 58
Do — — — — p. 33. N^o 72
1 Pigeau. 399. 400 —
1 Bornier p. 279. —
Perrin Tr. des Nullités de Droit —

No 1163.

Maitland & al. appts
vs
De Lagorgendiere
& Boudreau — Respts

In the Court of Appeals. —

The declaration stated, — That the Defendts on the 6th May 1820, were owners of a schooner or vessel called the Reine Blanche, and on that day entered into a charter party of affreightment before Doucet and his confrere, Notaries, at Montreal, by which, the said Olivier Boudreau, the Master of the said vessel, for himself and for the owner Mr De Lagorgendiere, did undertake and agree, that the said schooner or vessel, being tight, strong, staunch, and in all respects sufficient for the voyage, he would be ready by the 15th May at the port of Montreal to load such goods as the pltffs should tender to him, for which he should sign bills of lading, and should forthwith proceed to either of the ports of Barbados or Trinidad in the West Indies, according as the Supercargo should require, and there unload the said vessel, and thereupon to load the said vessel with all such goods as should be offered to him by the said plaintiffs or their agents, and for which the said Defendts should sign bills of lading, and thereupon to return back to Quebec or Montreal, according as the Supercargo should require, and there to unload and deliver to the said plaintiffs the whole of such goods, when the said voyage should be determined (The acts of God, Kings Enemies, Fire, and all and every dangers and accidents of the Seas, winds & navigation

of.

of whatever nature and kind, during the said voyage always excepted).— That in consequence of said charter party the said vessel proceeded from Quebec to Trinidad, where she unloaded her Cargo when the said Plffs on the 1 Dec. 1820 reloaded the said vessel with a full cargo of goods, viz.t

70 Puncheons of Rum
41 Hogsheads } Sugar
24 Barrels }
14 Puncheons of Molasses—
+ 18 Puncheons of Lime Juice
+ 10 barrels of bottled Rum.—
34 Barrels of Limes & oranges.—
2980 Cocoa Nuts
14 Kegs of Lard, and
+ 2 Quarter Casks of Madeira Wine,

being of the value of five thousand ..... lawful current money of this Province — And although the said Bourdeau did afterwards deliver to the said plaintiffs, a part of the said goods, viz.t

5 Puncheons of Rum
18. Puncheons of Lime Juice
10 Barrels of bottled Rum, and
2 Quarter Casks of Madeira Wine,

yet the said Defendants, have not delivered the residue of the said goods (although the act of God, the Kings Enemies, nor any danger or accident of the seas, rivers, or navigation, did prevent them from so doing) but on the contrary the said Defend.ts conducted themselves negligently so that the residue of the said goods, of the value of three thousand pounds, current lawful money

aforesaid

aforesaid, are still wholly undelivered to the said plaintiffs, to the damage of the said plaintiffs three thousand pounds, Current money aforesaid

Conclusions against the Defendants for the part of £3000 jointly & severally, for damages with interest & Costs. —

Plea of Mr Delagorgendiere. —

1st Exception peremptre en droit perpetuelle — Says on — Because after sailing from Trinidad with the Supercargo on board appointed by the plaintiffs, about the 6th Sept 1820 — by the act of God, the effects of the climate, of the season, as well as of the sea and navigation, the said Vessel was damaged and perforated by worms, so as to take in water in all directions, whereby the Master and Mariners were obliged to make for the port of St Thomas, for the safety of their lives, of the said Vessel, and of the goods on board, where it was found necessary, after examining the said Vessel, to put her on the Stocks, and to make considerable repairs to her, which were made by the order, consent and direction of the Supercargo, and of the Insurers of the said Cargo — which said Supercargo and Insurers caused a considerable part of the said Goods on board to be sold, the produce whereof they applied to pay the repairs of the said Vessel

That the said Schooner so repaired left the said port of St Thomas, about the 28th Oct. 1820 and was afterwards by the act of God, of tempests

and

and dangers of the Seas, damaged in her masts, Sails and rigging, and was obliged to run into the port of Newport in the United States of America, and there to winter, and that the Master with the consent of the Plffs sold and disposed of a further part of the Cargo on board, to pay, as well the further repairs becom necessary to the said Vessel, as the wages and board of the Sailors. —

That it was the said Supercargo of the Plffs who so disposed of the said goods. —

That the plaintiffs by themselves and their agents disposed of the said goods. —

That the Master of a vessel cannot by his acts bind his principal or a Coproprietor, beyond the value of the vessel in so far as regards the repairs and expenditures of the vessel; and that the Schooner in question is not worth more than £390 — Cy —

That the freight earned by the said Vessel which is still due by the Plffs amounts to more than the said Sum. —

2— Defenses au fond en droit — denies the right of the Plaintiffs to maintain this action —

3. Defenses au fond en fait — denies the facts.

The answer of the Plaintiffs to the above pleadings is general and joins issue thereon.

Plea —

Plea of the Defendt. Olivier Bourdreau is in all respects the same as that of Mr Delagorgendiere - and the same answer is made thereto by the Plaintiffs. -

Before entering upon the consideration of the principal question raised by this action, we must first determine as to the liability of the Defendt Mr Delagorgendiere, ~~upon the sup~~ under the charter party entered into with the Plffs by the Defendt Mr Bourdreau, upon the supposition that the Plffs have a good Cause of action on that Contract - Mr Delagorgendiere was no party to that Contract, and to make him liable under it, it is necessary that enough should appear to support that allegation made by the plaintiffs in their declaration that this Contract was made and entered into by the Defendt Bourdreau as well for ~~himself~~ ~~as for~~ Mr Delagorgendiere, as for himself

To support this, we have the following evidence - The deed of Sale of the 6th Septr 1819, by which the Defendt Mr Delagorgendiere sole then proprietor of the Schooner Reine Blanche sells and conveys one half of her to the Defendt Bourdreau, for the considerations therein mentioned, and in this deed it is amongst other things - stipulated as follows - " Sera ladite Goelette " menée et conduite par ledit Sieur acquereur, " et ce à frais communs entre eux, et ledit Sieur

" acquereur

" acquereur aura pour gages et Salaire chaque
" mois pour mener et conduire ladite Goulette,
" la moitié de la Somme de dix livres Courant
" pour mener et conduire ladite Goulette en Mer —
" Et aura pour gages et Salaire pour la mener &
" conduire en la Fleuve S. Laurent la moitié de la
" somme de Cinq livres courant — Aura en outre
" mondit Sieur Acquereur le droit de payer les
" gages et dépenses de ladite Goulette, et en avant
" partage des gains et benefices d'icelle." —

By the testimony of the Witness, Turnbull it also appears, that the Defend. Lagorgendiere was apprized of the intended voyage of this Schoone Rum Blanche to Trinidad & Barbadoes on or about June 1820, before she sailed, and the same is more fully acknowledged by Mr Delagorgendiere himself, in his answers to the Faits et articles — He did not then intimate his disapprobation of the voyage, nor does any desire to retract — that authority with which he had vested Boudreau, his Coproprietor, to act for him in this behalf — The Contract between Lagorgendiere and Boudreau in regard of this vessel, was of a Commercial Nature — it was for the carriage & transport of goods, + Merchandize, as well on Sea voyages, as on the River St Laurence — they were to participate in all profit and loss, and Boudreau

was

was to conduct and carry on the business — and they thereby became jointly and severally bound for all their dealings and transactions in regard of this vessel, like any other Mercantile Concern — The Charter party in question had in contemplation the joint interest of the Defts and was entered into by Boudreau as the authorised Agent of Lagorgendiere, † and we must say that both are equally bound thereby —

† It contained no extraordinary stipulations which would have required a more express authority from Mr De Lagorgendiere, the stipulations are only such as the Law would enforce of the owners of Vessels of this description /

Looking therefore to the other facts in the Case, we find, that this vessel sailed from Quebec on 21 June 1820 — arrived at Trinidad in July after, there discharged her Cargo, underwent some repairs, and re-loaded for Quebec — She left Trinidad on the 4th Sept and on the 11th of the same month, became so leaky as to be compelled to run for the Island of St Thomas — here she was examined, and found wholly unfit to continue her voyage, having 4 feet water in her hold and leaking at the rate of 4 feet an hour, which was found to proceed, from that cause stated by the Defendants in their plea, her bottom being perforated by worms in almost every direction — Here very considerable repairs were found to be necessary, in the opinion of those who surveyed the vessel, and these repairs were in consequence made under the direction and consent of Mr Turnbull

the

the Master, of a Mr King, an agent for the assurance Co at Lloyds, but in which the Supercargo, Mr Galway took no part—

To pay the expence of these repairs, and the other things incident to the then State of the vessel, a great part of the Cargo belonging to the plaintiffs, was sold, by the concurrence of Capt Turnbull, of the Defend. Boudrian who was on board, and of the said King— These expences are stated to have amounted to about One thousand Pounds, of this Currency.— The vessel being refitted, sailed from St Thomas's on the 28th Oct and shortly after, in consequence of a gale of wind, she sustained so much damage, as to compel the Capt to put into Newport in the State of Rhode Island, where further repairs were made, and it being then too late to proceed on the voyage, she wintered there— To defray all these expences, a further part of the Cargo was sold, and the ensuing Spring the vessel arrived at Dublin, with the small portion of what remained of the Cargo, which was delivered to the Consignees.—

On this statement of facts, and on the arguments had, some questions have been raised, which we must now consider.—

St—

It has been said, that the injury done to the vessel by worms, is a danger of the Sea, and as such, within the exceptions contained in the Charter party — In answer to this, we must refer to decisions on the point, as our safest guide for our decision — The first is that cited by the plffs 1 Esp. N. P. Rep. 445. 6. Rhol v Parr. — where it was held by L^d Kenyon and a Special Jury, that a damage done to a vessel by worms was not a loss by perils of the Sea — & therefore not covered by the Insurance.

So where a Ship was destroyed by rats, L^d Ellenborough was clearly of opinion, that this was not any of the perils usually insured against in the Policy of Insurance — In mentioning this Case we find it corresponds with what is said in Emerigon 1. Vol. 377. who cites a Case from the Consulat de la Mer which states, that where any injury was to be apprehended from rats, if the Master used the precaution to put Cats on board, he was excused, by thus endeavouring to prevent the injury; as this was using the best precaution against it, for he lays it down, that the Captain must deliver without damage all the goods he has received, " a moins que le
" dommage ne procede d'un accident, qu'on
" n' a pu ni prevoir, ni empecher " And

2 Marsh. 493
4 Campb. 203.

L^d

Ld Ch. J. Abbot in his treatise on Shipping, in noticing this Case, observes, This rule, and the exception, bearing somewhat of a ludicrous air, furnish a good illustration of the genral principle by which the Master and owners are held responsible for every injury that might have been prevented by human foresight and care. — Marshall in his Treatise of Insurance makes nearly the same observation — he says, The Master as well as the Owners, is answerable for all loss or damage goods may sustain, unless it proceed from an inherent defect in the article, or from some accident or Misfortune which could not be foreseen nor prevented — For, he says — the vessel must in all respects be fit for the trade in which she is meant to be employed. —

1 Vol. p. 234. 5.

Id. p. 151.

Now it is but too evident, that this vessel was not fit for the trade in which she was meant to be employed, and that all that precaution was not used, which might, and which ought to have been used to render her so, particularly against that kind of injury to which she was exposed in the voyage about to be undertaken, and

which

which is not a peril of the Sea, the injury from Worms.— What do the Witnesses state in this respect?

1 Samuel Brown, a Ship-Carpenter, for 30 years and upwards, says, It is usual and generally considered necessary, to sheathe Vessels going to the West Indies, if they are not copper'd, to prevent the bottoms from being ruined by the worms — they are considered safe when so sheathed, as strong Card paper is put on between the sheathing and the vessel, and the worm cannot pass through the paper.— A vessel of about 130 tons, might be sheathed in about 4 tides, without removing the Cargo —

2. John Munn — a Ship-Carpenter for many years.— says — It is usual to sheathe Vessels going to the West Indies — I do not consider it altogether safe to send Vessels to that Country without being sheathed — I would not send one of my own — I am also a Ship-Owner.— I have declined chartering Vessels going to that Country, on account of their not being so — sheathed.— The sheathing is requisite to — prevent the worms from injuring the bottom as it has frequently occurred, that Vessels have required new bottoms in consequence of the injury sustained by the worms — I think that every experienced Seaman would necessarily take

take this precaution upon entering into that trade — The sheathing render Vessels perfectly safe from the worms — there is sheathing paper used on purpose which is put between the vessel and the sheathing which worms can seldom penetrate — It would take probably 4 tides to sheathe a vessel of the description mentioned, without moving the Cargo —

3. John Thirlwall, Merch.t trading to the West Indies, says, — he always considered it necessary to sheathe vessels going from the port of Dublin, unless they are coppered — On several occasions I wished to charter Vessels which have been refused me, in consequence of not having been so sheathed, and on that account only, I would almost say, that it is the universal custom to sheathe Vessels — indeed people will not trust them without — They are considered perfectly safe when so sheathed, and which is requisite to prevent the worms from eating away the bottom of them — I have resided some years in the West Indies, and am well acquainted with that trade. —

The state of this evidence shews clearly, that every master, or owner of a Vessel, chartering it for this trade, must know, and was bound to know what was requisite to render such vessel in all respects fit for that trade —

It is said by Emerigon — "Si le Capitaine "n'a

1.re Vol. p. 373
1 Valin. p. 394

"n' a pas prévu, ce qu'il auroit dû prevoir, il
"est en faute" — although the author here makes
use of the word, "Capitaine", yet it is equally
applicable to the Owner, for the "Capitaine", is in
this respect, the preposé of the owner, and both
equally liable, in what regards the sufficiency
Pothier. Ch. P. N°31.- of the vessel, "pour leur faute legere" — and
amongst other things, it is the duty of the
Captain, "de bien agréer, calfeutrer, & conditionner
1. Emerigon. 373. "son navire afin d'arriver à bon port, et que
1 Valin. 653. "les marchandises soient rendües saines & sauves
"au lieu de leur distination" —

The Defendants here however not only knew
the state of the vessel, and the danger to be incurred
but they chose not to provide against it, but to
run the risk — see the evidence of Turnbull —
he says — "That this Deponent advised the said
"Olivier Beaudreau, previous to sailing from
"Quebec, to get the bottom of the said Schooner
"sheathed, informing him that as it was an old
"bottom it would be more liable to be eaten with
"worms, and that it ought to be sheathed, to
"perform the said Voyage with safety on account
"of the worms — to which the said Olivier
"Beaudreau replied — that he had not time so to
"do, and that he must run the risk" —

The Defendants therefore having chosen
to run a risk which was apparent, and
which has been the great cause of disabling

their

their vessel, they must stand to the consequence —

2. Holt on Ship's. p. 82. — The sufficiency of the Ship is the substratum of the Contract between the parties, and a ship not capable of conveying the goods in a proper state, is a failure of the Condition precedent to the whole Contract. —

We have therefore to enquire to what extent the Defendants are to be considered as liable to the damages claimed by the plaintiffs —

On this head, it has been contended by the Defendants, that as owners they cannot be bound beyond the value of the vessel for any act of the master, and that on abandoning the vessel they ought to be discharged, and in support of this argument the Stat. 7. Geo. 2. ch. 15. has been cited — But could we consider this to be the law of the Country, which we do not, it cannot apply, as that Stat. was made for the purpose of exonerating the owners from acts of embezzlement or misconduct of the master or Mariners in regard of the Cargo, and not to make owners liable in this respect beyond the value of the vessel — but here is no question of embezzlement, but the sale of the plaintiffs goods for the benefit of the Defendants vessel — Even according to the Ordre of 1681, which is a more pointed authority for the Defendrs in this respect, the sale of the goods on board for the repairs of the vessel, is assimilated to the loan of money

Liv. 2. tit. 8. art. 2. 1 Valin 568.

In

for the same purpose, and the owners cannot be exonerated from the payment thereof by abandonment of the vessel - it is an exception to that article of the Ord[e]. As to what extent the owners can be bound by the acts of the Master, cannot here come in question because one of the owners, having the express authority of the other, was present and consenting to all that was done - he might have checked the master, nay discharged him if he had seen fit - he on the contrary approved of his conduct, and assumed all the responsibility - It therefore becomes unnecessary to enquire into the value of this Vessel or whether any abandonment of her has been made by the Defendants. -

1 Valen. 443. 655. 6. Poth. Ch. 5. N° 34.

The Maritime laws of all Countries render the owners liable for what has been advanced for the repairs of the Ship during her voyage, whether in Money or materials, the sale of a part of the Cargo, and of a part only, for this purpose can be allowed, as the last resort, in the case of extreme necessity, and where no other means are left - For what is so sold, the owners of the vessel must be liable, whether the damage arises from the perils of the sea, or from their own misconduct - Saving to the owners their recourse, if recourse they have on the Insurance of the Vessel or freight. -

2. Holt. on Shipp[g] & Nav: p. 91 - says. - But the

the Ship belonging to the owner, and the Cargo to the freighter, and the damage more immediately belonging to the Ship than to the Cargo, and the Captain being the servant of the Owners, and not of the merchant, are strong reasons of law and public expediency, for confining this authority of the Master over the Cargo, to the narrowest limits — and upon this principle admitting even a partial sale of the Cargo in no case, where the repairs can be procured by other means — It is therefore the duty of the Master in the first instance, to try the hypothecation of the Ship — or the personal Credit of his owners, or himself — and in the event only of the total failure of these resources, and of the extreme necessity of the case — for the safety of the Cargo itself, to have recourse to a sale of a part of it — But in this Case, on the return of the vessel, the proceeds of such a sale must be paid to the freighter by the owner, or he may deduct it from the freight —

2 Holt. p. 94.

Many cases might be cited to this effect

1 Holt. p. 385 — see cases.

Valin says — "Faute de trouver a emprunter, même en mettant les agrêts et apparaux en gage, le maitre peut vendre alors des marchandises du Navire lui — auquel cas, celui dont les marchandises seront vendües n'aura rien à dire, et il ne sera question que de lui en payer le prix ou —

1 Valin. p. 443 liv. 2. tit. 1 art. 19.

Some

Some of the authors seem to doubt as to this right of recourse, in case the vessel were afterwards lost but both Valin & Pothier are most express in saying that even in that case the proprietor of the goods is entitled to a recovery agt the owners of the vessel — En un mot nulle raison pour dispenser du paiement le proprietaire du Navire puis que c'est a acquitter sa dette personnelle, que la somme a été employée —

1 Valin. p. 655. 6. Poth. Ch. P. N° 34

We have lastly, to consider, the amount of the damages which the plaintiffs are entitled to recover — The rule which is applicable in this case is thus laid down — d'un coté, le maitre, (in this case the owner) tiendra compte de la valeur des marchandises au prix que le reste sera vendu au lieu de la decharge — et d'un autre coté, que par cette raison, il aura le fret entier de ces mêmes marchandises —

1 Valin. p. 655. liv. 3 tit. 3. art. 14

Pothier says — "Observez que le maitre contracte envers le proprietaire des marchandises vendües deux especes d'obligation, l'une de lui en rendre le prix; l'autre de l'indemniser du gain qu'il aurait pû faire si elles eussent été portées au lieu de leur destination" —

This is not to be assimilated to a case of average, where what is saved is to contribute towards the loss, but is a damage arising from the misconduct of the owners, or in its mildest expression, an indemnification for —

for that part of the Plaintiffs property which has been laid out and expended by the Defts for their own particular benefit and advantage. The estimate in such cases, according to the common rules of law, would be, to indemnify the party in all that he has lost, and in this particular Case, that is determined according to the current prices at the port of delivery.—

Exécuteur Testamentaire. — Duo. as to Mortgage —

Rep^re. V^o. Ex^r. Test^re p. 161 —

Si l'Exécuteur Testamentaire a été nommé par Justice, ou qu'il ait accepté la Commission par un acte authentique, il y a de ce Jour — hypothèque sur ses biens — autrement l'hypothèque n'est acquise contre lui que du Jour des condamnations. Il en est de même de l'hypothèque qu'il peut avoir sur les biens de la Succession —

N. Denisart. V^o Ex^on Testamentaire N^o. 11. §. 6.

The latter clause of this N^o — Ne peut on pas dire de même, et à plus forte raison de l'Exécuteur Testamentaire, que sa gestion ne commence pas du Jour du testament qui l'autorise, mais uniquement du Jour ou il en accepte la charge; et qu'à moins qu'il n'ait fait cette acceptation par un acte exprès devant Notaires, celui au quel il rend son Compte n'a d'hypothèque pour le reliquat que du jour du Compte s'il est passé devant Notaires ou devant le Juge; ou du Jour des Condamnations s'il a été rendu par acte sous seing privé. —

Fer. Gp. Com^re on art. 297. Glos 2. N^o. 27. p. 286.

