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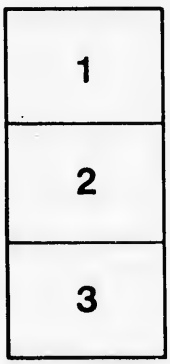

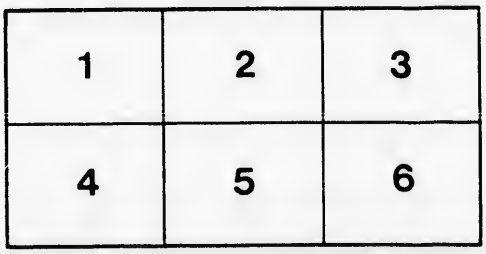

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REMARKS

ON

REGISTER OFFICES,

BY

WILLIAM BADGLEY,

ADVOCATE, M.L.L.A.

MONTREAL:

HERALD OFFICE, ST. GABRIEL STREET.

1836.

The following papers were written in numbers for the Montreal Herald, and published in that journal under the signature of Civis, but as it was suggested that their utility would be increased by their republication in the form of a Pamphlet, the writer has adopted the suggestion, in the hope that some advantage to the province, however small, may result from his labours.

W. BADGLEY.

MONTREAL, Sept. 15, 1836.

REMARKS

ON

REGISTER OFFICES.

No. I.

Sir,—As party acerbity has in some degree abated of its sharpness and given way to a less pungent feeling, the consideration of a question of importance to the future prosperity of Lower Canada may be allowed to claim some attention at present, in consequence of the early session of the Legislature; but especially, as the silent wisdom of the delegates has concealed their projected plans of provincial improvement from the knowledge of their constituents; and still more so, as the Royal Commissioners are, at last, allowed to be disposed, as well as desirous to obtain every possible information upon the conflicting interests, wants and wishes of the inhabitants of this province, which their royal master commanded them to visit.

The present stagnant condition of Lower Canada must be an object of solicitude to every class of her inhabitants; her farmers suffering from want of capital and a succession of bad harvests; her merchants partaking in the pressure upon the agriculturists; and all others, more or less affected, by the

evil consequences arising out of this unfortunate state of things. Ruinous indeed will be the result of another agricultural year similar to the former, nor can any general improvement be anticipated from more favourable harvests alone.

It is in vain, that the merchants in Lower Canada calculate upon support and assistance from Upper Canada. The inhabitants of that province are daily making a market for themselves; and, if higher remunerating prices for their produce can be obtained in the United States, and the present want of facilities to the intercourse between the two provinces is continued, the timber and corn of Upper Canada, her staple produce, will be carried across the line to our neighbours:—deprived of the bulk of our exports, the amount or value of our imports may be ascertained with the greatest facility, and the inevitable consequences to this province, in such an event, may be easily anticipated. The inhabitants of Lower Canada will be cast on their own resources; to them, therefore, the consideration of the question assumes an important aspect, because it is by them that its consequences must be attentively examined and its results carefully applied.

The French Canadian agriculturists of Lower Canada, who constitute the greatest portion of her inhabitants, and who possess the largest part of the landed property of the country, cultivate little besides grain, and a bad season cuts off all their crops at once, leaving nothing for their support but their credit with the merchant, whose interest compels him, for his own protection, to deprive them in the end of the only capital they posses, and upon which their credit is founded;—first, their implements of husbandry, then their farming stock, and finally, their last resource, their farm itself. In the meantime, seigniorial dues and parish tithes must be paid out of the proceeds, until penury and famine, with all their horrors, stare the luckless far-

mer in the face. These evils, under no common circumstances of agricultural distress alone, could become so fearful if the farmers had the power of relieving themselves from the pressure of present necessities, by obtaining temporary assistance from the superabundant and unproductive capital of others. By means of loans upon the sufficient security of their real estate, they would be relieved from distress and destruction, enabled to preserve their property and stimulated to increased exertion and additional industry.

They should likewise bear in mind, that every improvement in the implements of industry, in the farming stock, and even in the farm itself, is not only a saving of expense, but becomes an actual profit far beyond the amount of the first outlay in procuring them. Instead of the ricketty harrow, stuck full of wooden teeth, the harness made of old rope or horsehair, two or three teams upon one farm, and a very large amount laid out for labour which, in a new country, is always extremely expensive, capital would enable the cultivator at once, to procure the necessary improvements in his implements and stock; and by rendering his land richer and more easily cultivated, make one team and a less outlay of capital paid for labour amply sufficient for his purposes. By this means his wealth would augment, he would become a capitalist instead of a borrower, and enabled to advance his children by locating them upon new farms, where they might obtain similar advantages.

The commercial community, another great class interested in this question, are so well aware of the important advantages to be derived from the introduction into this province of foreign capital, that it is idle to urge it upon their consideration, and, indeed, every enlightened or even commonly intelligent person must be persuaded of this truth, that money brought into and expended in the province,

must necessarily lead to the present improvement and future prosperity of the country at large. Individuals may suffer, but the public will be benefited, the mere speculator may be ruined, but the country will be improved. By imported capital, labour will be employed in internal improvements, opening out the country, facilitating the intercourse between remote parts of the province as well as with the neighbouring government; it will create public and private enterprize, and cause a general diffusion of wealth over every quarter of Lower Canada.

To use the language of the Report of the Legislative Council of the 16th February last on the subject of Register Offices.

"The introduction of foreign capital into a new country, whose principal wealth consists in its agricultural and natural products, must materially promote its general prosperity, by encouraging the active energies of its inhabitants, and extending their means of improvement, not only to land actually under cultivation, but likewise to the unsettled portion of the country; and the advantages derivable from its introduction will be greatly increased, by means being at the same time afforded for its retention within the country.

The general results of agriculture and commerce, are so blended and connected together, that any increased facilities extended to the one become sensibly felt by the other, while depression, in like manner, is equally influential in its effects upon both."

It is not, therefore, surprising, that the general question of the introduction or attraction of capital, into this province, should have been frequently, and particularly of late years, a subject of very great interest. The securities to be afforded for the attainment of this desirable object, and the manner of retaining it in the province, have not only partaken largely of this interest, but have, unfortunately also, given rise to violent controversy, suspicion and jea-

lousy, in the midst of which, the real advantages to accrue from the employment of imported capital, have been altogether disregarded, and only fruitless attempts made, to remove the difficulties in the way of its introduction.

No. II.

Having stated the necessity for the introduction of foreign capital into this province, and its consequent advantages, it is just that the objections to the measure, whether in principle or in detail should be considered.

There is only one great objection to the principle and it has been raised either without sufficient consideration of the question, or to support interested views of it, it is this, "That the agriculturist in Lower Canada would eventually be deprived of his property by foreigners". To answer this specious but unfounded objection, it is only necessary to consider, that imported capital could, by no possibility, be spread at once and universally over the surface of the province; it would extend itself gradually—first, to the wants of the cities or more extensive villages, then to extensive land holders, afterwards to individuals generally, and finally to sections of the province and the province at large.—The benefit resulting to the borrower would be participated in by the farmer, independent of his having the same means at hand for relieving his own necessities, in case of need. A greater quantity of labour would necessarily be required, a greater demand for the produce of the soil would follow, and higher prices would, of eourse, be given; his gains being thus increased, he would employ a yet larger portion of labour, with a view to yet further gains; and so, a perpetual progress would be made. In like manner also, capital invested in sectional and provincial securities, and affording increased facili-

ties for the establishment and support of sectional and general works of utility, in clearing land, draining swamps, making and improving roads, constructing bridges, laying down railroads, excavating canals, founding schools, establishing markets, erecting churches, court houses, jails, &c. would, likewise, create a greater demand for agricultural produce, and cause higher prices; the supply would follow, of course, because the more food was raised, the more would be required; the farmer's capital would increase, and as industry is limited by capital, if a capital grows faster in proportion to its increase, as £100 would increase faster in proportion than £10, a large capital must, of necessity, afford increased employment at a quicker rate than several small ones. Thus, on every side becoming more wealthy, instead of being compelled to dispose of their present possessions, they not only would retain them, but be enabled to establish their descendants upon new farms, or if so inclined, they might obtain high cash prices for their land, and place themselves where competition, their interest or other inducements might lead them.

