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AN HISTORICAL ESSAY

ON THE ROMAN LAWS, AS THEY CAME DOWN TO US *In Corpus Juris Civilis.*

Read by R. S. M. BOUCHETTE, Esquire, *before the Montreal Law Students Society.*

MR. PRESIDENT & GENTLEMEN,

In responding to your flattering invitation and appearing before you to day in the, to me, unpractised character of a lecturer, I feel that you have conferred upon me an honor which I shall be able but slenderly to requite. My inability to adorn my subject with all those graces of ornament and diction which would impart to it a warm and pleasing interest impresses me at this moment with unfeigned diffidence; but yielding to a sincere desire of promoting as far as lies in my power the laudable objects and pursuits of your association, I deemed it my duty, as a member of the profession, to which you are all aspiring, to endeavour at least, to contribute something to the Temple of legal science which you are edifying, not for yourselves alone, but for Society at large.

In availing myself of the latitude you were pleased to allow me in the selection of the subject matter of the present lecture, I found the range of topics that fell within the Scope of Jurisprudence in general, so large, that I experienced much hesitation in the choice which it was fittest I should make on the present occasion, not only in relation to what might be most acceptable to yourselves, but with reference to my ability to treat my subject; for I confess with unaffected humility that in the large sphere assigned to me, there are many abstruse branches of the law, to the exposition of which, with becoming learning and wisdom, I feel unequal, and I therefore, have restricted myself as much as possible within the boundaries of an elementary lecture.

Under these circumstances, I have selected for your consideration

this evening, an Historical Essay on the Roman Laws, as come down to us in the *corpus juris civilis*. The subject itself is one of great intrinsic interest and in the hands of one more deeply conversant with the classic and legal lore of the Eternal City, it could not fail to be made as entertaining as it would, nay, must be instructive. I aspire not, therefore, to lay before you the result of any very profound investigation or research in the recondite pages of History or Law, but my aim will be attained, if in treating the matter in hand, in a manner quite elementary, chiefly from notes carefully taken in the course of general reading, I can convey to you a clear idea of the origin, completion and preservation of that great work which has stood the test of ages, and which still at this day, stands an imperishable monument of the greatness and wisdom of the ancient Romans.

The Code, the Pandects and the Institutes appeared in Constantinople and were promulgated as the laws of the Empire, between the years 527 and 534 of the present era, or nearly thirteen hundred years after the foundation of Rome. By the code and the Pandects all other antecedent laws whatever, were solemnly abrogated; and so rigorous indeed is the injunction given to abstain from any application of the repealed laws, that to do so, is declared to be a crime amounting to fraud or forgery. *Falsi reus est, qui abrogatis legibus utitur.* (*)

It will, however, be neither uninteresting or uninstructive to take a brief retrospect of Roman Jurisprudence before the days of Justinian and to examine what were the laws thus bodily consigned to oblivion, after escaping that wide and desolating ruin which the ruthless hand of the Barbarian spread over fair Italy and which shook the Western Empire to its very foundations and succeeded at last in its total overthrow.

Nor had the new Code which had been gleaned from the wisdom of the ancient legal Code of Rome, perils of a less imminent character to encounter from the degenerate and barbarised Greeks, the Persians, the Tartars and other asiatic nations, who, towards the close of the 15th century consummated the extinction of the Empire of the East, when Mahomet the 2nd stormed and plundered Constantinople, banished the insignia of the Cross and exalted in its stead the Crescent, which to this day adorns the mosques and minarets of the far-famed Byzantium.

That these abrogated laws were very voluminous, we are justified in believing upon the authority of Justinian himself, who informs us in his solemn confirmation of the Pandects that nearly 2000 Books

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(*) Const. ad Sena. § 19.

or Treatises, containing upwards of 3,000,000 of lines (*tricentas myriadas versuum,*) were necessarily consulted and studied by the compilers and condensed within the compass of 50 Books and about 150,000 lines or verses. (*)

Beyond the knowledge we thus derive of the magnitude of the body of the old laws that preceded the Justinian Codification, we know little or nothing of them, except what has been embodied in the *Corpus Juris Civilis.* Here of course are substantially consigned, in a more concise form, the laws scattered, as before remarked, through 2000 different Treatises referred to.

In the first Book of the Digest we find a succinct account of the origin and progres of the civil law and of the succession of magistrates and eminent Jurists who flourished from the days of Papirius down to the time of Justinian. Borrowed from the writings of the celebrated Pomponius and followed by Gaius, this title offers at once a clear and compendious sketch of the beginning, rise, and advancement of the civil law, as transmitted to present generations in the *Corpus Juris;* and I could not therefore follow a more judicious course than by adopting as my text this passage of the Pandects in tracing an outline of the history of Roman Jurisprudence.

Although the primitive government of Rome was an absolute monarchy, the wisdom and justice of Romulus, at an early period admitted the people to a voice in legislation. The sovereign indeed reserved to himself the exclusive right of proposing laws, but these laws were submitted for the assent of the people in the thirty *curiæ* or wards in which the City was divided. It was not until the reign of Tarquin, the proud, whose tyranny and vices provoked the expulsion of the Kings, that any attempt seems to have been made, of which at least we have any knowledge, to collect and arrange into something like order, the royal ordinances and enactments and such other laws as had obtained the sanction of magisterial decisions or the equally efficient sanction of universal consent and custom.

Papirian Code.—The compilation of Publius or Sextus Papirius in the reign of Tarquin, the proud, is the earliest essay of the kind we have on record, and this indeed is imperfect; a few fragments only remaining to us of the labours of that eminent lawyer, whose digest was denominated *jus civilis Papirianum* (†), which has transmitted his name with honor to posterity.

(*) Hist. Juris. de confirm. § S.

(†) Gibbon in a noted and learned chap. on Roman Juris. contained in the 8th vol. of his Decline and Fall of the Roman Empire, p. 5, in not: appears to doubt the existence of this Code and thinks that the *Jus. Papirianum* of Gravius Flaccus, quoted in the D. lib. L. Tit. XVI. C. 145, was

The expulsion of royalty seems to have been succeeded by a sort of legal anarchy, the *lex tribunitia* having bodily annulled all the royal laws and therefore subverted the authority of the Papirian Code or Digest leaving the Romans during a period of nearly 20 years without any positive rule for their governance and obliged to resort to the sole moral force of such customs as received general assent.

This state of things could not be long protracted in an age when the fame of Solon and Lycurgus had already given to Athens and Lacedemon so much celebrity, as the seats of legislative wisdom and moral philosophy. Hence under the solemn sanction of public authority a deputation or mission was appointed to repair to the Athenian republic, for the purpose of obtaining a knowledge of their municipal laws and of engrafting them afterwards, upon the legal institutions of Rome.

TWELVE TABLES.—The laws copied on this occasion, in so far as they were deemed applicable to the genius of the Roman people and to the state of Roman society, were inscribed by the Decemvirs upon ten tables of brass or ivory or wood (*roboreus primum deindè Æreas*, says Halicarnassus,) which were set up in the forum for public inspection, study and commentary. To these were added the following year two others, which supplied the omissions or deficiencies of the ten original tables, and hence arose the 12 Tables of the Roman Law, so famous in the annals of History, and into which had been transfused so many of the sound precepts of the Prince of the Grecian Sages.(*) Nor should I omit the mention here of that famous Ephesian surnamed the wise man, who about this time was cast as an exile on the shores of Italy, and to whom is ascribed the honor,

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not a commentary but an original work compiled in the time of Cæsar. But we may fairly believe that the profound Paul from whom this law is borrowed would be exact in this respect and would not use the positive language. *" Gravius Flaccus in libro jure Papirianum,"* were he not quoting the commentary.

(*) I have followed in this passage the text of the Pandects and the historians Dion. Halican. and Levy. Gibbon in his decline and fall of the Roman Empire, vol. 8, pp. 8, 9, rejects the truth of the Roman mission of the Decemvirs to Athens and he founds his rejection upon the fact that the Grecian historians of that period appeared not only ignorant of that famous embassy but even of the name and existence of Rome. He cites Herodotus, Thucydides, (A. U. C. 330, 335) Theopompus (A. U. C. 400) and others.

Pliny (lib. III. 9,) gives to Thophrastus who wrote A. U. C. 440, the credit of being the first Greek who diligently wrote any thing of or concerning the Romans. Gibbon thinks it improbable also, that the Patricians of Rome would take much trouble to copy the austere laws of a pure democracy; but weighty as must be the doubts of so learned an historian, his reasoning is somewhat inconclusive and scarcely sufficient to destroy the strong presumption arising from the analogy of the laws of Solon and the laws of the 12 Tables.

not only of the profound exposition of the laws of the 12 Tables, but also that of their amendment. The name of Hermodorus is honorably recorded in the Pandects and is mentioned with veneration by ancient and modern historians. (*)

Jus Civile.—Next in order to the laws of the 12 Tables or most probably growing out of the application of those laws, was the *jus civile* or common law, a species of *lex non scripta*, resulting from the legal discussions of the Forum, the interpretation of the laws as given by learned Jurists and the judgments of magistrates in individual cases. So we have in England and in the U. S. of America, the arguments of counsel, the dicta of Judges and the decisions of Courts, combining to produce the law of precedents and to engraft on the *lex scripta* or positive law of the country, a body of laws possessing a quasi binding authority. And here I may be permitted to remark, that this vast accumulation of legal opinions and speculations collected in the voluminous reports of adjudged cases in both the countries referred to, threatens to involve future generations into that confusion which preceeded in the Roman Empire, the compilation of Tribonian and his associates; and it seems not improbable that, in process of time, this then overgrown and unwieldy mass of legal perplexities and legal wisdom, will lead to resort to that comprehensive and intelligible system of Codification of which so brilliant an example is contained in the Pandects and the Code. But this is a digression and I now return to the history of the Roman Law.

Legis Actiones.—As the common law formed and developed itself, Tribunals were organized and the expediency of method in the procedure suggested itself. The importance of forms became manifest, and hence arose the *actiones legis* or *legitimæ actiones*, which required so strict an adherance to a prescribed form of words and certain specific symbolical actions that any departure therefrom subjected the Promovent, Libellant or Prosecutor to a *non-suit*.

The *actiones legis* (A. U. C. 446,) which were strict technical actions now became a momentous branch of Jurisprudence, and Appius Claudius (who is variously adorned with the cognomen of Centummanus, Crassus and Cœcus,) alike distinguished for his law learning and his general science, wrote a treatise on the *actiones legis*, of which, however, the honor was filched from him by one of those flagrant instances of breach of trust which must for ever tarnish the glory of Gneus Flavius. This Gneus Flavius the disciple of Claudius, surreptitiously obtained a copy of the treatise in question, which he presented as his own, to the Roman people, who exalted him in conse-

(*) Supra.

quence to the several dignities of Tribune, Senator and Edile, whilst he enjoyed, moreover, the usurped honor of having the labours of a learned Jurist, his injured patron, recognised under the name of the *Jus civile Flavianum*.

Subsequently *Sextus Ælius* compiled another work on the *actiones legis* known as the *Jus Ælianum*.

Hitherto, pratician influence had so predominated in the centuria or hundreds into which Rome was divided (the votes in these centuries being based upon property) that the mass of the people growing jealous at an order of things which, *de facto*, nullified their voice, insisted that in the passing of laws, the votes should be taken by tribes. Nor did this modification of patrician legislative power yield complete independence to the voters, until the occult suffrage of the ballot was introduced to relieve the embarassed debtors from the fear of a relentless creditor, the client from the restraint of his patron, and voters in general from that influence which those citizens possess who are exalted to the honors of the state and enjoy high authority among the people.

Plebiscita.—The laws thus enacted by popular suffrage were denominated *Plebiscita*; but so great became the confusion arising out of this new form of legislation, and often so incongruous the enactments under it, that under the dictatorship of Hortensius they were for the most part either abrogated or amended, and the *lex Hortensia* and *reformed plebiscita* were afterwards looked upon as alone containing the rules of action and the force of law.

Senatus consulta.—This paved the way to the supreme legislative authority of the Senate, and hence upon the Conscript Fathers devolved the important and responsible task of enacting laws. The decrees of the Senate were called *Senatus consulta*, and became of great weight and authority among the people.

Jus honorarium.—These laws were expounded and administered by the Roman Magistrates generally; but the Prœtorian Edicts alone went the length of supplying the defects of a law, as well as of explaining its latent ambiguities. These Edicts constituted what was termed the *Jus honorarium*, as proceeding from the highest Judicial functionary of the State, who was invested with especial public honors and extensive judicial prerogatives.

It was to one of these Prœtorian Edicts vastly more comprehensive in its scope than any others and more solemnly promulgated that Rome was beholden for its first well digested code of laws. The reign of the emperor Hadrian was rendered famous as the epoch of the *Perpetual Edict*, and the name of *Salvius Julianus* will be handed

down with unfading glory to civilized nations as the author of that celebrated Ordinance.

From this period the power of making laws for the Empire seems to have passed wholly into the hands of the Emperors. From the reign of Augustus and that of Trajan, the Cæsars appear to have contented themselves with the promulgation of their Edicts through the intervention of Roman Magistrates, or as Magistrates themselves, and in the Decrees of the Senate we frequently find inserted, with remarks of peculiar respect, the Epistles and Orations of the *Prince*. *Hadrian* whom I have before mentioned, was the first of the Emperors, who at the beginning of the second century of the present Era, yielding to the dictates of ambition, threw off all disguise and assumed the plenitude of legislative power in which he was followed by his successors.

CONSTITUTIONS, RESCRIPTS, EDICTS.—Hence, afterwards arose that multitude of Constitutions, Rescripts, Edicts and pragmatic sanctions composing that large body of Roman law which was at a later day methodized and condensed into those three famous compilations known under the respective names of the Gregorian, the Hermoginian and the Theodosian Codes. The Gregorian covers the period from Hadrian A. D. 117 down to the reign of Valerian A. D. 254. The Hermoginian commences with the reign of Claudius in 268 & descends to the time of Dioclesian in 284, a period of 16 years only and yet including 6 different reigns, such was then the ephemeral tenure of the Imperial Crown; and the last, the Theodosian Code, beginning with Constantine the Great in 306 down to Theodosius in 421. Of these three Codes the last only has been preserved to the present time, and among its compilers we find the names of Caius, Papirian, Paul, Ulpian and Modestinus, men so pre-eminent in their day, that by a Special Edict of Theodisius the Younger, they were solemnly pronounced to be the Oracles of Jurisprudence throughout the Empire.

Now in glancing back at what has been said in the preceding pages we gather that the laws which governed the Roman Empire from an early period of its History down to the age of Justinian were composed as follows:

1o. The *Jus civile Paparianum* under the Kings.

2o. The *lex tribunitia* which abrogated the *Jus Paparianum*.

3o. The laws of the 12 Tables.