Ferriere is here of opinion that the charge & appointment of an Executor being a private act and not a charge publique, no hypothèque accrues thereby in favor of the Creditor, heir or legatee on the property of the Executor — and cites the Concurrent opinions of Bacquet and Chopin —

c'est aussi l'opinion de Chopin N^o 4. qui fait cette exception, savoir, lorsque l'Executeur a signé le Testament passé pardevant Notaires, auquel cas il prétend que ses biens sont obligés de même que ceux du Mandataire, qui a accepté la procuration devant Notaires, parceque les actes passés pardevant eux emportent hypothèque. —

2. Bourj. p. 378. No 34 — Says, il n'y a pas solidité entre plusieurs Exécs, cites Lapeyrere — and gives his opinion thus — Il ajoute au nombre suivant, qu'il n'y a pas d'hypothque tacite sur les biens d'un Executeur Testamentaire, ce qui paroit devoir recevoir une exception dans le Cas que l'Executeur a été chargé par un Inventaire authentique — en effet de cet Inventaire, et du jour de la date d'icelui, nait une hypotheque legale sur tous ses biens — Ce cas n'etant pas ~~l~~upté par la loi qui est generale, et qui fait produire une hypothque à un tel acte. —

3 Furgole. p. 384 No 80. — see also No 79. En troisieme lieu, si l'Executeur testamentaire accepte sa Commission par un acte public, soit devant le Juge qui lui donne ce pouvoir, et lui fait la delivrance des meubles, comme on la pratique en certaines coutumes, soit par un Inventaire fait d'autorité de Justice, ou devant Notaire, ou par quelque autre acte — public que ce soit; un tel acte devant produire l'hypotheque, suivant nos maximes — on peut être le doute que l'heritier du defunt n'ait une hypotheque sur les biens de l'Executeur Testamentaire du jour de l'acte public qui justifie que l'Executeur testamentaire a accepté la Commission. —

Pothier seems to be of the same opinion from the general terms in which he gives it, as to a tacit mortgage. —

Poth. Hyps. p. 424 art. 3. — La Loi donne une pareille hypotheque sur les biens de tous les autres administrateurs, tels que sont les administrateurs d'Hopitaux, Fabriciers, Curateurs d'interdits, Syndics de Communauté, du Jour qu'a commencé leur administration. —

see after (p. 299.)

See also case of a Mandataire accepting his Commission — Cont. Mandat. No 66.

Pothier, Exp. Foucher & al. } As to acte d'heritier — and consequent liability. —

art. 317. Fer: Gp: Com^u p. 676. N°. 10 —

De prendre de son autorité privée les choses qui auroient été leguées — is an acte d'heritier, when the legatee stands in the right of an heir — car les legs sont sujets à delivrance, et il faut les demander de l'heritier ou de l'Executeur, autrement si le presomptif heritier le prend, il se rend heritier pur et simple. —

3 Furgole 176. 77. 78, & 181. —

S'il vend les biens de la Succession, ou s'il les donne à loyer, ou a ferme. —

de 184 —

S'il delivre les legs aux Legataires. —

S'il paye des Créanciers — ou s'il se paye lui-même ce qui lui devoit dû. —

3 Furgole 175 —

Tout acte exterieur qui demontre la volonté et intention de se porter heritier suffit. —

On fait acte d'heritier en partageant l'heredité 3 Furgole. 181. —

La transaction sur l'heredité, ou avec les legataires est un acte d'heritier — 3 Furgole. 184. —

—

L'addition d'heritier produit encore cet effet, de confirmer toutes les dispositions du Testament, qui deviendroient nulles, si l'heredité etoit abandonnée. Elle produit encore un quasi-contrat, qui assujetit l'heritier au paiement des dettes et charges de l'heredité. — 3 Furgole. p. 205. N°. 157. — & p. 291. —

Domat. liv. 3. Tit. 1. sec. 5. art. 17. p. 341.

Dans le cas ou l'heritier institué par Testament seroit l'heritier legitime, si pour eviter d'acquitter les legs, il pretendroit renoncer à la Succession testamentaire et —

s'en tenir à son droit de succeder ab intestat, il ne laisseroit pas d'etre tenu d'acquitter les legs et les autres charges reglées par le Testament.—

Domat. liv. 1. Tit. 8. sec. 8. art. 1. p. 282.

Tout heritier, soit testamentaire ou ab intestat qui accepte une Succession, s'engage par là à toutes les charges indistinctement, et à celles meme que celui à qui il succede pouvoit avoir ignorées; Et comme il a tous les biens et tous les droits de l'heredité, et ceux même qui n'y sont acquis qu'apres la mort de celui a qui il succede, il est aussi tenu des charges survenües apres cette mort.—

art 2. Si dans la Succession qui passe à un heritier, il se trouve d'autres Successions que celui à qui il succede ou ses auteurs avoient recueillies, toutes les charges qui peuvent rester de ces diverses successions, se confondent et reunissent en la personne de cet heritier et lui deviennent propres.—

Patrimoine

benefice d'Inventaire

Domat liv. 1. Tit. 3. sec. 1. p. 294. N°. 13.

Si l'heritier testamentaire, etoit le même qui devoit succeder ab intestat, et que croyant eviter le paiement des legs et autres charges du Testament il renonçat à la Succession testamentaire, pour s'en tenir a son droit de la Succession, il ne sera pas par là privé de l'heredité, mais il ne laisseroit pas d'être tenu d'executer le testament — Car le Testateur pouvoit faire un autre heritier — et il ne peut profiter de ses biens, qu'en executant ses dispositions.—

Bourdon
&
Alliance Assur^ce Co

On question. how far the policy of Insurance was binding on Defend^t the plff having effected it in his own name for an object which at the time belonged to a Copartnership, and the interest stated on the Declaration being for Plff alone +

5 Taunt. 107.
Cohen. v. Hannah
anno 1813.

It is necessary in a declaration on a policy of Insurance, truly to describe the interest on which the policy is effected. — Therefore if A. & B. jointly intended effect an Insurance, and there be two Counts — the one averring interest in A — and the other averring interest in B. — the plff can recover on neither Count —

Said — That the Defendant should by the Declaration be made acquainted with all the real parties to the Contract, otherwise he may have one of the plff called as a Witness — or may have him on the Jury.

16 East Rep. 141
Bell v. Ansley

The question here was whether joint owners could recover a loss insured on their joint account, upon an averment of interest in one of them only. — Held they could not —

But see case of His cox. v. Barrett referred to in the opinion given by L^d Ellenborough +

See also case of Page. v. Fry. 2 Bos. & Pull. 240 (15) when the interest of two in the Cargo who had insured the whole, & although it appeared that a third person was also interested — Yet action maintained.

Also. Carruthers. v. Sheddon. 6 Taunt. 14 — A person who has several interests in a Cargo may act as a partner in 7/16^ths as Consignee of the whole and as having a lien on the whole for advances may protect them all by one Insurance, without expressing on the policy the number or nature of his interests —

1 Emerigon - p. 55. Ch. 2. Sec. 7. — Il est necessaire que la police contienne le nom de celui qui se fait assurer, afin que les assureurs sachent avec qui ils contractent — mais peu importe que l'assuré agisse pour son compte, ou pour compte d'autrui — Il peut meme se dispenser d'enoncer le nom de son Commettant — Il suffit que la personne qui se fait assurer soit denommée dans la Police, pourvu que d'ailleurs les choses soient en regle, et qu'il n'y ait aucune surprise —

p. 3 Peu importe aux Assureurs que l'assuré soit Commissionaire ou Proprietaire — Il suffit que l'aliment du Pris que soit réel, et que le connoissement soit relatif à la Police — Les Assureurs sont non recevables a elever la question de propriété, lorsque ce point est etranger aux hazards dont ils sont responsables. —

Id. chap. 10. Sec. 1 p. 293. — Les Docteurs traitent au long la question, Si l'assurance indefinie de mes marchandises comprend les marchandises qui sont communes à moi et à d'autres interessés — Ils sont divisés en trois opinions — Les uns pretendent que cette assurance est absolument nulle — Les autres soutiennent qu'elle est valable pour la portion d'interet qui appartient à l'assuré. — Enfin les troisiemes soutiennent que l'assurance est bonne en entier — Valin embrasse ce dernier avis — and Emerigon on the 3d supposition he raises, says — Si les marchandises Communes

ont toutes été chargées en mon nom & pour mon compte, l'assurance que je ferai faire pour mon Compte sur la totalité des mêmes marchandises, profitera à moi seul, dans le Cas ou la somme assurée n'excede pas l'interêt que j'avois en la Chose commune. —

2. Valin p. 34 Lo 3. tit. 5 art. 3.

Si quelqu'un fait assurer comme sienne une chose qui lui est Commune avec d'autres l'assurance n'est valable que pour la portion de l'assuré, à moins qu'il ne fut le chef de la Societé, ou qu'il n'eut le pouvoir de ses associés, ou enfin que les associés ne l'ayent satifiée, rebus integris — c'est l'avis de Straccha & de Rocus. —

Kuricke — p. 835. & 836., approuvé par Casa Regis, soutient au Contraire que l'assurance est valable pour le tout, et que l'assureur n'est pas recevable à la contester — quum etiam, dit-il, id quod Commune est nostrum esse dici queat. Je crois qu'il a raison, surtout, si l'assuré a stipulé tant pour ~~lui~~ ses associés que pour lui; et le seul risque qu'il court alors c'est leur desaveu s'il a fait assurer sans leur Consentement, ce qui n'empechera pas qu'il ne demeure obligé pour le tout. a

Assurance pour Roland seul, declarée bonne, s'étant trouvé seul interessé aux marchandises chargées sous le nom de Roland & Compagnie — Sentence de Marseille du 9 Aout 1754. a

2. Pardessus – p. 363
Cours de Droit Com.

On peut de même décider que serait le sort de l'assurance d'une chose faite par l'un des Copropriétaires, sans opposition des autres. — S'ils ratifiaient, on suivrait les règles du mandat; S'ils refusaient de ratifier — l'assurance serait rendue à la part du Copropriétaire qui a stipulé pour lui seul. —

No. 1933.

Barron dal. v. Watson dal

On Rule to shew Cause &c. Andrew Shaw and Robert Mason, the bail to the action ~~to shew~~ why the name of Wm W. Brown should not be added in the Recognizance of bail as one of the pltffs in whose favor the bail was given, but omitted by the error & misprision of the Profts. —

The decisions had on this point seem to be somewhat at variance, but still the Courts in all of them entertain the opinion that they have a discretionary power to amend a proceeding of this kind when it is for the furtherance of Justice —

Tabrum. vs Tenant.

The decisions against the amendment, are 1st Bos. & Pull. Reps. 481 — where a Recognizance of Bail is taken in the name of one Plaintiff only, it cannot be amended unless the Bail consent —

Venn. vs Warner

3. Taunt. 263. A Bail Recognizance cannot be amended as to the plaintiff's name —

5 Taunt. 814. Thus Tarbart for Tabart — amendment was refused — the Bail not consenting. —

Among the decisions on the other hand the following are to be considered —

Halliday & al. vs Fitzpatrick 4 Taunt. 875 —

If the Bail acknowledge in a Cause in which the plaintiff is correctly named and the Officer by a misprision incorrectly names the plaintiff in the Recognizance of Bail — the Recognizance may be amended at the instance of the Bail, by substituting the pltff's right name —

Even the application was made at the instance of the Bail, their consent ought not to vary the right to amend, because the demand was to forward their own interest — but both parties did not consent, and it was therefore by the authority of the Court alone that the amendment was allowed — What is the language of the Court in this case as the ground of their opinion — "if there be a clerical misprision, it may be amended" — what is the true distinction to guide the Court —

In this case the ~~name of the Plff was~~ Bail prie was amended by changing the name of the Plff from Charles to John. —

It is evident that in regard of amendment in cases when Bail are concerned the Court has exercised a discretion, according as they found it tending to the furtherance of Justice

Thus in the case of Stevenson v. Grant & another 2 New Reps. 103. The Court refused to allow the amendment of a declaration in Scire facias of Bail, who had failed to surrender their principal and this upon the particular circumstances of the case — But see the language of ~~the~~ Ch. Just. Mansfield in giving the Judgt — "I do not feel the reason why mistakes in proceedings against Bail should not be amended, as well as mistakes in other cases — persons must employ clerks in these proceedings as well as others, and if

if mistakes arise, I do not see why they should not be amended — But in the present case we are called upon to aid the plaintiff at the bar without sufficient reason for exercising the power to amend —

7. T. Rep. 699 Rex. v. Mayor & Burgess of Grampound —

When Court refused to allow an amendment of a return to a Mandamus —

Ld Kenyon — there says — I wish that that could be attained that Ld Hardwicke in the case before him lamented could not be done, namely, that these amendments were reducible to some certain rules — but there being no such rule each particular case must be left to the sound discretion of the Court — And the best principle seems to be that on which Ld Hardwicke relied in the same case — that an amendment shall, or shall not be permitted to be made as it will best tend to the furtherance of Justice —

This discretion has been variously exercised

Barnes Notes. 4. Sweetland. v. Beazley & Brown —

A Scire facias ad Bail and all the proceedings thereupon were ordered to be amended by the Record in the original action, by inserting the word, Merchant, instead of Mercer, being the Defendant's addition, after issue joined on "final Record" —

2 Bos: & Pull. 275 Perkins. v. Petit.

A Scire facias ad Bail in Error may be amended by the Record of the Recognizance

Ld Eldon. Ch. J. We have no doubt of the power of the Court to amend a Scire facias ad Bail but —

but as it does not appear to have been the modern practice to permit amendments in cases of this kind we think the bail in this Case ought not to be taken by Surprise — At the same time we desire that our refusal to amend may not be drawn into precedent since after this order we shall not think ourselves bound to abstain from exercising the power of granting these amendments in future —

anno. 1800 —

3 Bos: & Pull. 321
Fulwood. v. Annis

In this Case also the Court refused to amend a Scire facias ag. Bail — but on a different principle —

L. Alvanley Ch. J. The power of amending writs of Scire facias ag. Bail is certainly discretionary — but the Court in the exercise of their discretion do not think proper to cure any irregularities of which the Bail are entitled to take advantage —

1 Taunt. p. 221
Mann. v. Calow & anr.

1808

In Scire Facias ag. Bail, if there be a failure of the Record through a mis prision of the Officer of the Court, the Court will permit the Recognizance to be amended —

See L. Ch. J. Mansfield's opinion in every Case —

N° 1954

Sullock fils &ats
Chagnon

Question, whether a will made on the answers of the Testator to the interrogations of the Notary, be valid —

2. Bourj. p. 405. De la Revoc: des Test^ms Ch. II. Su. 1. §. 3.

En effet la suggestion detruit la base du testament, qui ne doit contenir qu'une volonté libre de la part du Testateur — ce qui ne se trouve plus, puisque c'est l'effet d'une volonté étrangere — De la il s'ensuit donc, qu'un testament fait sur l'Interrogatoire d'un autre, est nul, ainsi que tout testament vraiement suggeré.

Lemaitre Des Test^ms p. 424. ——

Le Testament fait sur l'Interrogatoire du N^re est nul — Arret du 31 Aout. 1602. —

Ricard tr. des Don: entre vifs 2^me partie 3^e. Ch. 1. N°55. p. 440 —

Le testament ad interrogata alterius, est jugé nul lorsqu'il y a soupçon de suggestion, et que le Testateur ne peut pas se faire entendre par aucun signe, ni declarer sa volonté. — Peleus en sa quest: 59. rapporte un arret qui a infirmé le testament d'un paralytique fait en presence d'un Conseiller du Parlement de Bordeaux commis pour être present au testament, ou l'on avoit ecrit pour heritier celui que le Testateur avoit embrassé temoignant le vouloir gratifier, et ayant repondu oui sur la demande du Notaire, d'autant plus que le testateur en cet etat, ne peut mander les notaires, ni les temoins, ni exprimer les charges aux quelles il veut laisser sa succession. — Le Notaire ne doit pas aussi interroger le Testateur en faveur des heritiers et il faut que ce que la bouche profere ait été medité auparavant

auparavant dans l'esprit — Requiritur, dit Dumoulin, Consil. 32. n. 12. ut articulatè loquatur testator — articulatè autem loqui non videtur, si unico monosyllabo utitur — 2. Ut in eo sit animus testandi qui deprehenditur, si Notarius, aut alius qui interrogat, sit ad hoc a testatore rogatus, et in hoc, declaratio notarii non sufficeret, non enim testator presumitur voluisse dicere, quod non ab ejus ore profectum est." —

see also — Froment ad. Ire. Testam. p. 706. — 2e Col. —

Il y a dans la neuvieme partie du Journal du Palais p. 230. un arrest du 9e Aout 1683. qui a confirmé un testament fait par Interrogatoire, par un particulier qui ne pouvoit s'enoncer que par oui et par non, pour avoir été attaqué d'apoplexie deux ans auparavant; mais il s'etoit expliqué, aux notaires par signes, et par des jettons, et il avoit mis entre leurs mains un premier testament qu'il revoquoit, avec un memoire des parens qu'il — vouloit gratifier, et même il avoit depuis declaré devant le Senechal de Lyon qu'il approuvoit le testament. —

2. Journal du Palais p. 446. — In this case the Interrogatories of the Notary were stated in the will, as made by him.

Charondas on 289. art. Cout — p. 179. —

Id. Reponses. liv. 5. ch. 45.

La Coutume est fondée en plusieurs arrets de la Cour, par lesquels les testaments ont été declarés nuls esquels y avoit obmission des solemnités requises par les Ordonnes & Coutumes des lieux, mesmement pour n'avoir été dicté et nommé par le Testateur — cites several arrets — Si donc le Notaire, Curé, vicaire, ou autre, demande au Testateur s'il veut et ordonne ce qui lui est proposé par celui qui l'interroge, sans que le Testateur le declare, et le dicte de lui-meme,

ou

ou qu'ayant dressé une minute de Testament, il demande au malade, s'il le veut ainsi, et qu'il reponde, Oui — tel testament sera nul, comme fait contre la forme de la Coutume, et à la suggestion d'autrui. —

— —

2. Maynard. liv. 8. ch. 59. Nº 7 — La Cour ne confirme tels testaments, si les temoins n'ont été priés, et si le testateur est moribond, un simple Oui en cet etat, est presumé venir de foiblesse de corps et de l'esprit. —

Repᵉ Vᵉ Suggestion §. 2. p. 601. 2ᵈᵉ — refers to opinion of Furgole —

3. Henrys. Liv. 5. Ch. 4. quest. 31. p. 140. 1. 2. 3ᵈᵉ — Id. liv. 5. ch. 1. Quest. 8. p. 41 — Il faut qu'un testament procede d'un mouvement qui soit libre — il faut que le testateur n'agisse que de son motif propre, et que ce dernier eloge qui doit servir de loi, et bien souvent renverser celle de la nature et du sang, vienne d'une pure volonté. — Que si le Testateur se trouve pre-occupé — si on lui a plutot suggéré sa disposition qu'il ne l'a lui même premeditè — si c'est plutot la pensée d'un autre que la sienne, il faut du moins que la fin soit plus volontaire que le commencement, c'est-a-dire, — qu'au moins, le Testateur parle, dise, et declare sa derniere volonté en la presence du Notaire et des temoins. — Autrement si on lui porte un Testament tout dressé, et qu'on ne tire de lui qu'une simple approbation, il est vrai de dire qu'il suit plutôt la volonté d'autrui d'autrui, qu'il ne declare la sienne — De même, si en la presence du Testateur malade à l'extremité et peut être agonisant, le

Notaire

Notaire dresse, ou dicte lui-même le Testament et se contente de demander au Testateur, s'il le veut ainsi, On peut dire, que c'est plutôt le Notaire qui teste, que le malade.— C'est ce que le President Faber. Dec. 69. ch. 1 a si doctement traité, que ce seroit comme peine perdue que de vouloir approfondir d'avantage la question. Nous nous contenterons donc de dire que cette forme de tester sur la proposition et demande du Notaire est vicieuse, & contraire aux regles de droit. —

No. 1885.