If we look abroad to other countries, for instance, to the United States, a country whose policy and wisdom, both practical and theoretical, is upon all occasions exhibited for imitation; whether, in general, correctly or not is not now the question, but, certainly with the greatest propriety in this instance, a refutation of the objection will also be apparent. That country is somewhat similarly situated with this province. She receives a very large annual amount of immigration; but unlike this province, she not only receives but likewise appropriates a large amount of foreign capital. With it have all her improvements, canals, railroads, &c. been commenced and completed; and yet complaints are never heard, because none exist, of old settlers being driven from their

farms and property by foreign capitalists; on the contrary, that country is progressing in wealth and capital, in a degree surpassing the most sanguine or extravagant expectations. The imported foreign capital is gradually spreading and expanding through every part of its extent, and all classes of her inhabitants feel its invigorating influence; while the farmer is a participator in its benefits, in the high prices he obtains for all his agricultural produce.—It is true, that the luxuries and some of the necessaries of life are costly, but this is easily to be accounted for by causes, which cannot influence this province, namely, protecting duties, for the encouragement of her manufactures, and the support of an extensive, but at the same time, complicated and very expensive machinery of State and general government. In the consideration, therefore, of the objection, both at home and abroad it has been shown to be unfounded, and at variance with common sense and reason as well as experience; and affords a sufficient relief to the apprehension of some, otherwise well disposed persons, that with Register Offices and facilities of borrowing on landed security, the real estate of the province would pass to strangers.

The general objection being removed, the next object for consideration is, the necessity of pointing out the means of retaining the foreign capital in the province; and it is here that the difficulty principally lies; for as the investment of capital upon real property will only be made upon sufficient security, that real property becomes the means of extensive improvement or otherwise, according as it offers the means of such sufficient security—or in other words, as it can be brought into the market free or incumbered, and easily transferable; and, as a consequence, according as the title to it is clear and undoubted. In the language of the report before referred to, "If the landed property of a country could be

made to contribute to the advancement of its general interests, and the introduction of foreign capital could promote that desirable object, it clearly becomes expedient to render its transfer from hand to hand secure, expeditious and economical; for this purpose it is requisite,—that the written documents upon which titles to land in every civilized community depend, and to which the capitalist looks for protection, as well as proof of the holder's right, beyond the fact of his possession, should not be liable to be defeated, either by other documents being kept out of sight, or by the impossibility of procuring all the information necessary to ascertain the validity of the title, and the freedom of the property from tacit or conventional incumbrance. It also follows, that means should be afforded by the law for the protection of capitalists against the effect of any documents which, for want of the use of such means, have not been brought to their knowledge."

No. III.

The necessity of affording sufficient security for the investment of capital having been shown, the mode and manner of accomplishing this object remain to be pointed out.

Independently of the inhabitants of this province by whom this imported capital is to be employed, there are only two classes of individuals interested in this subject—the lender of capital and the purchaser of real property in this province. The main object, therefore, is to satisfy both by affording to them sufficient security for their investments either by loan or purchase; and in consequence, the general measure of a system of registration of titles to land has been proposed, as the only certain and efficacious mode of accomplishing this desirable object.

The question of Register Offices has been agitated for several years past. The subject has frequently been submitted to the consideration of the popular branch of the Provincial Legislature, and as frequently has it been either abandoned or defeated.

In 1823, the House of Assembly resolved to take into their consideration, "the passing of a law, "for the public registration of instruments, conveying, charging or affecting real property; with "a view of giving greater security to the possession and the conveyance of such property and "to commercial relations in general." In December of the same year, a Bill passed the Council and was committed in the Assembly "for the enrolment

"*Insinuation* of deeds and instruments affecting pro-
"perty by way of mortgage and hypotheque."

Early in the year 1825, the House of Assembly rosolved "that it was expedient to provide that "more ample publicity to certain *actes* passed be-"fore notaries bearing mortgage, *hypotheque*, be afforded in district subdivisions."

In the same year, 1825, the House of Assembly resolved.

"1. That every purchaser of real property has "the indubitable right of ascertaining what charges "and mortgages encumber the property which he "is purchasing.

"2. That every creditor is entitled to ascertain "what real property of his debtor is liable to the "payment of his credit, and the charges and mort-"gages with which such property is encumbered.

"3 & 4. That the existing laws, do not afford "to the purchasers of real property, or to creditors, "the means of ascertaining the charges and mort-"gages, which encumber real property, purchased by "them or made liable to their creditors.

"5. That from the want of means of ascertain-"ing the incumbrances upon real property, there "have resulted and do daily result frauds, destruc-"tive of all confidence, the ruin of *bona fide* credi-"tors and purchasers, the depreciation of real estate, "contempt of the laws, and the deterioration of pub-"lic morals in the province.

"6. That it is expedient to make Legislative "provision to afford means of ascertaining such en-cumbrances." A Bill founded upon these resolutions, was read twice, committed and dropped. In February 1827 a similar Bill, "for making privi-"leges and mortgages public, and for the security "of creditors and of purchasers of real property" was introduced and likewise failed. During this time, Bills were annually sent from the Council, for the establishment of Register Offices in

the townships, which resulted in the laws now in force for that purpose, and the 10th and 11th Geo. IV. ch. 77, intituled, " an act for rendering valid " conveyances of lands and other immoveable pro- " perty, held in free and common soccage within " the province, of Lower Canada and for other pur- " poses therein mentioned." "

This question, therefore, is no novelty in Provincial Legislation. The House of Assembly has not only deliberately admitted that evils exist, from the present system of defective legislation, but has likewise itself solemnly declared its opinion, of the absolute necessity of Register Offices—1st by its own recorded resolutions, and 2d, by establishing these offices in the townships of the province. The refusal to make them co-extensive with the whole province, cannot be viewed in any other light, than as a highly exclusive and unjust system of Legislation.

The great objection to the principle of registration having been disposed of, those that remain are, to use the language of a celebrated modern writer, " merely trivial, such as that there is no experience how such a thing would work, though there is the favourable experience of every nation in Europe, not to mention Scotland and Ireland; that every man's debts would be generally known—as if credit could not exist without tricks of concealment and mystery, or as if the whole world would crowd to the Register Office from mere idle curiosity; that no man would be able to borrow money on his own individual securities and deeds—as if these would not be verified and confirmed, and greater security given to the lender." And in France, from which we derive our legal civil system, registration is in force and approved of; there the necessity and moral obligation of establishing such a mode of security have been felt and appreciated; and in that country, modern legislation, breaking through

the barriers of antiquated notions, has confirmed the maxim, that "all laws are made for the convenience of the community", and that, "what is legally done should be legally recorded, that the state of things may be known, and that where evidence may be requisite, evidence may be found. For this reason, the obligation to frame and establish a legal register is enforced by a legal penalty, which penalty is the want of that perfection and plenitude of right which a register would give. Thence it follows, that the objection to the present insecurity, is not an objection merely legal, for the reason on which the law stands being equitable, makes it an equitable objection."

The general objections to the principle of registration being, therefore, untenable, they can only be discovered to exist, in the defects of the system of law in force in this province; and it is here that they appear to be well founded, because before such a registration could be rendered efficient, the impediments in its way, arising from the present system of jurisprudence, must previously be removed and some changes must be introduced.

The report before referred to thus proceeds:—

"That the establishment of offices in the seigniorial parts of the province, for the registration of titles to land, and the incumbrances created thereon, is the only effectual mode of rendering the transfer of landed property secure, economical and expeditious, and of remedying the evils complained of, but the Committee are also sensible that their establishment would be encompassed with difficulties, unless previous modifications are made in certain particulars of the existing laws relating to real estate, which would, in a great degree, remove the obstacles to the general measure, without endangering existing interests, or creating too sudden an innovation in a long established system of jurisprudence."

It is unquestionable, that innovations in any es-

tablished system of jurisprudence, should be avoided as much as possible; but where the general wants of a country, and equity and justice combine to require them, they should be immediately and spontaneously conceded. *Etsi nihil facile mutandum ex solemnibus, tamen ubi æquitas poscit, subveniendum est.* Inconveniences in individual cases must be anticipated, but these should never be allowed to impede the general good.