4o. The *Jus civile* or common law.

5o. The *legis actiones* called also *Jus Flavianum* and *Jus Ælianum*.

6o. The *Plebiscita* or popular laws which were afterwards merged in the *lex Hortensia*.

7o. The *Senatus consulta* or decrees of the Senate.

8o. The *Jus honorarium* or Prætorian Edicts, or rather the *Perpetual* Edict which was a digest of them all, and

9th and lastly.—The Constitutions, Rescripts and Pragmatic Sanctions of the Emperors, which as before stated, were for the most part comprised in the Gregorian, the Hermoginian and the Theodosian compilations.

Thus stood the great body of the Roman Law in the beginning of the 5th century, when the genius of Justinian conceived and devised the Herculean plan of collecting and condensing that vast undigested mass of legal lore, and learning, and moral philosophy, (*) into the comparatively narrow limits of the Code, the Pandects and the Institutes.

Tribonian, the most laborious at least, if not indeed the most profound Jurist of his age, was the master-spirit to whom this great and momentous work was entrusted; and he and his learned associates, 9 in number, in the preparation of the Code, and 16 in the compilation of the Digest, achieved the arduous task assigned to them, much within the period allotted for its performance, such were the zeal, the ability and the genius that were brought into action in the fulfilment of the Imperial mandate.

The Justinian Code appeared on the 7 Ap. A. D. 529, not quite a twelve months after the work was commenced; and in 534 it was promulgated a second time with additional Constitutions and Edicts, but it does not appear that these effected any material changes or modifications in the now existing laws.

THE MAGNUM OPUS.—The Digest for the compilation of which ten years had been computed as necessary, was presented to the world in its present shape within the astonishingly short period of three years. It is true, however, that over-haste and precipitation have been ascribed, and not unjustly so to the compilers, from the occurrence of incongruous and repugnant laws under the same heads; but this is hardly sufficient to detract materially from the honor and the gratitude due to them for their labours.

The Code embodies the Constitutions and Rescripts of the Roman Emperors, beginning with the reign of Hadrian, and it is chiefly borrowed from the Codes of which we have already spoken, that is to say: the Gregorian, the Hermoginian and the Theodosian. It is divided into twelve Books, each Book into Titles, and these again into Laws, Principia, and Paragraphs, and it is usually quoted in that order, as is also the Digest, i. e. *the Book, the Title, the Law.*

The Digest, the most precious of the great works left to posterity by

(*) The mere M. S. S. are represented as so bulky that they were burthen enough for many camels, *multorum camelorum onus.*

Justinian, contains the solemn dicta and opinions of learned Magistrates and eminent Lawyers, who flourished both under the Republic and under the Empire, as taken from their writings or their responsa. But although the names of some of the great Jurists of the Consular period are not altogether pretermitted and that fragments are inserted from the legal writings of a Caius, a Sextus-Ælius and a Mucius-Scœvola, yet the compilers of the Pandects, writing under Imperial commands, are evidently chary of references to the Republican Era, and we do not, I believe, find in the Digest, quotations from more than twelve of the eminent men who flourished as the oracles of the Forum during that famous period of Roman History.

Both in the Code and the Digest, is inscribed at the head of each law, the source whence it is taken. In the Code that source is always an Imperial Constitution or Edict, but in the Digest it is usually the writings or the responsa of eminent Jurists, whose names are inscribed with great formality over the law which is to receive the sanction of their authority. The reasons assigned for conferring upon them this honor are so just and praiseworthy that you will permit me to insert them here as we find them in the confirmation of the Pandects, § 10 and 20. *Æquum erat*, says that law, *tam sapientium hominum nomina taciturnitate, non obliterari, tum ut manifestum esset ex quibus legislatoribus que ex eorum libris hoc justitiæ Romanæ Templum ædificatum esset.*

The Pandects are divided into 7 principal heads or divisions, called parts, comprising together fifty Books which are subdivided after the manner of the Code into Titles, Laws and Paragraphs or Principia, in a manner at once simple and lucid.

The Institutes to which the name of Justinian has emphatically attached, probably from the supposition which seems at one time to have prevailed that they were written by himself, were meant to contain, as they really do, the elements of Civil Jurisprudence. Inferior in magnitude and importance to the Code or the Digest, yet have they no less than these elicited in all countries the admiration of the Lawyer and the Philosopher. They are written with somewhat unequal elegance, however; the passages ascribed to Justinian being distinguished by the comparative barbarism of their style, from those copied from a similar work by the celebrated Gaius, dating as far back as the reign of Marcus Aurelius or Antoninus Pius, the latinity of which is esteemed to be in the highest degree classical. The Institutes, as we now possess them, are the result of the combined labours of Tribonian, Theophilus and Dorotheus. They are divided into four Books, and these into Titles and Paragraphs.

To the Code, the Pandects and the Institutes were subsequently

added a series of Constitutions and Edicts of the emperor Justinian himself. These Constitutions were called Novellæ or Novels, from their more recent promulgation, and are 168 in number; there are 16 Edicts. These Novels seem to betray wonderful fruitfulness in the legislative powers of Justinian's mind, from the rapid succession in which they made their appearance. They were sometimes written in Greek, the language in which they are still extant in the *Corpus Juris.*

We have thus traced, though in a very cursory manner, for which the limits of this lecture must be our apology, the origin, progress and completion of the Code, the Pandects and the Institutes; and if we pause a moment to contemplate the vast treasury of human wisdom and experience from which they have been derived, it will be no theme of surprise that these immortal compilations should have received the sanction of all civilized nations and should have been bodily adopted as texts of law by most of them, and partially received by all. The reference to them as to *written reason* in the Courts of all enlightened countries in which they possess no authority as law, is the highest order of approbation or eulogy that could be conferred upon them; and the universal assent of mankind to those branches of Roman Jurisprudence which are generally applicable to the transactions of civilized societies, such as the large subjects of contracts, bailments, servitudes and many others, fixes indelibly the stamp of wisdom on those laws which could thus happily have generalized and settled the rules of action, by which men should be, and are in fact, governed. (*)

That these invaluable repositories of the science of Jurisprudence should have been preserved to us amidst the vicissitudes that marked the history of Europe and Asia minor, during the barbarous and the middle ages, seems almost providential, especially when we reflect that until the middle of the fifteenth century when the art of printing was invented, they existed but in rare manuscripts exposed not only to the destruction of the elements and the depredations of barbarian warfare, but also to the still more dangerous cupidity, or ignorance of idle scriviners and poets, who not unfrequently, regardless of the value of the works they destroyed, obliterated inestimable M. S. S. of the description of the Institutes or the Pandects or perhaps some precious

(*) The Code, the Pandects and the Institutes are the common law of Bohemia, Germany, Hungary, Transilvania, Poland, Portugal and Scotland. In France, Italy and Spain they are constantly appealed to, as also in South America. Even in England, where a jealous predilection in favor of their own aboriginal laws prevails, the civil law was cited with great weight down to the reign of Ed. I. and to this day the universities of Oxford and Cambridge have professorships of Civil Law.

drama from the pen of Sophocles or Juvenal, for the purpose of applying the parchments or papyrus on which they were written to their own useless and oftentimes paltry effusions. One will readily believe after this the story told of the singular recovery, by sir Robert Coton, of the original *magna charta*, which they said he discovered in the hands of a Tailor, just as his unhallowed scissors were cutting it up for measures.

Numerous instances of these vandalic and mercenary obliterations of useful chronicles and scientific essays have been discovered within the latter 2 or 3 centuries. The practice itself of erasing M. S. S. to use the parchments for other writings obtained most probably at a very early period and is said to be coeval with days of Catullus. It is the chemical means, the art of reviving the original M. S. S. which is comparatively modern.

The restoration of Palimpsests, (such is the name given to these defaced papyri) has now become the favorite study of a certain class of antiquarians and some of the most learned men in Germany and Italy are pursuing a line of research which is hoped may lead to important historical and literary discoveries, and supply some of the lost passages of those great legal productions, of which we now possess but a few scattered fragments.

Indeed, it is but within a comparatively few years, (I believe in 1819 or 20) that a Palimpsest was found in the ambrosian library at Milan, which contains almost complete the Institutes of Gaius, from which it is well known the Institutes of Justinian, were in a great measure borrowed. For this invaluable discovery the world is indebted to professor Mai.

Justinian, the Atlas, on whom seemed to rest the ponderous tomes of Roman Jurisprudence, the legal Hercules of his age, if I may be allowed the expression, as applicable to the magnitude of the works accomplished under him, Justinian after a reign of 38 years, died A. D. 565. The epoch becomes the more memorable from the events which followed, for scarcely had his clay mouldered into dust, than the glory of the splendid monument of Roman law which he had reared, became eclipsed, and the Code and the Pandects gave way to barbarian laws, that usurped their place and well nigh threatened them with complete annihilation.

They, in fact, disappeared and remained in a state of almost total oblivion, until towards the middle of the twelfth century, when suddenly and by a divine miracle (such is the language of Pothier in his preface to the Digest) a complete and authentic copy of the Justinian Pandects resuscitated, *emersit tandem e sepulcri tenebris*, and appeared in 1136 at Amalphi an Italian city near Salerno. From Amalphi

this celebrated copy was transferred to Pisa, and finally in 1446, was solemnly deposited in the library at Florence. It is from this famous M. S. that the most approved editions of the Pandects have since, been copied and collated.

Thanks to the ingenius and all-important discovery of Guttemberg and Faust, a discovery which, from the wonderful facilities it has afforded for the dissemination of thought, forms perhaps the most remarkable and eventful epoch in the modern annals of mankind, the great works of which we are now speaking, as well as those which have since sprung from the pen of the literary and the learned of all countries, are now placed beyond the chance or probability of loss or destruction.

The Press has multiplied copies of the Justinian compilations to such an extent as to justify us in entertaining the well founded hope that posterity can never be bereft of the possession of those invaluable treasures, and that they will go down to future ages, amended, polished and perfected by the experience, erudition and wisdom of those Lawyers and Philosophers, whose peculiar study they have been and whose splendid commentaries are no less precious in the eyes of the learned of all nations than the text-books themselves which the commentaries have enlarged and expounded.

The first edition of the C. J. C. with which we are acquainted, is that of D. Gothofred, printed at Lyons in 1583. It contains the learned notes of its eminent editor and is published in 4 vols: royal 8o. (*). Among the various editions since extant, the most accurate and approved, is the famous Amsterdam edition of 1663, in 2 vols: folio with the notes of the same learned D. Gothofred. (†)

Of the *Corpus Juris Civilis. cum glossis*, there are many editions, but the best are those of 1589 and 1627, 6 vols: in folio. The C. J. *Academicum* is usually distinguished from the others by alphabetical Labels placed at the beginning of each book and projecting beyond the margin.

Among the earliest expositers of Roman Jurisprudence, we find Irenerius, Martin Cremonensis and Bulgarus, Accursius, a distinguished civilian of Florence, tem. 1213 and Alciatus a famous Milenese Jurist. Duarenus, Donellus, Hottomanus and Brissonius bring us down to the days of the great Cujacius. Then we have Gravina, Vinnius, Everardus, Noodt, Fehed, Voet, Schultingius and Heineccius. Their various commentaries cover the whole or most of the subjects treated in the text of the Code, the Pandects and the Institutes.

(*) One vol. only in the possession of a learned friend here.
(†) This Ed. is in the Library of the association of the Montreal Bar.

They have written in latin and the large volume of their writings, demands in the student who would become acquainted with their profound and sometimes subtle expositions of the text, no ordinary labor, assiduity, and perseverance.

Thus far we have considered the body of the Roman Law as it came to us from the hands of Tribonian and his coadjutors; and it may be remembered, that in speaking of the Digest in particular, some allusion was made to discrepancies and imperfections that crept into it, through the over-haste, probably, with which it was completed. These consisted in some measure in the confounding of existing with obsolete or abrogated laws; in the adoption, in different places, of the opposite opinions of the Sabinians and the Proculeans and in the obscurity of many passages which involved the laws in perplexity; but the principal defect was to be found in the wrong collocation of divers laws, under heads to which they had no immediate affinity. To these laws was given the name of *leges fugitivæ.*

These faults of the Tribonian compilation did not escape the acumen of that great Jurist, whose venerated name has become with us as that of a household God, I mean the profound POTHIER, who, at an early stage of his legal studies conceived the plan of removing from the Pandects those antinomics and blemishes he had detected in them, without nevertheless, altering the general order and method of the work.

In the achievement of this object, his life seems to have been in a great measure devoted; and although he sometimes despaired of the accomplishment of his task, his wavering courage was sustained by the approbation and the counsel of his renowned contemporary the immortal d'Aguesseau, and hence he persevered to the end, and finally, in 1743, his elaborate work appeared in 3 vols. folio, with this Title. *Pandectæ Justinianæ in novum Ordinem digestæ cum legibus codicis quæ jus pandectarum, confirmant, explicant aut abrogant.*

In this great work the order of the Books and Titles as adopted by Tribonian, has been scrupulously preserved; but in the details of each Title, the economy of the subject-matter has undergone very many and important modifications and improvements, and the defects of the original to which I have already adverted have been materially if not wholly corrected. This he has accomplished at immense labour, by recalling under their proper heads, the laws scattered through the whole work, and by gleaning from the Code and the Novels, additional authorities to support his positions and enrich his compilation.

His Titles are not unfrequently divided into Sections, these into Articles, and these again into Paragraphs and Principia. Each Title retains its original heading, but the Sections, Articles and Paragraphs

are also preceded by brief explanatory denominations or summaries, which add to the facilities of reference and give to the whole subject of the Title, the coherence and consistency of a Treatise. Nor ought it to escape our notice that these large and important improvements have been engrafted on the Justinian compilations without in any manner detracting from their utility, in the form in which they were first presented to us; for although the order of particular laws is often inverted in the same Title or transferred from one Book or Title to another, yet at the end of each Paragraph or Principium the Law from which it is taken is cited with great precision in conjunction with the name of its author, and thus is rendered both clear and easy a reference to the original.

With this splendid work before us, as the production of our own times we have perhaps little to envy in the glory of the Justinian age. The fame of this new compilation of the Digest spread rapidly throughout Europe, and although the *savants* of Leipsic attempted to question the depth of the learning displayed in the prolegomena, the learned of all countries sought the work with avidity, and the name of the immortal Pothier, our modern Tribonian, became everywhere endeared and venerated. Nay, many even hastened to Paris to see him, and it is related of a learned Spaniard, a celebrated Professor of Salamanca, that finding Pothier absent when he sought him in the French Capital, he asked to be at least permitted to behold his class, and to sit in his chair, and the Professor pressing his lips to it with enthusiasm exclaimed: "*I am sitting in the chair where habitually presides the coryphæus of Jurists.*"

This short digression can need no apology to you, gentlemen, who, doubtless, as well as myself, feel for the author of the *Traité des Obligations*, that high degree of respect and admiration to which that Treatise alone would be sufficient to entitle him, without appealing to the other great works which we have just briefly described.