Robillard — vs — Raby & al. —

On an arbitration bond or Compromis where it is stipulated, that in case of difference in opinion, the two Arbitrators, having also the qualification of amiables Compositeurs, are authorised to name a third, yet without stating in their report, that they had differed in opinion, they name a third, who unites in the report with them — does this annul their report? — Further, a penalty being stipulated for the non-compliance with the report, is it à fin de non recevoir, as to the party, that he cannot come against the award, until he has paid the penalty? —

On the first question, I do not think the report or award ought to be considered as a nullity, although it is not stated that it was in consequence of a difference in opinion that the third arbitrator was joined & acted —

1st Because the authority here given, was not merely to arbitrators, but to amiables Compositeurs, which meant to convey an unlimited power of decision and of equitable course of proceedings as these men should see fit, & on this account we must not construe so strictly their proceedings as if they had been bound to any regular form, and we must presume that they have done right unless the contrary manifestly appears — That in this case the arbitrators had a right to appoint a third, or tiers, in case of difference in opinion,

but

Dec. Fer. Vo Arbitrateur ou Amiable Compositeur

& Amiable Compositeur est celui qui est élu par les parties pour terminer leur different à l'amiable, selon l'Equité, sans être tenu de garder exactement les formalités de Justice à la rigueur de Droit.

but there appears nothing on the face of their award to say, that they were not of a different opinion, and therefore we ought to infer that they acted rather consistently with their authority than otherwise –

2d But admitting that they had not differed in opinion before they named the third arbitrator, and that under the apprehension of such difference or in order to prevent it, they had proceeded to this nomination. – Yet if their award be in other respects conformable to the submission this ought not to vitiate it – this appointment of a third arbitr can in that case be considered only as surplusage it cannot affect what has been determined, if that determination proceeds from both the Arbitrators named – Pothier de Louage. Ve arbitre – No 26 – p. 70 – says – "Le pouvoir des arbitres "est borné à l'objet du Compromis, et tout ce qu'ils "feroient au delà, seroit sans effet." – There is no authority to be found more in point than this, which evidently shews that what is done beyond their authority shall be without effect, & that only, – it would be contrary to first principles to determine otherwise – "Utile per inutile non "vitiatur."

On the question as to the payment of the penalty stipulated to be paid by the party refusing to comply with, or appealing from the Award — I am of opinion that in either case the penalty ought not to be enforced — It is true we find many arrets and Judgments which enforce the payt of the penalty in this Case, in conformity to the Ordinance of Franc. 2. of 1560 — but at the same time we cannot help observing how differently this law, which was a general law in France, has been interpreted and enforced in the different Parliaments in that Country — In some it was not enforced, and even when the penalty was paid it was ordered to be restored — see Dec. de Denis — as to the Parliam.t of Aix, of Douay — & Provence — But even in the Parliament of Paris, and according to those principles of decision which we ~~adopt~~ follow in regard of a penal obligation, there were many modifications adopted by the Courts which tended to limit and restrict the rigorous enforcing of this penalty. Denis.t says, that this penalty was often considered as Comminatory, and advises a mode to avoid this, by depositing the penalty in the hands of a third person — It is also held as a general principle that the Courts have the power to moderate the penalty, so says Jousse and the Rep.se and the reason given is very just and equitable — "que celui qui auroit une juste cause " d'appeller en seroit detourné par le paiement de la " peine qui pourroit être plus forte que l'objet meme " des Procès" — They even went further, and held

D. Dec. Raisonné des Dom.s v.o Compromis — Ces Conditions (penales) ne sont pas mêmes executoires — Il y a des Cours qui n'y ont pas d'egard, & d'autres qui les reduisent dans la proportion des dom.s & interets de la partie souffrante.

v.o Compromis §. 2. N.o 6. — + Rep.se v.o Compromis p. 314 —

v.o Arbitrage §1. N.o 6.

2 Jousse p. 719. N.o 81 Rep.se v.o Compromis p. 314.

2. Jousse. p. 720, N°82, held, that in certain Cases, there should be no right allowed to claim the penalty, as where there was any apparent nullity in the Compromis or Sentence Arbitrale —

All these instances shew where the Courts interpreted the law in such manner as to meet the ends of Justice, and although nothing of this kind was provided for by the Ord.ce of 1560 which was a general law including all cases where a penalty was stipulated, yet in the application of it, the same principles were held, which are adopted in the interpretation of all laws, that it ought not to be allowed to operate an injustice, which must have frequently happened had it been strictly enforced —

But the great principle which we hold here, and which was recognized in cases of this kind by the Courts in France, was, that no man could so effectually bind himself by any stipulation, by which he could be excluded from applying to the Kings Courts for redress when he conceived that injustice had been done to him — " Par le droit — (that is, the
2 Jousse p. 715. N°. 72. " Roman law) l'appel contre les Sentences arbitrales
" n'etoit point recevable — Mais en France, il est
" permis aux parties de se pourvoir par appel
" contre ces sortes de Sentences, quelques clauses

" que

" que les parties ayent mises dans le Compromis: et
" il n'est pas même permis aux parties de renoncer à
" cet appel par le Compromis, parce qu'il faut toujours
" que les Magistrats, qui sont établis par un ordre public
" connoissent des Jugements rendus par ceux qui
" n'ont d'autre pouvoir que celui qui leur a été donné
" par des particuliers." But this principle must hold not only in the particular case cited, but in every case where a man has or pretends to have rights, which he can, and ought, at all times to be entitled to submit to the laws of his Country — those laws are made for his governance and they ought also to extend to his protection — he cannot withdraw himself from their controul in the one Case, nor can he by his voluntary act renounce his right to their decision — This is a principle, whether it be taken from — Magna Charta, or from the Droits de l'Homme is equally just and equally maintainable in all the Kings Courts — Now I consider it to be nearly the same thing, whether a man renounce to his right to bring his claim before the Court, or bind himself in a penalty, amounting perhaps to the same thing an absolute inability to pay it — or in fact to any penalty, for penalties ought not to be enforced without consideration or without injury done to the person who is to benefit thereby — all penalties are held to be compensatoire, des dommages & interets, but where is the damage or injury, by allowing ~~a party~~ the Plff to complain of an injustice done to him by the arbitrators

arbitrator, it is no more in this Case than in any case of an ordinary Suit, — and supposing the Defendr had brot then action for the homologation of this report, or an action for the penalty, could the Court have stopped the Pltff from alleging the grounds he now alleges or any grounds he thought fit against such an action? — Certainly not — We therefore see the reasonableness of the ground taken by the French Courts of moderating the penalty according to Circumstances, — it was one of those equitable principles adopted by the French Courts in the administration of Justice, which we find they maintained in all cases, and applied it without distinction in all cases as well to the Legislative Edicts and Ordinances as to their own arrêtés or decisions — and as they possessed the double capacity of Courts of Equity, as well as of Law, their powers in this respect were well calculated to promote the great ends of Justice ~~of the Letter~~ by adhering more to the intention than to the letter of the law —

If consistently with these principles we can moderate the penalty here so as to meet the Justice of the Case, I should say, that it ought not to form any bar to the plaintiffs action, but that the Court would reserve to determine thereon until the merits shall have been heard —

№ 2441.

McKay
Rutherford

The Defend: drew a bill on the Pltff in the usual form of a draft or bill of exchange, in favor of Th. Porteous, for £737. 8. 11½ for value received — the pltff accepted and paid the bill, and now brot his action agt the Defend: to recover the amount so paid — No evidence was adduced beyond what appears on the bill — of the drawing acceptance & payment —

Plea. Non assumpsit.

For Defendant —

1. Wilson. 185. — An action upon a bill of exchange lies for the drawer against the drawee, after he has accepted it. —

2. Ph. on Ev. p. 33 — The drawer, when he takes up the bill after its negotiation, is refered back to his original Contract with the acceptor — The acceptor is discharged with respect to the drawer, until the bill returns to the drawer — but when that happens the right of the drawer revives, and the bill which is the evidence of the Contract of the acceptor, proves that his undertaking was to pay a certain sum of money at a fixed time. —

Ibid — The acceptance is evidence that the acceptor received value from the drawer, who will not be obliged in the first instance to prove that he had effects in the acceptor's hands

Id. p. 29 — An acceptance is in effect an acknowledgment by the acceptor, that he has received from the drawer such a sum on account of the holder. —

Vere val. v Lewis Wal. 3. T. Rep. 183. The Court said that the new circumstance of the Defendts accepting, was evidence that he had received effects ~~evidence~~ from the Drawer, and that on the demurrer to evidence, the Court might draw the same inference as the Jury would have drawn — and thereupon Judgt for Pltffs

2. Starkie on Ev. p. 290 same principle — & this case cited. —

2 Starkie on Ev. p. 276 — on action of Drawer agt the acceptor — said — acceptance is prima facie evidence, that the acceptor has effects of the drawer in his hands. —

1 Term Rep. 409. Bickerdike v Bollman.

& Mr J. Buller — I told the Jury, that where a bill was accepted, it was prima facie evidence that there were effects of the drawer in the hands of the acceptor. —

2 T. Rep. 713. Rogers v Stevens — The drawer of of a bill must be presumed to have effects in the hands of the drawee — so that it lies on the holder to prove the Contrary to excuse the want of notice. —

See also Bayley on bills Ch. 9. p. 287. —

Chitty on Bills. p. 410 — 6th Edit. —

2 Starkie on Ev. p. 290 — An acceptance is prima facie evidence of the acceptor's having in his hands effects of the drawer, sufficient to answer the amount of the bill — he is the principal debtor, and primarily liable to all parties, and cannot be discharged but by express agreement. —

For the Pltff

Poth. Cont. Change. N° 97.

D'un autre coté, le tireur qui est le mandant, s'oblige envers l'acceptant sur qui il a tiré la lettre à l'indemniser de tout ce qu'il lui en coutera pour l'execution du mandat.— De cette obligation du tireur nait l'obligation, mandati contraria, que l'accepteur a contre le tireur— 1° À l'effet d'être remboursé par le tireur de la somme qu'il a avancé pour lui pour l'acquittement de la lettre de Change.—

№ 331.

Torrance. v. Peddie. — Action by Indorsee agt the Indorser of a foreign bill of Exchange. —

£557. 15. 6 Sterlg. — Dublin 18 July 1826. —

At Sixty days sight of this my second of Exchange (first, third and fourth unpaid) pay to the order of Mr Peter Pentland (in London) five hundred and fifty seven pounds fifteen shillings and six pence Sterling, value received, for the use of the Ship Letitia, being amount of her Cargo purchased by me on Owner's account

Note — If the above is not duly honoured, the holder will insure the amount, and place the premium &c to the Ship's and my account —

Rob Stevens —

To Mr John Straker
Dublin

Indorsements. —

The bill having been dishonoured, but no Insurance made — Qued — If the holder be entitled to recover —

3. Chitty Comᵉ Laws p. 453

Insurance is a Contract of indemnity from loss or damage arising from an uncertain event — the object of Insurance properly speaking, is not to make a positive gain, but to avert a possible loss — A man cannot strictly be said to be indemnified against a loss which can never happen to him; there cannot be an indemnity without a loss, nor a loss without an interest — a policy therefore without interest, is not

an

an Insurance, but a mere wager —

Id. p. 454. — An insurable interest must be founded on some legal or equitable title; and though a person may have a sort of claim, which as between him and the legal owner might be thought reasonable and such as the legal owner could not conscientiously dispute, yet if this claim be inconsistent with the title which the law can recognize, it will not be deemed to be an equitable title, and therefore not an insurable interest. —

1 Barn: & Ald: 575. Smith & al. assignees v. Plummer & al! — The master of a ship has not a lien on the freight for his wages, or for his disbursements on account of the ship during the voyage, or for the premiums paid by him abroad for the purpose of procuring a Cargo —

Id — p. 581. A Captain of a Ship has no lien on the Ship for wages, Stores, or repairs done in England — cites case. Wilkins & al! v. Carmichael — Doug: 101. —

" — " The Master has no lien on the Ship for money expended or debts incurred by him for repairs done during the voyage. Hussey v. Christie & al! 9. East. 426. —

3. Chitty's Com. Law p. 540. — But it has been ruled that the Captain has a lien on the freight for goods furnished to the Ship by his direction, and on his Credit. — cites. 4 Esp. Rep. 22 decided by L^d Kenyon. 1803. — and where it was held, that the Captain of a Ship who has entered into engagements on account of the Ship, thereby acquires a lien on the goods and on the freight to the extent of his engagements — White v. Baring & al! — This however was a N. P. Case, known not the decision of the Court, on the rule obt^d to shew Cause & the Case having been settled —

This case is over-ruled by the above — Barn: & Ald

Doug: Rep. 468
Lowry & an. v. Bourdieu

In this case, the plaffs lent to Lawson, Capt. of an East India Ship, £26,000, for which he gave them a common bond in the penal sum of £52,000 while he was with his Ship at China, the plaffs got a policy of Insurance underwritten by the Defendants & others, which was in the following terms —

"At & from China to London, beginning the adventure
"upon the goods from the loading thereof on board
"the said Ship at Canton in China &c — upon the
"said Ship &c from and immediately following
"her arrival at Canton in China, valued at £26,000
"being the amount of Capt. Patrick Lawson's common
"bond, payable to the parties as shall be described
"on the back of this policy — and in case of loss
"no other proof of interest to be required than the
"exhibition of the said Bond — warranted free
"from average, and without benefit of Salvage
"to the Insurer" —

The Ship having arrived safe, an action was brought by the insured to recover back the premium, on the principle, that the policy, being without interest the contract was void

And it was held by the Court, that the Plffs had no insurable interest in the things insured, and that it was a gaming policy. —

1 T. Rep. 304.
Kemp & al. v. Vigne

1 Marshall 126.

The Insurance in this case was upon goods on board the Ship Emanuel, at and from Falmouth to Marseilles, warranted a Danish Ship — and on the policy was this memorandum,

The following Insurance is declared to be on money expended for reclaiming the Ship & Cargo valued at the sum, which shall be declared hereafter — The loss to be paid in case the

Ship

Ship does not arrive at Marseilles, and without further proof of interest than this policy — warranted free from averages and without benefit of salvage. —

The Ship not having arrived at Marseilles under the circumstances stated in the Case. The action was brought to recover the amount insured — and by the Court, this was held to be a wagering policy, and not a policy of insurance on account of any interest either in the Ship or Cargo

Stat. 19. Geo. 2. ch. 37. — an. 1746.

By this stat. it is provided that no Insurance shall be made on any Ship or Ships belonging to His Majesty, or any of His Subjects, or on any goods or effects laden on board such Ships, "interest or no interest or without further proof of interest than the policy — or by way of gaming or wagering, or without benefit of salvage to the Insurer"

1. Marsh. on Insur. p. 120. & sq. —

The decisions in Westminster Hall previous to this Stat. would appear to have recognized the right of action on such wagering policies as well as the Court of Chancery, except the early case of Goddard. v Garret. 2 Vern. Rep. 269 —

The provisions of the French Ordonn. of 1681, were in conformity to the above Statute,

2 Vern. Rep. 269. in Chancery

In the Case of Goddart. v Garret — the Defts

Defendt had lent money on a Bottomry Bond but had no interest in the Ship or Cargo – the money lent was £300 – and he ensured £450. on the Ship – The pltffs bill was to have the policy delivered up, by reason the Defendt was not concerned in point of interest, as to the Ship or Cargo –

Ld Cur. We take it that the law is settled that if a man has no interest, and insures, the Insurance is void, although it be expressed in the policy, interested, or not interested – and the reason the law goes upon, is, that these Insurances are made for the encouragemt of trade, and not that persons unconcerned in trade, nor interested in the Ship, should profit by it, and where one would have the benefit of the Insurance, he must renounce all interest in the Ship –

Note – In this case, notice was taken in the policy, that it was to ensure money on Bottomry

Note also – That in this case, the Ship survived the time limited in the Bottomry Bond, and was lost within the time limited by the Policy – So if Insurance good – Defendt might be entitled to the money on the Bond, and also on the policy.

It is true that there are some Subsequent Cases referred to in Marshall, where a Contrary opinion was held, but these were all prior to the Stat. 19 Geo. 2. ch. 37. and according to the principles established by that act & the Decisions had by the Courts thereon, the Case of Goddard v Gamut, would now be good law –

6 Taunt. Rep. p. 234

In the Case referred to of Tasker v Scott, where a similar bill of exchange was drawn by the Defendt to that in the Case before us, a question there arose upon the right of the Plff an indorsee to recover from the Defendt the drawer, the premium which the Plff had paid for ensuring the ship, in his own name on a policy for three months — The bill of exchange having been paid after the Insurance effected, but refused to pay the premium & charges of Insurance — and the Vessel having been lost after the expiration of three months —

The interest here declared on, was — "on the interest
" in a bill of Exchange drawn by the Defendt on
" Mr Bowsfield in favor of S. Goudie, dated, 2nd
" 10th June 1814, being for value received for the use
" of the Ship, and it was agreed, that in the event
" of the loss the bill should be considered as sufficient
" proof of interest, and payment made accordingly" —

The only question here was, whether under the authority given by the drawer to ensure — the indorsee was entitled to recover from the drawer the money laid out in effecting the Insurance — The objection taken was, that the Insurance was not only an unavailable, but an illegal Contract under 19 Geo. 2. ch. 37 — and therefore the premium could not be recovered back — The opinion of the Ch. Justice was — that it was not an illegal, but only an unavailable Insurance — and he thought that undoubtedly if an Insurance were effected by order of a person who had an interest, that though the Insurance were void, yet that he who effected it might recover back the premium from him by whose order he did it —

This

This case is strongly in point as to the legal effect of an Insurance made under circumstances like the present — it was an unavailable Insurance, and consequently, no party could draw any benefit therefrom

On the part of the Defendant the bill here has been stated to be in the nature of a bottomry or Respondentia Bond, which, it is said, requires no particular form of words, & therefore those used here may be binding as such,

But we must be satisfied that it was the intention of the parties to create such a security on the one hand that the Master hypothecated the Ship & Cargo, and on the other, that in case the Ship did not arrive the lender should lose the money he had advanced — ~~but the contract in this instance, the Plff looked to be paid his money whether the Ship arrived or not — and there appears no stipulation of extraordinary interest to indemnify for the risk run in case she did not arrive~~ — But the 2 Marshall 747.— essentials here are wanting to constitute such a Contract as whatever may be the form of it, it must contain the names of the lender, and the borrower — and those of the Ship and the Master — the sum lent — with the stipulated Marine interest — the Voyage proposed, with the duration of the risk, which the lender is to run — It must know whether the money be lent on the Ship, or on goods on board, or on both —

No. 250.

Foucher &c
Pothier. —

On action of tort, for having maliciously and without Cause sued out and executed an order of Scelle on the effects of the heirs Foucher. —

Judgt. 4th Feby. 1828

This action is founded on the principle that the proceeding of the Scelle adopted by the Defendant was not only ill-founded, but malicious, and being an extraordinary course taken to maintain the right claimed by the Defr. Damages are therefore allowed by Law suited to the circumstances of the Case. —

According to ~~the~~ general principles, it may be said, that the instituting of any action without sufficient grounds, or from malicious motives, is a tortious act, as it must cause a damage more or less to the person called upon to defend it — and accordingly by some provisions of the Roman Law, the party who lost his Cause was condemned not only in Cost but in damages also to his — adversary — but this Law was never adopted in France, where the only penalty attached to the loss of a Cause was the payt. of the Cost —

N. Denisart. Vo. Depens. §1. No. 2. —

In cases however where an extraordinary & an unusual remedy has been pursued, without sufficient Cause, as by attachment of the body or goods of a Defendr, and where an injury has been occasioned, beyond the mere expence of defence the

the suit damages have been awarded; but in all cases of this kind, the Courts have been guided by the circumstances of the Case — and this rule must be observed in the Case before us —

It appears that on the 20 October 1814 the late Pre Fortier made a holograph will with two Codicils — and afterwards died on 5 Dec. 1815. By this will the Testator made a general dispos. of all his property to his children, but under certain restrictions, with certain discretionary legacies, and appointed the Defend. and Hayes Henry his Executors and Trustees —

On the 14 Dec. 1815, Mr Henry renounced to the appointment of Executor and Trustee —

Difficulties having occurred between the Legatees and the Defend. now sole Executor as to the execution of the will and making an Inventory of the property and effects left by the Testator, we find that on the 23d January 1816 the Defend. protested against them for their refusal to allow him to proceed to make the Inventory, which they contended he had no right to do, as they were seized of the property left by the deceased as his heirs and which they had agreed to divide among themselves according to a certain transaction of 12 January 1816 —

It appears that subsequently the Legatees claiming as heirs, made the Inventory of the Estate of the deceased without the participation

of

of the Defendant, and having announced the sale of the property, he thereupon obtained the order of Scellé to prevent the sale and secure the property until further order, dated 16 Apl. 1816 -

This order for the Scellé was afterwards set aside by the Instt. of the Court of the 19 April 1816 — and in consequence whereof the present action was brot —

There is no evidence adduced to shew that in this proceeding the Defendant was actuated by malicious motives, but on the contrary was guided by the opinion of counsel, who considered it a necessary measure — it therefore rests to be considered whether it was without reasonable or probable Cause

C. Dimt. vs Scellé, No 17. Repre co. V. p. 140. —

There is no doubt, but the order of Scellé may be lawfully had at the instance of 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 have the seizin of the effects, they were in possession, and they had announced the sale of those effects — it was unknown to the Executor whether any Inventory of them had been made, and it was his duty as Executor to ascertain what the value and amount of these effects was before they were sold, when this might have been too late —

It

It is true, the order for the Scellé was set aside by the Court, but not on the principle that it had been illegally obtained, but on the grounds 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, legal knowledge, as it was made without his participation — and it is not in proof, that at the time of suing out the order for the Scellé he had a Knowledge that the Legatees had made any Inventory —

On this ground we think the Defendt had a reasonable cause for his proceeding by the Scellé which was a legal cause, and there being no evidence of a malicious motive — the action must be dismissed

Sourdain appt
vs
Miville Respt

On question, whether the privilege of the mason for his labor & materials in repairing houses and buildings as stated in an open account, but the amt ascertained by Experts, ranks before the Creditor by Hypothèque —

Repse Vo Hypothèque p. 657 —

Les ouvriers ont aussi une hypothèque privilegiée sur la partie des batimens aux quels ils ont travaillé — Le Charpentier sur la charpente — le Couvreur sur la Couverture, ainsi des autres —

Repse Vo Privilege p. 690. —

Lorsqu'il s'agit de distribuer le prix d'une Immeuble vendu, la Privilege given to the Entrepreneurs & ouvriers upon the work done by him, in so far as the land has been rendered more valuable thereby —

Dic. de Droit Vo Privilege du Maçon

Privilege du Maçon qui a bati une maison ou qui a fait des reparations dans une maison, l'emporte sur tout autre privilege — La raison est, que sa créance a une hypothèque privilegiée sur la chose même — ensorte que le maçon est préféré sur la maison, pour ce qui lui est dû par le proprietaire, à tous autres Créanciers, quoiqu'ils soient antérieurs en date d'hypothèque —

2 Bourj: p. 733 Tit. 8. Des Exons.

Ce privilege a lieu en faveur des Ouvriers selon moi, encore qu'il n'y ait aucun devis ni marché par ecrit, pourvu que les ouvrages soient constans, ou que s'ils sont deniés, ils puissent être verifiés, et que l'ouvrier ait agi dans un tems competent, c'est a dire, dans le tems que la Coutume a fixé pour la Durée de son action

Poth. Hyp. p. 453.

