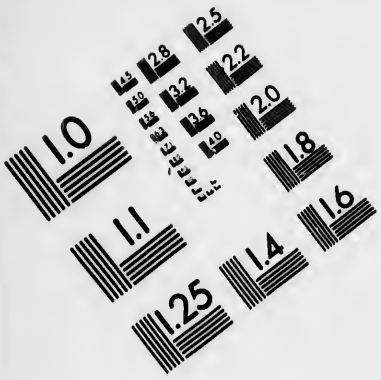

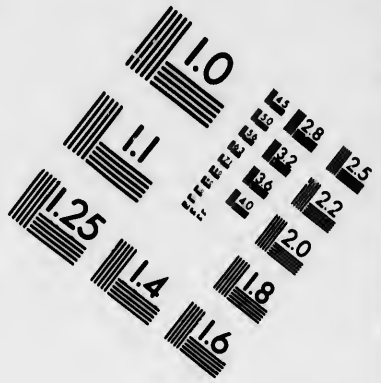

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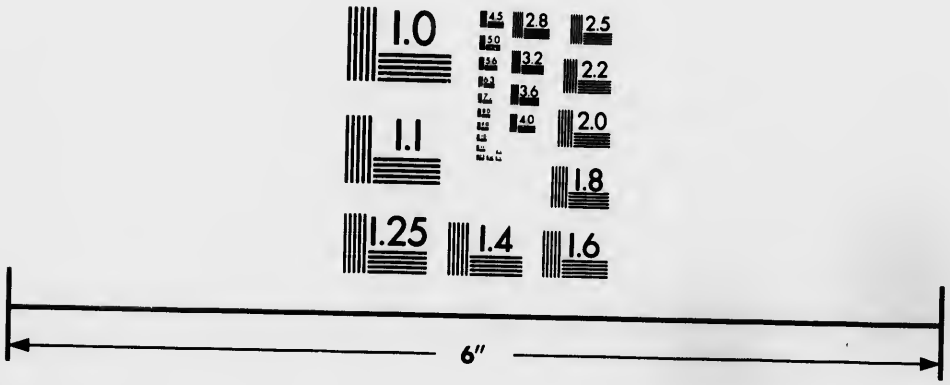

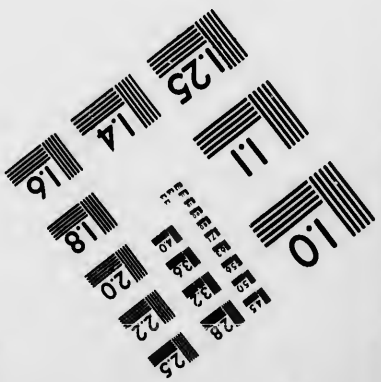

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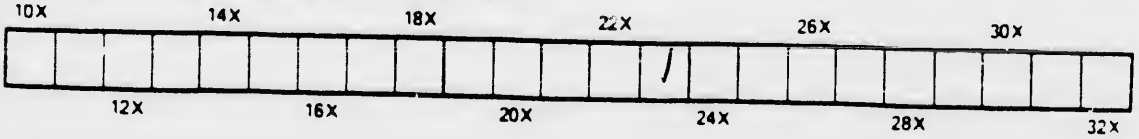

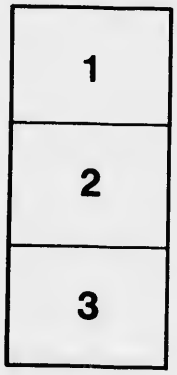

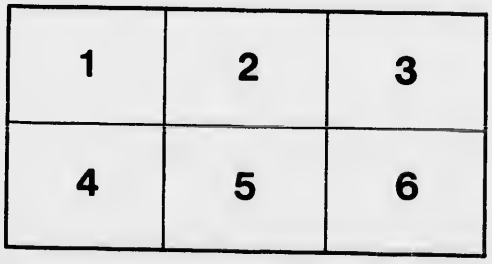

THE GUIBORD CASE.

JUDGMENTS

IN THE

COURT OF APPEAL

IN THE

GUIBORD CASE.

(From the *Gazette*, Montreal.)

SEPTEMBER 7TH, 1871.

PRESENT:—Chief Justice DUVAL, and Justices CARON, DRUMMOND, BADGLEY and MONK.

MONK, J.—I regret extremely that I am unable entirely to concur in the judgment about to be rendered by the Court in this important case. After very careful consideration, I have come to the conclusion that the judgment of the Court of Review must be confirmed, but for reasons differing in some essential points from those assigned by the Court below, and concurred in, if I am not mistaken, by this tribunal, or at least, by a majority of my honourable and learned colleagues. It is due, however, to the parties that I should state, as succinctly as possible, my reasons both for differing from this Court as to the *considerants* of the judgment, and for my concurring with the decision of the Court below upon the merits of the case.

The cause is one of considerable importance, not only by reason of the particular circumstances to which it relates—not alone in regard to the parties themselves, but also in so far as the decision of it may bear upon, or tend to influence the decision of causes of a similar or an analogous character in the future. Both as to law and fact, the case has undergone a remarkably able discussion on both sides before the Courts below. Most elaborate and learned decisions have also been rendered, not only on the questions of form, but also upon the merits. I hope, however, it may not be considered irregular to remark, that these judgments of the Superior Court do not come up for revision by this tribunal, sustained by the force and significance of concurrent opinions on interesting questions of law and procedure. One judge was in favor of the Appellants both on the form and upon the merits. Two decided for the respondents, not only in regard to the mode of proceeding which they regarded as defective, but also on the merits; and a fourth judge, considering the defects of form fatal to the the appellant's pretensions, gave no opinion on the merits. I regret to say that this diversity of opinion is in some degree, though not to the same extent, apparent in the decision about to be rendered by this Court. I have no hesitation in saying, that so far as I am concerned, I have found all this, though inevitable and perhaps in some measure not to be regretted, rather embarrassing, entertaining as I do much respect for the learning, judicial experience and abilities, not only of my honorable colleagues, but also of the judges of the Court below, this divergence, I may say antagonism of opinion, convinces me, that the case is not without difficulty; and considering the importance of the principles of law involved, I have been fully impressed with a sense of the obligation resting on me as a member of this Court, of bestowing upon this, as it is my duty to do so on all other cases, a careful, anxious and impartial consideration, without any fear or any influence from any quarter, operating on my decision, and with the view exclusively to a faithful performance of my duty as a sworn administrator of the law.

This remark may, indeed, be considered as superfluous, but as the learned counsel for the appellants seemed to labor, I have no doubt with conscientious conviction, under the painful impression from some peculiar circumstances, that this might possibly not be the case, I am desirous of relieving his mind upon this point, in so far as I am concerned and in so far as it is possible, and this assurance, therefore, may not be entirely out of place. Had there been a concurrence of opinion in the case as presented, and a formal judicial opinion about to be pronounced upon the merits of the appellant's demand, I should probably have felt it my duty to extend my observations over a wide field of enquiry and investigation. As it is, however, my remarks must be abridged and condensed as much as possible, and it is, therefore, not my intention to discuss at present the historical questions which have necessarily received my serious attention, and which are of so much interest in this case; nor do I deem it expedient now to enter into an extended examination of the legal authorities

so profusely cited by the parties. They have received full consideration, but a critical analysis of this immense mass of learning exceeds the proper limits of a judgment, embodying a partial dissent only from the decision of the Court. I shall briefly refer to those points in the case which seem to me to merit special attention, and upon which, as I view the case, the judgment of this Court should be based.

The first question to be considered, in the order in which they are submitted to this Court, regards the form of the writ. The proceeding was commenced by a *requete libellee* and writ of summons and not by a writ of *mandamus* properly and technically so called. This it is contended by the respondent is irregular and defective. By the article of the Code it is argued the writ calling upon the parties should be a writ of a *mandamus* By *some* of the members of this Court this deviation from the requirements of the law is regarded as a fatal defect. The law not expressly enacting, not providing that the proceeding may be commenced by a writ of summons simply, but declares that it should be by a writ of *mandamus*, properly so called, and, no doubt, strictly speaking, the mode adopted in regard to the writ summoning the parties to appear, is not in precise and rigid conformity to the letter and language of the law. Reading the law as a grammarian, a philologist, or a man of letters, no doubt this must be regarded as an irregularity; but is it fatal? Is the law so restrictive and peremptory that it must be a writ of *mandamus a peine de nullite*, particularly when a mere writ of summons, with a petition attached to it, setting forth all the reasons for the demand, and with most ample and exact conclusions, will to every intent whatever, answer the same purpose? I think not, and I am decidedly of opinion that this exception to the mere form of the writ does not possess the serious importance ascribed to it by the respondents. I am strongly inclined, under the circumstances of this case, to overlook this informality, and not to regard this proceeding as an absolute nullity. Of course, I am well aware of the extreme danger of disregarding what may be considered as even mere forms, and of departing incautiously from what seems to be pointed out as the proper course by the intent and language of the law, more particularly when the Code seems to provide a special mode of proceeding in seeking remedies of an extremely difficult and technical character.

Delicate, illusory, and complicated as the procedure is, in seeking these remedies, even, at the best, and under the simplest forms, the technicalities insisted on by the respondents, only render them more so; and although these captious and bewildering formalities may be insisted on in England, it does not seem to me a good reason why we should be enslaved and distracted by them here. When a complete and detailed averment of the complaint is served upon the party complained of, with the writ, it does appear to me that issuing two writs of *mandamus*, one ordering the thing to be done before the party is heard, and another after he has been heard and the case adjudicated upon, and the least deviation the one from the other vitiating the whole proceeding, is about as puerile and deceptive a mode of seeking a remedy and vindicating a man's rights as the legal mind has ever yet invented in these matters. That as it may, such intricacies and complications are obviously unnecessary before our Courts; and it may be said, I think with perfect truth, that the issuing a *mandamus* against a man or a public body in the first instance and without hearing him does not entirely or in any way harmonize with our usual procedure and more particularly is this the fact in regard to writs of prerogative generally, where the writ of summons and the petition duly served upon the party is all that is necessary, and I may add that there is no good reason or practical utility in the course insisted upon by the respondents. But it is said the law is so. Yet it may be argued with equal force that the article of the Code is ambiguous, not so much so in the particular Article 1022, sec. 4, *per se*, as in the whole Article, and particularly by the last paragraph. The writ is not styled a writ of *Mandamus*, as in every case where a writ of *Mandamus* may issue in England ordering defendant to perform a certain act or duty, or to give his reasons to the contrary on a particular day. As before stated, it is not called a writ of *Mandamus*, nor is the English practice or rules applied to such proceeding, made applicable here. In England the defendant shows cause on the writ, and here on the writ of summons and petition together. In both cases it is a proceeding calling upon the defendant to show cause, no more and no less. If it be contended that the law is not ambiguous, yet it may be urged with equal truth that it is not peremptory, and exclusive of the mode adopted here in express terms. Where the object of the law is clearly attained, by means not prohibited by the law—where no party is injured and every ground of defence may be fully and practically urged—it will require something very precise and peremptory in the law to induce me to declare a mere proceeding null as to form. But there is something more to be said on this point. The appellants have followed the mode of procedure which has been heretofore, in almost every decided case, generally adopted under our Statute and under the Code There is, I believe, only one reported exception to this form of procedure, and the old maxim, so often cited, may be invoked here, that is *Cursus Curiæ, legem facit*, may be applied. In any case, parties should not be defeated in the pursuit of remedies guaranteed by law, and deprived of their rights unless their course is in clear violation of a precise and peremptory provision of law, more especially when such a course has heretofore

been sanctioned by our courts of justice. Now in this case there is obviously a doubt; and we may inquire, have the Respondents suffered? They were bound to shew cause why a Mandamus, a final and peremptory order, should not issue, and they have appeared and shewn cause, fully and upon every ground. This is, of course, no formal waiver of matters of form, but there are pleas to the merits and adjudications *au fond;* and on all these issues the case comes before us for judgment upon every ground, and I entirely agree with Mr. Justice Berthelot, as he is reported in the Court of Review, in thinking that this important case should not be decided upon a defect of so slight and preliminary a character as the mere form of the writ. Adopting this view then, I would overrule this objection of the Respondents.