Pothier's Pandects have gone through several editions in the various forms of the folio 4o. and 8o. The Paris folio edition of 1818 (which is the 4th) is printed with remarkable neatness and care, and besides being adorned by the portrait of the Author, it contains interesting *fac similes* of his own M. S. and of the famous Florentine M. S. of the Digest from which the celebrated Gothofred edition was copied.

The *Corpus Juris* has been partially translated by divers french writers. Ferrière's translation of the Institutes is familiar to you all.

The Code was translated by Tissot in 1806 or 7 and the Novelles by Beranger, fils, in 1811. Of the Digest we have a french version by Hulot of the first 44 Books and by Berthelot of the remaining six. There is also a translation of the first 22 Books by l'Abbé de Bréard-

Neuville. Of the Institutes we have likewise a much esteemed english version by Dr. Taylor, L. L. D.

The designs with which I set out in the present lecture, I have now brought to a close. Whatever the success with which that design has been carried out, it has nevertheless been my endeavor to convey to you a general but distinct outline of that great body of Justinian legislation to which some reference is made in almost every page of the works you consult in your daily professional studies: and by tracing, however rapidly, to their sources the laws in their collective form, as contained in the Code, the Pandects and the Institutes, and dwelling upon the singular and providential event of their preservation down to our own times, it has been my aim far more to excite than gratify your curiosity in relation to those colossal and enduring memorials of roman intellect and greatness.

Our early impressions derived from the History of Rome are those of admiration for the heroism, the independence, the genius, the literature, the laws and the power of its people. These impressions become deeper as we afterwards investigate more philosophically their claims to this admiration; and we have the highest authority to say that this sentiment of reverence which we feel for the roman name and roman institutions is one to which that name and those institutions are pre-eminently entitled.

One of the legal luminaries of modern times, the great chancellor D'Aguesseau, thus beautifully expresses himself when speaking of Roman Jurisprudence, and the passage is so apposite that I cannot forbear giving it to you entire.

" Tout y respire encore cette hauteur de sagesse, cette profondeur de bon sens, et pour tout dire en un mot cet esprit de législation qui a été le caractère propre et singulier des maîtres du monde. Comme si les grandes destinées de Rome n'étaient pas encore accomplies, elle règne sur toute la terre par sa raison, après avoir cessé de règner par son autorité. On dirait en effet que la justice n'a pleinement dévoilé ses mystères qu'aux jurisconsultes romains. Législateurs encore plus que jurisconsultes, de simples particuliers, dans l'obscurité de la vie privée, ont mérité par la supériorité de leurs lumières, de donner des lois à toute la postérité; lois aussi étendues que durables; toutes les nations les interrogent encore, et chacune en reçoit des réponses d'une éternelle vérité."—Disc. sur la Science du Magistrat.

With this eloquent testimony before us, proclaiming the wisdom that pervades the rich inheritance of laws left by the Romans to mankind, and coming as that testimony does from a source so enlightened and exalted, it would be presumptuous to add any thing of my own in order to point out how important, how necessary, must be the study

of those laws to him who would aspire to become eminent as a jurist, or wise as a legislator.

With this citation, therefore, I take leave of my subject, more than ever convinced that there is as much truth as elegance in the thought and the language of Pothier, when he tells us that in reference to her laws, Rome is our common country: *Roman communem legum patriam confessus est.*

L'INSCRIPTION DE FAUX.

L'Ordonnance de 1737 n'ayant pas force de loi en Canada, l'on n'est point, en ce pays, assujéti aux formalités qu'elle prescrit, quant à la manière de procéder sur l'incident dont il est question.

Il est peut-être raisonnable de suivre autant que possible, la marche qu'elle indique; mais comme il y a dans l'incident, plusieurs personnes, si toutes ne se conforment pas, de consentement, à cette Ordonnance, on ne peut annuller leurs procédés à cet égard, à moins que des règles de pratique, n'aient, de point en point, reglé ce qui doit être fait, et que l'on tienne pour certain, que ces règles de pratique ne sont pas contraires aux lois existantes en cette matière.

Il n'y a donc d'autre parti à prendre, que de recourir à l'Ordonnance de François 1er, du mois d'Octobre 1535, chap. 9. (*Vr. Ordonnances de Néron, Tome* 1. *p.* 149.)

L'article 10 porte ce qui suit: "Pour ce que plusieurs parties sont promptes à mettre en avant et alléguer fausseté sans bons et sans valables moyens, nous avons ordonné et ordonnons que dorénavant aucuns ne seront recevables à alléguer fausseté, s'ils ne maintiennent aux actes de la Cour, et au Greffe en personne ou par Procureur spécialement fondé de procuration, la pièce produite fausse, et en ce faisant s'inscrire et bailler les moyens de fausseté dedans trois jours, lesquels seront mis au Greffe de la Cour, avec la pièce que l'on maintient de faux croisée et communiquée à nos Avocats et Procureurs, lesquels pourront requérir avec la partie iceux être reçus pour eux adjoindre, sans toutefois les communiquer à la partie contre laquelle ils sont baillez, et après seront mis ès mains du Juge pour être jugez s'ils sont admissibles ou non, et s'ils sont jugez admissibles, l'accusateur est reçu à informer sur le contenu par information secrète non communiquée, sans appeler partie à voir jurer témoins, laquelle faite sera rapportée

pardevers la dite Cour au Juge, et si par icelle les faits contenus esdits moyens semblent prouvez et vérifiez, ou aucuns d'iceux à suffisance, les Notaires, la partie, et autres coupables de la fausseté, seront ajournez à comparoir en personne ou pris à corps, comme l'on trouvera la matière disposée ; et s'ils comparent seront enquis, examinez et interrogez, et sera procédé extraordinairement, le procès parfait, la fausseté déclarée ; et ou par le dit procès extraordinaire, la fausseté ne pourrait être terminée, seront les parties appointées contraires et en procès ordinaire."

Comme il est facile de le voir, il y a dans les dispositions de cette Ordonnance, differentes choses qui ne peuvent rentrer dans le cadre de nos procédés judiciaires, à raison de la nature même de ces procédés; mais toujours, est-il vrai, qu'après avoir élagué ce qui ressort de la voie extraordinaire, l'on a le vrai principe de la Procédure dont nous parlons. Nous n'avions donc pas tort de dire qu'ils est, peut-être, raisonnable de suivre autant que possible, la marche qu'indique l'Ordonnance de François 1er.

Nous comprenons, sans peine, que les dispositions de cette Ordonnance, sont endeçà de certaines formalités usitées, requises, nécessaires même. A cet inconvenient qui serait un mal sérieux s'il était sans remède immédiat, il est un moyen de parer. Les Cours, en Canada, bien qu'elles n'aient pas, plus qu'ailleurs, le droit de prononcer des nullités que la loi n'a pas prononcées, ou voulu qu'elles prononçâssent, possédent néanmoins, celui d'établir la Jurisprudence, *là* où la loi garde un silence absolu. Or dans l'espèce dont il s'agit ici, il est des incidens auxquels, assurément, l'ordonnance de 1535 n'a aucunement pourvu. Il faut donc, pour parvenir aux fins de la Justice, des règlemens, soit *expressis verbis*, ou du moins une Jurisprudence.

En Canada, si nous ne nous trompons, les Cours ont, en général, agi sur ce principe. Il nous souvient qu'entre autres causes, une de Marie Eléonore Rivé Vve, Demanderesse *vs.* Joseph Longtin, Defendeur, et François Marie Bel, fils, Intervenant, Garant, donna lieu à la Cour du Banc du Roi de ce District, de se prononcer. Il s'agissait d'une inscription de faux que voulait faire l'Intervenant contre l'expédition d'un contrat de mariage, produit par la demanderesse. L'Intervenant avait, comme il a été d'usage dans cette Cour, commencé par interpeller la demanderesse de déclarer si elle entendait faire usage de cette expédition. Cet acte d'interpellation, était accompagné d'une Procuration pardevant Notaires, de l'Intervenant à son Avocat.

La Demanderesse attaqua ce procédé comme étant irrégulier et contraire aux dispositions de l'Ordonnance de 1737, qui règle les matières d'inscription de faux ; elle prétendit que l'Intervenant aurait dû d'abord, présenter Requête exposant les moyens, demander à

s'inscrire en faux, et faire ordonner sur cet exposé, s'il était jugé suffisant, que la Demanderesse déclarât dans trois jours, si elle entendait faire usage de la pièce arguée de faux, etc.

La Demanderesse cita le Rep. Juris. Guyot. tome 9, vo. Inscription de faux, p. 256, 257, 258, 259 et 260. Merlin Rep. Jurisp. tome 6, p. 138, 139 et 141.

Mais la Cour (à l'unanimité des quatre Juges) le 20 Avril, 1836, jugeant que l'on n'était pas tenu de se conformer à l'Ordonnance de 1737, laquelle n'est pas loi en Canada, déclara que l'Intervenant avait procédé régulièrement, en suivant l'usage observé devant cette Cour.

La motion de l'Intervenant fut donc accordée.

L'article que nous soumettons ici, aura, nous l'espérons, son utilité, en ce qu'il produira, sans doute, quelques réflexions sur ce qui, n'est pas, et devrait être fait en cette matière, et par le Barreau, et par le Banc, lorsqu'il se présente des questions qui ressortent de l'Inscription de Faux. M.

Montréal, Janvier, 1846.

Nullités non prononcées par les lois.—Clauses irritantes.—Règles fondamentales, utiles, nécessaires même pour le Juge, et tous ceux qui y ont intérêt.

Nous ne nous dissimulons pas les difficultés que nous avons à aborder, dans l'examen de la question dont le titre qui précède, indique assez clairemement la nature : difficultés moins inhérentes, peut-être, au sujet, que surgissant des préjugés que des circonstances toutes particulières, des opinions formées depuis longtemps, et quelque fois, une habitude routinière de chercher et appliquer machinalement, des autorités, ont naturellement fait naître, alimentés et enracinés. Ce serait peu connaître le cœur humain, et l'influence qu'exercent sur les esprits, les habitudes et la routine, que de regarder comme faciles à déraciner, les opinions amenées par les premières, confirmées ensuite par l'autre. Et l'on ne pourrait, à moins de fermer les yeux sur ce qui se passe au milieu de nous que comprendre combien est difficile, la tâche de celui qui, pour attirer l'attention sur un sujet de haute importance en lui-même, et d'un grand intérêt pour toute la société, doit, de prime abord, s'en prendre, bien qu'avec certaine déférence, à ces préjugés dont l'empire est si puissant, partout. Aussi pouvons nous

nous rendre témoignage, qu'un seul désir nous anime, comme un seul motif nous a porté à examiner le sujet dont nous nous occupons : découvrir, faire connaitre et faire pratiquer ce qui est vrai, juste et convenable. Il nous a paru que la discussion de ces questions, était hautement appelée, et qu'il importait à toutes les classes de la société, que des résultats certains fûssent là, comme le signe auquel on reconnût *la route à suivre, pour ne pas s'égarer dans la multiplicité* des sentiers inconnus, difficiles et tortueux des transactions humaines, toutes plus épineuses les unes que les autres. Les conventions des parties, nues d'abord, doivent revêtir une forme, un vêtement pour ainsi dire ; ce sont les Notaires qui sont chargés de les habiller, et aux tribunaux appartient de décider, après les avoir bien examinés, si ces vêtemens sont convenables. L'on nous pardonnera, nous l'espérons, cette comparaison qui, pour être un peu familière, n'en est peut-être pas moins vraie. Combien donc n'importe-t-il pas, que ceux qui le peuvent, sachent quelle est la loi, et la jurisprudence sur cet objet ; les parties intéressées, les Notaires, le Barreau et le Banc, ont tout à gagner à l'examen calme, honnête et approfondi de cette matière. Nous regretterions infiniment que notre article eût l'effet de blesser des suceptibilités ; nous avons une trop haute opinion de la tournure philosophique de certains génies, de certains esprits, de certaines têtes saines, bien qu'un peu timides et routinières, pour ne pas nous rassurer par là même, que nous sommes persuadé qu'on ne pourra jamais se résoudre à se fâcher contre un qui, comme eux, cherche la vérité qu'il nous importe à *tous* de connaître.

Commençons donc par nous entendre sur les définitions.

"Clause irritante (Rep. Jurisp. Guyot, tome 3. vo. Clauses, p. 553.) se dit de celle qui annule tout ce qui serait fait au préjudice d'une loi ou d'une convention, comme quand on stipule en ces termes, *à peine de nullité.*

"Lorsque la loi est conçue en termes prohibitifs négatifs, la clause irritante est inutile pour annuller ce qui est fait contre les dispositions d'une telle loi ; mais cette clause est nécessaire, quand la loi ne fait simplement qu'enjoindre quelque chose."

Ce qui précède n'est pas une règle sûre : la plupart des auteurs qui se sont guidés d'après la Loi de Justinien, dans la loi 5 *Cod de Legibus*, se sont égarés. Cette loi porte (*Loi Sancimus* 5 *Cod. de Legibus*, 14.) *ut quæ lege fieri prohibentur si fuerint facta, non solum inutilia, sed pro infectis etiam habeantur, licet legislator fieri prohibuerit, tantùm, nec specialiter dixerit inutile esse debere quod factum est.*"

"Il est certain (dit Toullier, tome 7, No. 484.) que cette loi ne saurait être invoquée comme obligatoire et impérative que dans les

lieux où le droit romain a force de loi. Ainsi l'enseignent les docteurs, et c'est d'ailleurs une chose évidente."

Comme cette autorité n'est aucunement fondée sur la raison, la première de toutes les lois, "la raison dit d'abord (continue Toullier, au même numéro) la raison dit dabord qu'une règle aussi générale ne saurait être admise sans distinction ; car outre toutes les lois prohibitives, il y en a dont les dispositions sont si importantes, et d'autres si peu, soit pour la société et l'ordre public, soit pour l'intérêt des particuliers, qu'il serait contraire à la raison, et à l'équité de punir également et indifféremment, l'infraction à la défense, par la nullité des autres faits au contraire. Aussi l'on trouve qu'il y a plusieurs lois qui en défendant certains actes, les laissent néanmoins subsister, lorsqu'ils ont été faits contre la défense."

Les interprêtes au lieu de rechercher, comme l'a si judicieusement fait M. Toullier, si cette règle de Justinien était fondée en raison, se sont perdus en distinctions, et ont jeté sur cette matière, une confusion qu'ils auraient facilement évitée, s'ils avaient examiné la question d'une manière éclairée.