Observez à l'egard de ces Créanciers qui ont conservé ou melioré l'heritage, que pour qu'ils puissent exercer leur privilege, il faut, ou qu'ils ayent donné leur demande dans l'année de la perfection de leurs ouvrages, parcequ'autrement il y auroit une fin de non-recevoir acquise contre leur créance; ou qu'ils soient fondés dans un marché fait par acte devant Notaire ou du moins dans une obligation pardevant Notaire, passée dans lade année. — Un titre de créance sous signature privée, est bien valable vis-a-vis du Debiteur, et pareillement une obligation passée depuis l'année — Mais ces actes ne doivent point donner de presomption au Créancier contre des tiers, parcequ'autrement des debiteurs, pourroient en fraude de leurs legitimes Créanciers ressuciter des créances deja acquittées —

Moffat. appellt
vr
Roberts on. Respt

Chas. Colé & al. Pffs in the court below
&
Le Pre Sequin. Defdr thers

On 27 May 1816, one Franc. Jacques Sequin, brother of Defdr made his obligy to the appellt for £183. 3. 4 payable in 10 years — To this obligy the Defendr became a party as surety, the condition of which was that the said Franc. Jac. Sequin should not leave the province until the said debt was paid, on pain of paying the said Debt & interest at the expiration of the ten years — On or about 28 Augt. 1820 — the said Franc. Jac. Sequin did leave the province & was absent until 20 Sept. 1822 — when he returned —

The property of the Defendr being sold the Appellt made his Opposition afin de conserver — on the principle that the Defendr had become liable to pay the above debt, as the condition of his surety had failed — This was opposed by the Respondt and by Lord of L.C. Quebec — the opposition was dismissed —

Domat. liv. 1. Tit. 1. Sec. 4. § 7 p. 22.

La condition qui doit accomplir une convention etant arrivée, elle donne l'effet à la convention et produit les changemens qui en doivent suivre

Dic: du Digeste Vo Condition p. 111.

La Condition une fois arrivée, la stipulation a le meme effet non seulement pour l'avenir mais encore pour le passé, que si elle avoit été faite sans condition —

Repre de Merlin vo Condition p. 745 —

Le principal effet, qu'elles (conditions lorsqu'elles arrivent) produisent, c'est de donner aux parties qu'elles regardent tous les droits qu'elles auroient eu au moment du Contrat, si le Contrat eut été sans Condition. —

Id. p. 754 —

Quand les termes de la Condition annoncent un fait, qui peut se consommer en un moment il suffit, qu'il ait été une fois accompli. — Et quand même il viendroit à cesser, la Condition n'en seroit pas moins remplie

Id — de —

Le même regle doit avoir lieu dans les conditions negatives, comme dans les autres — Des qu'une fois on y a contrevenu elles ont manqué irrevocablement, et l'on ne peut reparer la Contravention en reduisant les choses à leur premier état. —

Toullier. Dr. Frs 6 Vol. p 672 No 646

La condition negative qui consiste in non faciendo, est irrevocablement enfreinte, aussitot qu'on y est contrevenu, quand même il seroit possible de reparer les suites de la contravention en remettant les choses au premier état. — au 2 Fargole ch. 7. Sec 5. No 135 — c'est une consequence de la maxime, " Conditio quæ defuit non — " restauratur. —

Can a this be considered even in the light of a penal obligation, which it cannot, it bears evidently a conditional Security for the payt. of a certain Debt — yet as a penal obligation it would seem in this case to be due, exigible

see Poth. Obl. № 347. §1. Des Cas auquel
„ la clause pénale a été ajoutée à l'obligation de
„ ne point faire quelque chose — Il est evident
„ en ce cas qu'il y a ouverture à l'obligation
„ pénale, et que la peine est due, aussi-tot, que
„ celui qui s'étoit obligé sous cette peine, à
„ ne pas faire quelque chose, a fait ce qu'il
„ s'étoit obligé de ne pas faire". —

Percival — appellt.
vs
Patterson & al. Respdts } In the Court of Appeals

This was an action instituted in the Court of K. B. by the Respondts against the appellt to recover damages from him, for a breach of his duty as Collector of the Customs at the port of Dublin, in exacting and taking from the Respondts, a larger sum, than by law was allowed, for duties on the importation of goods at the said port. —

To this action, the appellant pleaded a plea of demurrer, or, defenses au fond en droit, and also the general issue — Upon the previous hearing on the demurrer, it was dismissed, and upon a subsequent hearing on the merits the Court of K. B. adjudged the appellant to pay the damages demanded of £19. 0 5d.

From this Judgt. the present appeal has been made to this Court, and we have now to consider the grounds and arguments, used in order to determine, whether the judgt. complained of ought to be maintained. —

The two first grounds of complaint may be taken together, as both tend to deny to the Respdts their right to recover damages from the appellant under the present form of action — The first of these grounds, is, that this action cannot be

constituted

considered only as an action of Condictio indebiti, or to recover the excess of duty claimed by the appellt, but contains no ground upon which it can be maintained against the appellt as a public Officer, for any breach of his duty as such — The second ground is founded on the demurrer, vizt That enough is not stated in the declaration to enable the Respondts to maintain the action, and more particularly in one respect, that the amount of the Sterling Cost in the Invoice, is not set out, so as to shew how much was due on the goods imported — That it was not shewn what the duty was which the public Officer had to perform, nor were the circumstances of the injury, or special damage, set out in such manner as to enable the Appellant to answer thereto, or to entitle the Respts to recover damages thereon. —

On these two grounds several authorities have been cited, to some of which we shall have occasion to refer; we must however first determine what the nature of this action is, as we shall thereby obviate a part of the Counsel raised, and limit the objects of discussion to a few points. —

In looking at the action here instituted, we must say, that it cannot be considered in the nature of a Condictio indebiti, or merely to recover back monies wrongfully paid by the Respondents. It is beyond all doubt, an action of Trespass on the Case for a Misfeasance. — The complaint is against a ministerial Officer in the discharge of his duty, not merely for refusing to perform

what

what this duty required, but by exceeding his authority in the discharge of that duty, and compelling the Respondts to pay more than by law they were bound to pay, and this, not from any mis-apprehension of the law, but wilfully and maliciously, with a view to injure the Respondts, and to hinder and prevent them from importing their goods & Merchandises into this Province, as by law they were entitled.—

This is the language of the declaration, which cannot be misunderstood, and in looking at the authorities cited from the English Law Books, we shall find the action maintainable in this shape against the public Officer.—

In the case of Drewe v. Coulton 1 East Rep. 563 (~~and the authorities there cited~~) which was an action against the Defendt as returning officer of the Borough of Saltash, for refusing the vote of the plff. as a burgage-tenant, in an election of members to serve in Parliament for that Borough — Mr Justice Wilson there said, — "This is in the nature of "it, an action for misbehaviour by a public "Officer in his duty.— Now I think it cannot "be called a misbehaviour unless, maliciously & "wilfully done, and that the action will not lie "for a mistake in law — In all the cases just "the misbehaviour must be wilful, and by wilful

"I

"I understand, contrary to a mans own Conviction".

That favor which is shewn to public officers in the discharge of their duty, will protect them from being sued for a mere mistake in law, or setting up a pretention, however unjust, which they conscientiously think they are entitled to maintain in the discharge of their duty — but we need not have recourse to any law authority or decision, to say, that no man shall be permitted, wilfully to abuse his office, nor by a malicious exercise of it to do injury to another, without responsibility in some shape — and in the Case of a ministerial officer, such as the appellant, an action is given for the damages thereby occasioned.—

Schinolli
Bunstead &al
6 J. Rep. 646.—

The declaration here contains all that is requisite to support an action on the Case agt a Public Officer — 1 Chitty. on Pleads p. 376, — says, "In actions on the Case, when the act or non-feasance "complained of, was not prima facie actionable "it is in general necessary to state, not only the "injury complained of, but also the circumstances "under which it was committed — as that the "Defendt maliciously or fraudulently contriving "and intending &c — (stating a bad intent) "corresponding with the wrongful act complained of) "committed or permitted the act complained of."

Now all this, is sufficiently set out in the declaration — the wrong — the injury, and the intent.

Again, in Com. Dig. 5 Vol. p. 590 (2.O.) it is said, — "The declaration in an action for

"misfeasance

" misfeasance in an Officer must shew — That
" the Defendt was an Officer — what it was his duty
" to do — and that he acted contrary to his duty." —

Now it is contended here that the declaration is defective, as it does not shew what the duty was the appellt had to perform, and particularly in this, that the Sterling Cost in the Invoice was not set forth, so as to shew how much was due on the goods imported. — But the Provl Stat. 53 Geo 3. ch. 11, does not specifically require this — but merely says — that upon goods wares and merchandises imported into this Province a certain duty shall be paid, to be calculated on the first or Sterling Cost of each one hundred pounds worth of such goods &c.

In looking at the declaration, we find there stated, that on the 23 May 1825, the plffs were possessed of divers large quantities of goods, wares and Merchandises of the value of £643.10.1, Sterling money of Great Britain, which they imported into this Province to the port of Quebec, and which were liable and chargable with certain duties to his Majesty — that of this importation the plffs gave notice to the Defdt as Collector &c, and then and there produced to the said Defdt as such Collector, the original Invoice of the said goods so imported — and then and there offered &c. — Now certainly all that was essential on this point is here stated,

and

and even to meet the very objection here made, namely, the Sterling Cost of the goods imported, ~~and to have established a Currency~~ the notice thereof to the appellant, and the Communication to him of the Original Invoice, and offer to do what was needful thereon — The Declaration might have been more minute, but as all the material facts are stated, more was unnecessary — Com. Dig: at the plea last cited, says, "If the declaration "shews the misfeasance it is sufficient, though "it omits several circumstances not material." —

It is further objected, that this action cannot be maintained without shewing the Special damage sustained by the Respdt and that here the conclusion in the declaration — to the damage of the plff — so much — is too general and applicable only to cases of Debt or assumpsit where the conclusion in damages must necessarily apply to the extent of the debt or undertaking declared upon — but that in this Case, a general damage does not flow from the nature of the action as the necessary consequence of the Appellts neglect of duty as a public Officer — But the principle here assumed is taken too largely — a distinction must be made between cases of general and special damage according to the circumstances of the case — If an action cannot be maintained but by reason of the special damage occasioned by the act complained of — there the special damage

becomes

becomes the gist of the action — and if no Special damage be laid, or if laid, be not proved, the action must be dismissed — But when the law gives a right of action for an injury — complained of, it presumes that damages arise from such injury, and a conclusion for general damages is sufficient —

1 Chitty. 386. & seq.

But it is clearly settled, that the law gives an action against the public officer for a wrong done by him in his office, when — alledged to be done wilfully and maliciously, and when such action is given, the damages are a natural consequence and may be demanded generally. —

On the general Issue —

Several points have been urged on this head

1st No proof of the notice of the action to the appellee —
2. No proof of tender of entry to be made at the Custom House —
3. No proof of protest — only of the signature of the notary to it —
4. No proof of the Entry made in the Books of the Custom House, under which the extra duty was paid — The original not produced — nor Mr Pendergast examined — being but evidence
5. No proof of any act done by the appellee personally

If-

It is unnecessary to go into a particular detail upon all these points, suffice it to say, that we consider the evidence sufficient on each of them —

The only question which now remains, and the most material in the Case, is whether there be sufficient evidence in the Cause, to support the allegation contained in the declaration, of a malicious intention on the part of appellee — by his refusal to take the duty on the Short prices of the goods imported, and for demanding and receiving the duty on the larger, or nominal prices — Taking that evidence as it stands it certainly bears strongly against the appellee It ascertains the fact, that different individuals at different times, and for some considerable time past, have made entries at the Custom House on the Invoices of goods imported, on all which the duty was paid on the Short prices, as a matter of course, and without difficulty — Now independantly of this being the interpretation put on the law, that duties on the Short prices only could be exacted, it would seem, as far as this evidence goes, to have been the Constant practice at the Custom House to receive duties on this principle — it does not appear to have been a matter of contest or of doubt — not a single instance is shewn to the Contrary, but the one before us, and it is difficult to say, why it should have been raised upon this occasion — In such case

it

it certainly was the interest, and we must say the duty of the appellt — to have laid before the Court such facts as would have shewn reasonable ground of excuse for his conduct, and thrown all imputation of malice out of the question — If he was in possession of such evidence, but did not see fit to adduce it, we regret, that as a public officer, he did not avail himself of so effectual a means of defence against an action of this nature — But taking the facts as they stand before us, uncontroverted or explained by any evidence on the part of the appellant, we find nothing to justify or excuse his conduct he has made no case for the Court to hesitate or deliberate upon, and we must draw that conclusion from the evidence which the Court below has done —

In the Cause between
Chas Jourdain appellt oppost in the Court of K. B. —
and
Joseph Miville Pltff in K. B. —
and
Felix Tetu Defdt

In appeal —

In the case of the mason for building or repairs done by him, the law allows a privilege, which, to a certain extent has the effect of a mortgage upon the building or repairs so done, and gives him a preference thereon for his payment — This cannot be denied — the authorities of law are too numerous and decided to doubt of it —

But it is contended here — that this privilidge cannot be exercised to the prejudice of a third person, without something specific to ascertain the nature and extent of the work done, or of the amount of the debt due thereon, and all this, within the year and day — so as not to deceive third persons, or lead them to trust their property in the hands of men of whom, either by consent or otherwise, such privileged claims may be brought forward.

We are disposed to think this objection valid, and that the Judgment here appealed from must be confirmed —

In looking at the Jurisprudence on this subject, it seems that previous to the Arret de reglement of 18 Augt 1766 — the decisions of the Courts were not uniform as to what would, or would not, entitle the Mason to claim his

privilege

privilege; that is, whether a devis & marché previously made, and procès verbal of the reception and value of the work subsequently done, were or were not necessary. — By some of the decisions, it would seem that these formalities were required — by others they were dispensed with, but the inconveniencies arising from this loose & contradictory decisions respecting a privilege which often extended to a great part of the value of the property in question, were strongly felt — and by the above arrêt de reglement, a certain mode of proceeding was established in order to secure the rights of all parties —

We must however enquire how the question would have stood previous to the making of this arrêt de Reglement, — and here we find, that the workman claiming a privilege on the work done by him, but not founded on any authentic document of a nature to ascertain when the work was done — the nature the value & the extent thereof, he was obliged to prosecute his claim within the year & day, so as to make his privilege available where it came in contact with the rights of third persons. — The end and object of the 127th cut. of the Custom was to limit the extention of credit, and to prevent law suits among persons of the description therein mentioned,

often

× as to the delegence to be exacised by the Mason in prosecuting his claim

× according to the but established jurisprudence

often injurious to themselves and to those dealing with them — The words of the article are very strong — ne peuvent faire action — après un an passé, which would seem to imply a limitation of action, and although by the interpretation which has been put on this article, the mason, or other artisan therein mentioned, may have his action against his debtor even after the year and day, yet in this case there is a certain discredit attaches to it, and if the Debtor will avail himself of the fin de non recevoir, a legal presumption is raised of the action, that the whole is made to rest on the oath of the Debtor — This is the case between the workman & his debtor but when his claim, with its attendant privilege, come in contact with the rights of a third person, the legal presumption against an unliquidated claim beyond the year becomes much stronger, and this privilege must yield to the authenticated claim of a more diligent Creditor — This seems to be the principle of law to be observed, as far as we can collect it from the opinions and decisions had on the question

Denisart. Vo Privilege, No 38 — gives an instance where the privilege was adjudged to the Mason who had not taken the precaution to obtain a Devis & marché — this was sometime previous to the arret de Reglement of 1766 — but the author observes

observes upon this Judgment — "qu'il ~~doit~~ doit être
" moins regardé comme un temoin de la Jurisprudence
" du Tribunal (Chatelet) que comme les derniers Soupirs
" d'une opinion mourante" — And in a note upon
the Case, we are told upon what principle
this privilege was granted — he says. "j'ai scu
" depuis de Mr Lois, que la question avoit été
" deux fois partagée dans cette affaire, et qu'on
" s'etoit enfin determiné a accorder le privilege
" parceque dans le fait, il s'agissoit d'une
" construction totale et à neuf d'une maison
" sur une piece de terre — et que d'ailleurs les
" ouvriers s'etoient pourvus presque aussitot
" les ouvrages finis, sans attendre l'expiration
" de l'année, pendant laquelle la Coutume leur
" accorde action" —

In the authority cited by the appellants
from Lacombe — vo Subrogation. No. 16. after
stating the principle, that a Devis & Marché
was not necessary to secure the privilege of
the workmen, and citing several decisions
to that effect — he at last comes down to an
arrêt de la C. des Aydes. 8 Juillet 1728, au
rapport de Mr Amiot, sur l'ordre du prix d'une
maison sise a Fontenaye près Paris, vendue
sur le Sr Taxis receveur des Tailles, par legal
les ouvriers qui avoient travaillé à la reconstruction
et fourni les materiaux, ont été colloqués pour
privilege, même au Roi, quoique pareillement

ils

ils n'eussent point de Devis & Marché, ni même de memoire arrêté — a strong case for the appellt but still they had something more than the appellt can pretend here — which was — mais seulement des Sentences par defaut depuis l'evasion de Paris, mais dans l'an des derniers Ouvrages. —

These decisions mark the principle of a necessity for the workman to follow up his claim with diligence within that time, beyond which the law stamps negligence upon it, and beyond q^l it will not extend a privilege to the prejudice of third persons. ~~to the prejudice of third persons.~~

We have also the opinion of some law writers on the subject —

2 Bourg^n Tit. 8. Des Exons. p. 733 — says "ce privilege a lieu en faveur des Ouvriers selon "moi, encore qu'il n'y ait aucun devis ni "marché par ecrit, pourvu que les ouvrages "soient constans, ou s'ils sont deniés, ils "puissent être verifiés, et que l'ouvrier ait agi "dans un tems competent, c'est à dire, dans le "tems que la Coutume a fixé pour la durée "de son action." —

Poth. Tr. de l'Hypotheque, p. 453 holds the same opinion, but is somewhat more explicit in the reasons he gives — he says, "Observez à l'egard de ces Créanciers, qui "ont conservé ou rectifié l'heritage, que pour "qu'ils

" qu'ils puissent exercer leur privilege, il faut, ou
" qu'ils ayent donné leur demande dans l'année de
" la perfection de leurs ouvrages, parcequ'autrement
" il y auroit une fin de non recevoir acquise contre
" leur créance — ou qu'ils soient fondés dans un
" marché fait par acte devant Notre, ou du moins dans
" une obligation devant Nre passée dans ladte année —
" un titre de créance sous signature privée, est bien
" valable vis-a-vis du debiteur et pareillement une
" obligation passée depuis l'année — Mais ces actes
" ne doivent point donner de preference au Créancier
" contre des tiers — parcequ' autrement des debiteurs
" pourroient en fraude de leurs legitimes Créanciers
" ressusciter des créances deja acquittées —

~~It is the particular situation in which third persons stand with regard to their debtor, that entitle them to this protection — they are no parties to numerous transactions between their Debtor and particular Creditors, nor can they always be prepared to meet the contrivances, or private understandings that may be formed to their prejudice — the law therefore seems to protect them.~~

~~in cases of this kind by requiring that ~~kind of delinquent to~~ ~~establish~~ a right uncertain & unliquidated should be ascertained wd. that debt[?] in that manner as to ~~state~~ preclude all presumption of fraud or collusion!~~

It is somewhat remarkable in this particular case, that when the appellant was taking the means of securing a debt due to him by the Defendr. Peter, by obtaining the Notarial obligation of the 29t. May 1820 — he should allow an open account of many years standing and ~~long due~~ upon w.h he now founds his privilege to remain unliquidated — It is a strong presumption in favor of bona fide Creditors that the appellant never looked to any other than

the

Tete

the personal security of the Debtor, for this account he was satisfied that ~~it~~ his claim should remain on that footing, and there we think it ought still to rest.

