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REVUE CRITIQUE

DE

Législation et de Jurisprudence.

THE HISTORY AND SUCCESS OF LAW REFORM THROUGH THE AGENCY OF LEGISLATION IN THE UNITED STATES.

By Isaac F. Redfield.

The following is the substance of a letter addressed to one of the most eminent jurists and among the highest judicial officers in England. It was prepared with care, and we believe the statements of fact to be reliable. It will not be necessary to advertise the reader that our early admiration of law reform, and of that especial form of it known by the name of codification, has long since given place to the most unquestionable conviction that, practically, it has no existence in fact; and that, speculatively, it is of no use, further than it affords a nucleus for good purposes to cluster around in early life, and finally, when experience has begun to show the folly of our youthful hopes and aspirations, it may afford some consolation to those who have adventured in the work in assuring themselues of having at least attempted something good. It is, unquestionably, an amiable hope; an innocent dream; a somewhat pleasurable delusion, — but, at the same time, none the less a dream and a delusion. It is not like the philosopher's stone, the universal solvent, or the quadrature of the circle, a mere idle and useless speculation, impossible of attainment, and equally impossible of being turned to any practical end if attained. The perfection of the jurisprudence of any country may always be regarded as of the highest value and importance; an end to justify the most intense striving, the most persistent and invincible efforts; but unfortunately one

which is no more possible of attainment by any short-hand process, than is strength or wisdom or power in the individual man. All things come and go, or abide in one stay, only by the appointment of the omnipotent power and wisdom of Him, who ruleth in the armies of heaven and among the inhabitants of the earth as seemeth Him good; with whom a thousand years are as one day, and one day as a thousand years. But with man everything lies in mere experiment; is merely tentative, except as it is confirmed by the procession of events, and can only be fully established by the advancing ages of the world, we might almost say, of eternity itself.

It may be proper to say that the letter was written at the request of the person to whom it was addressed, in June, 1870.

I have ventured to give a brief outline of the history and success of Legal Reform in the United States.

The earliest attempt at codification in the United States was made by the legislature of the State of Louisiana, in the year 1822, by the appointment of Edward Livingston and two others, to prepare a civil code for the State, to embrace all laws then in force, including the law merchant and a code of practice. Their report, under the title of "The Civil Code of the State of Louisiana," was adopted and promulgated by the legislature in the year 1824. The legislature resolved that thereupon all former laws should cease to have operation "in every case for which it has been specially provided in this code." It would therefore seem that the old law was still in force in all cases not specially provided for by the new code. This code is drawn largely from Toullier's "Le Droit Civil Français" and the Code Napoleon, as these were from the Code of Justinian and the commentaries upon the Roman Civil Law.

This is the only attempt at the codification of the entire civil law of a State, which has met with such acceptance as to be adopted by the legislature. And I believe the adoption of this code by the State of Louisiana is largely attributable to the fact, that the State was chiefly settled by Spanish and French emigrants, who had always been accustomed to that mode of legislation, and to the further fact that a species of code already existed in the State.

The legislature of this State in 1822 also appointed Mr. Livingston to prepare a code of criminal law, embracing procedure and evidence. This latter code was prepared by the dis-

tinguished commissioner; and presented to the legislature in 1822 but its adoption being delayed, it was destroyed by fire in 1824. Mr. Livingston was afterwards employed to reproduce it, but it seems never to have been adopted as the law of the State, although it was published by Congress and extensively circulated, and is said to have formed the basis of the criminal codes of some of the Mexican and Central American States, whose people were of Latin origin. This is probably the most complete and perfect code which has ever been produced in America; but for some reason the people of the State of Louisiana have never felt prepared to take the bold step of an entire change of its criminal law, by its adoption.

The earliest attempt at codification in any of the American States where the common law of England prevails, was made by the State of New York in 1830, by appointing three of their most eminent men, John C. Spencer among the number, as commissioners to revise the statutes of the State. This was soon after accomplished, and the code adopted. But these revised statutes do not embrace entire anything more than the statute laws of the State. They naturally embrace some changes, both by way of addition and alteration, and commonly include most of the authoritative judicial constructions of former statutes. The same plan has been adopted in most of the other States, and is found a very great convenience in bringing all the statute laws of the State into one body, so as to be readily accessible.