"Even if the introduction of these modifications should be productive of more inconvenience, or attended with greater difficulty than the Committee now see any reasonable ground to apprehend, they still believe that the inconvenience and the difficulty will be greatly counterbalanced by the benefit to accrue from the change."

No. IV.

Previous to entering into an explanation of the details of the contemplated changes and modifications above alluded to, it is expedient to examine cursorily the origin, extent and modifications of the law regarding mortgages, in order that their whole system may be appreciated and distinguished, and facilities afforded for comprehending any project by which contracts of this description, may be rendered at once expeditious, economical and secure.

It is a fundamental principle which admits of no diversity of opinion, that the contracter of a debt is bound to discharge it by means of all, or such portions of his property moveable and immoveable, present and future, as may be necessary to complete the payment. The consequence of this principle is, that his credit is composed not only of all his actual, real and personal property, but also of all that his good conduct, his industry, and the natural order of successions might lead him to expect; and the reason is evident, because so long as his debt endures, so long, will the liability of his actual as well as his future property for its discharge subsist also.

In the intercourse of civil life, it is well nigh impossible not to borrow and lend; we borrow sometimes from necessity, sometimes for the sake of anticipated profit; and we are compelled to lend either from expected profit upon the loan or to prevent our money remaining unemployed. Such considerations have made this kind of contract very common. But all obligations are not founded on

similar principles, nor are they similar in quality, wherefore, difficulties frequently arise among creditors of the same person, touching their preference, privilege or concurrence upon their debtor's property; moreover, as loans are only effected on condition of reimbursement, and, as good faith is not always to be found among debtors, creditors have sought different modes of obtaining security, by the pledge or engagement of their debtor's property; yet, whatever were the contracts made, or precautions taken, it was frequently found to be impossible to ascertain the precise situation of the debtor's affairs, or to discover his solvency or insolvency at the time of making the contract.

Personal obligations were first employed, but having been found not to be sufficiently solid and permanent, real obligations were adopted, by which at first the thing pledged, whether real or personal, was actually transferred to the creditor. This mode of security upon real estate, was also, in time, found to be very inconvenient, because, as money is a commercial commodity and constantly changing hands, every new loan occasioned the necessity of the actual tradition or transfer of the land itself to the new possessor, and new engagements were required to be made; great loss and depreciation in the value of real property were caused by these means. The possession of the creditor being uncertain and insecure, he took no pains or trouble to cultivate and improve the land; the debtor could not cultivate it himself, because he could not make the ameliorations he intended, without the consent of the creditor, in a word, he could not give to the land that constant care which preserves and improves real property; while, on the other hand, the creditor must likewise have felt a repugnance and dislike to cultivate the property of another, and to give to it that attention which he applied to his own. This led the way to the introduction of the existing

system of mortgage, which becoming more fitted to the requirements of the times and the progress of commerce and civilization, did not dispossess the debtor of the property mortgaged, but prevented its disposal, unless with the incumbrance due to the existing creditor, who was authorised to claim it, even after the land had passed into the hands of third persons, and whose right was only lost by means of prescription. Thus, the creditor had, from the moment of contracting the engagemement, a real right upon the property mortgaged, a right considered as accessary to the engagement, and which consequently attached upon the debtor's real property, whether in possession or in expectancy. From this arose the preference of the hypothecary before the personal creditor, and that of the first mortgage before others later in date.

This system applied to conventional mortgages; but there were also engagements, which, from their object and from principles of humanity or justice, claimed a preference before all other contracts; from such motives, these claims became like privileges and were separated into a distinct class. The rules of equity, with respect to them must have been as imperious as certain, because they are to be found in all ages and in all codes,

There are also engagements formed without convention, by the sole authority of the law, which intervenes at a time when it becomes necessary to preserve to creditors a right which the obligation of maintaining public order fully warrants; from the moment that this legal right is established, it should no longer be in the power of the debtor to give to any person, by means of a simple convention, any valid preferable right of mortgage over those already existing. Such is the mortgage of the wife upon her husband's property, that of minors upon the property of their tutors, &c.

The power or force of judgments would also

have been perfectly illusory, if the party withholding his consent, and requiring the creditor to be at the expense and trouble of obtaining a judgment of condemnation against him, could afterwards, by a simple conventional mortgage, give a preferable right upon his property; wherefore, it became absolutely necessary that judgments, like legal mortgages, should rank, according to their date, among the number of mortgage debts.

If, on the one hand, this conventional manner of contracting appeared so commodious and easy to debtors, on the other, it became very dangerous to creditors, from the difficulty of effecting secure loans or making purchases without fear of eviction. It therefore, became an object of great importance for the prevention of frauds and deceits, which daily increase from public necessities, to discover some effectual manner of preventing a debtor's hypothecating his property beyond its real value, and of giving security to loans and purchases.

Although contracts of purchase and sale, and of loan have been in use among all nations and in all ages, it would appear that, until Registration of Deeds. became practised, useless efforts were made to give the required assurance, under a simple mortgage.

In Greece, whence the mortgage system is originally derived, marks or visible signs, placed on some conspicuous part of the real property, declared its engagements, when it was not actually transferred into the possession of the creditor. At Athens, a mortgage had a special character of notoriety and publicity, well adapted to prevent frauds so often practised upon the good faith of creditors and purchasers; it was there made manifest, by small columns placed before the mortgaged land, with an inscription upon them, declaring the obligations of the proprietor. This mode of publicity, which was suitable for a limited territory and for a people but

little advanced in civilization and commerce, gave occasion to much abuse and inconvenience in a great empire, where the demand for credit rises in proportion to the necessity of expense, caused by luxury and commercial operations of great extent, to the latter of which especially, extensive population are compelled to devote themselves for subsistence.

This mode of publicity among the Greeks, as well as the actual tradition of the real property, were practised for a long time by the Romans; but commerce and the want of money, having increased with the greatness of Rome, and ambition having led individuals into great enterprizes, for whose accomplishment immense loans were required, the difficulty on the part of the debtor to give up his possession, and on that of the creditor, to make the transferred land available, caused the real tradition to be abandoned, and subsequently, the use of signs and visible marks of the mortgage, not only fell into disuse under the Roman Emperors, but was at last abolished by express laws. The mortgage, from that time, became occult, resulted from the convention of the parties, and was secured to the earliest in date, except in cases of preference from privileges as above mentioned.

Mortgages were introduced into France in nearly the same form as they existed in Rome, except that they did not attach upon moveables unless in certain localities, as for house rent, &c.; that they were the effect of every convention executed before Notaries, and that private writings or instruments could not create a mortgage, until after having been duly acknowledged by an authentic instrument, executed by a public officer or before a court of justice. Thus in France mortgages became occult as in Rome.

No. V.

Although the modified hypothecary system before described, was adopted in France, its occult and clandestine character was justly reproached both by ancient and modern French Jurists, with having lent itself to the commission of a multitude of frauds, not only against the creditor, but against the purchaser imprudent enough to pay his purchase money, without having previously purged his purchase from mortgage. Complaints were loudly made against a system so vicious and unprincipled, and whose results were so disastrous, particularly as the old laws of France had, until the promulgation of the *Edit des Hypotheques* in 1771, scarcely contemplated the possibility of obtaining a secure discharge from incumbrance.

In fact it was found, that mortgages constituted for the benefit of individuals, became injurious, eventually to the interests of the state, which requires every possible improvement of real property from its possessors, as its produce is the principal, not to call it the only wealth of the state.

Indeed, the purchaser of real property, the price of which he has paid, when troubled by mortgage creditors, of the existence of whose rights he was in profound ignorance, will of course neglect the cultivation of his purchase, the more so, as his improvements would awaken them to increased vigilance.

By securing as much as possible, the interest of individuals, with a view to that of the public, useless attempts were made in the reigns of the French Kings Henry the 3d and 4th and Louis the 14th,

to correct these abuses; but so inveterate was the evil, that one remedy alone was brought into operation, which at best could only be considered as a palliative, namely, the use of *Lettres de Ratification* by means of which, purchasers were made acquainted with the situation of the immoveable, except as regarded dower not open and substitutions. These *Lettres* were partial in their effect, as they afforded no security to engagements in general.