Judgt. affirmed w costs to Respdt.

~~O~~ Here we see the distinction evidently marked between the remedy which is still preserved to the workmen of his debtor for the value of his labor, even after the lapse of the year and the day, and the privilege claimed thereon — the remedy of the debtor affects him only, he owes, and justice requires that he should pay what he owes, nor can he avail himself of the tardiness of his creditor to proceed against him, while the debt remains unpaid — but in regard of the privilege, it is not extended on the same equitable principle with the debtor, because it tends to the prejudice of third persons, and to render ineffectual the security of bona fide creditors on the property of ~~the~~ such debtor — Laches must always operate against him who looks for an advantage, and will in ~~other~~ cases besides the present destroy the claim of privilege quoad third persons, who are often ignorant of the many dealings

and

and transactions between their debtor and particular Creditors, and cannot always be prepared to meet the Contrivances that may be formed to frustrate their claims — The Law therefore seems to protect the diligent creditor in a case of this kind against a privilege which may be set up by collusion with the Debtor or upon the mere assertion of the workman, who shews no Contract, nor has done any act of diligence to secure such privilege #

Hayes & al
vs
Gerrard

On question, whether two Executors of a Testator, can prosecute the Suit for the recovery of a debt due to the Estate of the Testator, two being authorised by the will to carry the same into execution T. L.

Bac: Abr: Tit. Executors & Administrators. p. 32.

One Executor cannot regularly sue another of his co-executors, touching any thing relating to their Testators will, or that is within the power, interest & duty & office of an Executor on note (b) - it is said - But may in equity & compel him to account for a moiety &c —

Ibid. — As Executors in representing the Testator make but one person, they are all regularly to sue and be sued. —

Vern: Ab: Tit. Executors (A. b. 2) p. 363.

No. 1 An Executor shall not have an account of his Companion

No. 9. If I make my debtor and another Executor, and the Debtor dies, — the other Executor shall have debt of the Executors of the Debtor, because the action was only in suspence & not extinct, & so is revived —

Id — N°13 — One Executor may sue another in Chas Court. (Chancery) thought not at law —

3 Foirq de ch. 10 sec. 4. N°. 46. p. 372 Lorsque plusieurs Executeurs testamentaires nommés conjointement par le même Testateur sont présens, ils ont tous un pouvoir egal; ainsi l'un ne peut pas empiéter sur les droits des autres — à moins qu'ils ne refusent d'executer la volonté du defunt. —

N°44 Quand les Executeurs, leur pouvoir n'est pas solidaire —

Rep^re v^o Executeur Testamentaire p. 160 — 1^re col — Lorsque le defunt a nommé plusieurs Executeurs Testamentaires, ils ont tous un pouvoir egal, et doivent agir conjointement. —

Cependant si l'un d'eux est hors de Paris, l'autre peut valablement agir seul. —

Principes du Droit Francais par Poullain du Parc. — liv. 3. ch. 18. tom. 7. p. 57. N°. 80. Il peut y avoir plusieurs Executeurs testamentaires qui doivent agir de Concert. — Et si l'un d'eux refuse, les autres doivent poursuivre l'execution du Testament —

№ 461

Donegany
val
Donegany

The Pltffs are ~~the~~ children ~~of~~ born in this Country of a mother who was an alien, & came to this Country with her father and mother, & three brothers all aliens, ~~and there~~ The father of the Pltffs mother acquired considerable real Estate in this Country, made a will, and died — the brothers of the Pltffs mother, being the pltffs uncles, Defendts in this Cause took possession of the Estate left by the deceased — the Pltff mother being dead, they now bring their action as their Uncles, for an account of their Grandfathers Succession — 2nd — will the action lie? —

The late John Donegani, the grandfather of the pltffs could have no heirs entitled to succeed him — he was an alien and the Children who came with him to this Country were also aliens, and there could be no right of Succession between them — It is said however that although the mother of the Pltffs could not inherit from her father, that her children, by being natural born Subjects are entitled to claim this inheritance, because, as natural born subjects, being entitled to the Succession of their mother, notwithstanding she was an alien, this right will extend to the Estate of the Grandfather, and to the whole ascending line in direct Succession — on the principle that the word Child, Enfant, in the lineal Succession applies equally to the Succession of the Gr. father as to that of the father —

This principle will not however hold here; nor is it universally true, either in deed or in legal decision, the word Enfant, receives this Construction — This no doubt is a Case where the Court would be disposed to give the most liberal construction to the word and to extend its application to its utmost limits, but it is evident that where used as applying to the Inheritance of the Grandfather, it is upon the supposition of a communication of inheritable blood and of that legal chain of connection by which Succession can be transmitted — So holds by decisions in the English law, the principles of which correspond with the Civil law & the law of Canada see — Com. Dig. Tit. Alien (C.1.) —

The Son of an alien cannot inherit to his Grandfather, though the Son be a Natural Subject — for he must inherit, mediante patre. —

Nor can the Son, or descendant of an alien inherit to the brother of the alien, being a natural Subject —

So no one can inherit to another who derives his blood or relationship to the other through an alien — as a nephew cannot inherit to an Uncle, or e contra, where the father is an alien. —

If a man has issue two Sons, and the elder is an alien, and the younger not, the younger may inherit — though the elder has a Son a natural Subject —

It may however be proper to consider, whether the Stat. of 11th & 12th Wm 3 ch. 6 – is not in force in the Colonies, and in that case, how far it will apply here By this Statute it is enacted – "That all and every "person and persons, being the Kings natural born Subject "or Subjects, within any of the Kings Realms or dominions, "shall and may hereafter lawfully inherit and be "inherited as heir or heirs to any honours, manors, Lands "tenements or hereditaments, and make their pedigrees and "titles by descent from any of their ancestors, lineal, "or collateral, although the father and mother, or "fathers or mothers, or other ancestor, of such person or "persons, by, from through or under whom he she or they shall "or may make or derive their title or pedigree, were or was, "or is or are, or shall be born out of the Kings allegiance "and out of His Majestys Realms and dominions, as freely, "fully and effectually to all intents and purposes, as if such "father or mother, or fathers or Mothers, or other Ancestor or "Ancestors, by from, through or under whom, he, she or they "shall or may make or derive their title or pedigree, had been "naturalized or natural born Subjects."

Now this Statute comprehending all persons being the Kings Natural born Subjects, within any of the Kings realms or dominions, will by legal interpretation extend to the Colonies – See Chalmers Op. 1 Vol. p. 201 – where it was held, that acts of Parliament, extending to the Kings dominions, are in force in the plantations notwithstanding some of the provisions may be – applicable only to great Britain –

N°. 94.
Pothier.
Mall. }

Qus + If a renvoi in the margin of an acte passed before a Notary be not signed or approved by the parties to the acte, whether this will affect the validity of the whole acte, or only the renvoi.?

Prost de Royer. Vo Addition. p. 715 –

Arret du Conseil du 21 Juin 1623, qui fait defenses à tous notaires, greffiers, et autres, ayant droit d'instrumenter, de faire aucunes ratures, renvois, ni changemens de quelque espece que ce soit, dans les actes qu'ils recevront, à peine de nullité des actes de 200tt. d'amende et d'interdiction – et même en cas de recidive, d'etre poursuivi extraordinairement

Arret du Conseil du 28 Mai 1626, qui en interpretation du précédent, prononce que la nullité n'aura lieu que pour les renvois non approuvés sans pouvoir donner atteinte au surplus des actes.

Armour v Gonnermann et Rollot & ux. Opt } Quest. as to the right of mortgage given by law to the minor upon the property of the person assuming the administration of the minors property, without appointment or authority —

Héricourt. Vente d'Im. p. 235. — L'hypotheque a lieu de plein droit, non seulement sur les biens des Tuteurs et des Curateurs, mais encore sur ceux de tous les autres administrateurs, lorsque les proprietaires ne peuvent agir par eux memes —

On ne suit pas dans le Pais Coutumier la disposition du Droit Romain qui n'admet hypotheque tacite que quand elle est accordée par une loi expresse — Car si on y suivoit cette regle, le mineur même n'auroit point d'hypotheque sur les biens de son Tuteur du Jour qu'il a été nommé, parceque les Ordonnances et les Coutumes ne prescrivent rien sur ce sujet, et que les dispositions du Droit Romain n'y sont point regardées comme des Loix — Mais comme on a vu que l'hypotheque tacite introduite en certains cas par le Droit Romain étoit fondée sur des principes d'Equité, on l'a adopté dans le pais coutumier pour tous les cas auxquels on pourroit appliquer le même motif de decision. —

Lacombe Vo. Tuteur — Sec. 11. Dist. 3. p. 595. — Les pupilles ou adultes ont aussi hypotheque sur les biens du Tuteur ou Curateur qui n'a administré Même sur les biens de ceux, qui n'étant ni Tuteurs ni Curateurs, ont administré en cette qualité — Ou comme amis —

Repertoire Vo. Hypotheque p. 653. — Les mineurs ont le meme hypotheque ~~qu~~ sur les biens de ceux, qui n'ayant pas eté legitiment nommés Tuteurs, en ont fait les fonctions, du Jour qu'ils se sont immiscés. —

Poth: Tr. d'Hyp. p. 425.

Quand même les Administrateurs des biens des mineurs, d'Eglise, de Communauté, ou de chose publique, n'auroient pas eu une vraie qualité pour les administrer, et qu'ils seroient portés pour tuteurs et Administrateurs sans l'être véritablement, l'hypotheque ne laisseroit pas d'avoir lieu sur leurs biens, du Jour qu'ils auroient commencés de s'ingerer dans leur administration — Ces faux administrateurs ne devant pas être de meilleure condition que les veritables. —

Poth. Cout d'Orl. Introdn. au Tit. 20. p. 747. N° 18.

Ils (les mineurs) ont un pareil droit d'hypotheque sur les biens de leurs protuteurs, c'est à dire de ceux qui, sans avoir une veritable qualité de Tuteurs, se sont neanmoins portés pour Tuteurs et ont en consequence administré les biens des mineurs. —

Et cette hypotheque a lieu du Jour qu'a commencé la Gestion ou Curatelle —

Arrets de Locat Lettre H. 23. N° 5. p. 857

Suivant cette doctrine il a été jugé par Arrest donné en la Seconde chambre des Enquetes au rapport de Mr Boüette, prononcé en robes rouges, par Mr le President Harlay le 5 avril 1654, que le fils avoit hypotheque sur les biens de sa mere, pour son reliquat de compte, non seulement du Jour de l'acte par lequel elle auroit été elüe nommée sa Tutrice, mais du Jour du décés de son pere, a l'instant duquel

sa

sa dite mere avoit commencé à gerer et administrer son bien — et le fils pour son dit reliquat fut préféré au Créancier intermediaire entre le décès du pere et l'acte de Tutelle, en infirmant la Sentence du Prevot de Paris qui avoit adjugé la préference au Créancier —

Dig. liv. 27. Tit. 3. l. 25. — 4 Hubt. 51.

Le privilege accordé au pupille a lieu non-seulement sur les biens du Tuteur, mais encore sur les biens de ceux qui ont géré en sa place aussi que sur ceux des Curateurs des pupilles et des fous si on n'a point donné de sureté à cet egard. —

Id. tit. 5. l. 1. 4. Hubt. 55.

Le Preteur a été obligé d'établir une action qui tint la place de l'action de la tutelle — En effet il y a souvent lieu de douter si quelqu'un a été veritablement tuteur, ou s'il n'a fait qu'en tenir la place en administrant la tutelle — C'est ce qui lui a fait concevoir une formule d'action qui comprend les deux cas; portant que le tuteur, ou celui qui sans etre Tuteur, aura géré la Tutelle, sera soumis à l'action de Tutelle — Car on se trompe souvent, et il est tres difficile à decider, si un homme a géré en qualité de Tuteur, ou si sans avoir cette qualité, il a cependant géré la tutelle, comme s'il etoit veritablement Tuteur

Un homme est censé tenir la place d'un Tuteur lorsqu'il en remplit les fonctions en gerant les biens d'un impubere, soit qu'il se croit tuteur, soit qu'il sache bien ne pas l'etre, mais qu'il se conduise comme s'il l'etoit —

Id. l. 3 — Il n'y a pas de doute qu'on ne puisse intenter l'action de la tutelle contre celui qui a géré comme s'il était véritablement tuteur, avant même la puberté du pupille, parcequ'en dans la vérité il n'est pas tuteur —

Deux art. V° Protuteur. — C'est le nom qu'on donne aux personnes qui s'immiscent dans l'administration des biens des mineurs, dont ils ne sont pas Tuteurs —

su also. Serpillon sur l. art. tit. 29. ord^ce 1667 —

Lamoignon Tit. 21. Des act. personnelles & d'Hypotheque §. 76

Les biens du Parent ou étranger qui s'est ingéré sans acte de tutelle ou de Curatelle ou auparavant dans l'administration des biens du Mineur, lui sont hypothequés du jour qu'il a commencé de faire la fonction de protuteur, encore qu'il n'ait point pris aucune qualité. —

1 Desp. 2 col. p. 594

Dom^n. Rex.
v^s.
B: Keenon

On Hab. Corpus. +

Wm G. Pell, stating himself by his Petition and affidavit that he was the father of one John Keenon, an illegitimate child aged about seven years, by B. Keenon, the Defend^t obtained a writ of Hab. Corp. to bring up the said Child before the Judges in vacation, on his statement that the Defend^t his mother was concealing him with a view to carry him out of the Province. —

The return made to the writ is insufficient, but can be amended, — the parties however were heard upon it without objection to the sufficiency of it and the question agitated was whether the mother has a preferable right to have the care & education of the Child —

This question does not appear to be clearly decided by the English law authorities, and on looking at some of the later decisions where it seems to have been agitated, they carry the impression, that the Judges would be guided more by the circumstances of the case, connected with the character, conduct and condition of life of the father & mother of the Child, so as to commit the Care & education of the Child to the most deserving, and the most capable to bring up the Child in a way to become a useful member of Society — This is the opinion of the

French

French Courts, and it is always gratifying to find that the principles are the same in both Countries on a question agitated before us when we have occasion to have recourse to both in forming our opinion —

The Case cited from 4. Taunt. 498. of Swansways vs. Robinson & another, brought the question before the Court, but the case was determined upon the insufficiency of the Plea of the Defendt — The Defendt in that case had given Security that a Bastard Child of which he was the father should not become chargable to the Township, & for this purpose he became bound to pay to the overseers of the poor of that Township a sum of 1/4 ℔ week for the maintainance of the Child — after the Child came to the age of seven years, the Defendt refused to pay this allowance and offered to take the child under his own care and to — exonerate the overseers of the poor from any further maintainance of it —

Ld Mansfield in the Judgt of the Case says, "The plea therefore being defective, the Pltff is "entitled to Judgment — I say nothing upon the "grand point, whether, after the Child is out of "the age of nurture, any father whatsoever, be he "who he may, can go to the mother and claim the "Custody of the Child, upon that point the Court "gives no opinion." —

In

In the Case of the King v Soper. 5 T. Rep. 278 — a child of three years of age, being brought up at the instance of her mother on an Hab: Corp: by the putative father, on whom an order of filiation had been made, and who had obtained the possession of the child by fraud — Burrough, objected to the child being restored to the mother on the ground that as the child had been adjudged to be the child of Soper, he had a right to the custody of her — But, Kenyon Ch. J. (stopping Garrow & Dampier, Contra) said that the putative father had no right to the custody of the child — and she was accordingly restored to the mother —

Here we find several circumstances working against the claim of the father — the age of the child her sex, and the fraud of the father in getting her into his possession — It is true that none of these circumstances are mentioned by the Judge as the grounds of his opinion, and one might be induced to think from the manner in which that opinion is stated that His Lo Ship was laying down a general principle that in no case was the putative father entitled to the Custody of his bastard child, but we shall see this was not the case from other decisions —

In the Case of The King, v. Mosley. 5. East. Rep. 224, note (a) Mingay moved for a writ of Hab: Corp: to the Defendt to bring up the body of a bastard child of 5 years old, which a young woman had had by the Defendant, and he cited the case of Rex. v Soper

5 T. Rep

5. J. Rep. 278, as in point, where it was holden that the putative father had no right to the custody of the child. —

Ld. Kenyon. Ch. J. Take a rule — Where the father has the custody of the child fairly, I do not know that this Court would take it away from him — though I do not mean to impeach the propriety of the case cited. — But when he has got possession of the child by force or fraud, as is here suggested, we will interfere to put matters in the same situation as before — Rule granted —

Here the father having the custody of the child fairly, would presume some act or consent of the mother, and her consent must presume that it is for the benefit of the Child, a circumstance which every Court must look to in the determination of this question —

See what N. Dens[illegible] says on this head under the word Batard. §. 5. Nº 3. 4. 5. 6 & 7.

N°2165.
Chapman
Harrison

Question as to legal subrogation of the Caution in the right of the Creditor.—

Repse. vo. Subrogation p 443. S.C.

Dumoulin a soutenu dans sa 4e leçon de Dole, que le paiement fait par un Co-debiteur solidaire de ce qu'il doit, avec d'autres, ou pour d'autres, le subroge de plein droit aux privileges et hypotheques du Créancier, et cette opinion a été suivie par Bourjon, droit Commun de la France — par Ravot, observations sur Perrier — par Thibeau, Tr. des Criées, et par plusieurs autres Auteurs, mais dit Pothier, (Obl. N°280) elle n'a pas prévalu et l'on a continué d'enseigner dans les ecoles, et de pratiquer au barreau — qu'un Codebiteur solidaire de même que les Cautions, n'etoient subrogés aux actions du Creancier, que lorsqu'ils avoient requis la subrogation. La raison en est, que suivant un principe avoué par Dumoulin lui-même, il ne se fait pas de subrogation de plein droit, a moins que la loi ne s'en explique. Or Dumoulin ne peut ~~trouver~~ aucun texte de droit qui établisse ~~du droit~~ en ce cas la subrogation. ~~pour~~

Renusson enseigne la même chose dans son traité de la subrogation ch. 7. N°68.— Quand plusieurs, dit-il, se sont obligés de payer une même somme pour une même cause, s'ils se sont obligés solidairement les uns pour les autres, chacun des Co-obligés est contraint de payer le tout mais chacun n'est debiteur principal que de sa part, et est Caution des autres pour leurs parts, l'un payant la somme entiere volontairement ou par contrainte doit stipuler la subrogation, autrement il n'a que l'action mandati, ou l'action negotiorum gestorum, pour repeter des autres ce qu'il a payé pour eux. ~~—~~

Telle est encore la doctrine de Rousseau de la Combe, articl. Subrogation, N° 10. — L'un des co-obligés solidairement n'est subrogé de plein droit, soit qu'il paye contraint ou non, il n'a que l'action mandati, s'il n'a subrogation expresse — see Poth. obl. N. 429. —

Lacombe vo Subrogation. N° 10. & 11 —

The Caution by agreeing that the Creditor give a discharge to the principal debtor thereby gives up his claim to subrogation —

Poth. Hyp. p. 468. —

Le Créancier est censé avoir tacitement remis le droit d'hypothèque qu'il a sur un heritage lorsqu'il a consenti à l'alienation de son heritage sans faire reserve de son droit d'hypothèque —

cont^d from p. 222. —

Soumatys Tr. des Hyps. p 78.79.