The second defect of form technically urged by the Respondents, is that the terms of the petition of Appellant, the conclusions and prayer thereof, are too general, too vague, in fact, altogether too obscure, and do not with sufficient clearness and precision disclose what she wants, what is demanded, and what she requires to be done. It is contended that requiring that a deceased person should be interred *conformement aux usages et à la loi* have not a signification sufficiently definite for the purpose and object of this proceeding I am not disposed to regard this as a very serious objection, nor do I attach much importance to this pretension of the respondents. An order in exact conformity with the prayer of the petition that the remains of the deceased Joseph Guibord should be interred in the Roman Catholic Cemetery therein designated, *conformement aux usages à la loi* is a judicial decree which, as I understand the meaning of the words, would be perfectly intelligible. I understand it to be required that the deceased should be buried according to the usages—the usual and ordinary custom of the Church of Rome to which Guibord belonged—not according to exceptional cases, but in strict conformity with the rules, regulations and observances sanctioned and practised by the Church—in plain French *conformement aux usages*—in other words unconditional burial in the Catholic cemetery of the parish to which the deceased belonged at the time of his death, and I can easily comprehend that the words *conformement a la loi* may mean that in addition to the mere act of interment whether civil or ecclesiastical, all the requirements of the civil law should be strictly observed. The appellant seeks to obtain for the burial of her deceased husband's remains, the observance of all the customary forms and solemnities of Christian interment. If the words mean anything they mean this, and also that all the exigencies of the civil law should be rigidly enforced in the registration of his death and burial. All this might have been set forth in terms more ample and in language more explicit, but it seems to me that this was not necessary. I am, therefore, of opinion that this objection is not well founded. In any view of the matter, I should not be disposed to rest my decision of a case so urgent and so important upon such *a fin de non proceder.*

I come now to the third exception in relation to the form according to the order in which I am disposed to regard these objections, and that is that for the purposes of this demand, not only the "*Cure et Marguilliers de l'Œuvre et Fabrique de la Paroisse de Montreal,*" but also the Rev. Messire Rousselot, the *Cure* of the parish, should have been included in the writ of summons. This, properly speaking, is a plea of *non-joinder* and not an *exception a la forme.* But in whatever light we may be inclined to consider this objection of the respondents, the first enquiry to be made is whether as a matter of law, and in the course of regular proceeding, the Rev. Mr. Rousselot could be, in his individual name and capacity, introduced into this proceeding along with the respondents? Manifestly, according to English practice, and according to the objects and the exigencies of the proceeding, he could not. This would have been a misjoinder obviously fatal in the very first stage of the appellant's proceeding. Two separate bodies, or two distinct persons with separate functions and separate duties, cannot be included and proceeded against by one and the same writ of *mandamus.* This is elementary, and will, I presume, admit of no controversy. So as a matter of law and regular procedure, the only means of introducing Mr. Rousselot into this record was by impleading him, as he has been cited to appear. In his individual name and in his spiritual capacity, he cannot be joined with the respondents, and could not be impleaded before this Court in conjunction with them in a proceeding like the present—and further, as a matter of fact, he is before the Court, but only as a part of the Corporation, and as a further and more important matter of fact, Mr. Rousselot, being as the head of the *Fabrique* in the record, has himself individually, or in conjunction with the respondents, pleaded directly to the merits of the appellant's demand. It is true that this plea is produced and filed under reserve, but I think he has unadvisedly raised an issue upon the merits, which we must dispose of. The spiritual power of the Church is invoked by him—his ecclesiastical authority is appealed to—his action as Curé of the Parish of Montreal is defended and justified. He has set up, or there has been set up for him in conjunction with the corporation to which he belongs, what he or they or both regard as a triumphant, a conclusive *fin de non recevoir* to this action. We are told that he is not in the record in his individual—his spiritual—his personal quality—but he is before us in the capacity of head of the corporation, and being here he defends his individual, civil and spiritual action in this matter, and he calls upon the Court to justify him in what he has done. He says we cannot go to the merits, yet in so far as this demand relates to him individually as Curé, he

has pleaded to the merits. Of course Mr. Rousselot knows very little about legal technicalities; but this blowing hot and cold in his behalf won't do. This exception cannot stand. Mr. Rousselot is in the record in one capacity—he has defended himself in another. The functions and duties of the Fabrique and the Curé are closely connected in the subject matter of th s burial, and I think Mr. Rousselot is right in saying—"I am in the record; I waive all objections as to my double capacity; I refused ecclesiastical burial to the remains of Guibord; I was justified in doing so; I offered him civil burial in that part of the Cemetery where, by ecclesiastical authority, by purely spiritual orders, he could alone be interred This was refused. I will, I can do no more. I pray that this demand be dismissed, my conduct as Curé be justified, and my action as the keeper of the Registers also justified." In order that there may be no mistake, let us see what he did plead, or what was pleaded for him and with his sanction by the respondents. (His Honour here cited the plea, setting up among other things the Bishop's order.) This obviously is a plea on behalf and in vindication of M. Rousselot, not in his capacity of head of the Corporation, but in his quality of *Curé*. Under the peculiar circumstances of this case, I think he had the right to take this course. He has done so; and I am of opinion that it is the duty of this Court to give him a formal and decisive adjudication upon the merits of his defence, irrespective of all exceptions as to mere form, which he has himself, though informally, yet practically waived; and I feel satisfied, that, seeing the issues raised, it would be more satisfactory to both parties, more in the interests of justice, that a judgment should be rendered on the main question—provided, always, that it can be done without any violation of law or transgressing any clear rule of procedure. From what has been said I think it can. Disregarding, therefore, these objections of form as insufficient in themselves, under the circumstances of this case, to defeat the appellant's pretensions, I come now to what I regard as the merits of this highly important cause.

Before entering upon this part of the case, however, and in anticipation of the remarks I am about to make, I would observe that into the great historical questions in relation to Gallicanism and Ultramontanism, and into the variety and conflict of views which this strange antagonism in the Church involves, I shall not enter. These controversies and these discussions cannot touch or diminish the ancient and recognized power or the spiritual authority of the Church. Despite all the revolutionary violence and persecutions by which she has been assailed, the spiritual authority remains, and has remained through centuries, undiminished, and is as essential now to the moral welfare of those who belong to the Catholic faith as it was in the beginning—and I am not going too far in stating that every Roman Catholic owes to its inculcations—its discipline and decrees absolute obedience in all matters purely spiritual. Nor shall I discuss the interesting question as to whether it is or is not advisable to have a free Church in a free State. This is, perhaps, not a very new or a very original idea—it was agitated centuries ago, and has long been familiar to those who have read or examined these matters. The saying has been recently revived and loudly proclaimed—and it is not for me to express any opinion as to how far it is wise to carry it out, and to apply this principle. No doubt the doctrine is illustrated in rather a remarkable manner in the present day, but whatever may be the advantages or disadvantages of such a system, there can be no doubt, so far as my knowledge extends, that the civil power in this country has never directly controlled the spiritual action and decrees of the Church in Canada. For example, an order, by a Bishop, refusing ecclesiastical interment to the remains of a deceased Roman Catholic for spiritual reasons assigned, is an instance of that character, and could not be, I apprehend, superseded or set aside by any Civil Tribunal in this Province, not at least without the Bishop being in the record, which is not the case in this instance. In purely spiritual matters the course, therefore, as I view the case, is easy enough. We know where we are, and we can, I apprehend, have no difficulty in determining what we have to do—but that is not simply the question. Interment in the Roman Catholic Cemetery *conformement aux usages et à la loi*, is an act partaking partly of Ecclesiastical and partly of Civil function. The real difficulty we have to contend with is to determine what are the purely spiritual and what are the purely civil acts required to be done, and those also which are of a mixed character. For example it may be said that the furnishing of the ground—in fact the grave in the cemetery, the supplying of Registers in which the death and burial are to be recorded are purely civil acts. These are the duties of the Fabrique, and these are required of them. The registration of the burial is also a purely civil act, and is required of the *Curé* in his capacity of Parish Priest. The division of the cemetery into two parts and the consecration of the one of them destined to ecclesiastical burial are acts performed or to be performed by the spiritual power alone. It is by it and under its authority these acts are performed, and it does not appear to me that the civil power, the Fabrique in other words, has any directing or controlling authority here. The decision of the question also as to whose remains are entitled to ecclesiastical and as to those who may receive only civil interment, must as I apprehend, rest with the spiritual authorities exclusively, but the material act of burial, civil interment *per se*, is more of a civil than a religious proceeding, and as such may be said to be under the control of the Civil Tribunals of the country. Combining all these acts together, and

viewing them as a whole and inseparable, we have, no doubt, before us a series of proceedings which appertain partly to the spiritual and partly to civil authority. But in applying a remedy by a writ of *mandamus*, and forcing what is known as specific performance we must regard these and appreciate them seperately, more particularly when they are to be performed by separate and distinct agents. We are called upon to order each agent, body or person separately to do that which he has refused to do and what the law compels him to perform; and that in the individual-personal capacity in which the law has constituted him a public functionary, no further, no more and no less. In proceedings like the present the utmost caution and precision are necessary, and the direct and exclusive application of the remedy to the proper party and to the real subject of complaint is absolutely essential.

Bearing these principles in mind, let us examine what bearing they have upon, and how they affect the decision of the present case.

Considering, as I do, that Mr. Rousselot has pleaded to this action, and that he has alleged and put in issue as a matter of fact, that he refused ecclesiastical burial to the remains of the late Joseph Guibord in obedience to an order from the Bishop of the Diocese, that this order is binding on him, that it is valid, and justifies his refusal to give religious interment, I must first inquire whether we can supersede this order, assuming it to be proved, whether we can or cannot, as a civil tribunal, pass judgment on its validity or compel Mr. Rousselot to disobey it. This, it seems to me, is the chief point, the main difficulty in this case. It is here that the spiritual power of the church and the civil law of the land are brought face to face, and thus confronting each other over the mortal remains of the late Joseph Guibord, we are called upon to decide which of these two authorities has the right to determine where and how these remains are to be interred. It must be conceded that this is a difficult and a delicate position. But my embarrassment is greatly increased by the necessity under which I find myself of first determining whether I have any right to pass any such judgment in the matter or to give any decree which will determine the contest. It does appear to me, however, that these difficulties are not insurmountable.

According to the view which I take of this case it is unnecessary for me to describe the difficulties which existed between the *Institut Canadien* and His Lordship, the Catholic Bishop of Montreal. It is always painful to witness the existence of such controversies, —such instances of antagonism in the Church. But we must not forget that the Bishop had sacred duties to perform—a grave responsibility rested upon him. I can easily understand how embarrassing the position was. He had to deal with a body of men of ardent and cultivated minds; he thought they were wrong in the attitude they had assumed as a literary and scientific body, and that their course was pernicious to the moral welfare of themselves and others; and in the conscientious discharge of his pastoral duties, he wished to bring them as Catholics and children of the church into a safer road. After the submission of the *Institut* perhaps a wise forbearance and judicious admonition on his Lordship's part might have resulted in harmony and reconciliation. I know not if this would have been the case, but these deplorable difficulties went on and culminated in the order pleaded by Mr. Rousselot in this case. Guibord came under ecclesiastical censures, and became a victim to his own obstinate perseverance in a course condemned by the Bishop. Now, I am not disposed to enter into the important question whether he was or was not, at the time of the order from Monseigneur Truteau, under canonical censures of a formal character, or to a degree so serious, so unequivocal, that he was justly refused ecclesiastical burial. Nor am I inclined to offer any opinion upon the point whether, at the time of his death, he was or was not, as a member of the *Institut*, formally and regularly excommunicated. I am clearly of opinion that sitting here as a civil tribunal, administering the civil law of the land, I have not the right to give any decision on these questions, which belong exclusively to the spiritual power. Had I such a right, and were I forced to adjudicate on these points, I have no hesitation in saying that I should be extremely embarrassed in this instance. For the present I will not suppose a case of an abuse of the spiritual power so obvious, so outrageous, that the civil law is or would be bound to interpose its authority. It is quite within the bounds of possibility that such a case might arise, but this is not one of them. I may, however, venture to remark, and it is plain that the observation embodies no more than a truism, obviously nothing more than what is reasonable, and it is this, that it is impossible to conceive a case in which the greatest care, the most deliberate and scrupulous caution, are more necessary than in proceedings cutting a man off—rejecting a Catholic from the rights and communion of his Church. To every Christian it is an extremely serious matter: and for the best of reasons, in view both of this life and the next, the spiritual power should so act as to leave no doubt whatever in any reasonable mind as to the formal and strict regularity and justice of its proceedings from beginning to end. The facts established by the evidence adduced in this cause do not warrant me in saying that this has not been the case here, and hence I am bound to presume that the proceedings of the Bishop in this instance were in strict conformity to justice and the rules of the Church. It must be borne in mind that the powers of the Church in spiritual matters are exceedingly great—are, in fact, supreme—and as we Roman Catholics view her object

and end on earth, and her divine origin, it is proper that they should be so. The laws for her government, and the rules of her moral discipline, are precise and peremptory enough. The obligation of obedience and submission on the part of those who belong to her communion is of the most sacred and binding character. But if much is expected from the faithful—if in their own eternal interests much is required—still more is expected from the Church itself. If she admonishes and commands, she is also our infallible teacher and guide; and any mistake or omission by one of her ministers would be lamentable in the extreme, and might lead to the most deplorable consequences. These of course are obvious truths; but they are adverted to here as indicating the very great importance of this matter, and also to intimate that if we possessed the power we should look closely into the proceedings of the ecclesiastical authorities in this case. But, as before stated, I think it is manifest that we have no such power. It is quite true that instances are cited where the Civil Courts in France did interfere and did adjudicate in such matters when connected with the performance of civil duties; they went very far and were under peculiar influences, whilst the organization and the composition of their High Courts were different from ours. It is plain to my mind that no such power exists in the civil tribunals of this country, nor do I believe it ever existed as a regular and recognized authority in the *Conseil Superieur* of Quebec, and if it ever did, I am clearly of opinion that it did not continue to exist after the cession of this country to the Crown of Great Britain, and after we came under the rule of a Protestant Sovereign. It was the theory and practical exercise of the Royal power in France which gave to their High Courts the apparent right to interfere and to exercise certain control in ecclesiastical questions. I need not enlarge upon this point.