This partiality and the general evils of the system became so urgent, that the attention of French Legislators was forcibly directed to the discovery of means, to secure honest citizens against injury, and afford them precautions against persons disposed to defraud them. Their deliberations resulted in stamping upon mortgages, a character both public and special; that is to say, that a reference to the public registers should without difficulty, exhibit the dates and amounts of all incumbrances upon a particular property, while the debtor should be held to designate and describe the special immoveable subjected to the mortgage; with this information in hand, capitalists would be enabled to consent or refuse to treat with applicants.

The idea of the publicity of mortgages was no novelty in France; it is the basis of the mortgage system of modern France, and several unsuccessful attempts were made to introduce it into the old French jurisprudence. An edict of Henry the 3d, in 1581, erected offices for the *controle* registration of all deeds, and as a penalty for non-registration, deprived them of their mortgage effect. This edict, although nominally intended to complete a system of publicity, was actually converted into so grievous a fiscal burden, that it was done away with in a few years, without regret, inasmuch as the *controle* could not be made to exhibit in a certain manner, the existence of deeds to parties interested in knowing them.

In 1673, during the administration of Colbert in the reign of Louis the 14th, an edict was promulgated, founded upon that of Henry the 3d, which also erected offices of registration for the preservation of the preference of mortgages. In virtue of this edict, mortgages registered against property in actual possession, or after actual possession, against that subsequently acquired, were preferred upon that property before mortgages not registered, the unregistered followed in the order of their dates upon any other property. The legal mortgages of women and minors were protected and preserved. This edict excited the displeasure of the great, whose credit it destroyed, and so violent an outcry was raised against it, that it was revoked in 1674; thus the clandestinity of mortgages remained the common law of France, and publicity existed only in certain provinces, known by the name of *pays de saisine or nantissement.*

The clandestine and vicious hypothecation system above described, which has been so much and so justly abused in France, is fostered and protected as the existing law of Lower Canada. Modern France has felt its abuses and has entirely rejected it, she has boldly and honestly proclaimed the triumph of publicity. In 1795, a change was accomplished; by a law of that year, officers wereappointed in every *arrondissement,* who were charged with the registration of mortgage titles, and the existence of the mortgage was made to depend upon the usage of this formality. In 1799, another law was made which may be considered, in almost every particular as the basis of the present French code upon this subject; its fundamental principles were publicity and speciality, it preserved the formality of registration required by the law of 1795, and subjected every mortgage creditor, even women and minors, to the formality of registration for the security of the preference of their legal mortgages. The

French code, at a later period, established similar principles, it secured legal mortgages arising from *tutelles* and marriage conventions, without registration, but compelled the husband and tutor to effect the registration of these mortgages, under the penalty of being deemed *stellionataires*, and subjected to corporal punishment for non-compliance with the law.

By the preceding observations it has been shewn, that the theory of speciality and publicity is not new, that its institution reaches to remote antiquity, that it was the general law of Greece, adopted by the Romans, and formed part of their jurisprudence until the time of the later emperors. It might readily have been shewn, had it been necessary, that it was for a long time the law of two-thirds of Customary France, and never ceased to govern a great portion of those conquests, by which Louis the 14th extended the French monarchy; and that it continued through the republic, the consulate, and the empire, to the restoration of the monarchy and the present period.

It has likewise been shewn, that the wisest of the statesmen and ministers of France, Sully and Colbert among others, endeavoured to restore this institution to France, and it has been seen how it was repelled by prejudice and intrigue, and particularly by the necessities of landed proprietors, which compelled them to continue to impose upon the public and to deceive their creditors.

If some inconveniences belong to the system of publicity and speciality, it may be easily shewn, that the same also exist in the clandestine and occult system, and that they are more injurious and vicious in the latter; and finally, that the latter possesses peculiar inconveniences, which not only render it unavailing in practice, but which absolutely destroy the essential objects of every legislator in establishing a mortgage system, namely, the security of the investment.

No. VI.

The law at present in force in France respecting mortgage rights, is founded upon two general principles—1st, that no mortgage or privilege shall be effectual without registration; and, 2d, that creditors shall be satisfied with a special mortgage, except in the cases of the legal mortgages of married women and minors, and for some petty claims, which, humanity and the law regarding as privileges of a special nature, has exempted from the necessity of registration; such as the legal, funeral and last medical expenses, and limited amounts of servant's wages and debts due for subsistence.

The unknown amount of these petty privileges is necessarily so small, as never to cause any difficulty, they were exempted, therefore, from registration; but legal mortgages, which have been most carefully and wisely protected, being from their nature, unsusceptible of estimation, are, notwithstanding, made public, as far as the law can compel their publicity, with a due regard to the protection of the rights of the mortgagees, by the husband's or tutor's being required to effect their registration; and these persons are subjected to severe penalties, in case of their remortgaging their real property without declaring its pre-existing incumbrances. In default of the husband or tutor making the registration, the married women and minors themselves, or their relatives and friends, or the crown officer, or *subrogè* tutor may complete the formality. It is also to be observed, that the parties to a marriage contract if of age, and the tutor by *avis de pa-*

rents at the time of his appointment, may limit the general mortgage incurred in both these instances; and both, moreover, have the right to demand this special limitation, when the property subjected to the general mortgage is known to exceed in value a sufficient guarantee for the charge; when the value of the incumbered realty exceeds the amount of the mortgage a reduction is also granted.

Conditional, eventual and undetermined mortgages are likewise estimated and specialized, and an excessive estimation renders them subject to reduction.

Finally, customary dower has been totally abolished.

This state of the modern French law affords good security for investments, because the capitalist is enabled to ascertain the existence of all mortgages upon any particular property, and although the amount of legal mortgages may be unknown, their existence being ascertained, gives him the power of making himself sufficiently acquainted with their details, to judge with accuracy of the security of his investment.

As a purchaser, the law authorizes him to obtain the freedom of his purchase from incumbrances of every kind, and even from the legal mortgages of married women and minors, after a pubilc transcription, and special notification to all the parties interested, expressive of his intention to obtain that relief, within the time limited by law, and requiring them to file their claims against the purchase, within that limited period.

These details have been entered into to shew, that no serious impediments exist to the introduction of changes in the hypothecary system of this province, and that if these changes should be introduced, they need not necessarily interfere with old prejudices or disturb existing rights.

The institutions and jurisprudence of Lower

Canada are not so deeply impressed with a character of unchangeableness, as to be beyond the range of innovation, nor has real property been subdivided into so many and minute interests as in older settled countries. Not only, have the inhabitants of Lower Canada been undergoing the great process of transition, but her laws and institutions have been constantly suffering positive changes.

The Custom of Paris was originally established in this Colony, at a time when the numerical amount of her population, was extremely limited, and from that time to the conquest, it is well known, that the people were governed rather by regulations of police, than by any positive and satisfactory system of law rightly and duly administered. The history of Lower Canada, of that period, shews that it could not be otherwise.

The act of 1784, 14 Geo. 3d Cap. 83, secured, or rather re-established, the law of the custom of Paris in this colony, and and it is in truth only from that period, that the colonists became capable of appreciating a settled system of jurisprudence, or were made aware of the previous existence of such a system. From the conquest to the present time, innovation and change have been working their silent but steady course, and have extended themselves either by decisions of the provincial Courts of Justice, or by imperial or provincial enactments, throughout the entire body of our jurisprudence.

It cannot be denied in principle, that laws, like more positive institutions, suffer changes either from their incompatibility with innovations introduced into the institutions, or alterations produced in the habits of a people, or from various other causes; hence, the laws which were known to the original French colonists and their immediate descendants, were modified to accord with the peculiar circumstances of the colony, even previous to the conquest; and since that time, they have been

more materially altered to meet the various changes, which have been made, in the political as well as commercial state of the province and the circumstances of its inhabitants.

It is idle to assert, that the French Canadians are so wedded to their ancient laws, that they require and will allow of no innovations in them. The answer is to be found in the constitution of the Provincial Legislature, in the criminal law, trial by jury, rules of evidence in commercial matters, power of devising, in the judiciary, authorities conferred upon magistrates, commissioners, &c. *cum multis aliis*, not to omit the ratification of title act—all of which are great innovations in the former state of things, and have not only been adopted but are still in practice, to the satisfaction of the country at large.