My own experience of the practical working of attempts at codification has been restricted to these Revised Statutes. That process was resorted to in the State of Vermont, while I was connected with the Supreme Court of that State. The result did not impress me favourably in regard to any actual improvement in the statutes, by reducing them to a formal code, either in regard to certainty or completeness. The Commissioners for presenting the draught of the revision consulted the statutes of other States, and incorporated many new provisions into their report, and altered some of the existing ones, and changed the phraseology in many instances, either for greater certainty or symmetry, but in almost every instance produced many times more uncertainty than they cured, and in some instances resorted to such refinements of language, as might seem more suitable to other writings than to the statutes of a State. The highest judicial tribunal of the State was, more or less, occupied for many years in removing the

uncertainties created by these "improvements in language." I am thoroughly convinced that after a statute has received repeated judicial constructions, if it is intended to be substantially preserved, it is not wise to change its phraseology, however much it may seem to increase its clearness or beauty. I think, therefore, that while revisions or concentrations of the statutes of a State after they become considerably numerous, is of the last importance, for the convenience of those who desire to consult them; it should, nevertheless, so far as practicable, always be done with the strictest adherence to existing phraseology. And I think the American States are now, very generally, arranging their existing statutes, upon the same topics in successive chapters or subdivisions, so as to bring the entire body of the statute law, from time to time, into one homogeneous form, which are now called compilations, or General Statutes, and sometimes Codes; but under whatever name are in fact nothing more than reducing the scattered statutes into one compact and systematic body. It has always seemed to me the greatest cause of surprise of anything in regard to Law Reform in England, that in the multiplicity of projects upon the subject, some one should not only have attempted but accomplished a compilation of existing statutes, arranged according to topics, with the repealed and obsolete ones excluded. No book, it seems to me, would be easier of accomplishment, or of greater utility to the profession there.

It may be proper to mention that the law of the American States upon some subjects has been of a statutory character from the first; as in regard to the conveyance of the title of lands and the registry of such titles. This resulted almost of necessity from the fact that all our land titles are strictly of an allodial character, there never having existed in this country any of the accompaniments of feudal tenure. These statutory provisions upon this and upon some other subjects, have assumed in the course of years very much the form of codes, but nevertheless more or less supplemented by reference to the English common law. Thus, for instance, the codes upon conveyancing in the American States, for the most part, I believe, define the nature and form of the instruments to be executed by the grantor, or the grantee, or both, for the purpose of transferring the title. But the precise force and effect of such instruments, and the particular title conveyed, is not uncommonly referred to the doctrines and definitions of the English common law. For instance, the estate conveyed

by the use of particular words, whether a fee simple or in tail; whether an estate for life in the first grantee, and a remainder in fee to his heirs, or an absolute fee simple in the first grantee; whether an estate in joint tenancy, or a tenancy in common; and many other questions of like character have to be referred to the definitions of the common law. We hear almost as much of the rule in Shelley's case here as you do in Westminster Hall.

And the whole law of pleading and procedure in all respects, has in the American States been held more or less under the control of the legislature, from the first. And while pleading has been made more special, by legislation, in England, it has constantly been made less so in America. So that here, for many years, it was competent, in all forms of civil action, even trespass, to give all special defences in evidence under the general issue, by filing with the plea of the general issue, a notice of the special matter proposed to be given in evidence under it, which notice must contain the substance of a plea in bar, but without its formal averments.

There are many other subjects, where the American law has become essentially modified by our peculiar circumstances and condition, and where it is essentially statutory. But in all these cases the common law of England or the rules of equity jurisprudence, as the case may be, may be brought in to supply any defects existing in regard to the provisions of the statutes. So that upon all subjects, and in all forms of statutory enactment, they are merely supplementary and reformatory; much like the acts of the British parliament for many generations past. And to this extent all must agree that legislative reforms are indispensable in all free States. And it seems to me that this admitted necessity of statutory amendments of the common law, within certain limits, has led many enthusiasts, and many perhaps who are not altogether of that character, to entertain the belief or the hope that, by careful study and revision, a more complete and perfect system of laws might be created, than any now existing. I shall not stop to discuss a proposition so abstract, and so incapable of being reduced to any decisive test, through the agency of mere logic. It may be so. It would seem that it might be. Many very wise and prudent men believe it is so. But for some reason there seems to be an aversion to try the experiment, with almost all communities of the Anglo-Saxon race. There is among them an attachment to the system of unwritten law, or customary

law, as a supplement to statutory law, which seems almost invincible. The speculative and the ambitions feel great confidence in law reform, through statutory enactments, in the form of complete codes; but the mass of the people prefer to "endure the ills they have, rather than fly to those they know not of."