Les Legataires ont une hypothèque tacite sur les biens du défunt pour la délivrance de leur legs, quoi qu'ils soient contenus dans un testament olographe et non reconnu pardevant Notaires ni en Justice du vivant du Testateur, suivant la Loi 1 Comm: de Legat: & Fideicomm: parceque le paiement des legs etant fixé par le decès du Testateur, il s'ensuit, que le testament etant valable, quoique de main privée, l'hypothèque des legataires doit être fixée aussi au Jour du décès du Testateur. —

On a douté pendant longtems si l'hypothèque tacite ou legale qu'ont les legataires sur les biens du défunt est solidaire contre chacun des heritiers mais enfin les derniers arrets ont fixé la jurisprudence à ce point, que les legataires ont aussi bien que les Créanciers une action solidaire et indivisible contre chacun des heritiers, ensorte que chacun d'eux peut être convenu hypothecairement pour l'entier legs sur sa portion qu'il a recueillé de la succession sauf son recours contre ses Coheritiers. —

cités. Augeard. 2 Vol. p. 507. 2^e Vol. p. 492
Boutaric Instit. Liv. 2. tit. 20. §. 2. —

Principes du Dr. Fr^e suivt M. Poullain du Parc 7 Vol. p. 191

Les Legataires ont hypothèque sur les biens de la succession du Testateur, après toutes les dettes et ils sont preferables aux Créanciers personnels de l'heritier, dont les biens sont hypothéqués au paiement du legs du Jour de l'addition de l'heredité. —

Rep^re vo Legataire p. 80 1^re col. —

Mais du moins dans le droit Commun du Royaume qui accorde une hypotheque tacite a tous les actes publics — ne doit on pas en donner une aux legataires sur les biens propres de l'heritier depuis son adition ? — Il faut distinguer le cas, — ou l'adition est faite en Justice — ou par acte notarial, d'avec celui ou elle s'opere par le seul fait, c'est à dire par la mise en possession de l'heritier, sans aucune declaration autentique et préalable de l'acceptation qu'il fait de l'heredité.

Au premier cas les legataires acquierent une hypotheque sur ses propres biens du Jour de son adition

Arrets de Ravior sur Perrier Quest. 273. N°13. p. 397. —

L'adition d'heredité a un effet retroactif, et l'heritier est reputé heritier non pas du Jour de l'adition de l'heredité, mais du Jour que le defunt est mort; en ce cas, le mort saisit le vif — cet effet retroactif resulte des principes du droit Romain, suivant lequel on ne peut mourir, pro parte testatus et pro parte intestatus. — Mais les Créanciers hereditaires n'auront leurs hypotheques sur les biens propres de l'heritier que du Jour de l'adition

ainsi jugé au Parlement de Paris le 9 Août 1683. par un arret rapporté au Journal du Palais — and see the other authorities there cited. —

N. Denizt. V^o Ecor Testamentaire § 6. N°11. last clause

Ne peut on pas dire de meme et a plus forte raison de l'Executeur Test^re que sa gestion ne commence pas du Jour du Testament qui l'autorise, mais seulement du Jour ou il accepte la charge et qu'a moins qu'il n'ait fait cette acceptation par un acte exprès devant notaires, celui auquel il rend son Compte n'a hypotheque pour le reliquat que du Jour du Compte s'il est passé devant notaires, ou devant le Juge, ou du Jour des Condamnations s'il a été rendu sous seing privé. — (Cont^r to 2354)

Is stare.

M.Nider & McGillvrai & Porteous Ints

On question whether the Vendor, who in England sells his goods to the Vendee in Canada on credit, can attach those goods before they come into the hands of the Vendee or after, on account of his insolvency? so as to prevent their being sold for the general benefit of the Creditors?

The plff 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, a right, not of very antient date, and not created by any positive law, but ~~arising~~ grounded upon equitable circumstances, and allowed for the encouragement & protection of trade — He has also relied upon the law of Scotland, where the contract of sale was made, and under which he claims this right of stoppage in transitu, and by which law the interests of the parties must be governed — But whatever the rights of the parties may be under the Laws of England or Scotland, we cannot take notice of them in this case, for had the Plff meant to rely upon any ~~right~~ 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 Decln — as it became a matter in issue between the parties and both had a right to adduce evidence upon it — This not being the case in the declaration before us

we

we must have recourse to the Laws of the Country to determine the matter now in — contest between the parties — Whatever objections may be made to some parts of the laws of Canada, we must still admit that ~~the~~ in general they are marked with strong principles of equity and Justice when duly considered, and they in general provide as an effectual remedy for an injury as any other System of laws we know — In the particular case before us it is perhaps fortunate for the Pltff that his right must be determined by them, for in this respect they carry the right of the vendor over the property sold to the Vendee, whether before or after delivery, when 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 them laws as far as we can see, after delivery of the goods to the Vendee the remedy of the Vendor by Stoppage in transitu ceases —.

The action here is what in England is called

called an action of Trover and Conversion, whereby a Pluff, under the fiction of having lost his goods out of his possession, tries the question of title to them with the person who he says found them & now detains them — Fictions of law are said to have been invented and are used for the ends of Justice — but where the ends of Justice do not require fiction, it would seem in such case rather calculated to retard if not defeat them ~~ends of Justice~~ There is no doubt but by the laws of this Country if a man loses his goods and another finds them, this kind of action might be maintained — but I find nothing in this law ~~of this Country~~ that when a man sells, exchanges or voluntarily parts with his goods, that this is to be construed into a casual loss for which an action can be maintained — The borrowed forms of Trover & Conversion, Assumpsit & Trespass on the Case, may be admitted as far as the facts they allege ~~can be supported by the statute alleged~~ afford a remedy by the laws of the Country, but beyond this they are not only useless but may be dangerous — In looking however at the conclusions of the declaration, which by our law constitutes the material part of the demand, we find it concludes for revindication of the goods in question ~~claiming a right & retention of them till he be paid his money~~ as part of Insolvent's Property ~~as being the sole proprietor of them~~ — The Plea to the action is, that the goods were sold in Glasgow by Messrs to Andw Portous, on a 9 months Credit were there shipt & sent to this Country addressed to him and were in fact his by actual delivery & are now the property of the Defenders as assignees of his Estate & Effects for the benefit of his creditors — From the facts admitted by the pleadings, there remained little in contest except the fact of delivery, — and here it appears that

We must put out of the question all the law and all the arguments ~~which are~~ founded on the rule in England touching the stoppage in transitu, as not applicable to this Case & consider it under the Laws of this Country —

The 177th art. 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 préféré sur la
" chose aux autres Creanciers". —

This article supposes, that the thing has come to the hands of the vendee & is seized by another creditor — still in this case, the Vendor has a right to prevent the sale & to have a preference on the thing itself — But this it is contended gives no right to the action of revendication, it gives only the right of preference upon the monies arising from the sale of the thing seized — and some authorities have been cited to this effect — In looking at that cited in Fr. Gr: Com^re p. 1334. N^o 4 — he goes on to add — ~~Il paroit par ce que nous venons~~ ~~de dire~~ "Si la chose vendue avec terme se trouve
" saisie sur l'acquereur avec d'autres meubles le
" Vendeur

Pothier
Pigeau.
Bourjon.

" vendeur peut en demander la distraction pour la
" faire vendre diparement, si mieux n'aiment les
" autres créanciers le payer ou l'assurer de son dû.

"Il paroit par ce que nous venons de dire que
" celui qui en vendant a donné terme, a dans cette
" Coûtume autant de privilege sur sa chose vendüe
" que celui qui a vendü sans terme, à la reserve de
" la suite entre les mains du Tiers acquereur."—

So says Sorel. Bella P. 19. p. 348— Mais tant et si longuement que la chose demeure entre les mains de l'acheteur, le Vendeur, la peut non seulement vendiquer, mais demander à être preferé sur le prix d'icelle à tous autres Créanciers"— Du

De Lauriere on the 177e art. cites the opinion of Lalande on the 458e art. of the Cout. D'Orleans— De Lalande dans son Commentaire sur l'art. 458 de la Coutume d'Orleans semblable a celui-a, pretend que le Vendeur qui a donné Terme a le choix de requerir la — restitution de sa Marchandise contre les Créanciers de l'acheteur qui l'ont saisie, s'il y a plus d'avantage de la reprendre, ou de consentir qu'elle soit vendüe en Justice à la charge de son privilege sur les — deniers qui en proviendront"—

Pothier on this article says — non pour revendiquer la chose — mais pour etre payé sur le prix.—

Fer. Pet. Comte on 177e art — says — Toutesfois si elle est saisie sur lui par ses Créanciers le vendeur a droit de s'opposer, et d'en empêcher la vente, etant Créancier privilegié et preferable a tout autre sur icelle — parceque la Coutume lui donne une hypotheque speciale sur la chose pour sureté du prix convenu — et même en sa faveur il y a lieu de feindre que la proprieté de la chose n'a jamais passé en la personne de l'acheteur, tant qu'elle se trouve en sa possession —

Denizt — vo Revendication N° 5 —

Le vendeur d'une chose avec Jour & terme pour le paiement, peut-encore la revendiquer même avant l'echeance du Terme lorsqu'elle est saisie sur l'acheteur par un autre créancier —

L'effet de la revendication en ce cas est de donner au vendeur un privilege sur le prix de la chose vendüe. —

N°. 6

Enfin le vendeur d'une chose mobiliaire avec terme, peut encore la revendiquer, s'il n'est pas payé apres le terme convenu; — pourvü qu'elle soit encore entre les mains de l'acquereur. —

Brodeau on 177 — art.

Principes du Droit Franç. par M. Poullain du Parc —

Au contraire, si le Vendeur a donné terme il n'a la Revendication que contre l'acheteur ou ses créanciers, & la preference sur le prix existe de la chose — mais il ne peut pas la suivre entre les mains d'un tiers acheteur. —

1808.
Ex parte
on Requete of
Pres Bte Melodie

On question whether the Court can take cognizance of and homologate certain resolutions or Bye laws of the Fabrique of the parish of Lachine respecting the interment of dead bodies in the Church of that parish —

1 Raym. 114
Framework Knitters
Green —
2 Hyd. 107. —

Members of Corporations are not bound to perform by-laws, unless they are reasonable, and the reasonableness of them is examinable by the Judges —

2 Hyd. 97. 98. — Hobart says — That though power to make by-laws be given by special clause in charters of Corporation yet that is needless, for it is included by law in the very act of incorporation, like the power to sue for and as reason is given to the individual for the government of his conduct, so a body corporate must have laws as a politic reason to govern it.

And according to this opinion of Hobart, it has long been established, that this power is necessarily incident to every Corporation — and it extends to every Subject in which the Corporation are to exercise a right

Bac: Ab: Title
Church-wardens
p. 597.

Though they deal chiefly in matters belonging to the Church, yet are they every where treated of in our law books as temporal persons, and are undoubtedly to be considered as a Lay Corporation vested with a temporal right in their offices, and a special property in the goods belonging to the Church —

Dic. de Droit Can.
Durand de Maillane
Vo Fabrique p. 349

En France les Fabriques sont considerées comme des corps laiques quoiqu'elles participent aux privileges des corps Ecclesiastiques —

Que toutes les places de sepulture dans l'Eglise à la reserve de celle du Patron et du Haut Justicier sont communes à tous ceux de la paroisse, quand même il y auroit des tombes sur ces places, parceque la superficie de l'Eglise est commune à tous les paroissiens, quant à l'usage, et que la proprieté n'en appartient à personne en particulier — Soussa Cour: des Paroisses p. 75. — Loiseau Tr. des Seigneuries. ch. II. N° 87.—

Neanmoins lorsqu'on a permis à quelqu'un d'avoir une Cave ou sepulture dans l'Eglise, ce sepulture est reputé particulier pour sa famille qui peut empêcher dans la Suite qu'on n'y en enterre d'autres — Loiseau ch. N° 86— Au surplus il faut observer que le droit de Banc dans l'Eglise n'attribue pas le droit d'avoir une sepulture particuliere et exclusive sous ce banc, de même que le droit de sepulcre particulier dans l'Eglise n'attribue point le droit de Banc sur la superficie comme on se l'imagine ordinairement, parceque dans les choses qui concernent un simple usage sans proprieté ni servitude, il n'y a aucune consequence du Sol à la superficie.— Loiseau N° 88—

C'est aux marguilliers seuls à disposer des places de Sepulture. (Ainsi jugé par Arrêt du 24 Avril 1665, rapporté par Catelan liv. 1. ch. 64.— au profit des marguilliers de la Paroisse de Notre Dame des Tables de Montpellier contre le Curé de la même paroisse.) Si la sepulture se fait dans l'Eglise, ils sont en droit d'exiger pour cela un droit au profit de la Fabrique — mais si elle se fait dans le Cimitiere qui doit être le lieu public et ordinaire pour les sepultures il n'est dû aucun droit à la Fabrique pour l'ouverture de la fosse.—

Dic: Brillon. V° Sepulture. N° 12.

C'est une maxime que les droits & places de sepulture sont à la disposition des marguilliers.

Par arret du Parlement de Bretagne du 13 Janvier 1622, rapporté par Frain. plaid. 130. il a été jugé, qu'il appartient aux Recteurs et marguilliers de designer les Sepultures avec les Curés — les Curés ne le peuvent seuls. — La decision est bonne — ce doit être ici une administration commune, s'agissant du temporel de l'Eglise. —

Le droit de conceder des sepultures, qui appartenoit anciennement aux Evegües et aux Curés primitifs, a passé par leur negligence aux marguilliers. Il leur appartient tellement, qu'il fut jugé au Parlement de Toulouse le 24 Avril 1665. que les Marguilliers de Notre Dame des Tables de Montpellier ne l'avoient point perdu par la demolition de cette Eglise, demeurée demolie durant plus de Cent ans, ou qu'ils le reprenoient avec leurs autres droits et prerogatives dans l'Eglise ensuite rebatie. —

Jousse 132. 3.

Quand les deliberations ont pour objet d'imposer quelque nouveau droit, ou quelque nouvelle charge aux habitans, et non d'etablir seulement une nouvelle depense sur les biens et revenus ordinaires de la Fabrique, comme dans le cas ou l'on vouloit augmenter au profit de la Fabrique ou du Curé les droits des enterremens, ou faire quelques autres impositions semblables, alors l'opposition d'un seul habitant suffit pour empecher l'effet de la deliberation jusqu'à ce qu'il en ait été decidé par la Justice. — &c —

Hors ce cas, l'opposition d'un particulier ne doit point empecher l'effet d'une deliberation, si ce n'est que cette deliberation fut contraire au bon ordre, ou à l'interet de la paroisse. —

D. Poth. Traité des Personnes, Ch. 7. des Comtés p. 629. —

Il est encore de la nature des Corps & Communautés que chaque Corps ou Communauté puisse se faire des Statuts pour sa police et sa discipline, auxquels tous les membres sont tenus d'obeir, pourvû que ces Statuts ne contiennent rien de contraire aux Loix, la liberté publique, et à l'interet d'autrui. — Mais comme c'est aux Magistrats à examiner s'il ne s'est rien glissé dans les Statuts qu'un Corps s'est prescrit, qui soit contraire aux Loix et à la liberté publique; les Corps doivent présenter leurs Statuts, ou aux Juridictions Royales auxquelles ils sont soumis immediatement, ou au Parlement Ils y sont homologués, s'il ne s'y trouve rien qui puisse empecher l'homologation —

№ 1808

Ex parte — on Requete of Jn Bte. Meloche on

The question now before the Court is whether the deliberation of the Church Wardens & Parishioners of the parish of St. Michel de Lachine, touching an extra allowance to be paid by the parishioners 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 effices, and a special property in the goods belonging to the Church — "En France les Fabriques sont considerés comme des corps laïques, quoiqu'elles participent aux privileges des Corps Ecclesiastiques" —

Maillane Dic. Droit. Can. v. Fabriques p. 349. —

Being an association known and established by law as a Corporate body, this Fabrique, or Church-wardens have a right at their meetings to form rules & 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 & Communautés "que chaque Corps ou Communauté puisse se faire des "Statuts pour sa police et sa discipline, auxquels tous les "membres sont tenus d'obeir, pourvu que ces Statuts ne "contiennent rien de contraire aux loix, la liberté publique "ou à l'interet d'autrui" —

Poth. Tr. des Personnes Ch. 7. des Comtés — 6 Vol. p. 629. —

The Church wardens in this case have settled & determined by their deliberation of the 5th Sept. 1819 further confirmed by another deliberation of 30 Janv. 1825 that the rate of burial in the Church of Lachine should for the reasons they state be augmented to 20 £ —

This they had a right to determine, it was a matter within their cognizance, as having the charge of the temporal intents of the Church

Jousse. p. 75. 6

c'est aux marguilliers seuls a 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, ~~is it~~ can, or ought this Court to confirm their proceedings? —

What do the Petitioners ask here? — That this Court will homologate and confirm the foregoing act of deliberation of the 5th Sept. 1819, "en forme "de reglement pour lad.e Fabrique, ce faisant "adjuger et ordonner qu'elle aura son plein & "entier effet, et qu'elle sera suivie & executée suivant "sa forme & teneur" or in other words that this Court ~~should~~ 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 ~~right~~ power to frame or to confirm rules and regulations for the general government of particular Societies of Men, associated as Corporations or otherwise

before

before they can take cognizance of this petition. There is no doubt, but that according to the constitution of the Courts under the French Govern^t in this Colony, this right was inherent in the Courts, as a part of that superintending power vested in them as derived from the Crown — but under the present Constitution of the Courts, and the powers vested in the Judges by the Crown, the power of making rules and regulations for the government of any portions of Her Majesty's subjects does not appear to be vested in them — The Courts as now constituted, are established for the administration of Justice, properly so understood, that is, to try, hear, & determine all causes of Civil or Criminal, matters of private right or of public injury among the Kings subjects — but this cannot imply the right to make rules and regulations for the government of the Kings subjects — This is a power of a legislative nature, which although possessed by the Courts established prior to the Conquest, has been 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 or permit the exercise of some portion of this power to His Courts in regulating many inferior matters which came under their notice in the administration of Justice — hence arose the numerous Arrets de Reglements made by the Superior Courts, which were in matters laws, sous le bon plaisir du Roi, and were followed and observed as such —

O. Denizt. vo Reglement No. 3.

Quoiqu'il soit de principe que le Roi seul peut faire des Loix, il est cependant permis aux Cours superieures de faire des Reglemens, sous le bon plaisir du Roi, et ils s'executent comme loix dans tout le ressort. —

Prost de Royer vo Arrets. No. 15 Arrets de Reglements p. 678. —

Comme il etoit permis aux Juges dans l'Empire Romain de suppleer à ce que les Loix avoient omis — de meme il a toujours été permis en France aux Juges Souverains de prononcer des decisions solemnelles, de faire des Arrets de Reglements sur — Ces arrets ont en consequence une force de Loi, sous le bon plaisir du Souverain parceque, jusqu'à ce qu'il ait parlé lui-meme les Cour sont les veritables organes de ses Volontés les fideles interpretes de ses Sentences. —

Now according to the Constitution of our Country the King possesses no Legislative power and therefore can communicate none to His Courts, neither can the Courts exercise such ~~authority~~ power unless specially authorised by law so to do — Thus we confirm rules Regulations of Police made by the Magistrates — we make rules Regulations for the practice of the Courts, & 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 we are warranted to take cognizance of these matters — But failing such express authority we conceive that in all matters of general regulation touching the rights and interests of the Kings Subjects, we have no

power

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 deliberations of the Marguilliers in this instance may not be legally enforced without such confirmation by the Court as that they now demand. —

No 8.—

Ex parte. Dec: Vol:
On Requete of
Jos: Girouard
and
Antr. Lalonde Opt.
&
Jos: Lalonde, the
sold to Girouard - Intrs

By mar. Contract between Gabriel Lalonde & Ursule Lalonde of 25 July 1796, the husband put into the Community by ameublissement 2½ acres of land, and during the Community the other ½ acre was purchased, which made the whole 3 acres 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, no Inventory appears to have been made of it — By marriage Contract of 26 Jany 1798, the said Gabriel Lalonde again ameubli the whole of the said land & put it into the Community between him and his second wife Rosalie Lefebvre — On the 4 July 1822 the said Gabriel Lalonde died — and on October 1822, his widow & her children as his heirs sold the land to Joseph Lalonde the Intrs party who afterwards on 17 Novr 1826 sold it to the Petitioner Jos: Girouard — On the Decd Vol. of this Land by Girouard, Antoine Lalonde the maternal uncle of the said Marie Rose Lalonde, claims by his opposition one half of the said land, as being the right in the Community between her & the said Gabriel Lalonde & to which half the said Oppost — as the heir, of the said Marie Rose Lalonde — quant aux propres, to the said Oppost. is entitled —

The claim of the opposant is founded on the principle, that the land so ameubli by the marriage Contract, was to be considered as a Conquet, and in the succession of the said Marie Rose Lalonde was

a

a *propre naissant maternel*, and as such went to the heirs on the mothers side — ~~On~~ The Intervening party contended, that the *clause d'ameublissement* being a fiction in law, did not extend beyond the contracting parties, and in the succession of the deceased Marie Rose Lalonde, it ceased to operate, and the land then fell back into the former line of succession as a *propre paternel*. —+

On the part of the Oppost the following authorities are referred to —

Potts: Comté
№ 314.