Proceeding to the state of the provincial law, with respect to the security to be afforded to mortgages, it will be found to be the same vicious and unprincipled system which was so long and so justly reprobated in France, and which did not afford the least security to lenders or creditors; by the introduction of the ratification of title act, some facilities of little importance, beyond the requirements of the Sheriff's sale, or *Decret*, have been extended to purchasers, but their security has not been at all improved. It may not be improper to mention, that the ratification of title act is a translation almost *seriatim et literatim* of the French *Edit des Hypotheques* of 1771, which was founded upon the older edict of 1673.

The report of the Legislative Council supports these assertions, and states, "That under the existing system of law, it is impossible to ascertain "the freedom of any landed property, in the seigniorial parts of the province, from incumbrances, "or the extent to which it may be incumbered, and "that the only means available to persons desirous

" of purchasing real estate, are—1st, the integrity " or honour of the seller; 2d, the general report " respecting his estate or property; 3d, the pro- " ceeding of a *decret* for a Sheriff's title by a suit at " law; and, lastly, the obtaining a judgement of " confirmation of title under the act for the more " effectual extinction of secret incumbrances.— " The two former means are evidently not to be re- " lied upon, and the two latter are equally ineffica- " cious, from affording no relief against the opera- " tion of dower, an evil which has been productive " of serious injury, and which is generally admitted " to be of the greatest magnitude. The delay and " expense of both these measures are so great, that " they are resorted to only where the real estate is " of considerable value, and it is established that " even these limited means of protection, are not " participated in by the inhabitants of the country " parts, from the operation of the above causes. " The two latter are in consequence but partially " efficacious in their operation, limited in practice " to real property of considerable value, not availa- " ble to the inhabitants of the country parts, do not " free real property from the worst evil of the pre- " sent system, and are attended with great expense " and loss of time."

No. VII.

It has been asserted that the punishment of *Stellionat* inflicted under the old French law was amply sufficient to prevent fraudulent conveyances and mortgages. The experience of French Jurists and the unsuccessful attempts to amend and correct the hypothecary system of France, up to the period of the revolution in that kingdom, are a sufficient refutation of this allegation.

The term, as well as the crime and punishment, are all derived from Roman Jurisprudence. By this law, *Stellionat* was applied to every kind of fraud practised in contracts and false declarations in deeds.

By the French law, *Stellionat* is restricted to a false declaration of the freedom of real property from incumbrance.

In Rome the punishment was arbitrary. In France, it depended upon the gravity of the offence and the circumstances of the transaction, and the usual punishments were fine and banishment, sometimes whipping and *amende honorable.* It was, under the old law of France, a criminal proceeding"—*on poursuivait antrefois le Stellionat par la voie criminelle, mais on ne prend aujourd'hui cette voie, que lorsque le dol est accompagne de circonstances tres graves.* In all cases it was punished by corporal imprisonment. A French Jurist of eminence says, that as fraud always proceeds from debtors, who, notwithstanding their knowledge of their own insolvency, continue to borrow, and to hypothecate their real property, as long as their credit lasts and

they can conceal their necessities, it appeared to him very proper to adopt the Roman practice, that is, arbitrary punishments, " *Si l'on en usait en France de cette maniere, le desordre ne serait pas si grand*". Stellionat was therefore found to be ineffectual for the prevention of frauds in France, nor can it be rendered more efficacious in this country.

By the act of 1774, the criminal law of England was established in this province " to the exclusion of every other rule of criminal law or mode of proceeding therein, which did or might prevail before the year 1764" By the same law the custom of Paris, for the regulation of civil rights, was likewise re-established; and consequently the criminal part of the customary or French Jurisprudence gave way to that of England. Stellionat forming no part of the English criminal law, and its penalties not having been enacted by our provincial legislature, it has ceased altogether to exist in this country.

Having shewn that *Stellionat* is no part of the provincial law and that even if it were in force, it would be insufficient for the prevention of frauds in mortgages, we are thrown back upon the system of publicity and speciality, which has been adopted into the jurisprudence of France, as the only effective general mode of security for transactions of the nature under consideration, and as the only means of preventing a multitude of *decrets;* because arrangements with debtors would be made with greater facility, when their debts are known not to exceed the value of their property.

An objection to registration may here be mentioned, which has been passed over unnoticed, " that it would lead to the exposure of family affairs". In reply, it may be sufficient to refer to the preamble of the edict of 1673, which offers as the reasons for its enactment, that " by means of pub- " licity by registration, loans might be made with

" security, and purchases effected without fear of " eviction from anterior mortgages, and that cre- " ditors would be made certain of the fortunes of " their debtors, without the apprehension or unea- " siness of losing their claims :" later writers declare " that the publicity of mortgages was considered by " the French tribunals as the *chef d'œuvre* of wis- " dom, as the protection and security of property, " as a fundamental right, the use of which had con- " stantly produced the happiest results, and esta- " blished as much confidence as facility in transac- " tions between individuals ; that the principle of " publicity and speciality, is essentially a conserva- " tor of property, a creator of public and private " credit, a regenerator of good faith and morality" ; these are the recorded opinions of men of eminence, as well as of the principal legal tribunals in France ; and when publicity is found to be so much applaud- ed in that kingdom, where the ramifications of pri- vate interests and rights are so minute, not only no doubt should exist against the continuance of the clandestine system, but the necessity for that conti- nuance should be clearly demonstrated, to allow of its protracted existence in this province, where real property is but little divided.

Too much space would be occupied in detailing the various powerful reasons for publicity ; it may suffice to state generally, that, at present, contract- ing parties are not placed on an equal footing. The borrower knows his previous engagements, and acts in bad faith, the lender is ignorant of those en- gagements and compelled to trust to the integrity of the other party. On the one hand, unincum- bered property needs no concealment, while on the other, incumbered property should not, in common honesty or good faith, be permitted to deceive the lender.

The provincial public registration *insinuation* in the several prothonotaries' offices, of wills, donations

and other legal instruments bearing *substitutions*, entails, demonstrates that neither inconveniences nor evil arise from disclosure ; and as neither complaints nor objections have been made to this branch of the formality of registration, it is fair to conclude, that it is neither troublesome nor repugnant to the habits and feelings of the people.

As the expense of the registration of mortgages, would of course be regulated by enactment, it would no doubt be made as economical as possible.

It has also been asserted that mortgages are property ; if so, an actual or a constructive possession must have been given to the mortgagee, to enable him to be repaid the amount of his mortgage, and then the public have a right to demand that concealment should not be practised nor fraud allowed, to the injury of the lender, who, seeing the possession in the borrower, is justified in concluding that the property is in him also.

The report before mentioned, refers to the objection of disclosing private affairs and states, that

" The disclosure which would be afforded by " Register Offices is considered in general as most " desirable, while its disadvantages would be of tem- " porary duration, operate in individual instances " and solely affect the fraudulent and dishonest. " That though it might be productive of pain and " mortification in some cases, the general good is of " paramount importance, and that the apprehensions " entertained of unnecessary exposure are ill-founded " and futile; for, it is in evidence from the registrars " of the counties, where the registry system prevails, " that though few transactions of any amount take " place, without reference to the books of registry, no " instance has occurred in their experience since the " establishment of those offices, of the disclosure of " mortgages or incumbrances having been required " except for actual purposes of sale or loan. They " also state, that great and universal satisfaction is

" entertained, by all who have occasion to take ad-
" vantage of the registry, that real estate in all the
" counties, has been greatly inhanced in value, trans-
" actions therein much facilitated, and that its ex-
" pense is trifling and no delay is incurred."

It is only necessary to refer to the example of Louisiana, a former French colony, governed by a system of jurisprudence similar to our own, where no difficulty, to the removal of impediments in the way of publicity was experienced and where registration prevails, and to the resolutions of the House of Assembly adopted in 1825, mentioned in No. 3, to convince every unprejudiced mind, of the evil of clandestinity and the necessity of change.

No. VIII.

Assuming that the principle of publicity and speciality possesses advantages over that of clandestinity, so powerful and important as to require its introduction into our provincial system of civil jurisprudence, the question arises, in what manner or by what means this is to be accomplished.

