The Legal News.

VOL. IX. MAY 22, 1886. No. 21.

THE EXCHANGE BANK & THE QUEEN.

"Non omne, quod licet, honestum est."

Some judgments work so unfairly that the best reasons do not make them palatable, whilst others seem so equitable that the worst reasons in support of them pass muster. The judgment in the combined cases of *The Exchange Bank & The Queen* is an instance of the latter class. It is not denied that the statute, literally construed, gives to the Crown the priority claimed for it by the suit, and it is important to enquire what, and whether a sufficient reason is given to explain why the article should not be interpreted literally. To justify a judgment on the ground that it does substantial justice, is only to say that the judge has substituted his emotions for the prescription of the law. This may make a good *arrêt*, but it is an evil precedent.

The untenable argument in support of a judgment against law, lacks the casual advantage which sometimes attaches to the judgment itself. It is wholly mischievous, and it would be better to avow its arbitrary character than to include it within ordinary rules. In pointing out what we believe to be the error in the opinion delivered, for the judicial committee, by Lord Hobhouse, in this case, we shall endeavour to deal more fairly with the propositions of the learned lord than he does with those of the majority of the Court of Appeal.

About a third of the opinion is taken up with a discussion as to the value of the word "*comptable*"; the result of which is, that their Lordships agree with all the judges in Canada, that a *comptable*, within the meaning of the Code, is one who owes an account, and that the periphrasis of the English version (1994 C.C.) is intended to convey the sense of the word *comptables* used in the French version. In other words, they concur in saying that every *comptable* is a debtor, but every debtor is not a *comptable*. Had their lordships come to any other conclusion they would not only have *perverted* the use of language, but they would have diverted their readers. "*Redde rationem*" has not generally been considered as an injunction to pay one's tailor's bill.

Coming to the more important part of the opinion, the construction of Art. 611 of the code of civil procedure—their lordships' position appears to be this: (1) they reject the argument based on the word "defendant." It is used, they think, because it is the word suggested by the distribution of money in a suit; but it must be generalized when dealing with the abstract right. On this point again there is no difference of opinion among the judges. (2) An article of the code of civil procedure might create or establish rights not touched by the civil code. This was also the doctrine held by the majority of the Court of Appeal. (3) That if any article of the C. C. P. conflicts with an article of the C. C. as to the creation of a right, the C. C. P. must yield, because "it could be no part of the code of procedure to contravene the principles of the civil code, and it is clear from Art. 605 that the two were believed to be working in harmony." (4) That the C. C. P. extending a right *touched* by the C. C. is in conflict with it. The learned lord then goes on to resume the particulars of the present case. He contends that article 611 C. C. P. conflicts with par. 10 Art. 1994 C. C., swamps it and renders it unmeaning, and that it is "the duty of the judge, if possible, to reconcile the two."

In this statement of the argument we hope we have done the learned lord no injustice; but his style is so involved and his mode of setting forth his propositions is so peculiar and indefinite that it is not very easy to find out his meaning. With the last sentence of his statement we agree most cordially, but is it *possible*, according to known rules of law, to reconcile as he has done?

Taking our *resumé* as correct, we think it is impossible to reconcile his approbation of the refusal of the majority of the Court of Appeal, to "set aside" article 611 C. C. P., and the doctrine of reconciling or modification which he immediately applies to the utter annihilation of art. 611. He says the Court of Appeal should not have "set aside" 611, they should have construed it. Here is the