But conceding for a moment that this Court possessed the right to enquire into the justice and regularity of the Bishop's proceedings in regard to Guibord and the Institut Canadien, and suppose I came to the conclusion that there existed no ecclesiastical censures of a regular kind—that he was not excommunicated—that he was not by the laws of the Church excluded from the privileges of ecclesiastical burial—and that Mr Rousselot ought to have given to his remains religious interment without referring to the Bishop at all—and it has been said that this is the proper view to take of this whole matter—even so, can we give a judgment declaring the action of Mr. Rousselot wrong in referring the matter to his ecclesiastical superior, and set aside the Bishop's order declaring it null? And if we had that right, can we do so in this instance the Bishop not being in the case? Clearly not. Then, is the order right or wrong? Mr. Rousselot had the right to refer the matter to the Bishop, and having received this order he is and was bound to obey. Could any Court in France, at any time, call in question the acts of any ecclesiastical functionary in spiritual matters without the party whose acts were complained of being before the Court? I never heard of such a proceeding, nor do I believe such a case ever existed. All this may be regarded as an extreme view of the ecclesiastical power. But I think not, and I am of opinion that the law is as I have stated it. It may be considered as extremely stringent, in some cases inconvenient; but, after all, if a member of the Roman Catholic Church in this country is not satisfied with the acts and decrees of the local authority of his church, let him appeal to the higher—the highest ecclesiastical tribunal in the regular and appointed way. If he is right, the abuse will be recognized and the remedy applied. If he is wrong, he must submit. The fact is, if a man is not satisfied with the teaching and authority of his Church—if he is not disposed to submit to her decrees—he has a very plain course before him—he may leave it and go elsewhere;—but while he remains a member of it, he owes his Church and the Church's authority in all spiritual matters—implicit and absolute obedience—it seems to me that practically there can be no wavering or evasion here. A man must be either one thing or the other or nothing—in any case he must settle these questions with his own conscience and with the Church. The civil tribunals of the country can give him no relief. We cannot touch the Bishop's order. But apart from all these questions, let us suppose that Mr. Rousselot had not applied to the Bishop, and had received no injunction to refuse to Guibord's remains ecclesiastical burial—and let us assume that when required to inter the remains of Guibord, he had of his own authority refused to give them ecclesiastical interment, assigning what he considered valid reasons of a spiritual character for his refusal, could we compel Mr. Rousselot, as a priest, and against his conscience, to do so? Could we force him or any minister of the Christian religion of any denomination to appear dressed after a particular fashion suitable to the occasion, and to say prayers over the dead or over the grave? Plainly not. Therefore, this pretension of the appellant must be overruled. All this reasoning, it may be said, rests upon pretty obvious principles. No doubt such is the case, and I do not suppose that these doctrines *per se* will be very seriously or very strenuously disputed by the appellant. But there still remain points of no little difficulty in the application of these principles.

The appellant, if I understand her demand rightly, asks that the remains of her late husband, he having died a Roman Catholic, be interred in the Roman Catholic cemetery according to the law of the land and the usages of the Church. She does not in express terms require any particular form of interment, nor the observance of any particular ceremonies at the funeral. But as a matter of fact it would appear that

if even civil burial *en terre sainte* were granted, she would be in a great measure satisfied. I collect this from the appellant's case—it is the condition attached to the offer of civil burial, that is, interment in the unconsecrated, or rather unhallowed part of the cemetery, that constitutes the appellant's chief ground of complaint. This is very natural—very reasonable. Can this Court come to her assistance in this matter? It is quite possible that we might order civil burial—but can we direct that the remains of the party claiming it should have a grave in that part of the cemetery destined to the interment of those who alone are entitled to ecclesiastical burial? If not, it is plain we can do nothing. Now as a matter of fact, the cemetery is divided into two parts as before stated. It will not be disputed that the respondents, under the direction of the curé or the Bishop, had the right to make this division, and that, for the purposes before adverted to. It is prohibited by no law, and it is in strict conformity to custom. Catholic cemeteries in Lower Canada are, with scarcely an exception, so divided, and for precisely the same object and for the same reasons. The custom in this case makes the law—in fact is the law. Every person entitled to burial in that cemetery is aware or should be aware of this state of things, and they must abide by them. There is, therefore, a distinction and a difference in the rights of persons claiming to be buried in the Cemetery, this is perfectly legal. Now is it the Fabrique as a lay Corporation that determines who are to be interred respectively in these divisions? If so, we may perhaps order them to give Guibord civil burial in the consecrated part of the Cemetery. But it is beyond controversy that it is not the Fabrique which decides this question—It is the Church and the Church alone. It is the ecclesiastical authority of the parish. It is to it exclusively belongs the right to regulate this matter. In this instance they have done so in the exercise of a purely spiritual power. It is legal, and the decision is final. From this action of the ecclesiastical authority determining *where and in what part* of the Cemetery Guibord's remains shall be interred, there is no appeal to this Court as I understand the law. The appellant has invoked law and usage in this matter of burial. On these, a decision has been given against her by an authority from whose adjudication there is no appeal to this Court. We cannot, therefore, assist her As to furnishing a place for Guibord's burial in the cemetery, the registers and the enregistration of his burial—in fact civil burial, it must be remarked, has not been refused either by the Fabrique or Mr. Rousselot. But on the contrary, both have been offered by them conjointly, with an objectionable condition it is true, that he should be interred in that part or division of the cemetery destined to the burial of children dying without baptism. This offer has been refused in consequence, I presume, of this condition being attached to it. We have no power to set aside this condition for the reasons above mentioned. So far as we can act in this affair, it must remain as it is. We cannot give the order required of us. The judgment of the Court of Revision must consequently be confirmed—but I would do so for reasons different from those assigned by that Court, and the following are the *motifs* I would assign, but they will not be accepted by this tribunal.

Considering that the writ issued in this cause, at the instance of the appellant, is not in the form of a writ of *Mandamus*, properly so called, but is in the nature of a writ of summons, with a petition calling upon the respondents to show cause why a writ of *Mandamus* should not issue against them, according to the demand and exigency of the case; and considering further, that such form and mode of proceeding in the first instance has been in use and has been sanctioned by the Courts of Lower Canada, and, therefore, that such proceeding by writ of summons and petition in cases like the present is in conformity to practice and not contrary to law;

Considering that the first of the two demands embodied in the conclusions of the appellant's *Requête Libellee*, to wit: that the respondents be ordered to *inhumer, ou de faire inhumer dans le cimitière Catholique de la Cote des Neiges, sous le controle et administration des defendeurs, le corps de feu Joseph Guibord, conformement aux usages et à la loi*, sets forth her demand in terms sufficiently precise and comprehensive in form to indicate what is, in fact, intended and sought for by the present *Requête Libellee*, and that, therefore, there is no defect or essential insufficiency of form in the allegations and prayer of the appellant's demand;

Considering that the Rev. Mr. Rousselot is in fact before the Court, though not exclusively or properly speaking as Cure of the Parish and in that quality, and being so before the Court as that of the Corporation of the *Fabrique*, he, the said Messire Rousselot, has defended and justified his action in this matter, and has pleaded to the merits of this cause; and consequently that he is sufficiently before the Court for the purposes of this case;

Overruling, therefore, the objections to the form pleaded by the respondents, and proceeding to adjudicate upon the merits of this case, in so far as it is in *the* power of the Court to give any decision upon the merits;

Considering that it is established by legal and sufficient evidence adduced in this cause, that the aforesaid Catholic Cemetery of the *Cote des Neiges* is divided, as Roman Catholic cemeteries usually are and have been in Lower Canada, into two separate and distinct parts; the one part or division thereof destined to the interment of the dead receiving what is and is known as ecclesiastical burial, and the other

part appropriated to the burial of the dead entitled to what is and is known as civil interment only, which division is conformable to custom, and not contrary to law, and is, therefore, binding and obligatory on all those entitled to interment in the aforesaid cemetery;

Considering that the ecclesiastical or spiritual authority of the Parish of Montreal alone has the right to determine whose remains shall be interred in the first named division, and who shall be buried in the second of the above mentioned divisions, and that the division of the said cemetery was known to the appellant before she presented her *requête libellée* in this matter, and that in the decision of this case, this Court is bound to recognize the division of the aforesaid cemetery, and that it is the exclusive right of the ecclesiastical authorities of the parish to order and regulate all matters connected with the division of the said cemetery as above mentioned, and with the interments to be made in them respectively;

Considering that the second of the said demands of the appellant, to wit: that the respondents be ordered to *inserer sur les regitres de l'etat civil par . eux tenus le certificat de telle inhumation du dit Joseph Guibord aussi conformement aux usages et à la loi* cannot be maintained; firstly because the respondents being impleaded in their corporate capacity, are not the keepers of the registers of *l'etat civil*, nor are they bound, nor have they authority to make any such registration as that demanded of them; and secondly, because such registration was offered to the appellant as a record of civil interment, and was by her refused;

Assuming the appellant to demand ecclesiastical burial for the remains of the late Joseph Guibord; considering that under the circumstances of this case, this Court, as a civil tribunal, has no power or authority to consider, revise or reverse the orders of the ecclesiastical authority of the parish in a purely spiritual question, such as that involved in the refusal to give ecclesiastical burial to the remains of the late Joseph Guibord;

Assuming that the appellant demands civil burial for her late husband's remains, this Court has the right to order such civil interment, but has no power or authority to declare in what part or in which division such civil interment shall take place; and considering that civil burial has never been refused, but on the contrary was offered by the respondents and by the *Cure*, although such civil burial was to be made in that part of the said cemetery destined to the interment of children dying without baptism;

And considering that this Court has no authority, has no right to order civil burial in the part of the said cemetery in which civil burial is prohibited by the ecclesiastical authorities of the parish;

This Court confirms the judgment of the Court of Revision, but for reasons different from those assigned by that Court.

Badgley, J.—The material facts specially connected with this contention are few and simple. The sepulture of the late Joseph Guibord, which has been the subject of very lengthy and tedious discussion in the Courts below, has been brought into this Court for our consideration, and has been submitted not only in the argumentative factums required by the practice here, and in the exhaustive oral arguments of Counsel before us, but also in the printed papers of arguments and discussions which formed the staple of the case before those Courts from whose judgment this appeal has been taken, necessitating the labour of examining them all, and of becoming acquainted with a variety of subjects interesting in themselves, and exhibiting the very great research and industry employed by the counsel for both the parties in this cause, but with little in them of assistance, and with much of little or no account in settling the judicial opinion sought to be had from this Court upon the contention as it really exists of record. The personal subject of this contention, Joseph Guibord, was born of Roman Catholic parents, and received into the Roman Catholic Church by the Sacrament of Baptism at the Parish of Varennes, in 1809. He in after time settled himself in this city, and was a printer by trade, and in 1828 was married to the appellant in the Parish Church of Montreal, under the Sacrament of Marriage, and according to the rites and customs observed in the Roman Catholic Church. The certificates of his baptism and marriage are filed of record in the cause. He was for many years and up to his decease a member of a charitable friendly society, in close connection with the clergy of his church, and also a parishioner of the parish of Montreal; during all his lifetime having professed the Roman Catholic faith, and lived and died in that religious community. He was struck with sudden death on the night of the 18th or 19th of November, 1869, without time allowed him to make his peace with God or man, and died, having survived all his children born of his marriage, and predeceased his wife, the appellant. In 1844 a literary and scientific institution was formed in this city, principally by Lower Canadians, and of course Roman Catholics, under the name of the Institut Canadien, admission to which was according to the constitution of the society general and inexclusive from difference of religious belief or opinion; not long after the formation of the society, it was incorporated under its original name, by an Act of the Legislature, 16 Vic.-cap., the preamble of the act exhibiting the object and purpose of the Society to be literature and science.