It has been previously stated, that all the property of a debtor, real and personal, is a pledge or security for the payment of his debts, and that its value should be equally distributed among all his creditors, unless legal causes of preference exist.

Individual freedom would have been restrained and injustice committed, if in the intercourse of civil life, a person were prevented from entering into any engagements or making any contracts, not contrary to good morals or to society, which his wants or inclinations, might suggest to him; and as a consequence of this personal freedom, he was at liberty to dispose of his real as well as of his personal property in any manner he might consider most conducive or advantageous to his interest.—This freedom of disposition introduced the class of mortgages denominated conventional, from being founded upon the agreements or conventions of the parties.

Conventions to create mortgages, according to the jurisprudence of this province, are entered into in deeds, *actes* executed by public officers, called Notaries or a Notary and witnesses, which contain an express or implied engagement of the real property of the debtor for the security of the debt.

The facility and celerity with which these instruments are completed, and the safeguard afforded by the public character of the Notarial office, are so great and at the same time so evident, that it would be idle to offer any argument, in favour of a continuance of the present form or mode of executing them, while the simplicity of the operation, in comparison with the cumbersome forms of other countries, precludes any possible difference of opinion upon the subject.

Admitting the facility, with which conventional mortgages are created, it must, likewise be allowed, that it would be the extreme of injustice, to deprive any creditor of a participation in privileges, granted to others by the voluntary convention of the debtor, because of his unwillingness or refusal, under the influence of bad faith, to assent voluntarily to similar privileges in favour of the unsecured creditor: hence, the compulsory consent, conveyed in the judgments of competent courts of justice, has given to them a mortgage character also. This class is denominated the judicial.

While the voluntary and compulsory consent of the parties, thus gave assurance to some creditors, it was equally just and reasonable, that the claims of an extensive class of individuals, who, from principles of public policy, are incapacitated, from making engagements for their own protection, and whose interests, the best and most powerful feelings of humanity, have placed under the protection of society, as well as those public rights, which, the necessity of maintaining public order, guarantees, should also be guarded and preserved from exposure to possible loss or destruction, either from fraudulent connivance or from baser motives: hence the class of mortgages called, the legal.

These several kinds of mortgages, the legal, judicial and conventional, are based upon an express or implied agreement, namely, by the parties them-

selves in the conventional, by the court of justice, acting for the unwilling debtor in the judicial, and by the law acting for the unprotected claimant, and the public, in the legal.

Considering mortgages only in respect to their effect, it may be said with strict propriety, that they are all of one kind; for the effect of every mortgage, is to give to the creditor, a right upon the real property of his debtor, for the security of his debt; but there are some claims, which, in addition to the general effect of the mortgage, are entitled to a peculiar preference from the nature of the transaction or debt; these are called privileges, from being founded upon the cause of the debt; they are not regulated or ranked in order, according to dates like mortgages, but carry a preference for their discharge, over all other mortgages even anterior in date, and in consequence the rule *prior tempore potior jure* is inapplicable to them. Among privileged creditors, the preference is regulated, by the more or less favourable quality of the privilege, and those of the same quality, concur equally in the value of the reality.

Mortgages and privileges, therefore, are the causes of preference, which exist to prevent the equal distribution of the debtor's property, among all his creditors.

Conventional mortgages are from their nature and form of the same description; the judicial, in like manner, are also substantially similar to each other; the legal are those of married women, minors and persons interdicted, and that of the public against public officers.

Applying to these different classes of mortgages, the principle of publicity and speciality, it will be obvious that the conventional, without any difficulty, admits of its application, because the deed may be made to contain, not only the precise amount of the debt, but also the specific realty upon which

that debt is to be secured; the judicial, from possessing the character of a compulsory liquidation or determination of a certain amount, or from ignorance of the debtor's real property, upon which to apply the judicial mortgage in general, cannot extend to the reality, and only specifies the amount of the condemnation; and the legal, from their peculiar nature, must remain undetermined in amount and unlimited to any specific realty.

Both conventional and judicial mortgages may be easily rendered determinate; the former, by an estimation or amount to be agreed upon by the parties; in the latter, by a compulsory or voluntary valuation, or by a penalty in damages, for non-compliance with the judgment.

Legal mortgages are not susceptible of determination, until after the death of the husband, the majority of the minor, the removal of the interdiction or death of the interdicted persons, and the termination of the office of the public servant; this class of mortgages must, therefore, remain unlimited in amount, as well as unspecialized as to property, because until after the marriage is terminated, rights, which during its existence, may become the objects of mortgage, upon the husband's property, cannot be appreciated or ascertained, and because, for the same reason, during the existence in office of the tutor, curator or public officer, their responsibility is not less extensive and uncertain, nor less difficult to estimate at a precise amount.

No. IX.

Having shewn in the preceding number, that conventional mortgages may be made to express, not only the precise amount of the debt, but also the specific realty, and that the judicial is limited to the specification of the actual or possible amount of the condemnation, while the legal cannot be made susceptible of either specific amount or realty, it is proper to observe, that the conventional mortgage is the positive agreement of the parties, who always have the power of stipulating a precise amount, or fixing upon some estimation or valuation of the mortgage claim, even if it should be conditional, eventual or undetermined; because, individual interests would always tend to the determination of a precise sum, for which the registration might be made, without necessarily limiting the debt to the amount specified; and it will readily be perceived, that this accessary stipulation would, from its utility, become a necessary formality of the deed, *une clause de style.*

It is also necessary that this class of mortgages should express the actual realty, that is the realty in possession, upon which the mortgage is to be secured, otherwise it should not exist, because, from being a real right, it must, at the time of the agreement, have been based upon some real foundation, especially, as the end and final object of the mortgage is the sale of the realty pledged for the payment of the debt.

These general pledges or mortgages of all real property, actual and future, for the payment of debts, and which are, in almost every instance, un-

known to third parties, and whose amounts are very uncertain, decoy creditors into entering into negociations with men, whose circumstances are in a state of ruin, although apparently very solvent. The credit of debtors themselves, by this means, not only suffers but is destroyed, because engagements are either not made at all, or at least not without security: publicity and speciality have, for these reasons, been deemed the most efficient remedy for these abuses; and to make that remedy as perfect as possible, the conventional mortgage should be made to express the precise amount and the specific realty, otherwise it should be inapplicable to property in possession, and without a new engagement, to that afterwards acquired.

The effect of conventional mortgages is to give to creditors, a real right upon their debtor's real property for the security of the debt, whence it must be allowed, that when no real property is possessed, no mortgage could exist or have effect, and that the protection of the mortgagee may be left to his own interest, to discover and secure his claims against his debtor's property subsequently acquired, if the creditor have been so unwise as to make his contract without sufficient actual security. Without these requisites, it would be quite impossible to work out speciality, which is one of the fundamental bases of the hypothecary system.

Judicial mortgages establish in a compulsory manner, the amount of the debtor's engagement, either without or against his consent, and do not specialize the realty to secure the amount of the condemnation; their security and advantage would be illusory and totally defeated, if a general mortgage were not allowed to the judicial creditor. Publicity, by means of registration, should alone be required for these mortgages. As has been already mentioned, publicity and speciality, should be positive and rigorous conditions of conventional mort-

gages, but publicity alone suffices for judicial mortgages, inasmuch as speciality is incompatible with the nature and effect of a general mortgage.

Nor should successive registrations be required for judicial mortgages, because otherwise, a debtor would be always armed with unjust favour to some creditors at the expense of others; the first informed would be the first enregistered against subsequent acquisitions, and rights attached to hypothecary registration, would be prizes of speed for first reaching the Register Offices.

In reply to the allegation, that real property not in possession, should not be affected by the real right given to the formality of registration, it may be said, that the mortgage, and not the incription, attributes the real right to the creditor; the latter is the perfection of the former, and only insures its publicity.

The judicial mortgage seizes or attaches upon the realty, from the moment of its becoming the debtor's property, and no new judgment should be required to vest it. In like manner, the registration once completed, should exercise its influence and produce its effect, from the moment, that newly acquired property vests in the debtor; all that should be required of the judicial creditor, is to secure the order of his mortgage, by a regular registration.