Il est de ces choses, de ces formalités tellement essentielles à l'existence des actes, qu'il n'est aucunement besoin de clause irritante, pour autoriser le Juge à déclarer nuls ces actes, ou dire qu'ils ne sont pas authentiques ; mais d'en conclure que les Cours sont en droit dans tous les cas, où il y a prohibition, de déclarer la nullité, c'est violer les principes de la logique, et se rébeller contre la saine raison. C'est d'ailleurs, se montrer peu connaissant, peu au fait des dispositions nombreuses des articles de l'Ordonnance de 1667, où des défenses, des prohibitions expresses, n'emportent souvent, aucune peine de nullité. L'on rencontre souvent les termes : *Défendons à peine de nullité, etc.*,et souvent aussi, ils sont omis, comme le dit Toullier, No. 474 du tome 7, "lorsque la clause irritante est omise, c'est qu'alors la contravention à la défense, n'emporte pas la peine de nullité."

Il faut donc écarter la règle de Justinien, qui n'est pas fondée sur la nature des choses, et nous en tenir avec Suarez (Toullier, tome 7, No. 496, p. 584.) à la maxime avouée par la raison, que le législateur qui se borne à défendre purement et simplement, sans ajouter la clause irritante ou autre équivalente, est censé n'avoir pas voulu annuler l'acte fait contre la prohibition ; les nullités ne doivent pas être admises arbitrairement, il faut s'arrêter à celles qui sont écrites dans la loi."

Avant de formuler les règles qui peuvent servir de guide en cette matière, nous rappèlerons au lecteur, quelques autorités qui nous paraissent bien dignes d'attention.

"Il n'est pas permis (ancien Dénisart, Vo nullité, No. 58.) de suppléer les nullités qui ne sont point établies par la loi, en des termes

assez précis et assez evidens pour être entendus de chacun. Ce principe est général, et doit s'étendre à toutes les lois."

M. Toullier, au No. 482 de son tome 7, se sert d'expressions très énergiques.

"Il parait donc, dit cet auteur, que la première règle en cette matière, est qu'on ne doit point suppléer arbitrairement les nullités qui ne sont point écrites dans la loi ; car la loi seule peut établir des nullités, et pour annuler ou anéantir une convention ou un acte fait par des personnes naturellement capables, il faut non seulement l'action ou la volonté de la puissance souveraine, il faut de plus, que cette volonté soit manifestée de manière que personne ne puisse la méconnaître ou l'ignorer."

Bien plus imposante, est l'autorité de M. D'Agnesseau: c'est lui-même qui parle au T. 8. p. 74, comme suit:

"Je ne saurais trop recommander . . . . de ne pas multiplier arbitrairement les nullités, et de s'arrêter, sur ce sujet aux dispositions écrites dans les Ordonnances, Edits et Déclarations, etc."

M. Toullier (T. 7, p. 568, dons la note.) observe, avec raison, que "c'est à propos des lois criminelles qu'il (M. Dagnesseau) fait cette recommandation, mais que la raison est la même pour toutes les lois."

Voici comment s'exprime le même auteur, à la page 590 du même tome:

Lorsqu'une formalité n'est point par elle-même, absolument nécessaire pour observer la justice, mais introduite seulement pour en faciliter l'observation, on ne voit pas sur quoi juger, *sans clause irritante,* que le législateur a voulu la prescrire, sous peine de nullité.

"Si la formalité (p. 586) n'est fondée que sur une disposition arbitraire et variable, son omission n'emporte point la nullité de l'acte, sans l'addition d'une clause irritante."

Ecoutons M. Merlin (Rep. Jurisp. 3me edit., 4e Vol. Nullité, p. 616.)

"Les nullités ne peuvent être établies que par la loi, la loi seule a le droit de les prononcer."

M. Toullier se résume en bien peu de mots, à la p. 580 du T. 7.

"Le législateur qui se borne à défendre purement et simplement, sans ajouter la clause irritante, est censé n'avoir pas voulu annuler l'acte fait contre la prohibition."

En se rappelant plusieurs des défenses faites par l'Ord. d'Orléans (1560) et celles de Blois, (1579) sans qu'elles soient accompagnées des *clauses irritantes,* l'on peut facilement se convaincre que non seulement les autorités citées plus haut, sont fondées en principe, mais, de plus, qu'elles sont en rapport parfait avec ce qui se pratiquait en

France, sous l'empire de l'ancien droit, et ce qui se pratique habituellement.

L'article 167 de l'Ord. de Blois, porte :

" Seront tenus nos Notaires mettre et déclarer dans les contrats, testamens et actes, la qualité, demeurance et Paroisse des parties et des témoins y dénommés, la maison où les contrats seront passés, et pareillement le temps de devant ou après midi, qu'ils auront été faits."

Cette disposition est conforme à l'art. 67 de l'Ord. de 1539 (François 1er.)

On ne peut disconvenir de la sagesse de l'obligation imposée aux Notaires, par ces Ordonnances, et s'il était permis de se décider d'après ce qui devrait être, au lieu de se régler d'après ce qui est par la loi, on n'hésiterait guère à dire, que le défaut du Notaire, de se conformer à l'art. 167 de l'Ord. de Blois, doit frapper de nullité les actes qu'il passe, en violation de ce qui y est ordonné. Mais l'Avocat en plaidant, et la cour en jugeant, se guident d'après les principes des lois ; et si, par malheur, ces lois n'ont pas embrassé tous les cas possibles, de même que si les circonstances particulières où se trouve un pays, nécessitent que des changemens ou des modifications soient apportés à ces lois, et l'Avocat qui se repose sur la loi qui existe, et le Juge qui a juré d'administrer les lois du pays, doivent laisser au philantrope et au législateur, le soin de remédier au mal que les imperfections d'une ancienne législation produisent peut-être.

Au reste, cette opinion sur l'effet de l'art. 167 de l'Ord. de Blois, n'est pas sans fondement. M. Dénisart (nouveau) s'exprime d'une manière précise et énergique à ce sujet, au 1er vol. vo. Acte de Notoriété, p. 158, No. 6, 1ere colonne.

" Comme l'art. 167 de l'Ord. de Blois, ne prononce pas la nullité on pense que l'obervation n'en est pas indispensablement nécessaire, mais seulement utile, pour fixer exactement la date de l'hypothèque résultant des actes notariés."

Cela est si bien vrai, c'est que la cour, par un arrêt du 25 mai 1762 (non de date à citer, à la vérité, en Canada,) sur les conclusions de M. Séguier, a déclaré valable, la donation faite par la Dame Bouvart, à la fabrique de Maintenon, dans laquelle, il n'était pas dit si elle était faite, avant ou après midi.

En parlant de l'art. 167 de l'Ord. de Blois, M. Toullier (T. 8, p. 138) observe " qu'il enjoignait aux Notaires d'exprimer dans les actes s'ils étaient faits avant ou après midi. C'était une précaution de plus contre le faux, et un moyen de fixer l'instant précis où prenait naissance l'hypothèque résultant alors de tous les actes

notariés. L'omission de cette formalité, qui d'ailleurs, n'était pas exactement observée, n'emportait point la nullité de l'acte."

Et au T. 1, p. 83, No. 92, le même auteur nous déclare le résultat de ses recherches.—" Nous avons, dit-il, essayé d'approfondir la théorie des nullités, tome VII, p. 616 et suiv. et nous croyons avoir prouvé qu'on ne doit point prononcer la nullité des actes où quelque disposition de la loi n'a point été observée, lorsque cette peine n'a pas été prononcée par le législateur, et que dans le doute, les juges ne doivent pas prononcer la nullité, parce que les nullités sont de droit étroit, et ne doivent pas être suppléées."

" Lorsque les actes par lesquels une partie est lésée (dit Pigeau Proc. Civ. édit. de 1737, T. 2, p. 95) ne sont pas déclarés nuls par les lois, les Juges ne peuvent les annuller de leur propre mouvement: comme les actes sont la base des possessions et des propriétés, il faut l'intervention de la puissance souveraine pour les annéantir." ι.

Nous pourrions en dire beaucoup plus long, et ramener ici, divers arrêts qui ont prescrit et prohibé certaines choses, mais non à peine de nullité, et qui, par cela même, n'ont pas l'effet d'entacher de nullité, les actes faits en contravention de ces règlemens ; mais il nous semble, et nous le craindrions, que ce serait rendre trop long, un article qu'il est temps de terminer.

Nous ne pouvons mieux conclure que par un résumé qui n'est pas le nôtre, mais bien celui de l'auteur distingué que l'on ne saurait trop étudier, trop méditer, trop consulter, si l'on est en état de le faire avec le discernement nécessaire. Ce résumé, nous le présentons sous la forme de règles clairement énoncées. Laissons donc parler M. Toullier, au T. 7, p. 613 et seq.

" On doit s'attacher à la maxime ancienne et raisonnable si énergiquement recommandée par d'Aguesseau, T. 8, p. 74," qu'il ne faut point arbitrairement multiplier les nullités ; qu'elles sont de droit étroit ; que le juge ne peut ni les créer, ni les suppléer, ni les étendre d'un cas à un autre, et qu'il faut s'arrêter sur ce point, aux dispositions écrites dans la loi. Ainsi donc.

PREMIÈRE RÈGLE GÉNÉRALE.

Il ne faut point prononcer la nullité des actes où quelque dispositions de la loi, n'a pas été observée, à moins que cette peine n'ait été expressément ou équivalamment prononcée par la loi.

SECONDE RÈGLE,

Qui n'est qu'une exception à la précédente.

Tout acte qui ne contient pas les formalités indispensables pour remplir le but de son institution, le but que la loi s'est proposé, est

imparfait et nul, il doit être considéré comme s'il n'avait pas existé.

Ce sont ces formalités qu'on appelle *intrinsèques* ou substantielles, parce qu'elles sont nécessaires à l'existence ou à la perfection de l'acte, et que sans elles, il ne peut remplir le but de la loi.

TROISIÈME RÈGLE.

Le silence du législateur sur l'effet que doit produire l'omission d'une formalité ou l'inobservation d'une disposition, annonce qu'il a voulu s'en reposer sur la prudence du juge, qui n'est point lié et qui peut prononcer la nullité d'un acte, lorsqu'il trouve qu'à défaut d'observation d'une formalité prescrite, l'acte est imparfait, ne remplit pas le but de la loi, et surtout qu'il blesse les droits d'un tiers; mais qui ne doit jamais la prononcer, lorsque par ailleurs, l'acte peut remplir le but de la loi, et qu'il ne porte préjudice à personne; car alors, personne n'a le droit de l'attaquer.

On doit alors placer la formalité omise au nombre de celles qui ne sont prescrites que pour rendre l'acte plus sûr et plus authentique, ou comme une indication des moyens propres à remplir le but de la loi, lequel peut être rempli par des equivalents, car il ne faut pas confondre le mode avec l'essence.

Enfin, dans le doute, le juge doit s'abstenir de prononcer la nullité, l'acte doit subsister, sauf à celui qui a fait la faute, à réparer le dommage, s'il en a causé."

Nous livrons à l'examen du Barreau, des Juges et de tous ceux qui par leur position dans la société, sont en état de les apprécier, les autorités que nous avons recueillies, aussi bien que les réflexions que nous ont fait faire la méditation du sujet important dont nous avons cru devoir entretenir les lecteurs de la *Revue de Législation et de Jurisprudence*. Puisse cette faible esquisse des diverses questions envisagées, donner lieu à des discussions sur celles qui seront, à n'en pas douter, soulevées plus d'une fois. C'est par l'examen suivi progressivement, que les difficultés sont signalées et ensuite résolues; et si parfois, celui qui, tout en désirant connaître la vérité qu'il cherche, avance des paradoxes, que de plus habiles, de plus éclairés, les relèvent, toujours dans le même esprit, et activés par un égal désir de répandre les lumières. M.

Montréal, Février, 1846.

COLLECTION DE DECISIONS

DES DIVERS TRIBUNAUX DU BAS-CANADA.

QUÉBEC—EN APPEL.

TERME DE NOVEMBRE, 1845.

LAURENT CHABOT ET JULIEN CHABOT,

Requérants pour lettres de ratification

Appelants.

et.

JOSEPH FUROIS,

Opposant afin de conserver.

Intimé.

D'après les dispositions de la 2e Vic. chap. 36, sections 5, 7, 14, 28—(*Ord. relative à la distribution des biens des Banqueroutiers, maintenant rappelée,*) la vente des immeubles du Banqueroutier par le Syndic ne les purge pas des hypothèques dont ils sont grevés, quoique les créanciers hypothécaires aient filé leur reclamation devant le Commissaire des Banqueroutes; il eût fallu obtenir d'eux une renonciation expresse à leur droit d'hypothèque, et le fait d'avoir filé leur reclamation ne saurait équivaloir à telle renonciation. Les créanciers hypothécaires ont encore droit de s'opposer à la demande de lettres de ratification faite par les acquéreurs de tels biens, et de se faire colloquer sur le prix de l'acquisition, nonobstant le paiement fait au Syndic. Ainsi jugé en la présente instance par la Cour du Banc de la Reine pour le District de Québec, le 29 Janvier 1845. Jugement confirmé en appel, en Novembre 1845.

Ci-suit le dispositif de la Cour du Banc de la Reine.

QUEBEC, 29th January, 1845.

« Exparte

L. CHABOT & AL. *for a Rat. of Title.*

No. 433.

et

JOS. FUROIS, *Oppt.*

The Court of our Lady the Queen now here having seen and examined the opposition *afin de conserver* of the said Joseph Furois, in this cause fyled, and the peremptory Exception pleaded to the same by the said Laurent Chabot and Julien Chabot the petitioners in this cause and the issue thereupon joined;—as well as the other pleadings in this cause fyled and the evidence therein adduced and of record, and having heard the parties by their counsel respectively; considering that the said Joseph Furois, by and under a notarial obligation in the said opposition mentioned, bearing date the sixth day of July in the year of our Lord, one thousand eight hundred and forty, and by and under the judgment recovered by him against Joseph Turgeon and Simon Tureon, jointly and severally in the Court of King's Bench, for the District of Quebec, on the twentieth day of October in the year of our Lord one thousand eight hundred and forty one, acquired an hypothec on the lot of land and premises in the said opposition mentioned and described, for the payment of the debt and interest in the said opposition mentioned, which said hypothec has not been in any manner released, waived or extinguished, by or in consequence of any act done, or omitted to be done by or on the part of the said Joseph Furois, and that the said Joseph Furois is entitled to the full benefit of the said hypothec for and towards the payment of the said debt and interest, from and out of the price of the said lot of land and premises whereof mention is made in the Petition of the said Laurent Chabot and Julien Chabot in this cause fyled, being the price and consideration of the sale made to the said Laurent Chabot and Julien Chabot in the said Petition also mentioned. It is adjudged by the said Court now here, that the said peremptory Exception of the said Laurent Chabot and Julien Chabot, be and the same is hereby over-ruled and dismissed, with costs. And the said Court now here doth further adjudge that the said opposition be and the same is hereby maintained to all and every intents and purposes as to Law and Justice may appertain, with costs.