Lorsque j'ai ameubli à la Communauté mes immeubles, jusqu'a concurrence d'une certaine somme cet ameublissement indeterminé ne donne pareillement contre moi à la Communauté qu'un droit de créance. Mais (et c'est en cela que l'ameublissement indeterminé differe de la simple convention d'apport d'une certaine somme d'argent:) cette créance n'est pas une — Créance mobiliere — car ce n'est pas une somme d'argent que la Communauté a droit d'exiger de moi — elle a droit d'exiger que je mette quelqu'un de mes immeubles jusqu'a Concurrence de la Somme convenüe dans la masse des biens de la Communauté.

Cette créance ayant pour objet des Immeubles est une créance immobiliere — C'est pourquoi lorsque ma femme meurt, l'enfant né de notre mariage qui lui succede à cette créance pour la part qu'elle avoit en la Communauté, c'est à dire pour la moitié succede à une créance immobiliere, la quelle est en sa personne un *propre maternel*, auquel, s'il vient a mourir par la suite, succederont à mon exclusion,

ses

ses heritiers aux propres maternels.— Je pourrai seulement dans les Coutumes de Paris et d'Orleans succeder en usufruit, suivant la disposition de ces Coutumes, qui diferent au Survivant la — succession en usufruit des Conquets aux quels leurs enfants ont succedé au prédécedé.—

Poth. des Succ.ns p. 84. 5. & 6.—

After proposing the question — Le Survivant pourroit-il succeder à l'usufruit des propres ameublis par le prédécédé, qui auroient passés à ses enfans par le décés du predecedé?— he goes on to state the reasons of the right, but that nevertheless the Jurisprudence had been ~~differently~~ otherwise settled by some arrets to which he refers ~~to some Arrets on the Subject~~ — and then adds— La raison de cette jurisprudence est, que l'ameublissement que l'un des Conjoints fait de ses propres, se faisant en faveur de l'autre Conjoint, la fiction de l'ameublissement doit avoir son effet, non seulement dans le cas de — partage, ou de la disposition des effets de la Communauté mais generalement dans tous les Cas ou il est de l'interet du Conjoint au profit duquel cet ameublissement a été fait, que ce propre ameubli soit regardé comme un Conquet, et par consequent la fiction de — l'ameublissement doit avoir son effet, le propre ameubli doit passer pour conquet dans la succession des — enfans, aussi bien que dans tous les autres Cas, le survivant ayant interet qu'il soit reputé tel, pour y succeder en usufruit—

Si le survivant succede en usufruit à ses enfans aux propres ameublis par le prédécédé, à plus forte raison doit-il

doit-il succeder à l'usufruit de ceux qu'il a ameubli lui-même, et dont une portion a passé à ses enfans par le décés de l'autre Conjoint; car le survivant a plus que contribué à les acquerir à la Communauté puisque c'est lui qui les y a mis. —

Si le pere survivant n'a ameubli aucun corps certain à la Communauté, mais y a ammeubli — indeterminement ses immeubles jus qu'à concurrence de 20,000, et que cet apport n'ait point encore été fourni ni determiné, les enfans de leur mere prédécédée sont, pour raison de cet apport de leur pere, créanciers de lui d'heritages jus qu'à concurrence de la moitié de cette somme — Cette créance, ayant des heritages pour objet, est une créance immobiliere que la Communauté avoit contre le survivant, qui appartenoit pour — moitié à la femme comme Commune, qui dans la personne des enfans, est un propre naissant du coté de leur mere, de la Succession de qui ils l'ont eu, auquel leur pere survivant doit lui succeder en usufruit conformement à ces articles —
(art. 314. Cout. Paris) —

Case cited from Journal du Palais 2 Vol. 7 Janv. 1688 - of Madame Le Chaleux — also referred to in Rep^re v^e ameublissement. p. 370. 371. —

Arret of 11 Dec. 1710 - cited from Rep^re v^o Succession p. 570 - on question - "L'Immeuble ameubli par
" Contrat de mariage conserve cette nature jus qu'au
" partage de la Communauté." —

Fr. Gr. Comm^rs on art. 220. § Des ameublissements N. 24 & 27. —

In laying down certain principles as arising out of the ameublissement, he omits. N. 24. —

En

En sixieme lieu — La part du propre ameubli par la femme est conquet en la personne du pere — et si l'Enfant decede, apres y avoir succedé, la mere y succedera dans l'usufruit, comme a tout autre Conquet, comme etant une acquisition faite pendant le mariage —

N. 27

Brodeau. sur Loüet Lettre P. Som. 28. N. 24. —

En huitieme lieu, quand la femme qui a ameubli un heritage accepte la Communauté, la moitié d'icelui passe à l'enfant heritier de son pere, et il est propre naissant paternel en sa succession, et propre maternel pour l'autre. —

O: Denizt. Vo Ameublissement N. 7 ——

Sans principle subd —

Brodeau sur Loüet Lettre P. Som. 28. N. 24. p. —

Quand une femme ameublit un propre, et qu'elle accepte la Communauté, il faut dire que la moitié de ce propre ameubli devient propre naissant paternel aux Enfans issus du dit mariage, sans en considerer l'origine — de sorte qu'apres le decés des dits enfans, qui ont survecu leur pere, ou, mere, les choses ameublis se — doivent partager egalement entre les heritiers paternels & maternels. —

The authorities relied on by the Intervening Party were the following—

Arrêt du Parlement de Paris du 22 Août 1622 qui decide que l'heritage ameublé, qui à la dissolution de la Communauté, tombe pour le tout, ou pour partie entre les mains de celui qui l'avoit ameubli reprend et conserve sa premiere nature de propre

Prost de Royer v° Ameublissement p. 580.

This arrêt is also cited by
~~Rep.~~ Denizart v° Ameublissement §. 8. N°. 8.
Auzanet on 220 art. Cout. —

N Denizart ~~Rep.~~ v° Ameublissement §8. N°. 8. —

Rep. v° Ameublt p. 370 ~~1~~ 2 col.

Si par le partage de la Communauté, le propre ameubli tombe en tout ou en partie dans le lot de celui par qui l'ameublissement avoit été fait, ou de ses heritiers, ceux-ci le possederont à titre de propre. — La faveur attachée à la conservation des propres dans les familles, a même fait accorder au Conjoint qui a consenti l'ameublissement, ou à ses heritiers, le droit de retenir dans le partage le fonds ameubli en le precomptant sur sa part pour le prix qu'il vaut au tems du partage —

cités. Poth. Comté N° 310
Renusson Tr. des propres. ch. 8. N°. 29
1 Bouj. p. 523. N°. 2. — + abonnant p 22 Août 1622

Prost de Royer au above p. 580

Arrêt du Parlement de Paris du 10 avril 1688 Mariage de Franç. Crampon + Catherine Nourri. — La femme, qui n'a pour tout bien que le tiers d'une maison, l'ameublit — Le mari + la femme decedent + ne laissant qu'un fils, qui meurt bientôt sans

enfans

enfans — Proces entre les heritiers du coté paternel et du coté maternel — Les premiers veulent avoir la moitié du propre ameubli, comme d'un conquet dont le mari avoit acquit la propriété par la clause d'ameublissement, et qui etoit devenu propre naissant dans la personne de son fils. — Les seconds soutiennent que l'ameublissement est une fiction qui n'a d'effet que vis-a-vis des Contractans, et ne s'etend pas d'un cas à un autre — qu'ainsi le propre doit leur appartenir comme heritiers legitimes de la femme qui l'a ameubli — C'est ce que la Cour decida. —

cités Soefve. tom. 2. cent. 4 ch. 13. p. 367. —
Renusson. des Prop. ch. 6. su. 8. N° 31 —
Rep^re v° Ameublissement. p. 370. 2^e col. —
Poth. Com^te N° 310. —

Poth: Com^te N° 312. —

Il nous reste à observer sur les effets de l'ameublis^t soit generaux, soit particuliers, qu'ils n'ont lieu qu'entre les parties contractantes ou leurs heritiers, et pour le cas de la Communauté. — Lors donc que l'un des Conjoints a ameubli un certain heritage, cet heritage n'est reputé Conquet, que vis-a-vis de l'autre Conjoint ou de ses heritiers, et pour le cas de la Communauté: vis-a-vis de tous les autres il conserve la qualité qu'il avoit avant l'ameublissement. — C'est pourquoi lorsque j'ai ameubli un heritage qui m'etoit propre d'une certaine ligne, cet heritage pour la part que j'y ai, et même pour le total, s'il m'est demeuré en total par le partage de la Com^te, conservera dans ma Succession la qualité de propre de cette ligne, et en seront mes heritiers aux propres de cette ligne qui y succederont. —

Royer. v° ameublissemt p. 578. N° 4

La fiction qui fait reputer meuble, l'immeuble ameublé, en lui imprimant la qualité de Conquet n'ayant été introduit que pour faciliter les mariages et les mises en Communauté, ne doit par conséquent durer qu'autant que la Communauté existe, et ne doit avoir d'effet que vis-a-vis des Conjoints : C'est la un axiome fondamental établi par le celebre Dumoulin sur l'art. 55. de l'ancienne Coutume de Paris, formant le 78e. de la Nouvelle —

Cependant, comment combiner les vrais resultats de cet axiome avec les decisions des differens arrets, et les distinctions des differens auteurs pour les concilier. —

See also. Duplessis. Tr. de la Communauté. p. 360 — his remarks on the Arret cited by Brodeau of 12 april 1616.

See also Renusson. Tr. des Propres ch. 6. su. 8. N° 29. 30. —

Stem. } action for impeding the navigation of the
Hatt, a } River Richelieu - by erecting a dam over

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2. Prat. des Terriers de Fremainville - p. 65. quest. 13. — La propriété des Fleuves & Rivieres navigables dans l'etendu de tout le Royaume, ne peut resider que dans le Souverain, & jamais dans celle d'un particulier cités LeBret. liv. 2. ch. 15. -

Id. p. 422. - Ces Rivieres qui appartiennent au Souverain, et qui font une partie de son domaine, ont des accroissements de tems à autre, ainsi que des atterissemens, des Isles, Islots, accrues, cremens, et dessechements, qui font toutes parties de ces mêmes rivieres, & appartiennent de même au Roi, à l'exclusion de tous les Seigneurs et particuliers riverains d'icelles - Bacquet. Justice. ch. 30. N°5.

Id. p. 469 - L'usage des Rivieres etant au public, il n'est permis à personne d'y faire des Constructions et changements qui nuisent à cet usage - par consequent nul ne peut rendre le cours de l'eau plus lent ou plus rapide, par quelques constructions que ce soit, parceque'elles seroient nuisibles à la navigation. -

Id. p. 491 - + 526. 536. Il faut distinguer les Rivieres navigables et flotables des Rivieres Seigneuriales — à l'egard des premieres, cela est très expressement defendu par les anciennes ordonnances, et en dernier lieu, par l'art. 42. du Tit. 27. de l'ord^ce de 1669. - en ces termes - "Nul " soit proprietaire ou Engagistes, ne pourra faire Moulins " batardeaux

" Batardeaux, ecluses, gords, pertuis, murs, plans d'arbre
" amas de pierre, de terres, et de fascines, ni autres edifices,
" ou empechemens nuisibles au cours de l'eau, dans les
" Fleuves et rivieres navigables & flotables, a peine de—

De Lapalanche liv. 1. ch. 3. p. 25

La seule autorité du Roi peut faire ou permettre tous ces differens etablissemens sur les Rivieres — et cette permission même ne peut être accordée, que sous la Condition que les batimens ne puissent nuire à la navigation. —

Renaudon Tr: des Dr: Sig p. 359. —

Mr Sebret remarque, que le droit qui donne en France la proprieté des Rivieres navigables au Roi, n'est point un droit nouveau et particulier: C'est un droit general et universel à tous les Souverains à cause de la protection qu'ils doivent à la navigation et au Commerce — C'est pour l'entretenir avec vigueur que leurs Officiers sont chargés d'ecarter tous les empechements qui pourroient nuire à la navigation et au flotage des bois — Il est donc interessant pour l'etat, et pour le bien des sujets, que les Rois protecteurs du Commerce, ayent sur les Rivieres et fleuves navigables tous droits de— proprieté & de Souveraineté. —

Id. p. 363.

Ceux à qui Sa Majesté a permis d'avoir ou de batir des moulins sur une Riviere navigable, doivent les entretenir de facon qu'ils n'apportent aucun empechement à la navigation, ce que Lamarre reduit à six articles —

5° De ne point poser le moulin, ou autre edifice dans le cours de l'eau qui sert à la navigation. —

~~The Attorney General~~
Henry Jno Caldwell
oppost in K.B. appellt

The Attorney General
pro Rege Respt

and

Wm Merklejohn
Intervening oppt in K.B appellt

The Attorney Genl pro
Rege Respt

In the Court of appeals –

This case is brought before the Court upon an Appeal from the Judgt of the Court of K.B. for the district of Quebec upon the oppositions made by Henry John Caldwell, and William Merklejohn, to the sale of the Seigniory of Lawson, which has been seized and taken in execution as belonging to the Defendant, under the writ of Fi. Fa. sued out in this Cause, the said oppositions being founded on the dispositions, by the opposants alleged to have been made, by the late Hon. Henry Caldwell in and by a certain holograph will, whereby, after devising all his property and Estate to the Defendant, the said late Henry Caldwell directed, that the said Henry John Caldwell, his grandson, should inherit the said Seigniory entire, or such other of his grandsons as should be born in wedlock and be preferred by the said Defendant – The said Opposants thereupon concluding, that the seizure of the said Seigniory, be set aside and annulled, and that by virtue of the said will, they, the said Opposants, in the respective rights in which they claim, may be declared the legal owners and proprietors thereof. +

To –

To these oppositions different pleas have been made, ~~on which the following questions have been agitated~~ and it has been argued on the part of the Respondent — First — That the will in question is without legal effect or validity, the same not having been written and signed by the said late Henry Caldwell — Secondly — That the devise therein and thereby made, containing a — substitution in favor of the opposants, but the same not having been published in the Kings Courts, nor enregistered in the public registers thereof, as by law required, the devise in question is therefore wholly null and void. —

On these points the Court of Kings Bench, after hearing the parties and the evidence by them adduced, have adjudged, that the will in question, not having been made and executed either according to the laws of Canada, or — according to the forms prescribed by the laws of England, was not sufficient to pass the Estate or Seigniory of Lauzon to the opposants, and therefore dismissed the said Oppositions with Costs — The same questions have been agitated before this Court, and the Case has been fully and ably argued, and after giving all due consideration to its importance, we come now to determine, whether the Judgment appealed from is warranted by law, or whether it ought to be reversed. —

The first point to be considered is, whether the writing produced and proved, as the last will and testament of the late Hr. Caldwell,

the same having

the same having been written by him, but neither dated nor signed, that is, subscribed by him, can nevertheless be considered under the laws of the Country, as a good and valid holograph Will, sufficient to vest in the opposants the rights they claim.—

Among the arguments adduced in support of the will, it has been strongly urged, that as the subject in this Country is at liberty to adopt any form in making his will, known either by the laws of Canada, or by the law of England; ~~as far as regards~~ and ~~the~~ as the form here followed, is one known by the law of England, in as far as regards the disposition by will of Chattel interests; and no distinction being made or known by the laws of Canada, as in England, ~~between~~ between the form of a will of real, and a will of personal property; (any form when legal ~~being~~ sufficient to pass all kinds of property by the laws of Canada,) therefore the form used by the late Hy Caldwell, being recognized here as a legal form, ~~it~~ must necessarily have the effect to pass the real, ~~Estate~~ as well as the personal Estate, inasmuchas ~~that~~ the effect of such a will must be determined by the laws of Canada, where the property lies— That although the will in question has not been subscribed or closed by the signature of the Testator yet his name being written by him at the commencement of it in these words— "I Henry Caldwell, Esquire, of Belmont &c" it is a sufficient signing, and so held by the decisions of the Courts in England on the Stat. 29 Chr. 2—

consequently ~~therefore~~ the

the will so signed, ~~so as to have the effect in this respect~~ must be held ~~to~~ ~~operate by the laws of Canada~~ ~~suff~~ to operate the devise contended for, by the laws of Canada. —

This argument however cannot be admitted ~~to~~ as correct in principle ~~its full extent~~ — for if we consider the British Stat: of the 14th of the late King, commonly called the Quebec act, it is evident that the forms of Wills thereby introduced, were the forms which in England were admitted and known as having the effect & operation of a sufficient conveyance and disposition of the Estate of the Testator — these were extended to this Colony no doubt for the benefit of such of the Kings Subjects settling in it, who might be unacquainted with the forms then followed under the French laws, in order to facilitate to them the disposition of their property, and to enable them to transfer it by will in Canada as easily and effectually as they could have done in England. — It certainly cannot be inferred from this Statute that the form of a will operating only as a bequest of a Chattel interest in England, ~~should have~~ ~~the effect of a devise of the realty in Canada, unless by the laws of Canada such~~ it was ~~form was sufficient for this purpose~~ — the words of the Statute are very clear and plain — "That every person "having lands or goods in the Province, or who has "a right to alienate the same in his life time by "deed of Sale, gift, or otherwise, may devise or "bequeath the same at his, or her death by his or "her last Will or testament, such will being executed

"either

W should have a greater effect in Canada, than it had in England or that it should operate a devise of the realty in Canada, where by the laws of the Country it was insufficient for that purpose

"either according to the laws of Canada, or according
"to the forms prescribed by the laws of England"—
The plain meaning of which is, that every person
desirous of devising his lands in Canada by^a will
~~if he wishes to adopt~~ in the English form, must
follow that form in such manner as would operate
a devise of land in England, and the same thing
in regard of Chattels — It never was meant or
intended by this statute that the forms known by the laws of the two
Countries could be so amalgamated, that a person
might adopt in part the form of a will recognized
by the law of the one Country, to give effect to an
insufficient form under the laws of the other^x —
the distinction is sufficiently marked, that the
forms of the one Country, or of the other, must be
followed throughout, and the form adopted
must be efficient according to the law of that
Country from which it is taken^o — The will in
question therefore must in its form be such, as
by the laws of England, or by the laws of Canada,
will operate a devise of the real estate. — Now
according to the laws of England, it must be
admitted on all hands, that this will can have
no effect in devising the Realty — we must
therefore consider it, in point of form and effect
under the laws of Canada. —

It is called a holograph will — and by the
testimony adduced, appears to have been wholly
written by the late Henry Caldwell, but is neither
dated, nor signed by him, and on this account

the

+ for this would be adopting a form unknown ~~neither~~ to the Laws of either ~~Country~~ ~~Country~~ ~~not to the other~~.

o the forms of the one contry are introduced, the forms of the other are conformed, as two distinct modes for the conveyance of real property by will. —

the objection appears to have been taken, that it cannot in point of form be considered as a will, nor have any effect whatever under the laws of Canada — The rule of law, as established by the 289th art. of the Custom of Paris, is, "pour reputer un testament solemnd
" est requis, qu'il soit ecrit et signé du Testateur &c."
This is the holograph will, and the two requisites in point of form are, that shall be written and signed by the testator — Now if we can find, that by the decisions of the Courts of Justice or by any interpretation had upon this article, the signing thereby required, has, or can be construed in the same manner, as it has been construed by the Courts in England under the Statute of the 29th Chap. 2. we will certainly allow the full effect of such construction here, and declare that the Testator, by writing his name at the commencement of this holograph will, has thereby sufficiently complied with the law, which requires — "qu'il soit ecrit & signé du
" Testateur". —

Among the commentators upon this article little is to be found very applicable to the question, they in general assume the words of the law, by saying, that the will must be written and signed by the Testator, but as to the ~~time~~ place where such signature should be affixed, it would seem not to have been considered as a matter of doubt or difficulty, so as to excite observation or comment, the few who have intimated any opinion on

The

the Subject, we shall have occasion just now to notice. The authorities cited by the appellants we have carefully examined, but they are far from establishing the principle they contend for — The case cited from Denizt under the word, Testament, N°35. is given by that writer as an authority ~~establishing the principle~~ to shew, that a holograph Will, without a date, was not on that account ~~to be considered as~~ null and void, but in regard of the signature this Case rightly considered, seems to bear ag't the appellants, as it certainly implies that the signature there made was the last act done, and in confirmation of all that had preceded it — for the signature of the Testatrix, after the words, c'est moi qui l'a cachette en cire rouge et en chiffres", although the first thing seen on looking at the will folded up, was the last thing done, and so far from being considered as the commencement of the act, it was the close and confirmation of it, and by the formality of sealing and signature, it was giving an approbation to ~~what was~~ the writing it inclosed, as effectually, as if the signature had been attached thereto — but neither by this case, nor by any to be found touching the execution of a holograph will, has it been held, that the name of the Testator written at the commencement of the ~~act~~ Will, has been considered, as the signing of it — It is true that in England, the Judges, by giving a great latitude to the words of the before mentioned Statute, have held, that the writing of the name of the Testator at the beginning of

the

the will, is to be considered as a sufficient signing within the intent and meaning of that Statute, and it may therefore be asked why the Judges here cannot adopt the same favorable interpretation ~~and apply it to a~~ in regard of the holograph Will made under the laws of this County — but this we are unable to do — and the strong reason against it is — that we have no witnesses here, as required by the British Statute, who can declare and certify to us, that the testator made and published this writing as his last will and testament — we are left in doubt as to the material fact — What was the intention of the testator in regard of this paper — whether it contains all his dispositions or whether it was meant only as a mere projet or instructions whereby to draw a more formal instrument at some future period. —

But such of the law writers who have touched upon the point, of what constitutes the execution of a will by the signature of the Testator, and where the signature ought to be placed, put the question beyond all doubt. —

Fer. in his Dic: de Droit. V° Signature, lays down the general meaning of the word, he says — "Signature est la Souscription "ou apposition de son nom au bas d'un acte "mise de sa propre main". —

Don: Test: ch.1. art. 2. §. 2. p. 299.