I shall now content myself, in conclusion, in giving a brief history of the attempts at legal reform in the great State of New York for the last twenty-five years, inasmuch as that is the only state in our country, having the common law of England as the basis of its jurisprudence, which has made any very decided attempts to reduce the whole body of its law to a code. The constitution of this State adopted in 1846, was essentially a revolutionary movement, and altogether in the interest of what is called Law Reform, and under the lead of the most advanced movers in that direction. It began with the complete fusion of Law and Equity. It converted the old system of courts, based upon the principle of circuits throughout the State for the trial of facts, and central session in banc for settling the law, much after the English system, into eight independent local supreme courts, holding their sessions, each for itself, both at *nisi prius* and in *banc*, and deciding everything on full argument, with the right of appeal upon all questions of law, to a grand court of Appeal, consisting of eight judges, one half elected specially from the State at large for that particular tribunal, and the other half taken from the local supreme courts, of the class of those who had served the longest term, and whose remaining term soonest expired. This added about twenty judges to the number formerly employed, and by a judicious distribution of candidates throughout the State, and referring the elections to the people, by general ballot, and limiting the period of holding office to a comparatively short term, secured the adoption of the constitution, by an overwhelming majority. I believe that every able lawyer, and almost every fair-minded man in the State, will now admit, that the administration of justice has never been as able or as impartial, under the new constitution, as under the former ones, where the judges held office, *dum bene se gesserint*, and were far less numerous. But some may claim an advantage, because, if the administration of justice has not been improved in quality, it certainly has been somewhat increased in quantity. But it seems very questionable, how far bringing justice to every man's door is always a benefit. It is always best one should feel that justice

is not beyond his reach; but not always, that its awards may be too cheaply attained. It should not be "denied, or deferred, or sold," but may be made too cheap.

The legal reforms required by this new constitution, were numerous, and of a most radical character. It was made the duty of the first legislature convened under the new constitution, to appoint three Commissioners, whose duty it should be to reduce into a written and systematic code, the whole body of the law, or such parts thereof as to the Commissioners should seem practicable and expedient. The Commissioners were also charged with the further duty "to revise, reform, simplify and abridge the rules of practice, pleadings, forms and proceedings of the courts of record." The legislature in 1847 created two commissions, one in reference to procedure, and the other as to the general law of the State. The former made a preliminary or provisional report in 1848, in order to meet the pressing emergency of the fusion of law and equity; which was immediately enacted by the legislature, and with subsequent amendments, forms the present code of practice in that State, which is the only code the State has ever adopted; and this has been somewhat extensively adopted in other States. It is rather a significant fact in this connection that this only American code, in any State where the common law of England obtains, was confessedly a hasty and imperfect effort; prepared without study and adopted without deliberation; and that the final and mature work of the Commission was never acted upon by the legislature; and that this one code has reference exclusively to procedure and practice, and was rendered indispensable by the foregone action of the constitution in the complete and irrevocable fusion of law and equity. It could answer no good purpose to speculate upon the grounds of this singular action, or rather inaction, on the part of the legislature. It could result from no want of agitation and advocacy on the part of the reformers; for they have always been active and persistent and loud in their demands; but never able to accomplish any other approach towards codification, except this hasty fragment entirely upon compulsion, by the prior and irreversible action of the constitution. It certainly indicates extreme distrust of reforming the body of the law, by means of the labours of learned jurists and wise and experienced statesmen. For it is undeniable that many of the most learned and most experienced of the American bar have been, first and last, connected with the