L'on trouvera, dans les factums filés en appel, une exposition ample et fidèle des questions soulevées et décidées en cette instance.

CASE OF THE APPELLANT.

On the 10th of June 1842, the Appellants acquired by deed of purchase, executed before Bignell and colleague, notaries, from Edouard Glackemeyer, Esquire, in his quality of assignee of the estate and effects of Simon Turgeon, a bankrupt, a certain lot of land and premises therein described for the sum of £190, on account of which the Appellants then and there paid £95, and also upon the further consi-

deration by the Appellants of fulfilling the obligations of a certain deed of donation referred to. On the 8th February 1843, the Appellants deposited their deed in the Prothonotary's office, at Quebec, and gave notice in the manner prescribed by the statute that they would apply for a confirmation of their deed to the Court of Queen's Bench at Quebec. On the 3rd June 1843, the Respondent fyled an opposition *afin de conserver*, alledging an obligation, executed before Pouliot and another, public notaries, on the 6th July 1840, by Joseph Turgeon and Simon Turgeon jointly and severally, for the sum of £300 currency, and containing the usual conclusions. To this opposition the Appellants pleaded a defence *au fonds en fait*, and also a perpetual *exception peremptoire en droit*, in which they alledged that the said Simon Turgeon had taken the benefit of the Bankrupt Act, and that the Commissioner of Bankrupts at Quebec had issued his warrant as required by law, that a meeting of the creditors of the said Simon Turgeon was duly convened and had on the 19th October 1841, and that the creditors present at the said meeting elected the said Edouard Glackemeyer assignee; that on the 3rd October 1841, the said Respondent PROVED and FYLED his claim against the said Simon Turgeon before the said Commissioner of Bankrupts for the sum of £305 6s. 4d.; that afterwards, to wit, on 2nd April 1842, the said Commissioner of Bankrupts assigned and transferred as required by law the estate and effects of the said Bankrupt to the said assignee, that the said assignment vested all the estate of the Bankrupt in the said assignee, and that the said assignee advertised for sale the immoveable property of the said Bankrupt, and sold the same by public sale on the 4th March 1842, to the said Appellants as the last and highest bidders. That by deed at Quebec, the 10th June 1842, before Bignell and colleague, the said Edouard Glackemeyer, in his said quality of assignee executed the said sale, of which deed the said Appellants seek a ratification. That the Appellants having paid into the hands of the said Edouard Glackemeyer the price of their said purchase, the sum of £190, together with divers other sums amounting to £557 9s. 2d., were distributed by the said Commissioner of Bankrupts among the creditors of the said Simon Turgeon, and that the said Respondent stands collocated for the sum of £40 16s. 0½., that the debt claimed by the Respondent in and by his opposition is the same as that claimed by him before the Commissioner of Bankrupt; that the said price paid by the said Appellants was distributed among the creditors anterior in date to the Respondent, and that his mortgage is consequently extinguished. That the Respondent having fyled his claim in bankruptcy had thereby made his option to exercise his rights therein, and having desired the distribution of the price of the said sale to the Appellants had thereby abandoned his right of hypothèque upon the said immoveable to exercise the same upon the price thereof. That the said Respondent has sold his said claim to Narcisse Faucher, Esquire, a practising advocate, that the said sale was null and void. That the said Simon Turgeon had obtained his discharge from the said Commissioner of Bankrupt on the 1st December 1841, and that the proceedings in bankruptcy are still pending.

Issue was joined and the case put down for evidence. It is established beyond controversy that the Appellants have paid the price of their purchase to the assignee, that the Respondent fyled a claim for

the same cause of demand before the Bankrupt Commissioner before the assignment was executed to the assignee, and consequently long before the sale to the Appellants, that the monies so paid by the Appellants were subsequently distributed by the order of the Commissioner of Bankrupts, and the Respondent was collocated according to his rights, and that the said Simon Turgeon is a Bankrupt with his certificate of discharge. Under these circumstances was it competent to the Respondent to fyle an opposition in the Court of Queen's Bench? Could he claim to be paid in the Court of Queen's Bench after having fyled his claim in bankruptcy? Could he hold himself out to the other creditors as a claimant in bankruptcy, and at the last moment put in an opposition in the Court of Queen's Bench, and by that means obtain a preference over them? Can there be two distributions, one for the exclusive benefit of the Respondent in the Court of Queen's Bench and another among the creditors generally in bankruptcy? Can the operation of the Bankrupt Ordinance be such that it vests the property of the Bankrupt in the assignee for the benefit of the creditors generally with provisions requiring the distribution in bankruptcy, and yet that it is in the power of any creditor of the Bankrupt without impugning the proceedings in bankruptcy to seek payment any where else but in bankruptcy. Does not the deed of assignment constitute the assignee the legal attorney of the creditors, and is not the act of the assignee the act of each of the creditors? Is not the assignee accountable to the whole of the creditors and have they any other recourse against him than that of obtaining an account in bankruptcy? Was not the receipt of the price by the assignee a receipt by the creditor or creditors who were entitled to the same, and can the Respondent in this case after receiving the money through his agent recover the amount a second time? Is not the Respondent entitled to rank in bankruptcy upon the proceedings of this sale according to the date of his mortgage, and what injury can he suffer by being made to seek his money there? on the other hand what injustice is not operated by distributing the Bankrupt's money in the absence of all his creditors? Notwithstanding however, the Court of Queen's Bench maintained the opposition of the said Respondent, and dismissed the Appellants' contestation thereto. It is from this judgment the Appellants have appealed, and of which they respectfully sollicit a reversal.

A. STUART.
For Appellants.

Dated 24th June, 1845.

FACTUM DE JOSEPH FUROIS, INTIMÉ.

Les Appelants en cette cause, acquéreurs d'un immeuble en vertu d'un acte de vente consenti par Édourd Glackemeyer, écuyer, de Québec, syndic à la faillite de Simon Turgeon, exécuté devant Mtre Bignell et son confrère, notaires, en date à Québec le 10 juin 1842, demandèrent à la Cour du Banc de la Reine du district de Québec, une sentence ou des lettres de ratification le 13 juin 1843.

L'Intimé, Joseph Furois, fila dans la dite Cour le 3 juin 1843, une Opposition afin de conserver, réclamant ses droits et priviléges à lui acquis en vertu d'un acte d'obligation fait et passé à Saint-Michel, devant Mtre B. Pouliot et son confrère, notaires, en date du 6 juillet 1840, et d'un jugement rendu en la Cour du Banc du Roi pour le district de Québec, en date le 20 octobre 1841, pour la somme de £300 avec intérêt du 10 septembre 1841, demandant à conserver son hypothèque sur le dit immeuble, ou à être payé sur le prix d'icelle en cas de dépôt en Cour du prix d'acquisition.

Les requérants en la dite cause, Appelants actuels, contestèrent la dite Opposition du dit Joseph Furois, Intimé, par divers plaidoyers, et moyens d'exception que l'on peut résumer en peu de mots, savoir: que le dit Joseph Furois, Opposant en Cour Inférieure, Intimé actuel, aurait filé sa réclamation devant le Commissaire des Banqueroutes et fait son option d'être colloqué en la dite Cour des Banqueroutes, et par là donné extinction à son droit d'hypothèque.

L'Intimé, Opposant en Cour Inférieure, par ses répliques générales a nié cette prétention des requérants comme non fondée *en fait et en droit*, et après preuves offertes de part et d'autres, la Cour Inférieure a renvoyé la contestation et les exceptions des Appelants, requérants en Cour Inférieure, et maintenu unanimement l'Opposition du dit Joseph Furois, Intimé. C'est pour infirmer ce jugement que le présent Appel est porté devant ce tribunal.

L'Intimé, Opposant en Cour Inférieure, a prouvé les allégués de son Opposition, par les titres filés et par la preuve testimoniale constatant l'identité de l'immeuble hypothéqué à sa créance et de celui pour lequel les Appelants, requérants en Cour Inférieure, ont demandé une sentence de ratification. Sans admettre que les Appelants, requérants en Cour Inférieure, soient fondés en droit dans leurs moyens de contestation, nous prétendons qu'ils n'ont pas prouvé d'une manière suffisante et légale, les allégués de leurs *exceptions*.

Cette banqueroute de Simon Turgeon, et la vente de l'immeuble en question, ayant eu lieu en vertu des dispositions de l'Acte des Banqueroutes, 2e Victoria, chap. 36, il était nécessaire de prouver que l'Intimé, opposant en Cour Inférieure, avait fait remise de son hypothèque, qu'il avait fait son option dans la Cour des Banqueroutes et été mis en ordre parmi les créanciers hypothécaires du dit banqueroutier sur les deniers provenant de la vente du dit immeuble. Tout ce que l'on trouve dans la procédure à ce sujet, est une simple *attestation* sous serment, d'une somme due, sans réclamer aucuns priviléges ni hypothèque, ni demande d'être mis en ordre, comme créancier hypothécaire, ou autrement, tel qu'on peut le voir en lisant la dite attestation, à l'Appendice de ce Factum, sous la lettre (A.) ; d'ailleurs cette attestation ou réclamation ne parait pas avoir été approuvée par le commissaire, du moins elle ne le porte pas. Il n'appert pas qu'il y ait eu ensuite aucun rapport de distribution des deniers provenant de la vente du dit immeuble régulièrement fait ni homologué, et quoique la masse mobiliaire et immobiliaire de la faillite de Simon Turgeon, se soit montée à une somme considérable, il n'a pas été prouvé que Joseph Furois, l'Intimé, ait reçu en aucune manière, un seul denier. Les Appelants, requérants en Cour Inférieure, étaient tenus de prouver ces faits; mais ils ne les ont pas prouvés. Le contraire est prouvé. Vide Appendice B.

L'un des motifs du jugement rendu en Cour Inférieure, est que le syndic n'a pu seul, et sans une remise et abandon par les créanciers de leurs priviléges et hypothèque, vendre, les immeubles de la faillite du dit Simon Turgeon, et par conséquent il n'a pu transférer la propriété quitte et déchargée des droits et priviléges acquis aux créanciers hypothécaires sur les dits immeubles. La clause V, de l'acte 2e Victoria, chap. 36, établit de quelle manière les biens du banqueroutier peuvent être vendus, elle dit: « Et lorsqu'aucun créancier aura « une *hypothèque*, sur aucuns des biens immeubles du banqueroutier, « lors de la première publication de l'avis d'émanation du dit mandat, « ou aura aucuns priviléges sur icelui, pour garantie du paiement « d'une dette réclamée par lui, le bien meuble ou immeuble ainsi *hy-* « *pothèqué,* ou retenu par forme de garantie, *sera vendu, s'il l'exige,* « et le produit de la vente passé en payement de sa dette, et il sera « admis comme créancier pour le résidu, (si aucun il y a), et telle « vente sera faite en la manière que le commissaire l'ordonnera, et le « créancier et le syndic respectivement *passeront* tous titres et papiers « propres et nécessaires pour effectuer le transport de la propriété."

La clause VII. du même acte dit: « Les Syndics auront le pouvoir « de racheter toutes les hypothèques, obligations conditionelles, gages « ou garantie, relativement aux marchandises ou aux biens du ban- « queroutier, ou de les vendre, sujets à telle charge ou hypothèque."

La clause XIV. du même acte réserve les dettes privilégiées en ces termes: « Pourvu toujours que toutes dettes dues par le banquerou- « tier à Sa Majesté, ou à toutes personnes qui par les lois de cette pro- « vince, (non révoquées ou changées par cette ordonnance), ont ou « peuvent avoir droit à une priorité ou à une préférence, relativement « à ces dettes, sur les biens cédés comme susdit, jouiront du bénéfice « de cette priorité ou préférence, de la même manière qu'ils en au- « raient joui si cette ordonnance n'avait pas été passée?

La clause XXVIII, du même acte, réserve aussi tous les droits acquis à toutes personnes, lesquels seront jugés et déterminés en la même manière que si cette ordonnance n'avait jamais été passée.

Il est donc nécessaire que les créanciers hypothécaires, qui ont un privilége ou une hypothèque sur l'immeuble du banqueroutier, se joignent aux syndics pour effectuer la vente, ou fassent une rénonciation expresse à leur privilége ou hypothèque ; c'est ce qui n'a pas eu lieu.

L'hypothèque de l'Intimé, opposant en cour inférieure, droit réel, créée sur l'immeuble vendu, et droit acquis au dit Intimé par ses titres ne peut pas être anéantie par induction, et il n'y a aucune disposition positive dans l'ordonnance qui annulle le droit de l'Intimé et qui le prive de poursuivre son droit, en justice.

En supposant que l'Intimé se soit présenté à la cour des banqueroutes, était-il tenu par-là de laisser obtenir aux Appelants une sentence de ratification sans réclamer la conservation de son hypothèque sur l'immeuble. L'Intimé ne veut pas perdre son droit d'hypothèque, soit que le prix de vente soit distribué dans la cour des banqueroutes, soit qu'il soit distribué dans la Cour du Banc de la Reine. Le créancier chirographaire n'est pas lui-même privé de faire son opposition dans la demande d'une sentence de ratification.

La procédure ne montre aucune renonciation expresse de la part de

l'Intimé à son privilége et à son hypothèque, et on ne peut pas dire qu'il ait renoncé par implication à un droit acquis.

D'ailleurs les Appelants requérant une sentence de ratification, voyant le trouble qui leur est causé par l'opposition de l'Intimé, ne devaient-ils pas appeler leur vendeur et le faire intervenir dans la cause?

Il était libre à l'Intimé opposant en cour inférieure de faire son option, il l'a fait d'une manière formelle par son opposition.

Après avoir examiné l'état de cette cause, et considéré que les Appelants n'ont pas prouvé d'une manière légale et suffisante leurs moyens d'exception, qu'il n'y a jamais eu de renonciation de la part de l'Intimé à son privilége et à son hypothèque, que par la loi, l'Intimé pouvait et devait réclamer la conservation de son hypothèque qui n'est pas éteinte, qu'il avait droit de filer et soutenir son opposition afin de conserver dans la cour en laquelle les Appelants demandaient une sentence de ratification, la cour verra que le jugement rendu en cour inférieure est correct, et qu'il doit être confirmé avec dépens contre les Appelants

TESSIER ET FAUCHER.
Procureurs de l'Intimé.

Québec, 26 juin 1845.

PROVINCE DU CANADA,
DISTRICT DE QUEBEC. } *APPENDICE A.*

En la Paroisse de St. Michel, ce 20e jour de juin 1841.