In furtherance of these purposes, a library was commenced which has reached to a number which speaks favourably for the laudable exertions and perseverance of the officers and members of the society, in

those pursuits. In a society so numerous and general as that soon became, one is not surprised to learn that some of its members were not individually as tolerant as the rules of its formation professed, and in consequence a few of them endeavored to exclude from the library some books and papers which they assumed to consider objectionable, and to force their opinions upon the Institute in general. These domestic differences which commenced in 1857, were terminated by the defeat of the objecting small minority in 1858, when, however, the Roman Catholic Bishop of the Diocese, in the quality of protector and guardian of the Roman Catholic teaching and morals in Montreal, intervened in the domestic quarrel in support of the pretensions of the minority, and converted the difference into one of a more serious character, bringing the Institute as a body, face to face with himself, as their Diocesan. It is true that the Bishop limited his pastoral exhortations in the first instance, and his Diocesan censures afterwards to the Roman Catholic members only, but his own astuteness or the shrewdness of the defeated minority, could not fail to tell him, that the abandonment of the society by the members of his belief, would necessarily be the disruption of the Institute, and effectively prevent all literary and scientific information, except that of a denominational character. Without entering into an uninteresting detail of the incidents of the dispute between the Institute and the Bishop, which drew its length along for ten years, until the Bishop's final decree in October 1869, it will be sufficient to mention, that two apparent grounds of complaint have been made prominent against the Institute, the first and original one being its having in its library a few French books which were declared to be in the Roman Index, thereby under an antiquated decree of the Holy Inquisition, entailing sin upon all who possessed or read such indexed books; and the last and for the time, important one, passing over the former ground, directed against the Annuaire of 1868, namely, the report of proceedings of the society for that year, which referred to the tolerant principle upon which the society had been originally formed and had prospered for 20 years, and approved and recommended the same, and which was also indexed by the Roman Inquisition. In August, 1859, the Bishop, being then in Rome, transmitted, for publication in his diocese, a pastoral letter in which he announced that the Roman Congregation of the index had reprobated the doctrines contained in the Report of the *Annuaire* as imperilling the education of Christian youth, and directing their withdrawal from the Institute of Roman Catholics, particularly *la Jeunesse*, so long as such pernicious doctrines should be taught, and thereupon declaring that every continuing member of the Institute, and every reader and possessor of the *Annuaire*, without the authority of the Church, would incur the loss of the Sacraments, even when dying, *meme à l'article de la mort.* With the view to remove this censure, the Roman Catholic members resolved, with the sanction of the Society in general, "that having learned the condemnation of the *Annuaire*, by authority at Rome, "they submitted to the decree purely and "simply," and the Society itself resolved, "that the Institute having been formed solely "for literary and scientific purposes, had no "doctrinal teaching, and scrupulously excluded all teaching of pernicious doctrine." These were the recorded actions of the Institute in general, and of its Roman Catholic members in particular, on the 25th of September, 1869, and yet no one who has followed the proceedings would be surprised to learn that these resolutions were not sufficient or satisfactory; they may have met the apparent difficulties of the Institute having indexed books in its library, and of having published the mere *Annuaire*, but the substantial difficulty of the Bishop altogether passing over these as of but little moment, declared one of a more important character, which he finally announced in his letter from Rome, of the 30th of October, 1869, to the Vicar General Truteau, and which, that official says, reached him on the 19th Nov., a copy of which he has produced with his deposition in the cause. In that letter the Bishop in substance asserts, having reference to the September resolution of the Institute, "*Qui et ablit en principe la tolerance religieuse qui à ete la principale cause de la condemnation de l'Institut*, and therefore that all should know that absolution should not be given, even when dying, to those who do not renounce the Institute." *Tous comprendront qu'ill n'y a "pas d'absolution à donner, pas meme a l'article "de la mort a ceux qui ne voudraient pas renoncer a l'Institut, &c,*" because the principle of its organization was religious tolerance. It will be seen that the apparent former grounds for censure have been shifted and replaced by the condemned tolerant character of this literary and scientific Society, but even this only became known generally or at all only when Guibord's burial was demanded on the 20th November. No one would be surprised to learn that the decree resting chiefly upon such a ground of censure when once known became public property and the text of remark and criticism. The Roman Catholic clergy of the Diocese could not be found fault with, it was their duty to submit to their Diocesan in ecclesiastical matters, and it only remained for them to carry out the directions of their Bishop; but their submission could not control persons of that faith outside of the ecclesiastical order, and therefore, the Institute, placed in the midst of a mixed community of different persuasions, where hitherto religious intolerance was unknown, and where Christian charity in its best sense was generally practised, disregarded the Bishop's last announcement, and this has been shown in the treatment it has received in this unfortunate and ill-timed discussion, in which such pretensions are held up as revived expositions of ecclesiastical

power in the dark ages, which neither knew nor cared for the amenities of sympathy nor the humilities of persuasion towards the laity, but in isolation and despotism denied the rights of individual reason, and imposed beliefs without allowing private judgment, forgetting that conviction does not enter human intelligence until that intelligence had opened the door for its acceptance by reason, and that belief only enters because reason and intelligence accept it. Guizot says that human thought, human liberty, private morals, and individual opinions cannot be governed by ecclesiastical co-action, which is the illegitimate employment of force; all which may be summed up in the words religious intolerance. This decree of the Bishop is the more obnoxious in this country, a British colony open to all persuasions, and under a government of the utmost tolerance, where Roman Catholic ecclesiastical authority has always been most beneficently displayed, even though it were absolute in effect, and where the the law assumed the equality of all who are subjected to reciprocal and equal obligations to be the free common sense and opinion of the people. In this country arbitrary ecclesiastical laws had become forgotten or existed only on the dusty shelves of church libraries, and were only to be found in the compilations of ancient times which first saw light during the world's darkness and were made, though not promulgated, without the consent, as they were without the knowledge, of either clergy or laity, and specially without the sanction of the highest secular power of the existing Christian commonwealths. History must have been read to little purpose, if these facts could be denied and yet upon these assumptions was predicated the outrageous dogma revived by one of the respondents' counsel in the court below that all human Governments were subjected for their existence to supreme R. C. ecclesiastical rule; it is only surprising that another rule, equally outrageous as that mentioned, drawn from the same ancient archives was not also re-announced, that *hereticis non est servanda fides*, no faith is to be kept with heretics, that is, with persons who choose to think for themselves or to form their own opinions on any subject, this being the true meaning of the word *heretic* as every Greek scholar knows. The high morality and uprightness of life and conduct of the R. C. *secular* clergy of this province have by their own personal conduct and precepts annulled and set aside this latter ecclesiastical rule, and substituted a more exalted one, that in this mixed community tolerance is not only a virtue but a necessity for good and peaceful government, which could not subsist for an instant without its benignant and kindly influence. Men who teach otherwise or revive these ancient unprincipled incitements to popular confusion *sont des hommes dont le Passé sterlize l'avenir* as has been curtly observed. They would unite legislation and jurisdiction in the same persons and execute their judgments at the same moment.

The Bishop's letter of the 30th of October finally closed the controversy between the Institute and the Diocesan, and it has been necessary to state these circumstances with some fulness, because such was the position of affairs at Guibord's death.

As already observed his death occurred in the night of the 18-19 Nov., '69, at which time he was a member of the Institute and as such assumed to be obnoxious to the above ecclesiastical censures and disabilities at the time of his decease. There is nothing to shew that he individually was either known to or thought of by the Bishop in the generality of his decree, but his membership in the Institute made him individually liable to its infliction. In all these ecclesiastical proceedings and in this final Diocesan decree, the marvel to lawyers and judges is, that everything is taken for granted in favour of authority, no citation for complaint is given, no opportunity offered for defence, but outraging the rule of common justice and common right of being heard before condemnation, the judgment is decreed pretty much upon the same authority as that which influenced the Roman lady who had ordered her slave to be crucified and upon being remonstrated with, that he was innocent, answered,—" my command, my will, let that for a reason stand."

It is not my business according to my appreciation of this cause or of its merits to question the validity of the Bishop's decree of ecclesiastical disabilities nor to follow out the legal objections taken against it; it is sufficient to say that he is the highest R. C. ecclesiastical authority in the Diocese and as such his decree was within his authority to enforce upon his Diocesan clergy until it should be set aside by appeal to Superior Ecclesiastical authority, *Non nostrum tantas componere lites*, and the more especially as, in my apprehension, it is but very remotely connected with the real points of this contention which the Court must adjudicate upon; as long as the decree was confined within its ecclesiastical province, civil jurisdiction might not touch it, but when it overreached its sphere and extended into the region of civil or mixed jurisdictions, the civil law of the province by its civil jurisdiction might question its abuses, and subject it to a power paramount to its own. It is not necessary, as the case presents itself, and simply for that reason, to examine the jurisdiction and power of the Civil Courts in this province in matters of *abus* before the Cession of 1763. Whatever the treaty of that year or the proclamation of the same year or the capitulations of Montreal and Quebec may aver, the Imperial Act of 1774, surely removed all possible difficulty upon that score, having declared, "that the inhabitants at the conquest, not the Cession, professed the religion of the Church of Rome, and enjoyed an established form of constitution and system of laws, by which their persons and property had been protected, govern-

ed and ordered for a long series of years from the first establishment of the Province of Quebec, &c., and again afterwards, by the 8th section, declared that Her Majesty's Canadian subjects may hold and enjoy their property and possessions, together with all their customs and usages relative thereto, and all other their civil rights, in as large, ample and beneficial n manner as if the proclamation, &c., had not been made, and as may consist with their allegiance to the King and subjection to the Crown and Parliament of Great Britain; and in all matters of controversy relative to property and civil rights resort shall be had to the laws of Canada for the decision of the same, and all causes instituted in courts of justice with respect to such property and rights shall be determined agreeably to the said laws and customs of Canada, until varied or altered, &c. I presume it would be, therefore, no difficult thing to ascertain and fix the jurisdiction of our courts in matters of ecclesiastical *abus*, the more so as the Court of King's Bench has been more than once declared to have inherited all the superior jurisdictional powers of the highest jurisdictions and courts in Canada previous to the conquest. The necessity for such an examination does not present itself in this cause, but it would not be difficult to fix the extent of the jurisdiction of the courts in such matters if the occasion required it. Now Guibord, without any renunciation of his quality of Roman Catholic, or of parishioner of the parish of Montreal, died in that parish, to which the Roman Catholic Cemetery of the Cote des Neiges belongs, as the burying ground for Roman Catholics, and especially of the Roman Catholic parishioners of the parish of Montreal. His widow, whose interest and right to have him decently and Christianly interred is unquestioned and unquestionable, by writing duly executed, authorized some of his friends to obtain burial for his body in that Cemetery, which was, in fact, the only one for the burial of Roman Catholics of the parish. Application was made in due course, on the 20th November, to the clerk of the respondents, at their office, for the purchase of ground for a grave in that cemetery, and the application was referred by the clerk to the Curé of the parish. The demand was renewed on the same day to Messire Rousselot, the Curé, who, being asked generally for burial of Guibord's remains, on the following day, the 21st of November, and conceiving that the demand was for a burial to be performed by the priest with the usual religious and ecclesiastical customs and cerem nies, requested a short delay for instruction from the Vicar-General, Messire Truteau, who replied by letter, filed of record, that having received from the Bishop his directions to refuse absolution to members of the Institute when dying, he could not permit the ecclesiastical sepulture to be given to Guibord, who had died suddenly, but who had not renounced his membership with the Institute, and therefore it was impossible to allow him ecclesiastical burial. This answer, which was predicated upon the supposed demand for ecclesiastical burial alone, having been communicated by the Curé to the applicant, the latter intimated that ecclesiastical burial was not required, but only simple interment in the Roman Catholic Cemetery of Cote des Neiges, which Messire Rousselot, the Curé, as a public officer, was required to allow, offering at the same time to purchase for the appellant sufficient ground for a grave, or to have him buried in the ground belonging to one Poulin, for which purpose the applicant exhibited a written consent. The Curé was quite willing to sell to the appellant, what ground she might require for burial, but refused interment therein to her husband, Guibord's remains. He also refused to allow the interment to be made in Poulin's lot, but offered to allow interment in what is called the reserved lot, divided off and separated from the burying-ground of Roman Catholics by a wooden fence, and kept for the interment of bodies of infants unbaptized in the R. C. Church, and of such as were not known to have been Roman Catholics. This was manifestly not Christian burial, and the qualified and distinctive offer of the Curé was refused. Afterwards, on the same day, a similar demand for burial in the cemetery was made through a notary to the respondents at their office, speaking to their clerk, demanding interment for the deceased in the cemetery used for Roman Catholics of the parish of Montreal, known as the Cemetery of Côte des Neiges, in the parish of Montreal, and requiring the respondents to give or cause to be given interment on the morrow, or then to receive the remains into the cemetery for the purpose of interment, and offering money for the purchase of the necessary ground, to which the answer of the Secretary was *that he was authorized to answer that the Fabrique (the respondents) would give the interment in that part of the cemetery not consecrated, and without any dues or charges for sepulture.* On the following day, the 21st November, the body was brought by Guibord's friends to the cemetery gate and refused entry into the cemetery by the keeper, acting under directions, except for interment in the so-called reserved lot, the lot reserved for unbaptized and unchristian bodies, as stated before, to which the keeper added another class, the bodies of executed criminals who had not made their peace with the Church. The remains were thereupon removed, and received interment, temporarily, in the Protestant cemetery, Now, under the circumstances, as stated above, of the demand and of the qualified and distinctive refusal, the refusal itself may be deemed absolute and a distinct determination not to do what was demanded, to bury the body of this Roman Catholic and parishioner in the ground appropriated for the interment of Roman Catholics, and the refusal also was made by the party properly called upon to do the act. So that a demand and