Legal or tacit mortgages are granted and established by the law, without the consent of parties or express stipulations, or they proceed from the disposition and will of the law, without any convention of parties; they are allowed either by special favour and privilege, or in consideration of the person of the creditor or the cause of the debt; because, when a person does that, for which the law grants a mortgage, he is presumed, to have tacitly consented to the same mortgage upon his realty, which the law has established, although no express stipulation had been made; and although this is accomplished

by a legal fiction, yet the legal or tacit mortgage produces the same effects as the conventional and express. So that, as regards the law, they are considered express, and as regards the parties, they are always deemed tacit mortgages, because they do not proceed from any act of the parties.

These legal mortgages are principally threefold 1st, those of married women upon their husbands' property. 2d, those of minors and interdicted persons upon the property of their tutor, and 3d, those of the state and of communities upon the property of their servants.

The state of dependence in which married women are placed, with respect to their husbands, and the legal incapacity of minors and interdicted persons, have established in their behalf the peculiarly cogent and favourable rights which humanity and society have united to sanction and preserve. This very favourable consideration has given a retroactive effect to the mortgage of the married woman, as far as the husband's influence over her was supposed to extend, namely, to the date of the marriage contract, or to that of the solemnization of the marriage.

Minors and interdicted persons participate in these sanctions of humanity, and efficient security is afforded to them, by dating their mortgages from their public guardian's entry into office.

Legal mortgages against state accountants interest the whole state. Experience teaches us, that no inconvenience can exist, in making the state revenues dependent upon the fidelity and care of its servants, when proper safeguards are used, and that it is possible for the government officers as well as for individuals, to make themselves acquainted with the property of these public accountants, however distant may be the situation of their realty from their residence. The same remarks apply to officers of communities. As both offer great facilities of pe-

culation and of escape from discovery, the legal mortgage is granted against them from their acceptance of office.

Besides these three classes of individuals, to whom, what may be called this exorbitant prerogative, the legal mortgage is granted, there are a few others which need not be mentioned, inasmuch as they consist of privileges or rights of property upon special real estate.

No. X.

The interests of posterior creditors, and the security of their rights, are the essential motives of the principle of publicity and speciality; wherefore, the hypothecation system should be made to repose upon these two bases. The observance of either one should not relieve from the accomplishment of the other, because by shewing to third persons, the incumbrances upon property, a knowledge is conveyed to them of the object and foundation of the mortgage; and, though it is true, that registration exhibits the nature and situation of the realty, it is the work of the creditor, and means should be afforded to third parties to verify its correctness: this can only be accomplished by a reference to the title constituting the mortgage, whence, it must be apparent, that the requisites for the full efficiency of the principle are, 1st public registration, and 2d the specification of the amount of the mortgage and the actual realty upon which the security is to attach.

Registration applies with facility to conventional and judicial mortgages, because the parties interested in them will, of course, be desirous to render their security complete, by the execution of every required formality. But legal mortgages are encompassed with difficulty; the persons beneficially interested in them, are prevented by law, from employing any protective means for their own security, and as long as they are thus incapacitated from securing themselves by their own act, the omission of that act, should not deprive them of the rights and privileges, which are vested in them by the law,

To require the execution of the formality of registration for legal mortgagees, by other persons, would be futile, because their interests are not concurrent; and moreover, this formality might not be completed, and then the legal mortgage would exist only in name.

It should not, therefore be made to depend upon registration, unless the most certain precautions are offered, of its being always indubitably completed; and legal mortgagees should not be deprived of their security, by any abrupt clandestine change of their debtor's property.

Principles should not be destroyed by the want of a formality, the execution of which, the persons most interested in the security, are prevented from effecting.

To give to any registration law an impression of civil justice, it is necessary to reconcile conflicting interests; but civil justice is averse from casting back upon the married woman, minor, &c., the consequence of a neglect, which they had not the power of preventing. This principle should not, therefore, be sacrificed to the wish, however laudable, of making transactions more secure, and the advantage of simplifying a law must not be purchased at the price of injustice.

Indeed, too much simplicity in Legislation is, in general, an enemy to property. Laws cannot be made very simple, without cutting the knot instead of untying it, and abandoning many things to arbitrary uncertainty.

Nevertheless, civil justice is the basis of law: every one is convinced, that personal rights repose upon immutable principles, whereas, all respect for property is lost, when it is subjected to chances which transfer it with facility but without reason, from hand to hand. Legal mortgages have every where, been considered as emanating from and identifying themselves with the engagement

which produced them; this principle in the registration system, must be made accordant with the security of purchasers and lenders. The law, by this means, would be less simple, but more conformable with the principles of civil justice.

Little advantage would have followed, from the mere public registration of conventional and judicial mortgages, if information of the precise amount of the mortgage debt had not been imparted; wherefore, if the conventional claim resulting from the deed, or the condemnation conveyed by the judgment, be conditional in existence, or undetermined in amount, both should be estimated previous to their registration: this may be accomplished without any difficulty.

Legal mortgages cannot be rendered determinate even by an approximate estimation, because of the impossibility of appreciating rights, which, during the entire course of the marriage or the existence of the office, may become the object of mortgage.

All mortgages, in this province, are general in their effect, and only subject to the greater or less privilege of certain creditors. This generality was made a principle of law, in violent contradiction to the rules of justice and equity; and was based upon a legal fiction that the mortgage conveyed property. This, as a general principle, was a fallacy, because no fiction could have conveyed what was not existing even as a right, and no conventional mortgage could convey a real right, *jus in re* where no realty existed, upon which to found it.

As long as debtors have no realty, their voluntary engagements by deed, should only be considered as positive acknowledgements of debt, and never be permitted to precede the subsequently and similarly acknowledged claims of others, or the compulsory consent of a judgment of a competent tribunal.

The general mortgage may be maintained in effect, by means of proceedings, which the creditor is

free to adopt, but the debtor's credit should not be paralyzed by excessive registration; as realty becomes the property of the debtor, it becomes the pledge of all his existing creditors, but no creditor could have obtained possession of real estate previous to its existence as the property of the debtor; the priority of debts in this respect is, therefore, quite indifferent.

In fine, safe dealings are never entered into without the warranty of property in possession, future property is too uncertain, and it is a well known fact, that the greater part of notarial deeds, executed in this province, specify the realty to which the transaction applies, and upon which the security is established. In this respect, therefore, the proposed restriction is not repugnant to the habits of the people.

Conventional mortgages should always express the special realty mortgaged, and the judicial and the legal should be relieved from this necessity.

From the preceding observations, it will appear,

1st—That conventional mortgages should be liable to the principle of publicity and speciality in all its extent.

2d—That judicial mortgages should extend only to publicity; and

3d—That legal mortgages should be relieved from both.

The registration and specification of the conventional, and the registration of the judicial mortgage, convey sufficient information that incumbrances exist, specially in the former case, and generally in the latter upon the debtor's realty.

No doubt can exist, of the propriety of affording similar information, of the existence of legal mortgages; but as the mortgagees are prevented from accomplishing this object, and are at the same time secured against the effects of omission or neglect, the public might obtain this information, if

the law were made to allow them, their friends and relatives, or the *subroge* tutor, to make the registration, or to compel the husband or tutor to complete the formality under severe penalties, or to require the officer of the court registering the appointment of the tutor, or the notary executing the contract of marriage, or the clergyman officiating at the marriage, to make the registration. By this means, the publicity of the legal mortgage would be attained and information of its existence would be afforded to the creditor, without injuring the rights of the legal mortgagees.

In framing any general system of registration, regard should be had to the removal of every impediment, which might prevent or impede its effect.

The report of the Legislative Council states, that "Customary dower has been the fruitful source of "many of the evils complained of, and though in- "tended to secure a provision for the widow and "orphan, that its retention is not applicable to the "present condition of the province."

An examination of the spirit of the hypothecary system, discovers, that the end of the mortgage is the prosecution to sale of the mortgaged realty, for the payment of the mortgage debts, out of the proceeds, and that every hypothecary creditor should be prepared, to be collocated in order for the amount of his claims.