Dans l'affaire de SIMON TURGEON, *Banqueroutier.*

JOSEPH FUROIS, de la dite Paroisse St. Michel, écuyer, capitaine de milice et cultivateur, étant assermenté et examiné le jour et l'an et au lieu ci-dessus mentionnés, dépose sous serment que Simon Turgeon, la personne contre les biens et effets de laquelle le warrant de Robert Hunter Gairdner, écuyer, Commissaire des Banqueroutes, est émané dans cette cause, était lors et avant la date de la première publication de l'avis d'émanation du dit warrant, et est encore justement et légitimement en dette envers lui, ce déposant, en la somme de deux cent quatre-vingt-quinze livres, argent du cour légal de cette province, balance de l'obligation consentie par le dit banqueroutier et Joseph Turgeon, en faveur du déposant, passée devant Mtre. Pouliot et son confrère, notaires à St. Michel, le six juillet mil huit cent quarante, et en outre la somme de dix livres six chelins et quatre pence pour frais d'une action intentée contre les dits Joseph Turgeon pour le recouvrement du dit capital pour laquelle dite somme de trois cent quatre-vingt-cinq livres six chelins et quatre pence, ou aucune partie d'icelle, ce déposant n'a reçu et aucune autre personne n'a à son usage ou à sa con-

naissaance ou croyance reçu aucune sûreté ou satisfaction quelconque, excepté la sûreté mentionnée au dit acte d'obligation.

(Signé) JOSEPH FUROIS.

Assermenté à St. Michel,
devant moi, ce 20 octobre 1841.

(Signé) FRS. FORTIER, J. P.

Certified to be a true copy.

Quebec, 13th September 1843.

R. H. GAIRDNER,
Com. of Bankpt.

BANC DU ROI,

No. 433.

Ex parte L. CHABOT et al.
REQUERANTS,

et

J. FUROIS,
APPELANT.

Pièces des Requérants.
No. 9.
Fyled, 29th September 1843,
P. & B.

B.

L'Hon. Robert Hunter Gairdner, écuyer, alors Commissaire des Banqueroutes, étant transquestionné sur sa déposition, déposa et dit:

" Le dit Joseph Furois, opposant en cette cause, n'a jusqu'à présent " été colloqué que sur les meubles provenant de la vente du mobilier " du dit Simon Turgeon, comme tous les autres créanciers *au marc la* " *livre*, laquelle collocation se monte à la somme de quarante livre " seize chelins un denier et demi courant, laquelle a été réservée par " moi, Commissaire des Banqueroutes, comme il appert par le rap- " port de distribution dont copie est filée en cette cause, lequel est en " date du vingt-deux Novembre, mil huit cent quarante-deux; mais " le dit Joseph Furois n'a pas encore reçu un seul sol provenant de la " vente des immeubles du dit Simon Turgeon. La raison pourquoi " le dit Joseph Furois ne peut pas toucher sa collocation, c'est qu'il " y a encore des deniers provenant de la vente des immeubles qui " n'ont pas été distribués, et qu'ainsi la balance pour laquelle il doit " être colloqué, au marc la livre, ne peut pas être établie."

NOTE.—Il est à peine nécessaire d'observer que la statut de la 7e Vic. chap. 10, qui a remplacé l'ord. de la 2e Vic. chap. 36, contient des dispositions qui donnent à la vente des biens des faillis, par le Syndic, tout l'effet d'une vente par le Shérif.

District of Montreal. } COURT OF APPEALS.

IN A CAUSE BETWEEN

CHARLES BLAKE RADENHURST,

Defendant in the Court below,

Appellant.

and

ANDREW MACFARLANE,

Plaintiff in the Court below,

Respondent.

A composition entered into between a Bankrupt and two-thirds of his creditors in number and value, who have proved their claims, although binding upon the remaining third of the proved creditors, is not binding upon a creditor, who has not proved his claim, or otherwise snbjected it to the Jurisdiction of the Bankrupt Court.

The importance of this cause, for the commercial community especially, has determined the Reporters to give at full length the respective pretensions of the parties.

CASE OF THE APPELLANT.

This appeal originates in an action instituted in the Court of Queen's Bench for the district of Montreal, by the Respondent against *the Appellant, for the recovery of the amount of certain promissory* notes.

To this action the Appellant pleaded several exceptions and the general issue.

The Appellant will not here give the contents of the exceptions, as he has determined upon printing at full length in the present case the opinion of the Chief Justice of Montreal, dissenting from the other two Justices who pronounced the judgment in favor of the Respondent; which opinion is preceded by a narrative of all the facts material to the issue.

It may be necessary, however, to say that the exceptions allège the bankruptcy of the Apellant, and that a composition was entered into between him and two thirds in number and value of his creditors, which composition is binding upon the Respondent, a non proving creditor, and offering *à deniers découverts*, the amount of composition, so agreed upon, to the Respondent.

The Appellant fyled all the papers necessary to establish the bankruptcy and the composition, two of which he will here inscribe: the first is, the composition agreed upon by two thirds in number and value of the creditors, before Notaries, and the supersedeas granted by the judge in Bankruptcy.

" On this day, the twenty-fourth of February, in the year of our Lord one thousand eight hundred and forty five, before us, the undersigned Public Notaries, &c.

" Personally came and appeared Charles Blake Radenhurst, of the " said city of Montreal, merchant, as well in his own name, as for and " on behalf of his firms of Radenhurst, Turnbull and company, of the " said city of Montreal, and Turnbull and Radenhurst, of London, " in England, merchants, composed of Hector Turnbull of London, " aforesaid, merchant, and him the said Charles Blake Radenhurst, " of the one part, and Tobin and Murison, Lemesurier, Routh and " company, Delisle, Janvier and Delisle, by their attornies, Lemesu- " rier Routh and company, Forsyth, Richardson and company, the " Bank of Upper Canada, stipulated for by Thomas Brown Ander- " son, Esquire, Stephen Phillips, stipulated for by the said Thomas " Brown Anderson, the Liverpool Borough Bank, stipulated for by " the said Thomas Brown Anderson, the Ayrshire Banking Compa- " ny, stipulated for by William Smith, John Carter and company, H. " Joseph and company, Scott, Tyre and company, A. Smith and " company, stipulated for by Alfred Philips, Andrew Easton, stipula- " ted for by the said Alfred Philips, Dean, Roger and company, stipu- " lated for by George Dempster, the City Bank, stipulated for by " Charles Henry Castle, cashier thereof, the late firm of Charles " Philips and company, stipulated for by Hutchins, Birss and compa- " ny, William Peddie and company, Dinning and Senior, the late " firm of R. F. Maitland and company, by Maitlands, Tylee and " company, Thomas Ripley, stipulated for by Robert Smith, Tylee, " H. W. Harris, stipulated for by Frederick Griffin, John G. Macken- " zie and company, Pigons and Wilkes, stipulated for by John G. " Mackenzie, the Bank of Montreal, stipulated for by the Honorable " Peter McGill, Bruce, Buxton and company, stipulated for by their " attorney, the said Honorable Peter McGill, Benjamin Gott and sons, " stipulated for by their attorney, the said Honorable Peter McGill, " Frothingham and Workman, Phillip Holland, stipulated for by " James Riddel, James Dougal and company, J. Leslie and company, " William Macintosh, Morrison, Dillon and company, stipulated for " by D. E. Papineau, Burt, Watson and Burt, stipulated for by John " Auld, James Schofield and son, stipulated for by their attorney, the " said Honorable Peter McGill, Edward Ingoldsby, stipulated for by the " said Honorable Peter McGill, Nicoll and Miller, and Nicoll and son, " stipulated for by their attorney, John Michael Tobin, creditors of " the said Charles Blake Radenhurst, Turnbull and company, and " Turnbull and Radenhurst of the other part, which said parties de- " clared unto us said Notaries:

" That whereas, on the thirteenth day of December last past, a " commission of bankruptcy, did in due form of law issue against " the said Charles Blake Radenhurst, Radenhurst, Turnbull and com- " pany, and Turnbull and Radenhurst, under the hand and seal of " William Badgley, Esq., one of the commissioners for bankrupts for " the District of Montreal, and circuit Judge of and for the District of " Montreal, under and by virtue of which said commission all the " real and personal estate of the said Charles Blake Radenhurst, Ra- " denhurst, Turnbull and company, and Turnbull and Radenhurst,

" was attached and seized by the sheriff of the said District of Mon-
" treal.

" And whereas the second general meeting of the creditors of the
" said bankrupts, was on the sixteenth day of January last past, held
" at the office of the said William Badgley, in the said city of Mon-
" treal, at which said second meeting, after those creditors of the said
" bankrupts who had not theretofore proved their debts at the first ge-
" neral meeting, had been allowed to prove their said debts against
" the said bankrupts, the said Charles Blake Radenhurst as well indi-
" vidually, as one of the firm of Radenhurst, Turnbull and company,
" and Turnbull and Radenhurst, duly underwent the examinations
" mentioned in the act relating to bankrupts, and particularly the ex-
" amination mentioned to the fortieth section thereof, and took and
" subscribed the oath required by law.

" And whereas, the aforesaid parties of the other part, being more
" than two thirds of the creditors of the said Charles Blake Raden-
" hurst, and of the said firm of Radenhurst, Turnbull and company,
" and Turnbull and Radenhurst, in number and value, who have pro-
" ved their debts at the first and second general meetings of the credi-
" tors of the said bankrupts, have agreed to compound with them the
" said bankrupts for the composition hereinafter mentioned, and on
" the sixteenth day of January last past, proposed by the said Charles
" Blake Radenhurst for himself, and on behalf of his said firms of
" Radenhurst, Turnbull and company, and Turnbull and Radenhurst,
" to the said creditors of the said bankrupts, a duplicate of which
" said proposition is hereunto annexed, in conformity with the provi-
" sions of the law, and to supersede the commission of bankruptcy
" so issued as aforesaid, so that the composition shall be binding upon
" all the creditors of them, the said Charles Blake Radenhurst,
" Radenhurst, Turnbull and company, and Turnbull and Raden-
" hurst.

" Now these presents witness that the said parties of the other part
" as well as those stipulating for themselves and their respective firms,
" as those represented by their attornies duly authorised to the effect
" of these presents, have agreed, and do hereby agree to accept from
" the said Charles Blake Radenhurst, and his said firms of Raden-
" hurst, Turnbull and company, and Turnbull and Radenhurst, a
" composition of one shilling and three pence in the pound, upon the
" amount of their respective claims, without interest, as well on those
" of the said claims which are made up in accordance with the ac-
" counts already furnished, and which have been admitted by the
" said creditors, as the same appear by the schedule hereunto annex-
" ed, marked with the letter A, and identified by the signatures of the
" said parties hereto, and us said Notaries, as on those of the claims
" which shall have been legally proved under the said commission
" concurrently with those of the said parties who appear creditors by
" the said schedule, and to the amounts therein mentioned, for which
" said instalments of one shilling and three pence in the pound, the
" said Charles Blake Radenhurst, hath in his behalf and for and on
" behalf of his said firms, given and granted to each and every his
" said creditors, parties hereto, in proportion to the amount of their
" respective debts, his certain promisory note without interest, signed
" Charles Blake Radenhurst, for the amount of their composition, at

" the rate herebefore mentioned, bearing date the said sixteenth day
" of January last past, and payable six months after date, to the or-
" der of and endorsed by Messrs. Tobin and Murison, of the said
" city of Montreal, merchants, receipt whereof is hereby respective-
" ly acknowledged, which several notes, when paid, shall be in full
" acquittal and discharge of their respective amounts, without in-
" terest.

" And they and each of them the said several parties of the other
" part have agreed and hereby do agree to supersede and declare null
" the said commission of bankruptcy, and to consider the said com-
" position of one shilling and three pence in the pound, in full pay-
" ment, satisfaction and discharge of the debts of the said Charles
" Blake Radenhurst, and his said firms of Radenhurst, Turnbull and
" company, and Turnbull and Radenhurst, and each of them the said
" parties of the other part, for themselves, and their respective firms
" and constituents, hereby and forever hold the said Charles Blake
" Radenhurst, and his said firms of Radenhurst, Turnbull and com-
" pany, and Turnbull and Radenhurst, released and discharged from
" the said claims and demands, so set forth in the said schedule "A,"
" and by the said parties of the other part proved before the said bank-
" rupt commissioner as aforesaid, it being the intention of the said
" parties of the other part, that this composition shall be binding upon
" all the creditors of the said Charles Blake Radenhurst, and his said
" firms of Radenhurst, Turnbull and company, and Turnbull and Ra-
" denhurst, and the said commission of bankruptcy superseded.

" Done and passed," &c.

Here follow the signatures of all the parties to the Deed.

PROVINCE OF CANADA, }
DISTRICT OF MONTREAL. } IN BANKRUPTCY.

IN THE MATTER OF CHARLES B. RADENHURST.

Bankrupt.

I, whose name is hereunto subscribed, being the commissioner of bankrupts, and a Circuit Judge for the said District of Montreal, acting in prosecution of the commission of bankruptcy awarded and issued against *Charles Blake Radenhurst*, of the city of Montreal, in the said District, trader and merchant, as well in his own name as a co-partner with *Hector Turnbull*, of the city of London, in that part of Great Britain called England, trading together as such co-partners, in the said city of Montreal, under the name and firm of *Radenhurst, Turnbull & Company*, and in London aforesaid, under the name and firm of *Turnbull & Radenhurst, Do hereby certify*, that I, the said commissioner and circuit Judge, having put the said commission into execution did on the thirteenth day of December last, find that the said Charles B. Radenhurst, as well individually as such co-partner, did, before the date and suing forth of the said commission, become bankrupt within the true intent and meaning of the statute, made and now in force concerning bankrupts. And I did therefore adjudge and declare him, individually and as such co-partner, a bankrupt accord-

ingly; and I do further certify, that the said Charles Blake Radenhurst, on the sixteenth day of January last, passed his last examination, and that at a meeting of the creditors of the said Charles Blake Radenhurst, individually and as such co-partners, who had proved debts under the said commission, held at the office of the undersigned at the said city of Montreal, on this twenty-fourth day of February, instant, whereof, and of the purport whereof, due notice had been given; two thirds in number of the creditors of the said bankrupt, who had proved debts respectively, being also two-thirds in value of the said creditors who had proved debts under the said commission, agreed to accept the sum of *one shilling and three pence currency*, in the *pound*, upon their respective debts, payable by his note, endorsed by *Messrs. Tobin and Murison. And whereas* I have ascertained that the requisites of the said statute in force concerning bankrupts, have been duly performed, previous to the holding of the said last meeting in regard to the offer of such composition, and such acceptance thereof by the creditors in manner aforesaid, and that all the creditors who have proved debts under the said commission, are eighteen in number, and that they now assent to such composition, and that their debts amount to the sum of *Twenty-three thousand seven hundred and sixty-seven pounds, six shillings and eleven pence, current money aforesaid.* And whereas, the said Charles Blake Radenhurst, hath by his petition prayed that the said commission may be rescinded and annulled, and that all proceedings thereunder may cease and determine, I the undersigned, said commissioner and circuit Judge, acting in prosecution of the said commission, do adjudge and order that the said commission be rescinded and annulled, and all proceedings thereunder do cease and determine from the date hereof, and that all the estate and effects of the bankrupt in the custody and possession of the assignee duly appointed to his estate, be delivered over and given up to the said Charles Blake Radenhurst.