refusal are clearly established by the evidence of record, both preliminaries required for the issue of the mandamus, and, indeed, no objection is taken against either. On this state of things the appellant presented a *requete libellée* to a judge of the Superior Court, as provided by law, for the issue of a writ of mandamus, and the judge being satisfied with the application, granted the petition, and ordered the writ to issue. The petition averred the circumstances of Guibord being a Roman Catholic and a parishioner of the parish of Montreal, together with the circumstances and time of his sudden death, and also the demand for his interment, and the refusal of the respondents; in fine, all the intendments and averments necessary, and with the conclusions for the issue of a Writ of Mandamus directed to the respondants enjoining and commanding them, on payment by the appellant of the usual fees, to inter or cause to be interred within eight days from the judgment to be rendered, in the R. C. Cemetery of Cote des Neiges under their control and administration, the body of Guibord, according to custom and law, and *further* enjoining and commanding the respondent to insert in the civil registers kept by them the certificate of such interment of said Guibord, also according to custom and law, under the legal penalties in case of the respondents' resistance to the orders of the Court, with costs, &c. The writ was in the form of a summons issued from the Superior Court, specially endorsed, however, as issued under the order of the Judge of its date, and requiring the respondents to appear and answer to the *requête libellée* attached to the writ of summons, circumstances which take that writ out of the class of ordinary summonses, and gave it a superior character. The writ and the *requete* being together are one process, ordered to be issued by special judicial order as endorsed on it. The writ and the *requete* attached thereto were duly served upon the respondents. The respondents pleaded, first, by petition to quash the writ by reason of informalities stated, which was dismissed as being irregular and contrary to the course of practice in such cases, and, moreover was out of time. *Secondly*, by a peremptory exception reiterating the formal objection contained in their rejected petition, and being, in fact, an *exception à la forme*, which was also rejected as being out of time. *Thirdly*, a peremptory exception denying their refusal of the interment claimed in the *requete*, and their want of notice of the time of presenting the body at the Cemetery, as with such notice they would there and then have offered interment in the reserved lot. *Fourthly*, that in the free exercise of the Roman Catholic worship the respondents had divided the Cemetery into two parts, one for the interment of Roman Catholics with religious ceremonies, the other for the interment of those deprived of ecclesiastical sepulture; that Guibord at the time of his death was a member of the Institut Canadien, and as such publicly and notoriously subject to canonical penalties depriving him of ecclesiastical burial, which was refused by the Curé, by directions from his ecclesiastical superior acting under orders from the Bishop, but that he offered civil burial under the conditions regulated by the ecclesiastical laws, which the appellant refused; and, *fifthly*, a *defense en fait*. Upon exceptions taken by the appellant the respondents petition and the first exception, to wit *à la forme*, were both registered, and need not be referred to hereafter, except upon the merits of the cause. The appellant answered the second exceptions by averring that it was superfluous to fix an hour for the presenting of the body at the cemetery, because the respondents had refused the interment in the cemetery used for Roman Catholics; that the process was a formal document for that purpose, but which the respondents still refused by their plea. The appellant demurred to the third exception, averring that it contained no legal averment sufficient to justify its conclusions; that by the law of France in force at the cession, and the public law of England, the Courts had full jurisdiction to reform and prevent abuses by religious authority; that the respondents admitting that Guibord was at some time a Roman Catholic, have averred no fact whence could result the loss of rights belonging to those of that faith, and notably to the interment claimed; that the Institute being an incorporated body under an Act of Parliament, no authority but the Parliament could restrain the rights and franchises of its members, and that the asserted pretensions of the Bishop thereupon was an attack upon Sovereign authority; that the order of his superior could not justify the curé's refusal to inter the body, the superior having no authority to give such order; that the offer of interment by the respondents was a refusal to give to Guibord's remains interment in the cemetery used for burials of Roman Catholics according to custom and law. The appellant further replied by a general denegation and by a special response reiterating the terms of the demurrer, and averring a large number of facts and incidents of law and fact to which it is at present unnecessary to refer. To this elaborate response the respondents filed an equally elaborate special replication which will meet the same fate as the response. Evidence was taken in the case, and a full and exhaustive argument was had before the judge who issued the writ, and by whose judgment the conclusions of the *requete libellee* were granted in full in both particulars against respondents, and a peremptory writ ordered to issue against them for both conclusions—namely, to bury and to enregister the burial. Three judges sitting in revision have set aside the judgment and quashed the writ, and it is upon this last judgment that the case has been appealed to this Court.

The case will be followed in the order of the objections made by the respondents.

The first objection is purely technical, that the writ is not in the form required by law; that is, not in conformity with the articles of the code of procedure which apply to its issue. It is proper to premise this part of the subject by saying that the writ of Mandamus has in England, from whence it is derived here, been liberally interposed for the benefit of the subject and the advancement of justice, *though originally a writ of High Prerogative*, and that in modern times in that country, the general policy of the Legislature to promote it as a remedy has made it more remedial and useful, and conforming it more and more to the ordinary practice upon actions at law. On account of its extensive use and highly remedial nature, it obtained the sanction of an original writ, and was dispensed by the Court Banco Regis in all cases where there was a legal right of justice, but for which right the law had not provided any specific remedy, and commanding the performance of a particular act or duty, by those to whom it was directed and sent. In other words, the definition given of it is a high prerogative writ, *breve regium*, and not a writ of right, like the summons now issued in our practice, it is properly and in its nature a writ of restitution of a most extensive and remedial nature to the aid of which the subject is entitled, upon a proper case previously shown, to the satisfaction of the Court of Queen's Bench. It is said to be founded on *Magna Charta* to ampliate justice by the prevention of disorders arising from either a failure or defect of justice, and therefore used on all occasions where the prosecutor has a legal power consequent upon the violation of some legal right or duty where no specific or adequate remedy is given by law, and where in good government and justice there ought to be one. It does not, of course, go to a redress of mere private wrongs. This remedial writ which is gradually being assimilated to an actionable writ, forms part of our *procedure*, and it is under the 1022 Art. of the Code that the appellant has applied for its issue in this cause. By the terms of the article it may be issued here in all cases where a writ of Mandamus would lie in England: the article providing that any person interested may apply to the Superior Court, or to a judge in vacation, and obtain a writ commanding the defendant to perform the act or duty required, or to show cause to the contrary on a day fixed." The Code has varied our procedure from that of England, where the writ could not be applied for exception B. R., and it has also abolished the English practice of the motion in Court, the rule *nisi* and rule absolute with the other intricate requirements of the English practice, for the issue of the writ which was framed upon the rule absolute and which issues in the alternative, commanding the defendant by a fixed day, called the return day, either to execute the writ or to signify to the Court a reason to the contrary, so that by English practice the writ is in effect, a mere rule *nisi* to show cause, containing a mandate to the defendant for that purpose, and therefore, it must be served upon defendant personally. The return is immediate, and thereupon the real issue and contention arises because the prosecutor may plead to or traverse, the return, and the defendant may reply, take issue, or demur to the prosecutor's plea, according to Tapping, as upon an action, brought for making a false return; and afterwards, if judgment go for the prosecutor, the peremptory writ issues, which is only a writ of execution compelling defendant to admit or restore as commanded. All this intricate proceeding and practice have been abolished by our Legislature, and here the *exparte* presentment of a petition to the Superior Court or to a Judge, supported by the affidavit of the prosecutor, and containing the indictment and averment of the complaint, with the previous demand and refusal of the performance of the duty sought, and with conclusions for that duty and its enforcement, being found *prima facie* sufficient by the Court or Judge, the prayer of the petition is granted, and the writ is ordered to issue, which is served upon the defendant with the petition *requete libellee* attached thereto to form part of it, and only after service the defendant for the first time shews cause by special plea, not to the writ, but to the petition. By this course our practice is simplified and assimilated to that upon actions at law, and the writ is the substitute for the rule *nisi* to show cause with the mandatory injunction for that purpose. It has been deemed necessary to show both courses of practice, because of the alleged defect in the writ issued in this cause. In England the averments and indictments of the prosecutor are in the rule absolute and not in the writ, and the Court there frames the writ upon the rule so as to declare explicitly the mandatory right or duty required, that is, to show what is demanded—Tapping, p. 309. In our proceeding all these are shewn in the *requete libellee*, and Tapping says that in England the writ is likened to a declaration in a personal action, no precise form of words being necessary, provided the writ be formal and substantial—that is, that the matter is sufficient, and that it is deduced and expressed according to the forms of law—thus following out the forms of the old writs which contained in themselves the causes of action and demand. Without a mandatory clause the English writ lapsed, and here, without sufficient conclusions upon which to frame a mandate for execution, the writ would also lapse or be quashed. In this case a writ of summons has issued, endorsed with the special order of the judge, granted upon the petition for the issue of a writ of Mandamus, and commands the defendants-respondents to appear and shew cause against the demand contained in the *requete libellée* attached to the writ as forming part thereof, and, in fact, in itself bringing into the writ all the intendments and averments, and the mandatory conclusions or requirements of the prosecution in the most precise

and formal manner, giving to the defendants the fullest information of the title of the prosecutrix and of the particular acts of duty demanded. According to our practice, this is technically sufficient, the words of the article in this respect are merely descriptive of the writ and not prescriptive in substance, because the writ is not pleaded to here as in England, where it is really the action, but the pleadings to the Code are required to be directed against the *requete libellée* only: that is the defendants are required to show cause by *pleading specially to the information, laplainte*. A similar practice prevails in the Code of Ontario, where the English law prevails, see C. S. U. C. Cap. 22. Now where the reason of the English practice does not prevail the strict literal rule against our common practice should not apply, and our procedure being different from that of England, although we have nominally adopted her writ, I am satisfied that this first objection as to the form of the writ should not prevail.