By our law, dower is the only exception to these principles, it is not removed by *decret force* or a judgment of confirmation of title; and the very distant period of its becoming open, namely, after the husband's and father's death, the conditional nature of the right itself, the uncertainty of the final partition of the endowed realty, and the general inconvenience of customary dower, render it impossible to reconcile the interests of the claimants of dower with the security of the purchaser or lender.

For these reasons customary dower should be entirely abolished in this country, as has been done in France for dower generally, and persons of great practical information in this province entertain this opinion; among the number D. B. Papineau, Esquire, a brother of the Speaker of the Assembly, thus answers the question of the Legislative Council upon this point:—"Customary "dower is in many cases sufficient to secure the "subsistence of families, and principally in old es- "tablished countries. In a new country, where "property is of little value, it becomes an obstacle "to its transfer, and may afterwards become a "source of spoliation. It would be better to "abolish it, and to insist that for the future all "rights of dower should be particularized and "specially applied, not only by a notarial deed, but "by the act of the celebration of the marriage. "The clergyman receiving the consent of the "parties, should be required to ascertain their in- "tention upon the subject, and insert it in the act "of marriage. There should be no dower, unless "the person constituting it possesses real estate of "equal value to the dower, which he is desirous to "establish."—This opinion may serve to shew, that this innovation would not be opposed by the people at large.

No. XI.

The changes contemplated in the previous numbers, would entirely relieve lenders from the apprehension of loss of their investments by loan, upon the security of real estate; and purchasers might also be secured, by amending the common law as well as the act for judgments of confirmation of title, and requiring after a special notification to the parties interested, that dower, which is the only exception to the relief afforded by these laws, should also be made known and claimed by opposition, like all other mortgage claims, within the allowed legal periods; in this manner, both purchasers and lenders would be protected, the former, by a full measure of legal relief, and the latter, by having such information given to them, as would free them from the apprehension of other mortgages, which might have been kept out of sight.

These opinions were embodied in a Bill which passed the Legislative Council during the last session of Parliament, and were intended to be introductory to the establishment of Register Offices in the seignorial parts of the province. Its provisions were; 1st, making mortgages special: 2d, abolishing customary dower and particularizing all marriage rights: 3d, requiring that dower shall be claimed upon real property sold by *decret force*, Sheriff's sale, or under the statute for the confirmation of Title; the Bill in addition required, that the mortgage effect should only belong to deeds executed in the county of the situation of the realty,

and that Notaries should furnish certified statements of mortgages.

The last two provisions of the Bill would not be required, if registration were fully established in practice, but it must be conceded, that the three former, whether with or without registration, are especially serviceable and necessary.

Previous to terminating this part of the subject, the testimony of Mr. D. B. Papineau will again be adduced, as bearing out the preceding observations. That gentleman says, "that a register would do more harm than good, if it were open without restriction to all, who from motives of curiosity or otherwise, would wish to consult it, but that with certain restrictions he did not think, that any inconvenience would result, on the contrary that advantages would follow from its establishment." To the question whether it would be productive of more good or evil to provide by law that in future, mortgages shall be special and not general? he answers "that it would be a desirable reform, if it were not an isolated measure, and independent of others quite as useful"; and to the question, whether a county register would not afford protection against concealed incumbrance, ? he answers, "he had always been of opinion, that with certain restrictions such offices might be useful, and that their establishment ought to be preceded or immediately followed, by great alterations in all our hypothecary system".— The opinion of such a person should go far to satisfy the most violently opposed to registration, that its introduction must be attended with the greatest advantage.

It is the misfortune of this province to be prevented from enjoying, or deprived of the advantages of measures, by the interests of classes, by petty difficulties originating, either in the appellations of measures, or from jealousy of their introducers or proposers. It is time that such motives should cease,

that all parties should firmly unite in the great end of the advancement and improvement of the country, and lay aside every other consideration but the public prosperity.

The introduction of capital into the province, it is conceived, is sufficiently stimulating to support even this quixotic notion, and as the interests of the generality become better understood, those of a class would be made subordinate and treated as such.

Capital and its retention in the province have been shewn to be extremely desirable; and to effect this object, it has been established that changes or modifications must be made in our hypothecary law.

It is conceived, that the following provisions would meet with general approbation and remove every impediment.

The establishment of *bureaux* or offices for the registration of deeds in every county.

All conventional mortgages to be by Notarial deeds as at present.

Conventional and judicial mortgages to rank in order only from date of registration.

Legal mortgages to be exempt from registration. But for the sake of publicity, persons not interested to make the registration, and the husband, tutor, &c., compelled to register under a penalty.

Registered to rank in order of payment, before unregistered, and unregistered before chirographary creditors.

Registered mortgages only for determinate amounts: exception as to legal mortgages.

Conventional mortgages upon subsequent acquisitions to rank only from date of registration.

Judicial and legal mortgages to be general mortgages.

All registered mortgages to rank in order from date of registration, the non-registered from date of the deeds.

Prescription only from date of registration.

Tutors to register for claims of their wards or to be accountable.

Indemnity, &c., of married women as at present, from date of contract or of marriage.

Creditor of husband and wife to rank from date of wife's marriage or contract of marrige.

Separees de Biens, like other creditors.

A severe punishment for false declaration of existence or non-existence of mortgage upon realty.

Privileges to be registered like mortgages.

Excessive registration may be reduced if necessary, and general registration may be limited.

The foregoing more in detail, with the provisions of the bill above mentioned, namely, the abolition of customary dower, particularizing all marriage rights, speciality of conventional mortgages, and dower to be claimed in sales by *decret force* and ratification of title, would, it is conceived, be sufficient to insure the publicity and speciality so much required, and would not be inconsistent "with liens affecting husbands, tutors and curators, which attach upon real property."

Finally, privileges and mortgages existing previous to the promulgation of the proposed law, should be registered within one year after, otherwise to rank only from the date of the registration.

If registration be adopted in the manner above mentioned, it will give life and being to public and private credit; if not, distress and destruction must follow.

This province is agricultural as well as commercial—capital is necessary for both, and legislation should facilitate the application of that capital, to both these sources of national prosperity.

The expectation of great profits promptly realized, the despatch with which money transactions are completed, the short duration of loans, the quick return of funds, the impossibility of failure

in engagements, without dishonour and loss of credit, are powerful attractions to embark large and numerous capitals in commerce, which would soon absorb all, to the destruction of agriculture and the other wants of society, if, in mortgage loans and other real transactions, the inferiority of these advantages is not compensated by the facility and solidity of the investment.

Real estate enters into transactions either for sales, or for the security of the payment of loans and the execution of obligations. The object, then, of the hypothecation system, should be to procure to this double species of transaction the greatest solidity, without altering its essence or encumbering its form.

In the proposed plan, the purchaser will find security in his purchase, and facility as well as security, in freeing it from incumbrance. The seller will find the means of quickly and without expense receiving the price of the unincumbered realty which he has sold; he will be enabled to pay as expeditiously, and without expense, creditors to whom he had mortgaged the realty which he has sold. The proprietor of an unincumbered realty will enjoy the whole of the credit which his property will give to him, while the owner of an incumbered realty will obtain a credit equal to the excess of its value beyond the mortgage claims. The capitalist who is desirous to lend, or any other person contracting with the debtor or borrower, will have a sure and infallible means of ascertaining the fortune of the contracting party, and above all, it will afford a certainty that he will not be deprived of the warranty which he has obtained; from all this, the necessary consequence will be, that a man acting in bad faith, will never be able to sell what does not belong to him, nor offer the capitalist a fallacious security or credit. If the proposed plan give all these advantages, it would be idle to

call it perfect, or to say that it would remove every inconvenience; but it may be asserted with confidence, that, in comparison with the present system of provincial legislation on this subject, it will approach nearer to perfection and offer in comparison many less inconveniences.

To conclude, the proposed system offering more advantages and incurring fewer risks to proprietors and capitalists, would collect a greater number of purchasers at sales, and greatly increase the value of the realty, by competition; and the capitalist having a perfect security in his loans upon realty, would be content with a less return: a double advantage would be the result, the first, that the wants of agriculture would be easily satisfied, the second, that the interest of money would be reduced in proportion as the risks of the lender are diminished.

CIVIS.

September 2, 1836.

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