[L. S.]

In witness whereof, I have hereunto set my hand and seal, at the city of Montreal, this twenty-fourth day of February, one thousand eight hundred and forty-five—(in duplicate).

(Signed,

W. BADGLEY,

Commissioner and Circuit Judge.

The creditors forming an overwhelming majority, and consisting of the most respectable influential merchants, agreed to receive from the bankrupt, a composition of one shilling and three pence in the pound, (he having paid them before the issuing of the commission of bankruptcy, ten shillings in the pound,) which composition was legalized and made binding upon all other creditors, by the supersedeas in due form issued.

And the question at issue may be said to be, whether such composition is binding upon a non-proving creditor, or whether the same shall be declared inoperative and of no effect with regard to such non proving creditor or creditors.

The Appellant is of opinion that the respondent cannot by negligence or wilfully as in the present instance, set an important portion of the statute at nought, which he would be doing, if his pretensions were maintained. And that by his wilful absence from the meeting of creditors, he cannot place himself in a more favorable position than if present. The law contemplating in the passing of that statute, that all the creditors of the bankrupt, should prove their debts, and be subject to the provisions therein contained. The Respondent in this cause, could not have prevented by his absence the certificate of discharge, if given from operating against his present claim, and the power given the statute, to supersede the commission of bankruptcy, cannot be rendered illusory, and of no service, by a claimant who remains in ambush, to demand and obtain twenty shillings in the pound, with interest, costs, damages, &c., when every other creditor has accepted a composition of one shilling and three pence.

The Appellant is not desirous of extending the present case, as he believes that the following opinion transcribed literally as pronounced, contains all the facts of the case, and arguments more pertinent and convincing, than the undersigned could offer.

No. 1746. ANDREW MACFARLANE, *and* CHS. B. RADENHURST & HECTOR TURNBULL.	I. MERITS. *Action for* £1484 1s. 6d.

The Plaintiff and one Archbald Macfarlane, were co-partners in trade and commerce, at Montreal, from 1st May 1837, until 15th December 1843, under the firm of A. & A. Macfarlane, on which day the partnership was dissolved, and since that time, the plaintiff hath been a merchant, and at all the times and periods hereinafter mentioned, the defendants were merchants and co-partners.

Defendants made their bill of exchange, at Montreal, in three parts, on the 27th of August 1842, directed to Messrs. Turnbull and Radenhurst, London, payable 90 days after sight, to the order of the Messrs. A. & A. Macfarlane, for £1,000 sterling, value received, for which bill the defendants received from the said A. & A. Macfarlane, £1,204 10s. currency, being at the rate of 8½ per cent, premium, the current rate of exchange.

Presented for acceptance, 15th September 1842, and accepted, payable at Glyn & Co., bankers, London.

Presented for payment, 17th December 1842, and payment refused, and protested for non-payment. Notice-costs 21/6 for protesting.

Other Bill of Exchange of the Defendants, made by the Defendants, on the 27th August, 1842, directed to the said Turnbull and Radenhurst, payable 90 days after sight, for £400 sterling, value received, for which last Bill the Defendants then and there received from the said A. & A. Macfarlane, £481 16s., being at the rate of 8½ per cent, premium.

Presented 15th September, 1842, and accepted.

Protested for non-payment, 17th December, 1842. Costs of Protest, 14s. 6d., sterling.

Other Bill of Exchange made by defendants, 29th August, 1842, directed to the said Turnbull and Radenhurst, payable 90 days after sight, payable to the order of the Plaintiff, for £100 sterling, for which said last Bill the Defendants received from the said A. & A. Macfarlane, £120 5s., being at the rate of 8½ per cent, premium.

Presented and accepted, 15th September, 1842. Protest for non-payment, 17th December, 1842. Costs of Protest, 17s.

Sum total, including 10s. per cent damages, interest, costs of noticing and postages, £2,274 7s. 3d.

Paid on account, £1,233 5s. 4d., making with interest £1,367 10s. 2d.—Balance due to A. & A. Macfarlane of £960 17s. 1d., due the Plaintiffs by the Defendants, jointly and severally, with interest from this day, 1st May 1845.

That, by act passed before Gibb and colleague, notaries, 30 Decr., 1843, between the Plaintiff and his late partner, Archibald Macfarlane, their partnership was dissolved from and after the 15th of same month, and all the real estate and property, and all debts and sums of money, notes, bills, and all other credits due or payable to the Copartnership, and all goods, &c., composing the Stock in Trade, should belong exclusively to the Plaintiff, Andrew Macfarlane, with a Power of Attorney, from Archibald to Andrew Macfarlane, in the name of the late Copartnership, or of either of them, jointly or separately, or otherwise, to ask, demand, sue and recover.

Defendants, on 30th August, 1842, made their Promissory Note, and thereby, on the 31st December, 1842, promised to pay to the order of Andrew Shaw, £408 17s. 3d., value received, indorsed before payment and delivered by said Shaw to the Plaintiff.

Presented for payment 5th January, 1843. Failure of payment. Protest. Cost of Protest, 10s.

Defendants paid on account of said Note, £269 17s. 10d. Balance due, £163 19s., currency, with interest from 1st January, 1844.

Other Promissory Note made by Defendants on 30th August, 1842, payable 27th December, 1842, to the order of Andrew Shaw, esquire, for £405 3s. 8d. currency, value received, indorsed by Andrew Shaw before payment to the Plaintiff.

Presented for payment 31st December, 1842. Payment refused. Protested for non-payment. Costs of Protest, 10s. Paid by Defendants on account, £161 12s. 5d. Balance due, £243 11s. 3d. with interest from 24th January, 1843.

Other Promissory Note 30th August, 1842, by Defendants, to order of Andrew Shaw, for £425 13s. currency, value received, payable 3rd January, 1843, indorsed by Andrew Shaw to the Plaintiff.

Presented for payment 7th January, 1843. Non-payment. Protest, 10s.

Defendants paid on account £269 17s. 10d. Balance due, £169 14s. 2d., with interest from 20th July, 1843.

The whole of the aforesaid moneys so due, form united £1,484 1s. 6d., with interest as aforesaid.

On the 1st May, 1845, the Defendants were jointly and severally indebted to the Plaintiff in £2,000, for the price and value of goods sold, and for money paid by Plaintiff for the Defendants, and for interest and for money found to be due by the Defendants, jointly and se-

verally to the Plaintiffs on an account stated. Promise to pay jointly and severally to the Plaintiff, £2,000.

Service of Summons of Declaration on the Defendant, Charles B. Radenhurst. *No return of Bailiff as to the other Defendant, Hector Turnbull.*

Appearance for Radenhurst.—*Turnbull did not appear.*—Declaration of Plaintiff, that he does not intend to proceed in this cause against Hector Turnbull.—Radenhurst pleads.—Proceedings in Bankruptcy against him on his own Petition, as well in his own name as a Copartner with Hector Turnbull, trading together in Montreal, under the firm of Radenhurst, Turnbull & Co., and in London under the firm of Turnbull and Radenhurst. Commission of Bankruptcy issued 13th December, 1844. Notice given by the Sheriff duly published. Commission returned 27th December, 1844.

Assignee appointed on the same day by Mr. Badgley, a Circuit Judge, viz: John M. Tobin, Merchant.

On the 16th January, 1845, a *second meeting* of the Creditors of Mr. Radenhurst was, in due form of Law, and after due and legal notice, held and convened before Hyp. Guy, Esq., one of the Circuit Judges, at which second meeting the final oath, as required by the Statute, was taken by the said Defendant, Radenhurst, and filed of Record.

Mr. Radenhurst made an offer of composition to his Creditors at the said second meeting, of one shilling and three pence in the pound, payable as stated, and a special meeting was then and there ordered to be held, for the consideration and *acceptance* of the same.

That on the 16th January aforesaid, 1845, and after due and legal notice, on the 24th of February same year, a special meeting was held in due form of Law, for the consideration and acceptance of the said composition, before Mr. Badgley, at which special meeting were *present two-thirds* in number and value of the proved Creditors, who then and there signified their acceptance of the said composition.

On the said 24th February, in a certain Deed of Composition or Act of *Supersedeas* executed on that day by and between Chs. Blake Radenhurst, as well in his own name, as for and on behalf of his firm of Radenhurst, Turnbull & Co., and Turnbull and Radenhurst of the one part, and Tobin and Murison, and other Creditors of the other part, it was declared that on the 13th December, 1844, a Commission of Bankruptcy did in due course of Law issue against the said Chs. Blake Radenhurst, &c., and had been executed by the Sheriff.

The act proceeds to state the second meeting of Creditors on the 16th January, 1845, at which those Creditors who had not proved their debts at the first general meeting, had been allowed to prove their debts against the said Chs. Blake Radenhurst, and he duly underwent the examination mentioned in the act relating to Bankrupts, and particularly in the 40th section thereof, and took and subscribed the oath required by Law, and that—

Whereas the aforesaid parties of the *other* part, being more than two-thirds of the Creditors.... in number and value, who have proved their debts at the first and second general meeting, have agreed to *compound* with them, to wit: with the said Chs. Blake Radenhurst, and to supersede the Commission of Bankruptcy.

The Defendant Radenhurst further saith, that by the said Deed of Composition and Act of Supersedeas, the said parties of the *other* part, did thereby agree to accept from the said Chs. Blake Radenhurst and his said firm, a composition of one shilling and three pence in the pound, without interest. Promissory Notes to that amount given by Radenhurst, payable in six months, indorsed by Tobin and Murison. That the said several parties to the said act did thereby agree to supersede and declare null the said Commission of Bankruptcy, and 1s. 3d. in the pound shall be considered as full payment and satisfaction.

Supersedeas issued 24th February, 1845, by Mr. Badgley, certifying that M. Radenhurst did become Bankrupt and was adjudged such; that he passed his last examination on the 16th January, 1845, and that on the 24th February, 1845, the Creditors who had proved their debts, being two-thirds in number and value, agreed to accept 1s. 3d. in the pound, payable in Radenhurst's Notes, indorsed by Messrs. Tobin and Murison, and further declaring that whereas he had ascertained that the requisites of the said Statute concerning Bankrupts have been duly performed previous to the said last meeting, in regard to the said offer of composition and to the acceptance thereof, the Creditors who have proved debts under the said Commission are 18 in number, they now assent to such composition, and their debts amount to £23,767 6s. 11d. and that the said Commission was rescinded and annulled, and the Estate and effects of the Bankrupt to be given up to him.

Plaintiff's Action accrued before the said Defendant became Bankrupt.

Further exception—That on the 13th December, 1844, a Commission of Bankruptcy was issued under the authority of Mr. Commissioner Badgley, against the said Radenhurst, one of the Defendants, *as well in his own name as a Co-partner* with Hector Turnbull. And that in the prosecution of that Commission, the said Wm. Badgley found and determined that the said Radenhurst, *as well individually as such Co-partner*, did before the suing forth of the said Commission, become Bankrupt within the true intent and meaning of the Statute concerning Bankrupts; and the said Wm. Badgley did then and there adjudge and declare the said Defendant Radenhurst a Bankrupt accordingly.

That on the 16 January last past the said Radenhurst passed *his last Examination according to Law.*

At a meeting of the Creditors, lawfully held at the office of Mr. Badgley, on the 24th February last, and whereof due notice had been given, two-thirds in number and value of the Creditors of the said Bankrupt did accept of 1s. 3d. in the pound, payable in notes of the Bankrupt, indorsed by Messrs. Tobin and Murison.

The requisites of the Statute concerning Bankrupts were in all things duly observed, and the said Creditors, two-thirds in value, agreed to compound as aforesaid, and did accept the composing aforesaid.

That the said acceptance of the said composition by the said Creditors, two-thirds in number and in value, is valid and effectual upon the remaining one-third of the Creditors, and the same has the effect of superseding the Commission of Bankruptcy.

Plaintiff's Action accrued before the said Defendant became a Bankrupt.

Further Exception—The Plaintiff's cause of Action accrued before Radenhurst became a Bankrupt, and that he hath obtained from the

Commissioner of Bankrupts and one of the Circuit Judges, duly authorized to grant the same, a Certificate of Supersedeas fyled, which said Supersedeas and the matters and things incident thereto preclude the said Plaintiff from succeeding in this action.

Further Exception—That on the 24th January, 1845, Act of Composition and Supersedeas between the Defendant Radenhurst as well in his own name as for and on behalf of his firms of Radenhurst, Turnbull & Co., of Montreal, and Turnbull and Radenhurst of London, of *the one part*, and Tobin and Murison, (and others therein named,) Creditors of the said Radenhurst, Turnbull & Co., and Turnbull and Radenhurst of the other part; stating the Commission of Bankruptcy, and that in virtue thereof, all the *Real and Personal Estate* of said Radenhurst, Turnbull & Co., and Turnbull and Radenhurst, was attached by the Sheriff.

And that at the second general meeting of the creditors of the *said Bankrupt*, on the 16th of January, 1845, after those creditors of the said *Bankrupt* who had not theretofore proved their debts had been allowed to prove their said debts, the Defendant Radenhurst underwent the examination mentioned in the Act relating to Bankrupts, particularly in the 40th section, and took and subscribed the oath required.

The said parties did further declare that the parties of the *other* part being more than two-thirds of the creditors, in number and value, who have proved their debts at the first and second general meetings, have agreed to compound for the composition hereafter, &c. And on the 16th January, 1845, proposal by Radenhurst, for himself and on behalf of said firms. Copy of said proposal annexed, and to supersede the Commission of Bankruptcy, so that the composition should be binding upon all the creditors.

And that the said parties of the *other* part did agree to accept a composition of one shilling and three pence in the pound, without interest, Radenhurst to give his note for said composition payable in 6 months, indorsed by Tobin and Murison, in full acquittal.

That the several parties did agree by said act to supersede the Commission of bankruptcy, and to consider the said composition of 1s. 3d. per pound, a full payment and satisfaction, release and discharge, composition to be binding on all the creditors, and that the said commission of bankruptcy be superseded.

Supersedeas by M. justice Badgley, 24th February 1845, to Radenhurst, as well in his own name as a co-partner with Turnbull, (*in said two firms*) adjudging Radenhurst a bankrupt; certifying that Radenhurst, on the 16th January, 1845, passed his last examination, and that at a meeting of the creditors who had proved their debts, two-thirds in number of the creditors and two-thirds in value agreed to accept 1s. 3d. in the pound, payable by the bankrupt's note, indorsed by Messrs. Tobin and Murison. Creditors accepting the composition, 18 in number, in amount £23,767 6s. 11d. Commission rescinded, and all the property and estate of the bankrupt to be given up to him.