The next objection is as to the direction of the writ to the *Curé et Marguilliers de l'Œuvre et Fabrique de Montreal*, and that it should be to the Cure of the Parish only. Now the direction of the writ is a matter of great importance and the utmost care is required to ensure its accuracy, it must be directed to all those who are legally to execute it, and when directed to a corporate or quasi corporate body must describe it by its corporate or quasi corporate title, so also if several persons form but one artificial person or officer they must all be included. Now the Cure of the Parish and its Churchwardens are too well known to our laws and our jurisprudence to create a doubt of *their legal* quality and of their right and authority in the administration *in* and over the Cemetery of Cote des Neiges, as the Parish Cemetery; their administrative power is, however, admitted. The Cemetery was purchased for the Parish by the Fabrique, composed of the Cure and Marguilliers for the time being, and is appropriated t the interment of members of the Roman Catholic faith. The respondents admit so much in the authorities cited by themselves. *Les Fabriques comme corporations, sous le nom collectif du Cure et des Marguilliers sont formellement reconnus dans notre droit; et dans tous les actes et toutes les procedures qui se font au nom de la Fabrique, le Cure et les Marguilliers doivent-etre en nom collectif.* This Corporation as such, and not the *Curé* as such in his curial functions, because if the *Cure* alone as such had command of burials in the parish burying ground, why not his ecclesiastical superior, who has undertaken to order him to refuse the burial ecclesiastical. The corporation alone administer the cemetery; they sell the grave lots as required, and it is proved were willing to sell a grave lot to the appellant. One of these sales is produced of record, and shows the sellers to be the Fabrique of the parish, composed of the *Curé* and *Marguilliers*. It would be waste of time, therefore, to deny the legal validity of the direction of these proceedings against the respondents, the *Curé et Marguilliers*, and therefore this second objection cannot prevail. The special legal validity of that question however turns upon the duty to be done, and depends upon the requirement of the appellant, that is, the demand of duty required by her; the distinction is plain, because two kinds of burials have been mentioned, the ecclesiastical and the civil, both so called for purposes of explanation; the first being the burial of a body by a priest, with ecclesiastical rites and ceremonies of the Roman Catholic church and the benison, by him, of the grave at the time of the interment, which being of ecclesiastical cognizance I should not be disposed to interfere with or order, as being beyond that right; the other, the civil, that is simple interment without religious rites, which may be attended by the *Curé* or his deputy as a civil duty to recognize the civil fact—*inhumation depouillee de toute ceremonie religieuse*—which constitutes civil sepulture, *an acte purely* civil. A technical difficulty arises, and meets me here. It is plain that the applicant knew that religious as well as civil burial exists: at first, the demand for interment was general without distinguishing either kind of burial, and only upon the *Cure's* refusal to allow religious burial was the other, the civil burial demanded. Now the rule laid down by Papping, p. 284, is that the demand must be express and distinct, and not couched in general terms; it should accurately demand performances of that which the respondents legally could and should do, and yet the conclusion for burial of the *requete libellee* is couched in the same general terms, without accurately specifying either an ecclesiastical or civil burial. In England the practice is to quash the writ for uncertainty, where uncertainty exists, and the generality of the terms here as to the burial demanded would probably in England be fatal to the writ; but as a more fatal error exists in my apprehension in this proceeding, this uncertainty need not be pressed. Assuming as a general fact admitted, that the Cemetery of the Cotes des Neiges was in the possession of and under the administration of the respondents, as the Roman Catholic burying ground for the Roman Catholic parishioners, and appropriated for and used for persons of the Roman Catholic persuasion who had been made Christians by admission to Roman Catholic baptism, it differed from the English churchyards and parish burying grounds in this, that the entire English grounds were consecrated and required to be consecrated for Christian burial, either by actual consecration of the ground itself, or by consecration of the church within the inclosed ground, and therefore all without the area of consecration was not consecrated ground, and the clergymen of the Church of England could not be forced to perform clerical duties except upon consecrated grounds.—Wurtele's case at Quebec; Rugg's case in England, Privy Council, 1868.—

Here the Cemetery is simply purchased ground, for the purpose of burial, but in no part is it consecrated except grave by grave as purchased and used for Interment of Roman Catholics with ecclesiastical rites. There is no part of the English ground set apart expressly for bodies of such as are not Christians, or admitted to Christian fellowship, or excluded from it as schismatics, and all parishioners and others dying in the parish are entitled to be decently interred in the parish burying ground which is convenient, as Hooker says, for very humanity's sake. Yet by the rubrics in the Church of England common prayer book it is declared that the Church Office for the burial of the dead is not to be used by the clergyman for any that die unbaptized or excommunicated, or have laid violent hands upon themselves; it is true that the canon in this respect is almost a dead letter, because baptism may be performed at any time before death, even by lay hands. Excommunicated persons are those only who were denounced *excommunicate majori excommunicatione*, for some grievous and notorious crime, which is no longer practised, because the courts act upon the crime by way of punishment, and lastly suicides, that is only those who kill themselves voluntarily and by the instigation of the devil, as the canon says, which are put aside by the verdicts of the Coroner's jury that the act was done by the person when out of his senses, nor am I aware of the existence of any canon which necessarily enforces the reading of the Office over every corpse consigned to consecrated ground. But still it is the common law of England that every person may at this day be buried in the churchyard of the parish where he dies. In England, therefore, the right to interment is general, every person according to the circumstances having a right to sepulture in the church yard or other burial place attached to the parish church. Hence the right of interment is general for Christians because amongst them the honor which is valued on behalf of the dead is that they be buried in appointed burying grounds, where the field of God. God's acre in German, is sown with the seeds of the resurrection, that their bodies also may be among Christians with whom their hope and their portion is and shall be for ever. This *mutatis mutandis* applies to the R. C. interments in the R. C. parish cemetery of this parish appropriated and used for professed Roman Catholics. In England there is no exclusion from interment in the church burying ground, although there may be privation of the religious office for the dead over the dead body. Here, the R. C. Cemetery is not generally, consecrated, and besides that, a portion has been separated and enclosed from the cemetery, and is called the reserved lot which has been appropriated to unbaptized infants and to persons not known to profess the R. C. faith. The fact of the reservation and distinctive separation with its recognized appropriation to the bodies of those not Christians raises a conviction that the reserved lot, although it may be ground belonging to the Fabrique and purchased by them, the Cure and Marguilliers, was not the parish cemetery appropriated and used for the burial of Christians and especially for the interment of R. Catholics by R. C. profession and of R. C. parishioners. The reserved lot formed no part and was not intended to form a part of the R. C. Cemetery *eo nomine* and the offer of the Curé to give burial in that lot, was evasive and delusive as it regarded a professed R. Catholic, it had not even the merit of the neglected corner for the poor, and was equivalent to an absolute refusal to allow the interment of the R. C. Guibord in the R. C. Cemetery at all. He could not and would not have been prevented in attending the services of his religion in the R. C. Parish Church, in his life time, and by no right could his remains be legally excluded from simple interment in the cemetery of the parish attached to the parish church, which he could not be prevented from attending while alive. It is clear that the exclusion of the remains of the parishioner from civil interment in the parish cemetery is something touching the *acte civil* alone, over which the authority of the Bishop could have no control whatever; over which moreover the *Curé* as such could have no ecclesiastical control, and over which the *Fabrique* itself, the *Cure et Marguilliers*, were powerless in law to prevent, because the right in the Roman Catholic parish cemetery is the civil property of the parishioners, belongs civilly to, and is impliedly by law, to be divided amongst all present and future parishioners as such; and therefore the ecclesiastical exclusion by the Bishop or the *curé*, as a mere ecclesiastic, was a gratuitous extension of their ecclesiastical power over objects not within their special province as ecclesiastics. If the want of absolution and of the sacrament was the equivalent for the refusal of burial in the Roman Catholic cemetery, where were acknowledged Roman Catholics to be buried, who, by accident or sudden malady, died without these offices of the Church at their death-bed? Surely they would not be dumped into the reserved lot. In Guibord's case, it is manifest that the Bishop's censures could not and did not disfranchise him from being a Roman Catholic; they might prevent him from receiving the religious and ecclesiastical offices, but these censures remained outside of the parish cemetery, appropriated for him and other Roman Catholics; and, moreover, from which no professed Roman Catholic could legally be excluded by the act of the *Fabrique* in making the unreserved part to be used for merely ecclesiastical burials only. The *fabrique*, as a civil body, had no legal right to make such a distinction by any civil authority or ordinance that they know of, and where, as a civil act, *au fonds*, every Roman Catholic was entitled to his last resting place. A wrong argument has been drawn from the power of the parish rector, *Curé*,

in England to determine where, in the burying ground, or in what particular manner, he, in his discretion, would allow the interment, for which no mandamus could coerce him, because the mode of burial is held there to be within the cognizance of the ecclesiastical courts. Now, that is quite true, because the freehold is in the rector; and here also, probably, the proper discretion of the *Fabrique* might not be interfered with, with relation to such incidents; but these are very different from total exclusion from burial in the parish church cemetery. Case in 2 B. and A, 205, R. and Coleridge—where the mandamus would issue to compel the interment in the church-yard, a ruling which, in this cause, I should have found myself compelled, as a rule of law, to adopt, had Guibord's burial alone been demanded by the *requete*. It is here that the main difficulty arises, because the demand by the writ is multifarious. It seeks to compel the *Fabrique*, the *curé*, and church-wardens to a double duty, not only to bury but to enregister the burial, which is, in my mind, a fatal mistake—one which the Court cannot rectify, because the demand is indivisible in the one mandamus. It is plain that the demand must be made to him or them who has or have the immediate right to the subject matter of the writ, whose duty it is to execute the writ and if the writ in that respect, that is the required duty, be defective or bad in substance, the writ will be either superseded or quashed. The writ *requête libellée* must clearly show upon its face that it is the respondents' duty to execute it, and thereupon, it has been invariably held as the primary rule that the mandatory clause or mandate must not include more than one duty or right complete in itself, whether of the same or of many individuals, for, two or more distinct rights cannot be joined in the same mandamus, if, therefore, the separate and distinct rights or duties of two or more persons be so improperly joined, the writ may be quashed, p 324: the mandate cannot exceed or extend beyond the powers of the defendants legally to perform—hence, if several distinct rights and duties are joined in one writ it will be set aside and must be quashed, when it commands the defendants to do that which they have no power to do. Now, in this cause, the *requête libellee* demands of the *Cure* and *Marguilliers* of the *Fabrique* to inter the body of Guibord, this I consider a good and legal demand and had it been alone, I cannot see how it could be refused as to the civil burial, because that duty was within the province of the *Fabrique*, the *Curé* and *Marguilliers* to perform, but the same conclusions require the same *Fabrique*, the *Curé* and *Marguilliers* to enregister the burial, and this is a different duty from the burial and one in which they could not interfere. That duty belongs to the *Cure* alone; the law has made him alone the custodian and keeper of the registry book, he is required to see to the registration therein of all burials in the parish cemetery, he gives certificates of those burials and is liable in penalties for the contravention of his duties in this respect. Under these circumstances, he individually in the performformance of his particular duty, formed no part of the *Fabrique*, *le Curé et Marguilliers*, and by these double conclusions against the respondents, for one of which they could not legally be held or constrained, the proceedings are bad and informal, and the writ reprehensible, and must be quashed.

Drummond, J., said that his brothers, who had already spoken, had gone over the facts of the case so clearly and eloquently, that he would not refer to them in his remarks. There remained to be considered the questions of law. He referred to the history of the law bearing on the question, which had been drawn up by Mr. Justice Mondelet, and said there could be nothing better than this history. The case had also been very ably argued before this Court, and the *factums* filed had been of great assistance. Coming to the preliminary objections of form, his Honor expressed his regret that the Fabrique had not thought proper to set aside all question of irregularity in the procedure, and meet the case on the merits. Our Legislature had wisely determined to retain the benefit of these writs without loading them with the formalities which encumbered the English procedure. He considered the writ regular as to form and well directed, and the conclusions sufficient. The Court might order the Fabrique to perform the interment, while it restricted the order to register to the *cure* only. The majority of the Court, however, being opposed to the appellant on questions of form, he thought it would have been better not to have entered into any consideration of the merits; but as his colleagues had spoken of the merits of the case, he would make a few remarks. He looked at the case differently from any of his colleagues. Under the ancient French law the civil tribunals could intervene in these matters. The people and the Sovereign were Catholic. There was an intimate connection between Church and State, and the Sovereign, as a pledge of the protection extended to the church, assumed the right in certain cases to intervene for the purpose of checking and repressing the abuses and encroachments which ecclesiastics sometimes committed. The cession of Canada to England changed this state of things. The guarantee of the free exercise of the Roman Catholic religion granted to the members of that faith, and the fact that the new Sovereign was a Protestant, necessarily changed the ancient state of things, and rendered it as impracticable as dangerous for the State to intervene in ecclesiastical matters. If it were not for this want of jurisdiction, he would have been disposed to order the burial to take place. Guibord was not excommunicated. He was only under canonical censure. His honour's opinions on this point could only be considered as extrajudicial, the case being decided o questions of form.

Caron, J.—This *cause célèbre*, which owes

a great portion of its fame to the extraneous matters which have been introduced, and the numerous questions which have been raised unnecessarily and without advantage being derived therefrom, is assuredly one of the greatest importance ; not only because of the very proper interest manifested in it by the parties, but also, and above all, by the delicacy and the complication of the subject of the present litigation.

