

PROVINCE
OF
LOWER-CANADA }

COURT OF APPEALS.

WILLIAM FLEMING,

(Defendant in the Court below)

APPELLANT,

AND

JEAN HENRI AUGUSTE ROUX,

AND OTHERS,

(Plaintiffs in the Court below)

RESPONDENTS.

THIS was an *action en complainte*, brought in the Court of King's Bench for the District of Montreal, by JEAN HENRI AUGUSTE ROUX, and others, for a disturbance (*trouble*) of their right of *Bannalité* in the *Seigneurie* of Montreal, against the said WILLIAM FLEMING, the Appellant, who had built a Wind-mill, in the said *Seigneurie*, and who had ground into flour wheat and other grain for the *consignataires* or tenants of the Respondents.

The Respondents are thus described in their declaration filed in the Court below:—

“*Messire Jean Henri Auguste Roux, Superior of the Gentlemen Ecclesiastics of the Seminary of Montreal, Seigniors in possession of the Seigneurie of Montreal, in the District of Montreal, of the Province of Lower-Canada, and the said Gentlemen Ecclesiastics of the said Seminary of Montreal, Seigniors in possession as aforesaid of the said Seigneurie, by Messire Joseph Borneul, their Agent and Attorney.*”

The defence set up by the said William Fleming consists of peremptory exceptions, and of pleas to the merits.

By the former, the defendant in the Court below denied: 1st. The existence of the Seminary of Montreal as a Body Corporate or *Communauté*. 2d. Their right to sue in a collective name and by their agent or attorney. 3dly. He contended that the said declaration was insufficient; because, amongst other pretended defects, it did not allege that the said Seminary was ever possessed of the right of *Bannalité*, or that it ever was possessed of a Banal Mill within the said *Seigneurie*, at which the *consignataires* or tenants thereof might cause their grain to be ground.

These exceptions were dismissed by a Judgment of the Court below, rendered on the 18th April, 1821: And the same Court, after having heard the parties on the merits, awarded to the Respondents, by its final Judgment, of the 20th June, 1822, the conclusions of their declaration.

From these Judgments it is that an appeal has been instituted by the said William Fleming.

With respect to the first of these Judgments, it is respectfully contended, that the said William Fleming hath lost his right of appeal; because, by his subsequent proceedings in the cause, had, without having filed any exception, or made any reservation, he has acquiesced in the said Judgment, rendered on the 18th day of April, 1821, and barred any further consideration of the exceptions, which it has set aside.

If it were otherwise, however, the Respondents are prepared to shew that these exceptions were properly dismissed.

1stly. Because, in an action of *complainte*, the quality of the Plaintiff can never be the subject of contest: the only question that can present itself for examination is the naked fact of the *trouble* or disturbance: the only defence that can be made is either to deny the possession of the Plaintiff, or to set up a contrary one. (*Pothier, Traité de la Possession, No. 104, 105. Ferrière, Dict. de Droit Verbe Complainte, page 337. Gauret, Style Universel, p. 355.*) The reason is evident. The remedy affording redress against a trespasser should, from the very nature of the offence, be an expeditious one. (*Exhibits Nos. 1 and 2, filed by the Plaintiffs in the Court below.*)

2dly. The Appellant has no right to raise such a contest: because, interest is the measure of right, and he has not even a shadow of interest in the question; allow him to deny the possession of the Seminary as a Body Corporate, and you allow him to establish the right of some other Seigneur—of a third person. He is a *consignataire*, a tenant—as such he has nothing to do with the qualities of his *Seigneur*. He is bound to yield to the *Fief* that which is due to it. Besides, this is a question involving the state and condition of man—(*une question d'État*)—the possession of which forms an obstacle which it is difficult to overcome. (*Poth. Traité du Cont. de Mariage, No. 349.*) It is a question relating to the existence of a Corporate Body, and in which the King alone can be interested. According to the laws of *Mortmain*, no individual can have an interest in the property