Offer and tender of 1s. 3d. in the pound, and deposits of £81 2s. 3d.

Défense au fait,—Denial of Plaintiff's facts.

General answer and replication,—The Plaintiffs facts are admitted on the Record.

The Defendant has proved his facts, and the only question seems to be—Is the Defendant *liberated against all his creditors* by his composition with two-thirds in number and amount of his creditors who have proved under the commission.

The statute, 7 Vict. chap. 10, is certainly remedial and as such ought to receive a liberal construction. It was made *for the relief of such traders as shall, without any fraud or gross misconduct have become unable to pay all their debts in full.*

This intention is fully realized when the proceedings result in a certificate which, according to the 59th clause of the statute, discharges the bankrupt from all debts due by him at the date of the commission and from all claims and demands made proveable under the commission,—see 64th clause.

But, says the plaintiff, the effect of the 41st clause is not by any means so extensive. It does no more than enact, that if two-thirds of the creditors in number and value and who have proved their debts agree to compound with the bankrupt, such agreement should be valid and effectual, according to the tenor thereof, and equally binding *upon the remaining third* of the creditors aforesaid, namely *who have proved their debts*, and such is certainly the letter, and if that interpretation prevails, the whole clause may as well be cast off as nonsense and the letter will have performed its office of killing, as nothing could be more useless or absolutely dead than this clause so understood. But as every reasonable effort ought to be made so to expound the law, that it shall be living and effective, we must try to explain the clause in question, *magis ut valeat quam ut pereat* and

1st. It is observable that according to the concluding words of this clause, the composition *shall have* the effect of *superseding the commission of bankruptcy*, whence it is reasonable to infer that it affects all the creditors whose debts would have been affected by the further proceedings and certificate of discharge, otherwise the commission would be left open for such creditors as had not appeared or proved at the time of composition being accepted.

2nd. The object of the law, as expressed in its preambule, being the "*relief of such traders as shall, without any fraud, or gross misconduct, have become unable to pay all their debts in full,*" and the composition contemplated in the 41st clause having the effect of superseding the commission, it is evident that unless the composition be as binding on all the creditors as would be the certificate itself, the unfortunate debtor still remains liable towards his non-appearing creditors, and the principal end of the commission will be frustrated, as will be also the professed object of the law.

3rd. All the creditors of the bankrupt, the present plaintiff included, having been duly notified and called to appear before the Bankrupt Court, must be considered in the same light as ordinary defendants who, having been duly summoned and making default, are bound by the proceedings in the cause, and upon this principal, the plaintiff in the cause is evidently bound by the proceedings in bankruptcy, to which, as he was regularly summoned, he was virtually a party.

4th. I think the statute makes the composition binding on the creditors; but if their should remain any doubt on this head under the statute, the 75th clause refers us to the laws of Lower Canada, as the

rule of decision, and without referring to the *Ordonnance de Commerce* of 1673, which is of doubtful authority in this country, we may safely rely on the olden law of France in force in Lower Canada as establishing the rule, that where several persons are interested in the result of a deliberation, they must all be called to assemble for that purpose. *Ita demum factis hujusmodi creditoribus obset si conveniant in unum et communi consensu declararent quota parte debiti contenti sint. Si vero dissentiant tue Prætoris partis necessariæ sunt qui de creto suo sequntur majoris partis voluntatem.* D. 2, 14, 78, cited 2, Bornier, 676.

" Ceux qui refusent de signer, says Bornier, 677, peuvent y être contraints comme il faut juger par arrêt du 29 Juillet 1578 et divers autres arrêts.

Says Passans arrêts, 599, tome, on a maintenant recours aux attermoyemens, la Cour voyant quelques rigueurs de créanciers a coutume a donner terme aux débiteurs de bonne foi. Elles attermoye aussi les pauvres et les élargit voire *modèrs l'obligation.*

Que s'il y a plusieurs créanciers, d'un detteur, la dite Cour a souvent contraint le moindre nombre des créanciers sous signer au plus grand et des plus grande somme pour attermoyer le detteur.

Même à l'égard d'un Forain, s'il y a consentement avec les autres, pour tel bénéfice de remise, le moindre nombre est contraint c'y entrer.

Such being the spirit of our common law, taken from the civil laws of Rome, I think it my duty to be guided by that spirit in the interpretation of a statute enacted on the same subject, and I therefore say that the composition, like the certificate of discharge, is effectual and binding on all the creditors of the debtor who has obtained it, conformably to the statute, and therefore would adjudge that the plaintiff have judgment for the sum of £81 2s. 3d. and that his action is barred and must be dismissed as to the rest and residue of his demands. The defendant to pay costs up to his tender of the said sum of £81 2s. 3d. and all subsequent costs to be paid by the plaintiff. Considering that the act of composition between the defendant and his creditors therein named is effectual and binding against all the creditors of the said defendant, inasmuch as all the said creditors, the plaintiff included, were duly and legally notified and required to be present at the proceedings, whereof the said composition was a part—and considering that the said act of composition reduces the plaintiff's claim and action against the defendant to the sum of £81 2s. 3d. being at the rate of 1s. 3d. in the pound.

Notwithstanding this opinion of the Chief Justice of Montreal, the said Court below, rendered the following judgment:

" The Court having heard the said plaintiff, and the said defendant,
" Charles B. Radenhurst, by their counsel on the merits of this
" cause, having examined the proceedings and evidence of record,
" seen the admissions given and fyled by the said defendant, Charles
" B. Radenhurst, and having upon the whole duly deliberated, consi-
" dering that it does not appear that two-thirds in number and value
" of the creditors of the said defendant have compounded or agreed
" to compound with the said defendant, and that by reason there-

" of the agreement or deed of composition by him produced and fy-
" led in this cause is not valid or effectual to bind the said plaintiff,
" who has not proved his debt under the commission of bankruptcy,
" and that the consent of the two-thirds of the creditors who have
" proved their debts before the Judge and Commissioner to the said
" agreement and composition is insufficient, as a bar to the plaintiff's
" action, doth dismiss the exceptions by the said defendant, Charles
" B. Radenhurst, pleaded, and adjudge him, the said defendant,
" Charles B. Radenhurst, to pay and satisfy to the said plaintiff, the
" sum of One thousand four hundred and eighty-four pounds, one
" shilling and six pence, current money of the Province of Canada,"
due for the causes, and with interest and costs mentioned in the said Judgment.

The propositions which the counsel for the Respondent MM. Meridith and Bethune, endeavored to maintain in the Court below, were: 1stly. That the Bankrupt Law of Canada does not contemplate a compotion until all the creditors have proved. The composition is to take place at the second meeting, when, to use the words of the statute, " the creditors who may not have proved their debts at the first gene-" ral meeting have been allowed to prove, *and have proved the same.*" When this has been done, it is plain that all the creditors will have proved, and it is then, and then only, according to the wording of the law, that a composition can take place.

Secondly: That if a bankrupt think fit to compound before all his creditors have proved, the composition, as has been decided in England, ought not to be held to extend to the creditors who have not proved. The words " two-thirds of the creditors, in number and value," in the 41st section of the Bankrupt Act,* must, it is submitted, be taken in connexion with the preceding words in the same section, and therefore mean two-thirds of the creditors, who proved at the first meeting, and of the creditors who not having proved at the first meeting, have been allowed to prove, and have proved at the second meeting: " *remaining third of the creditors aforesaid,*" must, it is submitted, be the remaining third of the same description of creditors, and therefore does not include a creditor who did not prove at the first or second meeting, or at any other meeting. The words " remaining third of the creditors aforesaid," shew that the creditors who can bind, and the creditors liable to be bound are parts of the same whole; and as a creditor cannot bind others without proving, he cannot himself be bound unless he have proved.

Thirdly: That should it be held that the words " two-thirds of the creditors in number and value" mean two-thirds of all the creditors

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* 7, Vict. chap. 5, 41st sect.—" And be it enacted that if at such second
" general meeting of the said creditors, and after the creditors who may not have
" proved their debts at the first general meeting have been allowed to prove, and
" have proved the same, and the bankrupt has taken and subscribed the oath herein
" before prescribed, and submitted to such examination as aforesaid, two-thirds of
" the creditors in number and value agree to compound with the said bankrupt,
" such agreement shall be valid and effectual to all intents and purposes, according
" to the tenor thereof, and equally binding upon the remaining third of the credi-
" tors aforesaid, and shall have the effect of superseding the said commission of
" bankruptcy, from the date of such agreement, and the jurisdiction of the said Judge
" or Commissioner over the estate and effects of the said bankrupt, shall thence-
" forth cease and determine."

including the unproved creditors, then the supersedeas is bad, because it says merely that two-thirds of the *proved creditors* have compounded, but does not show nor purport to show, that two-thirds of all the creditors, including those whose claims were not proved, had agreed to compound.

The Respondent furthermore contended, that even if the Appellant had the power to compound, he has not done so according to law, and that the composition must be held inoperative as regards all the creditors who did not become parties to it.

Firstly: Because the composition was not as the law requires, entered into "at the second general meeting of the creditors," which took place on the 16th of January, but on a subsequent occasion namely on the 24th of February 1845.

Secondly: Because the composition ought to have been by an act made under the sanction of the Court, and the security should have been made as available to the creditors absent as to those present; whereas the agreement was as to form a mere notarial act, and the security was not extended, nor intended to be extended, to creditors not parties to the act.

Thirdly: And chiefly, because the offer to compound on condition of a discharge is not confined to the bankrupt who made it, but extended to M. Hector Turnbull his partner, and was made on condition of a discharge being granted to him, although he was not under or even within the jurisdiction of the Bankrupt Court.

In the Court of Appeals, the position taken by the Respondent as well as the Judgment of the Court below, were held good, and in accordance with the true spirit of the Bankrupt Act.

The honorables Justices Panet, and Bedard dissented from the majority of the Court of Appeals on the principal that all the creditors of the Appellant had received due noticè of the proceedings in bankruptcy; that two-thirds of the apparent creditors had agreed to the composition, and that the remainder who had not proved were bound by the said composition, according to the French law; and by that law they were disposed to interpret the working of the Provincial Act.

COURT OF APPEALS,—MONTREAL.

TUESDAY, 10th MARCH, 1846.

PRESENT:

The Honorable Sir JAMES STUART, Baronet, Chief Justice of Lower Canada, President.

Mr. Justice BOWEN,
" PANET,
" BEDARD,
" GAIRDNER,

The Court of Appeals of our Lady the Queen now here having seen and examined as well the Record and Proceedings in this cause,

and the Judgment therein given in the Court below, from which present Appeal hath been instituted, as the matters by the said Charles Blake Radenhurst, the Appellant for error and reasons of appeal assigned, and the same being fully understood, and having heard the parties by their counsel respectively; and mature deliberation, on the whole being had, considering that the causes of action of the said Andrew Macfarlane the Respondent, in his declaration in this cause in the Court below set forth, were in the said Court, fully proved, and established, as appear in this cause of record.

And considering also' that the said Respondent at the time of the making of the deed of composition, whereof mention is made in the Plea of Peremptory Exceptions of the said appellant in this cause in the Court below, made and fyled, was not among the number of the creditors of the said appellant, who had been allowed to prove, and had proved their debts under the Commission of Bankrupt in the said Plea of Peremptory Exception mentioned, and that the deed of composition in the said Plea of Peremptory Exception pleaded in bar of the action of the said Respondent, was not therefore binding on the said Respondent, and that the said Plea of Peremptory Exception contains no legal bar to the said action of the said Respondent. It is by the said Court now here adjudged, (two of the members of the said Court now here, namely: the honorables Philippe Panet and Elzéar Bedard, Esquires, severally dissenting, that the said Judgment of the Court below, now appealed from, namely the Judgment of Her Majesty's Court of Queen's Bench, for the District of Montreal, in this cause rendered on the 29th September 1845, be, and the same is hereby in all things affirmed, with costs to the said Respondent, against the said Appellant. And it is by the said Court, now here ordered, that the Record in this cause be remitted to the said Court of Queen's Bench, for the District of Montreal.

Certified,

STEWART SCOTT,

C. C. R.

MONTRÉAL—BANC DU ROI.

FÉVRIER, 1832.

No. 219.

TOUSSAINT PRÉVOST, ET UX. *Demands.*

vs.

NOEL BREUX, *Défend.*

Le Demandeur avait épousé la fille du Défendeur, laquelle était mineure, lorsque cette action fut intentée. Cette demande avait pour objet le recouvrement des droits mobiliers de la Demanderesse dans la succession de sa mère. Le dit Noël Breux, dans une Exception Péremtoire, prétendit que l'action ne pouvait être maintenue, parceque la Demanderesse étant encore mineure, ne pouvait, quoiqu'émancipée par mariage, poursuivre cette action sans être assistée d'un *tuteur ad hoc.*

Les Demandeurs répondirent à cette Exception en soutenant que cette action étant purement mobilière, il n'était pas nécessaire que la Demanderesse, étant émancipée légalement par son mariage, fut assistée d'un *tuteur ad hoc :* Que la loi n'obligeait une femme mineure mariée, de se faire assister d'un *tuteur ad hoc,* que lorsqu'il s'agissait de l'aliénation de ses immeubles. Que les Demandeurs étant en communauté de biens, et la somme réclamée par l'action tombant dans cette communauté, le mari seul pouvait intenter cette demande, comme étant le chef de la communauté et *le seigneur des actions mobiliaires qui procèdent du côté de sa femme,* suivant l'article 233 de la coutume de Paris.

Le Défendeur répliquait, que dans le cas actuel, il s'agissait d'une universalité de meubles qui devait être considérée comme un immeuble. Cependant la Cour du Banc du Roi de Montréal, par son Jugement du 17 Février 1832, débouta l'exception du dit N. Breux.

MONTRÉAL—BANC DU ROI.

OCTOBRE, 1838.

No. 619 et 1404.

H. ROBERTSON, et Al. *Demandeurs.*

vs.

AUGUSTIN PERRIN, *Défendeur.*

et

FRANÇOIS PERRIN, Tuteur, *Oppt.*

L'immeuble du Défendeur avait été saisi à la poursuite des Demendeurs. Il était affecté au douaire coutumier non encore ouvert en faveur des enfans nés du mariage du Défendeur avec feue Clémence Racicot.

François Perrin, comme Tuteur des enfans, forma opposition afin de charge du droit douaire coutumier.

L'opposition ne fut pas contestée. Mais par Jugement du 19 Octobre 1838, la Cour du Banc du Roi de Montréal, la débouta, sur le principe que le douaire n'était pas encore ouvert.

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