While admiring the immense labor accomplished with a perseverance and ability seldom seen, by the learned Counsel representing the parties, and after having examined it with all possible attention, I believe I am placed in a better position to do justice to the case by dispensing with all facts useless or of small importance, and also by putting aside several questions which, though of great importance in themselves, are here of doubtful application and may with advantage be deferred to another occasion. I will therefore content myself with recalling the facts which I consider useful and essential to the contestation ; and from these facts I shall deduce and state the questions which seem to follow.

The facts admitted as well as proved, may be summarized as follows,—Guibord was a Roman Catholic parishioner of the Parish of Notre Dame de Montreal. He was at the same time, during several years a member of l'Institut Canadien, a literary society, incorporated, and composed without distinction of persons of different religious denominations. This Society possessed a library containing works regarded as bad and dangerous by the religious authorities of the Diocese. After several representations and proceedings on the subject without practical result, the Diocesan Bishop launched, against the Catholic members of the Institute, who continued their membership, canonical censures and penalties, having for their effect the deprivation of the benefits of the Sacraments, and consequently the rights of ecclesiastical sepulture, as pretended by the respondents. This was the state of affairs when Guibord died suddenly. He died in November, 1869, without having retired from the Society. The friends of the defunct, at the request of the appellant, his wife, charged with making the necessary arrangements for the funeral, to that end applied to the Curé of the parish, and prayed him to give the remains of Guibord ordinary sepulture in the cemetery of the Parish. The Curé, being apprised that Guibord was a member of the *Institut*, desired time to consult with his superiors. To this end he wrote to the Administrator of the Diocese, in the absence of the Bishop, desiring to know what action he should take the matter.

In answer to this request he received a letter which will be found on page 2 of the *factum* of the respondents, declaring in substance that Guibord having died without having renounced his connection with the *Institut Canadien*, ecclesiastical sepulture could not be accorded to his remains. This letter, communicated to the friends of the Appellant, was followed by discussions and explanations between them and the *Cure*, in the course of which it was distinctly admitted and declared on the part of the Appellant, by her representatives, that they did not insist upon obtaining ecclesiastical burial for the remains of Guibord, but, waiving all such claim, would content themselves with civil sepulture, which the *Curé*, on his part, declared he was ready to accord.

In subsequent conferences between him and M. Dontre, representing the Appellant, it was declared, that this civil burial could not be performed except in that part of the cemetery set apart for the burial of infants dying unbaptized, and those to whom ecclesiastical burial could not be accorded. This mode of burial offered by the *Curè* was refused on the part of the Appellant, who by her representative consented to dispense with the prayers and other religious ceremonies usual in ecclesiastical burial, but insisted that the burial should take place in that part of the cemetery destined for the remains of those to whom ecclesiastical burial is accorded.

It was on this ground, taken by the appellant and refused by the Curé that the parties came to issue ; and it was subsequent to this conversation that the petition now before us was presented, this petition being the commencement of the important case which we have to decide.

On this petition presented to the Superior Court, directed against the respondents in their quality and denomination of "Les Curé et Marguilliers de l'œuvre et Fabrique de la Paroisse de Montreal," the appellant, after having alleged the death of her husband, her quality of Roman Catholic, the right which she had as such to be interred in the common cemetery, destined for Roman Catholics dying in the Parish in the manner required by law and custom, the demand which she had made on the respondents, their refusal to comply with the demand, she concluded (see the conclusion, p. 1 of the appellant's factum) by praying that a writ of *mandamus* issue, addressed to the Curé and Marguilliers above-mentioned, enjoining them to bury, or cause to be buried in the cemetery under the control and administration of the defendants, the body of said Guibord according to law and custom, and also to insert in the registers kept by them the certificate of such interment.

To this petition was annexed a writ of ordinary summons, summoning the defendants to appear to answer the petition, of which copy was also served upon the defendants.

In obedience to this summons the defendants appeared, and to answer to the demand pleaded guilty in substance as follows :

1. That the writ which had been served upon them, which, according to the allegations of the petition purported to be a writ of *mandamus*, was not such, but was a simple writ of ordinary summons.

2. That supposing the writ was in the required form, it should have been addressed to the *cure* only, in his quality of *cure*, on whom is incumbent the duty of making the interments and of making the entry in the registers of which he is the depository and guardian, instead of being addressed, as it has been, to the *Cure* and churchwardens, who represent collectively the Fabrique, which has nothing to do with burials and the keeping of the registers.

3. That civil sepulture only was asked for. This mode of sepulture was offered by the *Cure*, and refused by the duly authorized representative of the plaintiff.

4. That to the offer thus made by the *Cure* before suit, to proceed with the civil burial, no conditions or restrictions were affixed of a nature to justify the appellant in refusing it.

5. In addition to these pleas, the respondents filed another exception, which may be summed up as follows: The Fabrique of the Parish of Montreal, represented in the suit by the defendants, has according to law, which existed not only in the parish, but in the whole diocese, from time immemorial, divided the Catholic cemetery of the parish of which they have the control, into two distinct parts, the one destined for the burial of the Roman Catholics entitled to ecclesiastical sepulture, and the other destined for Roman Catholics not entitled to such burial. That the appellant's deceased husband, in consequence of his condition at the time of his death, should be interred in the latter, and not in the former, to which he had no right. That he should be buried in the reserved part of the Cemetery, not only in accordance with the declarations made in his lifetime, but also those made since his decease before the institution of the action by the authorized representatives of the appellant. That burial in the part to which alone he was entitled had been offered to the representatives of the appellant before the suit was brought, and refused on her part without lawful cause or excuse.

The respondents in the same exception raised several questions of importance, among others, the effect which canonical penalties pronounced against members the Institute should have under the circumstances, the validity of the censure or excommunication pronounced against them, the exclusive jurisdiction attributed to the ecclesiastical authorities in the circumstances, and other similar questions; if these censures and excommunications shou'd, to produce their effect, be accompanied by the procedure required by the Canons, what was the extent and limits of the jurisdiction of our civil tribunals where religious matters are concerned. Lastly, the result of the conquest, and the changes introduced into the country by it in these matters.

All these matters, on which so much has been written and said in the present cause, fully merit the attention which has been given them. I should make it my duty to treat of them had their decision appeared necessary to me for the purpose of rendering justice in the cause. But after the manner in which I have investigated the subject—after having given it all compatible attention, considering that it is clear in the cause, from the evidence and from the acknowledgments of the parties, that it was civil sepulture which was demanded, that it was that only was required, the appellant being willing to content herself with such burial, and never insisting upon ecclesiastical sepulture,—it appears to me that the question is restricted to learning whether the respondents or those who represent them have directly refused the demand, or imposed exorbitant or illegal rates for the granting of such burial with which the appellant would have been satisfied. The questions which have just been enumerated, and several others, important as they may be, may, as I stated at the commencement, be left for consideration on another occasion.

I will content myself with stating, *en passant*, that it appears to me extremely difficult to fix general rules as to the extent of the two jurisdictions—the civil and the ecclesiastical. Beyond doubt, in all cases where questions agitated are purely ecclesiastical, the ecclesiastical authorities alone are competent to judge, but the great difficulty, to my mind, is in distinguishing cases which are purely ecclesiastical from those which are not wholly or in part so.

It seems to me that if questions for decision are mixed with civil and ecclesiastical law, that in an infinitude of cases the ecclesiastical authorities would wish for the intervention of the civil tribunals to aid them in the execution and accomplishment of the rights and privileges which are their incontestable appurtenances. It appears to me that the question of jurisdiction rests much upon the circumstances of each case, without which it would be impossible to lay down a general rule.

As the thing does not appear necessary in the actual case, I will abstain from laying down this rule, reserving the privilege of doing so at a compatable time, and will now pass to a succinct examination of questions referred to above, and which appear to me to flow from the respective pretentions of the parties.

Reduced to simple terms the questions may be summarized as follows:

I. It was a writ of *mandamus* was demanded, and which should have been demanded: was the demand which had been made expressed in the form?

II. The writ of *mandamus* should have been addressed to those who, having to fulfil a duty imposed upon them by law, refused or neglected to perform that duty. In the present case, what were the duties to be fulfilled, on whom were they imposed? was the writ addressed to those who were bound to execute it?

III. The law recognizes two kinds of sepulture, the ecclesiastical and the civil; both

according to the peculiar circumstances of each case are, or may be, conformed to usage and to law. The appellant in her *requête* not having specified which of the two burials she claimed; were the respondents, according to the facts proved anterior to the action, and even at the death of the defunct, fixed in the belief that it was civil sepulture which was demanded, and if this be the case, was such sepulture offered, and refused?

IV. That offer to her was accompanied by conditions or restrictions which might justify the appellant in a refusal. Was this refusal justified by the fact that they, the respondents, were only willing to perform the burial in that portion of the cemetery reserved for the remains of persons who were found in circumstances in which the defunct was placed; was that condition injurious to his memory and that of his family; was the division of the cemetery for the ends and in the manner above mentioned legal? Had the appellant the right, under the circumstances, to insist upon the burial of her husband in the portion of the cemetery destined for those entitled to ecclesiastical sepulture? In declaring herself satisfied with civil sepulture did she not submit herself to the consequences thereto attaching, and among others to see the remains of her husband placed in a portion of the cemetery to which she has since objected.

1st. As to the form of the writ. It will be remembered that the present instance is based upon the 3rd sec., cap. 10, of Code de Proced., art. 1022, and following. She has commenced, as she should have done, by a *requête libellée* addressed to the judges of the Superior Court, to which *requête* is annexed a writ of ordinary summons, requiring the defendants to appear on a day indicated to respond to the demand contained in the said *requête* which led to the issuing of a writ of *mandamus* addressed to the defendants for purposes of which they were aware.

The respondents have maintained, and still maintain that this procedure is null and contrarient to the Code; they say that it is a writ of *mandamus* which should have been demanded, obtained and signified to the defendants; that it is to this writ that the respondents should have been called; that it is on the first writ obtained and signified that the discussion should have been held; that it was not until after this discussion that the peremptory writ of *mandamus* should have been issued.

The interpretation which the appellant would give to the article of the Code in question appears to me more reasonable, more simple in practice, and more satisfactory. They appear, above all, to conform more to the idea which seemed to guide the Legislature when it passed the Act cap. 38 S. R. of Lower Canada, in which are the articles of the Code mentioned above. If, then, it were possible, by implication or otherwise, to give to these dispositions the effect which the appellant takes from them, I will voluntary render myself to their opinion, but the law is too positive and too clear, the terms are too formal, and it is impossible to take any other interpretation from them than that which it fully expresses. The law, such as it is, is without doubt not so good as it might be; but, as it stands, it must be carried out. When the section of the Code treating of *mandamus* is read we must necessarily come to the conclusion that the Legislature intended to and did make a distinction between writs of *mandamus* and the proceedings which must be followed and between the other writs of prerogative; it invariably seems to me consistent that it intended to maintain the writ of *mandamus* and the procedure which is proper to it, whilst, with regard to the others, it adopted the ordinary writ of summons which the appellant used in the actual cause, erroneously, in my opinion. In support of the opinion which I have just emitted I will enter into more ample details. I am decidedly of opinion that the writ which was obtained and signified was not what it should be, and that the procedure which thereupon followed is radically null. I will merely add, upon this point, that all that could be said in favor of that opinion was perfectly expressed in the *factum* of the defendants, and especially in the additional papers produced on their part since the hearing of the case.