Pothier, in speaking of the Testament Olographe, says, "La signature doit être à la "fin de l'acte, parceque c'est le complement "et la perfection". —

Ricard

1. Ricard. des Don. N° 1531. p. 347. —

Ricard, speaking of wills in general, says, "Quant au lieu ou les Signatures doivent être "placées, il n'y a pas de doute qu'il y a obligation "de les apposer à la fin de l'acte; et apres qu'il est "achevé, attendu que faisant foi par elle-mesmes "et servant de Sceau à l'acte, elles ne peuvent point "valablement être faites, quelorsque l'acte est — "accompli." —

2 Bourj. p. 304. N. 6. —

Bourjon, says — "c'est la signature à la fin "du Testament Olographe, qui en est le Sceau". — and in the note, he adds. "En effet c'est cette "signature finale qui en est le Sceau, et sans la "quelle, il y a tout lieu de presumer, que l'ecrit "n'est que le simple projet d'un testament". —

A presumption, such as here alluded to, is in some measure confirmed by the evidence in this Cause, that this paper writing was intended by the late Mr Caldwell, merely as the projet of a will — We refer to the ~~testimony~~ disposition of Mr Tetu, the Notary — he says, That being at Belmont in the spring of the year 1809, the deceased Henry Caldwell requested of the Witness to return there in two or three days, as he, Mr Caldwell was desirous to make his will — and after reflecting a little he added — that in order to facilitate the Witness in drawing the will, he would reduce his intentions into writing and send for the Witness at another day — but the Witness was not again sent for before Mr Caldwell died — This presumption is also further strengthened by

by looking at the existing will of the late Mr Caldwell, regularly executed before the same Notary, and leads to a belief, that the paper writing in question, without date, and without signature, was an unfinished act, and intended only as instructions for drawing a more formal will, in the manner he had heretofore done.— But these presumptions, whether well or ill founded, are of little moment here, as they cannot affect the principle of law —

Griffin v Griffin 4. Vez. Jr. 197.

In addition to the authorities just cited, we would also refer to the opinion of a celebrated writer of the present day in France, M^r Tullier, not that we consider his opinion as an authority to ground our decision, but as he is writing on the same question, on a law the same in principle as the 289^th art. of the Custom of Paris, with this difference only, that* the will must be dated, as well as written and signed by the testator; we give his opinion, merely to shew the uniformity of Jurisprudence on this point, as well under the former System of law in France, as at the present day — he says — "C'est la signature qui rend parfait le Testament olographe elle seule atteste qu'il est l'acte propre du Testateur — sans elle il ne seroit qu'un projet".— And at N^o 375. he adds — "La place de la signature n'est pas variable et indifferente comme celle de la date — Cette place est marquée "par

* by the law on which he writes.

5. Tull: ch. 5.— Des Disp: Test^s p. 346. N. 372. and p. 349. N^o 375.

" par la nature des choses — elle est la marque de
" l'accomplissement de la volonté du Testateur,
" et de la dernière approbation qu'il donne à l'acte.
"Il est donc necessaire que toutes les dispositions
" du testament soient terminées par la Signature".

From all the authorities which have come under our notice, as well as those cited, we are satisfied, that in order to render a holograph will valid, it must be closed and confirmed by the Signature of the Testator, as constituting the signing which the law requires — and therefore that the paperwriting here produced cannot be received as the last Will & Testament of the late Henry Caldwell. —

There has been another point raised in argument, of which we must here also take notice — it is, That this holograph will, however insufficient in point of form, yet having been confirmed by the Defendant who alone had an interest therein, and at a time when there existed no claim against him by the Crown, it ought therefore to have the same force and effect, as if it had been originally made in — legal form — But the Court does not consider itself called upon, ~~not bound~~ to give any opinion upon this question, however material it may appear, as it is not raised by the pleadings in any way to require or warrant our decision thereon — this was necessary — as the time when this confirmation was made — the mode and manner of making it, and the consequences to accrue therefrom,

by

by giving legal operation and effect to an instrument in itself of no validity, but which by means of such confirmation became effectual and binding, were matters essential to have been averred in the opposition and claim of the opposants, as upon all these matters of fact and of law, the Crown was entitled to raise a contest and to be heard — But as nothing of this appears on the record by which alone the Court must be guided in giving its decision we cannot now take notice of this question —

As to the other questions agitated on the pleas to the oppositions, they need not be noticed the opinion we now hold as to the insufficiency of the will rendering this unnecessary —

Judgt of Court of K. B. confirmed
W. Costs to Respts

The Attt. General pro Rege — appellt
and
Jane Black &c — Respdt

In appeal —

The question here is, whether the Crown is entitled to recover interest, and from what period, on a debt which it had guaranteed to Mr Jarvis & others, and which it afterwards paid, on the default of the late Mr Goudie, who had become bound to pay the same under a deed of Lease of the Kings Posts, made to him by the Crown —

Some discussion has arisen as to the law that ought to govern the Case, as it brings in question a right claimed by the Crown; and it has been contended, that the public law of England is the only rule we can adopt by which the rights of the Crown can be maintained; and that according to this law, the Crown is not entitled to the interest now claimed, inasmuchas the right of the Crown to demand interest or costs, is limited to such Cases, as are specially provided for, and not ~~granted~~ allowed in all cases, as between Subject and Subject — that the debt here demanded, is sui generis, and does not fall within any of those cases where interest is allowed, it not being a debt due by a public accountant, not stipulated by any Obligation or Specialty, nor even certain or liquidated —

We take the principle to be, that in all cases when the greater rights and prerogatives of the Crown come in question, recourse must be had to the public law of the Empire, as that alone by which such rights & prerogatives can be determined — but the debt here demanded,

is

is a minor right, founded on a particular Contract made between the Crown and the late Mr Goudie, by which he undertakes, for the considerations therein mentioned to pay this debt on the behalf of the Crown to Mrs Mr Tavish & Co. This has more the appearance of a private Contract, than of a debt growing due to the Crown out of any of its public revenues. That ~~even~~ the Crown even entitled to exercise a stronger recourse than that ~~now taken~~ given to the Subject for the recovery of its right in this case, still it is competent to the Crown to ~~resort to~~ waive this right and to adopt the recourse given to the Subject, in which case it appears consistent with reason ~~and justice~~ that it ought to obtain the same justice as the Subject — this principle ~~universally~~ the law of England seems to recognize, for by the Stat. of 33. Hen. 8. ch. 39. sec. 54. — it is enacted, "That "the King in all suits thereafter to be taken in or upon "any obligations or Specialties, made or thereafter to be "made to the King, or any to his use, shall have and "receive his just debts, costs, and damages, as other common "persons used to do in suits and pursuits for their "debts" — The proceeding here is founded upon that principle, being such as one Subject might have against another — ~~But~~ It is however unnecessary to consider whether the debt demanded be founded on an obligation within the purview of this Statute, as in the decision of the question before us, we must be guided by the laws of the County — the rule we have to follow is that laid down by Mr Chitty,

Chitty on Prerog. p. 245.

where

Chitty on Prerog: p. 26. — where he holds — "That in the Colonies and plantations "the minor prerogatives and interests of the Crown must "be regulated and governed by the particular and "established law of the place where the demand is made" and accordingly he says — "Where peculiar laws and Id. p. 34 — "process exist as in Guernsey and Jersey, the King himself "in seeking to recover his own debts therein, must resort "to such laws for redress" — which alludes not merely to the form of process to be used, but also to the extent of recovery to be had, and is conformable to what Gail and other Civil law writers lay down on the subject. — Now according to the principle of law in this Country, the rights of the Crown are admitted by all writers to stand on at least as good a footing as those of the subject, and in regard of the interest to be allowed on debts accruing to it, the maxim is, "Le Fisc s'en Dic: des arrets vo. Interets: "doit tenir au droit Commun pour les interets." — applying this maxim to the Case before us, the Crown is entitled to claim interest from the day of the demande en Justice, that is from 4th July 1825. ——— but we cannot extend it further, as there is no specific demand, or Count, in the declaration, to support or which a Judgment for any greater interest can be supported. —

No 1500.

Alger
v.
Sanburn —

On question whether the purchaser of a succession is liable to the payt of the debts thereof, and whether an action will lie ag^t him for the same, as ag^t the heir

Repse v^o Droits Successifs. p. 551

Comme il est peu de successions qui ne soient chargées de quelques dettes, et qu'il n'est pas ordinaire qu'en vendant des droits successifs on entend se charger du paiement de ces dettes, puis que c'est souvent afin de s'en debarasser qu'on se defait d'une succession, il est de droit que l'acquereur demeure chargé de tout le passif de cette succession, quand même il n'en seroit pas fait mention dans l'acte. Rien n'empeche neanmoins que les creanciers ne s'addressent au vendeur en sa qualité d'heritier, sauf le recours de celui-ci contre l'acquereur qui doit le garantir de leurs poursuites. —

Poth: des Succ^s Ch. 5. art. 2. §. 2 p. 226. —

Il n'est pas douteux que tous ceux qui sont aux droits d'heritiers sont tenus des dettes & charges de la succession, de la même maniere que cet heritier au droit duquel ils sont. —

Pareillement le Cessionaire de droits successifs, soit que la cession ait été faite à titre onereux, ou a titre gratuit, peu importe, est tenu des dettes & autres charges de la succession de la même maniere que l'heritier qui lui a fait cession de ses droits — car il est de la nature de cette Cession que le cessionaire acquitte l'heritier son cedant de toutes les dettes & charges de la Succ^n; Le Cessionaire prend à ses risques les droits successifs qui lui sont cédés, et comme ils sont composés d'actif & passif, de même qu'il a tout l'actif, il doit supporter aussi tout le passif. —

N. Denz. t. V°
Cession de Droits
Successifs
§. 3. N°. 3.

Les effets de la cession doivent être considérés sous deux aspects — 1° par rapport aux deux contractans entre eux, et aux debiteurs de la succession — Et par rapport aux Créanciers de la succession. —

Par rapport aux Créanciers cette cession a des effets qui lui sont particuliers — Elle est un acte d'heritier, qui rend celui qui l'a fait leur debiteur personnel, de maniere que malgré cette cession, qui en tant qu'elle substitue à leur debiteur une autre personne, est pour eux, res inter alios acta, ils peuvent toujours poursuivre le Cedant, sauf son recours contre le Cessionnaire — Ils peuvent même s'adresser directement au Cessionnaire, parce qu'etant Creanciers du Cedant, ils peuvent comme exerçant ses droits, poursuivre le Cessionnaire — D'ailleurs ils pourraient attaquer le Cedant, qui a son tour — attaqueroit le Cessionnaire en garantie — et par l'action directe, on evite à ce dernier les frais d'un Circuit d'actions. — Le Cessionnaire est tenu indefiniment de toutes les dettes de la Succession, comme en auroit été tenu l'heritier lui-même. —

Le Brun des Suc.
liv. 4. ch. 2. Sec. 2
p. 625. — N°. 5.

Que dira-t-on de l'acheteur d'une Succession, & comme il se soumet ordinairement envers ses vendeurs au — paiement des dettes, les Créanciers ont action personnelle contre lui pour eviter le Circuit — C'est le Cas de la Loi 2. C. de Pactis. Que s'il ne s'est point soumis au paiement des dettes, il semble que les Créanciers n'ont que l'action hypothecaire contre lui, ou que tout au plus il leur est permis de venir contre lui subsidiairement, et apres qu'ils ont discuté son vendeur. — Cependant, il faut dire le contraire, parce qu'il a acheté une succession qui comprend les dettes passives et qu'il s'est tacitement obligé de les acquitter — Ainsi il est juste, pour eviter le Circuit des actions qu'il soit condamné directement envers les Créanciers, suivant la loi. C. de hered. vel act. vend. qui n'est pas particuliere au Fisc — et suivant la loi. C. 2. de Pactis.

4. Fer: Gp. Comᵉ p. 1009. Nº 3 & 4

Celui qui cederoit et transporteroit à un etranger sa part et portion dans la Succession, y seroit obligé, sauf son recours: neanmoins les Créanciers peuvent s'addresser à lui par l'action hypothecaire, s'il est detenteur d'heritages obligés et hypothequés — et par l'action personnelle, quoiqu'il ne se soit pas obligé expressement au payement des dettes, parcequ'il s'est obligé tacitement a les acquitter. —

see contra 2 vol. p 146 Nº 18 —

But see what Mr Ferrière says. 2 Vol. Gr. Comᵉ p. 146. Nº 18

Aussi au contraire les Créanciers ou legataires ne peuvent point poursuivre l'acquereur d'une Succession, s'il n'y consent, parcequ'il ne leur est point obligé par aucune maniere — C. de herd. vel. act. Vend. +

see also Fer. Dic. de Droit. Vº Vente d'une Succession. —

Il faut dire aussi que les Créanciers ou legataires ne peuvent point poursuivre l'acheteur de la Succession s'il n'y consent + La raison est, qu'il ne leur est en aucune façon obligé, ni par Contrat, ni par quasi Contrat ni par quelqu'autre maniere que ce soit + Leg. 2. Cod. de herd. vel. act: Vend: +

The law here cited from the Code, is from Lib. 4. tit. 39. Nº 2 — it says — " Le droit exige que vous repondiez aux " Créanciers, aux legataires, et aux fideicommissaires qui vous " attaquent, et que d'un autre coté vous attaquiez celui à " qui vous avez vendu l'heredité Vᵉ. —

"Nº 5. L'acheteur d'une heredité, les actions lui etant mandées, " doit user du droit qui appartenoit à celui dont il tient la " place — quoique cependant l'acheteur ait les actions utiles " contre les Debiteurs hereditaires. +

De hereditatis venditione

Poth. Pand. 50. liv. Tit. 17. Nº 1097 — §13. ~~De Vente~~

"L'acquereur d'une heredité ne peut pas etre forcé à recevoir " les actions hereditaires, malgré lui, quoiqu'il ait acheté sous " la condition de satisfaire les Créanciers". —

Argentré
Des Donations
art 219. Glos. 7
№ 8. Jo. 719. 720

Itaque etsi hoc casu, continet universitatem actionum activarum jure cesso, tamen passivarum quo non-resident in cedente non eadem ratio est — et ideo vendita quantumcunque hoereditate, Creditoribus actiones non competunt adversus emptorem, nec fit emptor hores, empta licet hoereditate, sed ut ante, hores convenitur actionibus hoereditariis, non item emptorem — cite L. 2. Cod. hered. vel act. vend: 2. lw. Cod. tit. 3. §. 2. De Pactis — which says — "Post-venditionem "hoereditatis à te factam, si Creditores contra emptores "actiones suas movisse probare poteris, eosque eas spontanea "voluntate suscepisse — exceptione pacti pacti non inutiliter "defenderis?" —

No. 1707
Mactier
&
Lacombe
sup^

Authorities on the Construction of Statutes

Viner Ab. Tit. Statutes E.6. Construction of Statutes. No. I. & No. II.

It is a maxim in the Common law, that a Statute made in the affirmative, without any negative expressed or implied, does not take away the Common law.—

do No. 35 An act which is to take away or clog a remedy, which a party has by the common law, shall not be taken by Equity.—

No. 132 It is a rule, that *Leges posteriores abrogant priores*, but though this holds in *thesi*, yet it does not hold in *hypothesi*, if the last act be not contradictory or contrary to the former; but if it be only so far differing or disagreeing, that by any other construction they may stand together, it is otherwise—

Bac: Ab. Tit: Statutes p. 383.

The best construction of a Statute is to construe it as near to the rule and reason of the Common law as may be, and by the course which that observes in other cases—

In all doubtful matters, & where the expression is in general terms, Statutes are to receive such a construction as may be agreeable to the Rules of the common law in Cases of that nature; for Statutes are not presumed to make any alteration in the common law, further or otherwise than the act

expressly

expressly declares — therefore in all general matters the law presumes the act did not intend to make any alteration, for if the Parliament had had that design they would have expressed it in the act. —

p. 388. — A Statute which is to take away a remedy that is given by the Common law ought never to have an equitable construction —

Stem
vs
Hatt

Quest. Whether in an action for a nuisance in stopping & impeding the navigation of a River, in which damages are demanded for the injury sustained, the Plaintiff can conclude for the removal of the obstruction or abatement of the Nuisance.

It seems very evident that the action populaire cannot in this respect be maintained, & that it never obtained in France. The care of all navigable Rivers in France was an object of General Police as regarding all His Majesty's Subjects, and as such seemed to fall under the notice and Jurisdiction of particular Officers & Courts The action to be instituted in this respect, was the action publique — see Rep. v. action. p. 159. "L'action publique a lieu toutes les fois qu'il y a contravention à la police générale ou particulière des eaux & forets — et cette action peut se poursuivre, ou d'Office par les Procureurs du Roi des maitrises, s'il s'agit d'un cas Royale, ou de Police general — ou à la requête des Procureurs Fiscaux des Gruries des Seigneurs, s'il s'agit d'un cas de Police, ou d'un cas seigneurial, c'est à dire, qui interesse le Seigneur pour les droits et revenus ordinaires de son domaine" — and p. 160. — "Ces Cas, soit de police generale, soit de police particuliere, donnent toujours lieu à l'action publique; mais ils ne donnent lieu à l'action privée, que quand ils causent du prejudice à quelqu'un en particulier".

1 Pigeau 62. Pour déterminer quelles sont les personnes qui ont cette capacité (d'actionner) il faut distinguer le droit en droit public et en droit privé — Si l'action procede du Droit public, elle ne peut être intentée par un particulier — mais une personne qui represente le public —

liv. 4. tit. 1. p. 535.

Serres in his institution au Droit Francois, says — Nous ne connoissons pas au surplus ce que les Romains appelloient Crimes publics ou populaires, et dont l'action competoit à un, chacun du peuple, bien qu'il n'y eut aucun interet personnel — Les actions populaires sont au contraire interdites en France et reservées en seul à la partie publique, c'est à dire, au ministere de MM. les Gens du Roi — C'est une maxime certaine tant en matiere Criminelle qu'en matiere Civile —

liv. 4. Tit. 4 ch. 9. p. 365. 6.

Davot. Tr. de Droit Francois — Nous n'admettons pas en France les actions populaires — il n'est permis aux particuliers d'exercer d'autres actions que celles qui les concernent, et ils doivent laisser le Soin des autres aux parties publiques, qui sont MM. les Procureurs Generaux, les Procureurs du Roi. &c —