2d. To whom should the writ have been addressed, supposing that it was valid as to form? Should that be to the Fabrique, as it has been addressed, or rather to the *Curé* of the parish? The answer to this question should necessarily be against the appellant. It has been said and repeated that the law devolves upon him (the Curé) the duty, which he refuses or neglects to fill, and that the writ of *mandamus* should have been addressed to him, in order to constrain him to fulfil it. Now, in the cause before us, the duties in question were two in number, to preside and assist at the burial of Guibord, in order to be in a position to establish it, and to draw up the authentic entry of such burial in the registry of the parish. Both of these duties were imposed on the Curé alone, who, as such, was the depository and guardian of these registers, for which he was responsible, the Fabrique having no control over them, although it was obliged to furnish them. The other duty, that of presiding at the burial, is equally imposed upon the *cure* alone, the Fabrique having nothing to do with it, its only obligation being that of maintaining the cemetery in which the burials take place in decent and convenient order, the which appertains to the parish represented by the Fabrique, which is composed of the wardens and the Cure—which responsibility does not stop the latter from having duties other and independent of those of the Fabrique and the Warden—those required on the part of the appellant in the present case, forming part of those duties which are entirely foreign to the Fabrique; which is not only not bound to fulfill them but unauthorized to do so. Wrongly therefore

Is it pretended that the Fabrique should be rial denuded of all religious ceremony and *mis en cause*, and the Cure as such put aside made in the place where the civil burials, for the reason that it is the Fabrique which then, and now actually take place, that her has charge of the cemetery and should fur- husband understood and desired to have, nish the registers. Once these registers are Consequently, in order to give expression to furnished and delivered to the *Cure* the this desire the representative of the appel- *Fabrique* possesses no farther right over lant took charge of the funeral, declared them, their maintenance, their care, their that he would content himself with civil bu- deposit, the resulting responsibility, all is rial, declared that he would not insist at the charge of the Cure, and the Marguil- upon the ceremonies usual in the case of liers possess no further right over them than religious burials. It was in the execution of the parishioners or even simple strangers this determination that Guibord's body, accom- whilst as to the burial itself, it is needless to panied by his friends, was taken to the Ceme- say that the Wardens had nothing to do tery on Sunday afternoon, at an hour when with it. Besides, it is easy to conceive that religious burials never take place, and when inconvenience would result from the adop- the Curé had not been notified: the pre- tion of the doctrine set forth by the appel- sumption being, from what then and there lant, viz: that the writ is well addressed in took place, that the guardian of the ceme- being addressed to the Fabrique. The Cure, tery, who was called upon to open the gates as forming a part of that Fabrique, has had consented to do so, the body of the de- no more power than any of the other mem- ceased would have been deposited therein bers which compose it; his vote in the de- without any ceremony whatever, and not in liberations only counts as that of another, the presence of the Curé.

and now, would it not be absurd to expose All these facts, it appears to me, prove the Curé to be controlled, prevented even by that they had no desire of obtaining a majority of his wardens, from accomplish- eccles'astical sepulture; that it was the civil ing the duties which he only is held, and sepulture only that was asked for and insist- which he is only qualified to fulfil. The ed on, and that sepulture was offered and re- conclusion to be drawn from all this is that fused.

the writ, supposing it to be valid, has been 4th. As to the refusal of the sepulture wrongly directed; the person to whom it offered. The proof on this point has been should be addressed not being regularly or abundant and conclusive, to establish that legally *en cause*; the peremptory writ directed the Curé offered to give the sepulture, that is against him is null, and for this reason, again, to say, the sepulture without any religious the judgment of the Court of Revision ceremony, prayers, singing, ecclesiastical should be sustained.—3. What form of burial vestments, and other things usual in eccles- has been demanded? By referring to astical sepultures. It is equally established the *Requête* we see that on this subject that the representatives of appellant had at nothing is specified. The parties con- the time accepted the offer thus made, and de- tent themselves by demanding that it clared on the part of appellant, that they shall be enjoined and ordered upon the de- did not insist on the prayers and religious fendants to cause the body of Guibord to be ceremonies, it was only when we entered buried in conformity to the usage and into the question of where the sepulture was law, and to insert in the registers kept by to take place that the misunderstanding com- them the certificate of that burial. All that menced that has given rise to the unfortunate was therefore required was the burial and the litigation that now occupies us. registration should made in conformity with In effect they were at accord on all points usage and law. Now, each of the except the place where the interment was to said burials may be made in conformity take place, and this was the only point on with the usages and the law. In the case which there was any question and on which before us all the indications are that it was they could not agree. The appellant con- the civil sepulture which was required; tends that it could and should be made in the which was demanded, and which the appel- part of the ground set aside for ecclesiastical lants contented themselves with asking for. sepulture, while the defendants aver that it This assertion is justified by the terms even was in part reserved for those who had no of the *requete*, which are vague and uncer- right to ecclesiastical sepulture but to the tain as to the description of the burial required civil only. It is because the defendants have and which must be consequently [illegible] insisted on this point that the appellant refus- by the facts established in this case. [illegible] ed to accept the sepulture offered, and has facts, amongst others, are anterior to the de- brought this action to obtain what she cease of Guibord, the declaration which he claims. made to him, that he knew that if he persisted

All depends then in knowing if the de- in remaining a member of the Institute he fendants are right in their pretension—for if would not be buried *en terre sainte*, but that they are, the appellant insists on a right he did not care much about it, provided that that she has not and that we cannot give he had a large number of persons at his fu- her. If, on the contrary, she had that right, neral was all he desired. It was to his wife, the defendants in insisting as they do are the appellant, that this declaration was made, wrong, and ought to be condemned, seeing and starting, therefore, from the decease of that they refuse to perform a duty that is her husband, she knew that it was civil bu- imposed upon them,—an illegal condition to

which the appellant was not called upon to submit, and which might be regarded as an indirect refusal. After having attentively examined this important point of the case, I find that it is sufficiently proved that from time immemorial it has been the custom, not only in the Parish of Montreal, but also in all parts of the Diocese, and further, in all parts of the country, to make in the cemeteries the division made at Montreal, and of which the appellant complains; that one of those divisions is appropriated for the burial of the bodies of those Roman Catholics who are entitled to the ecclesiastical sepulture, and the other destined for those who have not this right; that in this last part are buried those who find themselves in the position of Guibord at the time of his death; that it would have been contrary to the general rule and usage if they had accorded to the said Guibord what would have been refused to others. It is unreasonable, it appears to me, to pretend that this refusal on the part of the Fabrique, in the case of Guibord, is injurious to his memory and to the character and reputation of his family. If, in reality, there were reflections and dishonor to the deceased in being interred in the place assigned by the Fabrique, it could not surely be attributed to it, but rather to him who, knowing the consequences, voluntarily subjected himself and his family to a disgrace he could so easily have avoided.

Duval, C. J.—There can be no pleasure in listening to the repetition of a twice-told tale. The Bar will therefore be pleased to hear that I intended to say very little. No doubt, the question is one of the highest importance. It affects the feelings and interests of every family in the country, and therefore it is not a subject which should be treated lightly.

It is to be regretted that the question should be disposed of on what may be considered a question of form. We think the writ of *mandamus* is not of such a character as the writ which has been taken out in this case. Whatever our own opinions may be as to what might suffice, if we are satisfied that the law is imperative, it is our duty, not to judge the law but to respect the law. If on reading the Code and the law which preceded the Code we find the law stated in such terms as to admit of no doubt whatever, I say it is the duty of the Judge to respect the law, and to obey it.

The first question in this case is: Has the writ issued in accordance with the requirements of the law? I say, most assuredly it has not. It has issued in the very teeth of the law. We have been told that we have nothing to do with the English law in this instance. Nothing to do with the English law! Then, where are we to find the law? Is it the law of Canada which has told us what a writ of *mandamus* is? So far is this from the case, that the Code informs us, after mentioning two or three cases in which the writ of *mandamus* may be obtained, that the writ is to issue in all cases in which the writ of *mandamus* would lie in England. I turn to Article 1,023 of the Code of Procedure for Lower Canada, and I find no definition of what the writ of mandamus is. Here is what is stated. "In the following cases," (two or three instances are given) "4: In all cases where a writ of "mandamus would lie in England, any per- "son interested may apply to the Superior "Court or to a judge in vacation and obtain "a writ, commanding the defendant to per- "form the act or duty required, or to show "cause to the contrary on a day fixed." What right have we to say that the direction of the writ shall be other wise than to show cause on a day fixed? This does not admit of any doubt. Must we not look to that writ?

The modern writ of mandamus is a high prerogative writ, not a writ of right. The subject is entitled to it on a proper case shewn to the Court. It was founded on Magna Charta. In England, what does the writ contain? Here is what we are told by a writer on the subject. (His Honour cited the form of the English writ) The writ must expressly state the act. The absence of such a form will render the writ liable either to be superseded or to be quashed. I will now show that our own statute, our own Code, expressly enjoins the observance of this form. It is only necessary to refer to the commencement of Chapter 10. We find, in Article 998, that "the "summons for that purpose must be pre- "ceded by the presenting to the Superior "Court in term, or to a judge in vacation, of "a special information, containing conclu- "sions adapted to the nature of the contra- "vention, and supported by affidavits to the "satisfaction of the court or judge; and the "writ of summons cannot issue upon which in- "formation without the authorization of the "Court or Judge." Here we are told in one page what the defendant is to do. In the other page we are told that the writ of summons is merely to call him in. Can it be said, then, that the Legislature has not pointed out what the defendant is to do? It is to be a mere writ of summons to call him in. But it is said that the man is to answer a petition. The law, however, has made a distinction as to the proceedings. The law says in the one case, that a corporation violating or exceeding its powers, you are to do so and so—a simple writ of summons. In the other case you are to take the English writ of *mandamus*, and that the writ must enjoin upon the defendant what he is to do. (Several references were here made to Tapping and the writ of *mandamus*) Then the Code says that the proceedings after the service are to be in accordance with the provisions contained in the preceding section. He who runs may read. There is a positive injunction. I find the Legislature making a distinction between the mere writ of summons and the mandamus, and it is not for me to judge the law. But if we are to be left without any rule at all; if we are to

have only the three clauses of Article 1022 to guide us, I say that the judge in that case has no guide. He becomes as free as air. If he is of an arbitrary disposition, he is at liberty to indulge it to any extent to the detriment of the subject. I repeat, then, that we have no right to dispense with the law. It would be a most arbitrary proceeding. I do not think the Court has any such power. I say, if the law is bad and defective, let it be reformed.

I should certainly have wished all remarks on this case to stop at this point. Mr. Justice Monk, however, not objecting to the writ, entered upon the merits of the case. For my part, I am very desirous to stop here, simply saying that this writ is bad, that this person is not *rectus in curiâ*, and therefore the writ is quashed. It is desirable, certainly, that a question of this kind should be disposed of on the merits. Here again we find a difficulty. If we are to refer to the laws of England, the writ is not good.

The first question is, to whom has the writ been directed? I say it was directed merely to the Fabrique, *un corps laïque*. There used in former years to be much discussion as to the name to be given to these Fabriques. The writ is addressed in this case to the Curé and Marguilliers, not to the Curé personally. If you order a man to do a thing—either a Curé, or anyone else,—and tell him you intend to send him to jail if he does not do it, when you came to send him to jail, you certainly would not tell the Sheriff to put in jail the Curé et Marguilliers. It might be a different person who was *curé* when you went to execute the judgment, and how could you, with a judgment against the *curé* sue out a writ against another individual? The writ is therefore not properly directed. It is addressed merely to the Fabrique, a corporation *laïque*. What has the Fabrique to do with the keeping of the registers of burials? The duty of making entries of marriages and interments is not imposed on the churchwardens. The Fabrique may, therefore, say: We cannot comply with your request; we have no power to make an entry in the register.

With respect to the burial itself, here again I must say I could have wished that this question had not been touched, for it may be said, we are not meeting the merits of the case. What has taken place, however? What was asked of the Fabrique? The widow deputed a person to call on the *cure*. He stated that Madame Guibord would be satisfied with a civil burial. The *curé* answered that he was willing to give a civil burial. Here came the difficulty. The *cure* said: I will bury the body in consecrated ground. There is a division in the cemetery. The two portions are distinct, the one being allotted for persons dying without baptism, and unknown individuals. In France, the power of the Fabrique extended over cemeteries. As a matter of right, the churchwardens were authorized to direct where the graves were to be dug. There could be no doubt of this in France; and according to the authorities which had been cited, the same rules had been laid down in England. If there is a little difference in the powers held, the result is the same.

As I have said already, I am desirous of not going beyond the question before us. I therefore confine myself to the remarks I have now made. The writ has in my opinion contrary to the law, and therefore must be quashed.

Mr. Doutre inquired whether the majority of the Court quashed the writ because the form was defective. Three of the judges appeared to hold that the form was correct,

Duval, C. J.—We quash the writ for the reasons we have given. Mr. Justice Badgley, though of opinion that the writ issued legally, held that it improperly joined two conclusions which were incompatible, and could not be obeyed by the persons to whom it was addressed.

Drummond, J.—It is one thing whether the form of the writ is in accordance with the requirements of the Code, and another thing whether it makes the proper demand in this particular case. I say the form of the writ is correct.

Duval, C. J.—I say that the form of the writ is wrong; and, moreover, that it is wrongly addressed. We all agree in quashing the writ.

Mr. Doutre said he was aware of that. He merely put the question that the Bar might be satisfied as to the point of procedure.

Mr. Doutre then moved for leave to appeal to the Privy Council. Leave was granted.