New York Commissions for preparing its codes, and who have laboured, long and patiently, to produce codes of great wisdom and learning. But for some reason, no legislature has ever been found willing to adopt them, with the single exception already named, of the provisional Code of Practice. The first Commission appointed in 1847 to reduce the whole body of the law of the State to a code, consisted of Chancellor Walworth and two others. Chancellor Walworth, far the most eminent of the number, immediately resigned and another was appointed in his place; but no report was ever made by the Commission. Nicholas Hill too, the ablest man upon the former Commission of procedure and practice immediately resigned, and his place was filled by another. A new Commission was appointed in 1849, consisting of John C. Spencer, another very eminent jurist and statesman, and two others, but that law was repealed in 1850 and no report was ever made. Thus the matter slumbered until 1857, when a new Commission was appointed, consisting of Messrs. Field, Noyes and Bradford, who were expressly required to serve, if at all, without compensation, and these gentlemen being all in large practice in the Courts of the City of New York, after devoting, what leisure they could command for many years, have produced and published all the memorials of New York codification which still abide, with the exception above. None of them have ever become laws. They cover the entire ground of the law of the State, but do not profess to supersede the old law, *except* to the extent of the express provisions contained therein. It is certainly a very significant fact in connection with the attempts at law reform in this country, by way of codification, that it has resulted in accomplishing so very little, almost nothing at all, during the period of almost two generations, while the work has been hotly pressed by many ardent and persuasive advocates and earnest laborers.

I shall not be expected to discuss the merits or the hopefulness of the subject of Law Reform in this country. The long period which has elapsed and the numerous attempts which have been made, and the all but total failure of all of them, speak a language more significant than any other which could be uttered. If after a struggle of nearly fifty years absolutely nothing in that direction has been accomplished, under such favorable circumstances and with such persevering efforts, he must be a sanguine man indeed, who looks to the future with much hopefulness. There

are doubtless many apologies for this want of success hitherto, which the advocates of codification might urge. But we fear most of the obstructions would be found difficult, if not impossible to be removed.

It is unquestionably true that the real work devoted to the undertaking in New York has never been at all in proportion to the result proposed to be accomplished. A very friendly review of the work of the last Board of Commissioners in New York in the May number of the *London Law Review*, points so many and some such puerile defects and deficiencies in the work that it would be useless to attempt anything further of that character. The whole subject of Trusts is disposed of in the space of fourteen pages, and the subject of Charitable Trusts is not touched! And many other important subjects are handled in the same brief and summary mode, so that the writer just referred to very naturally concludes that if the work ever should be adopted by the legislature, while it may be useful to students as an elementary text book, and possibly to laymen desiring some knowledge of the elementary principles of the law, nevertheless that to the practitioners, except so far as it effects changes in the existing law, it must prove "absolutely useless."

But in saying this we beg not to be misunderstood. We by no means intend to depreciate the eminent fitness of those distinguished members of the New York bar for the difficult task which they took in hand. The difficulty was doubtless more in the work and in their want of leisure to devote to it than in the men. But one may conjecture that these gentlemen were very little aware of the extent and difficulty of the undertaking at the time they entered upon the work. I think it fair to conclude that any body of men able to comprehend the extent and difficulty of reducing the entire body of the Common Law of England to a single code with all the modifications it had received in that State by statute, for this was the work proposed to be done by them, and who really had mastered that comprehension, would not have announced their purpose in quite the same high sounding phraseology as that adopted by this Commission in their acceptance of the trust; wherein they declare the humble purpose of presenting to the legislature, "in a condensed and convenient form, the great body of the law, not the laws of England, nor the laws of France, nor yet of Rome, but the laws of the foremost American commonwealth, formed out of those which

were brought in by our ancestors, and those which have sprung from the genius and wants of our own land." When we compare this high-sounding manifesto with the actual results of the undertaking, we are reminded of the language of the English dramatist put into the mouth of Queen Katharine in regard to Cardinal Wolsey, "His promises were as he then was, mighty. But his performances as he is now, nothing."

Such is the brief but faithful history of Law Reform in the American States. It does not, in fact, extend beyond reducing the statute law to something like a code. And even this the national legislature has been never able to accomplish. It has made some attempts in that direction, several Commissions have been appointed, but no report has ever been made, or no complete report, and there is a kind of ominous intimation from those professing to be informed in the matter, that nothing has ever been done. And some are so cynical as to suggest that the less the better! upon the principle that no work is better than bad work. But I expect the statute law of Congress will soon be reduced to uniformity.

I ought perhaps in conclusion to say, in fairness, that from setting out in life as a rather confident believer in Law Reform, through the instrumentality of codes, I have come to believe that the thing, if not altogether impracticable among us, where there is not sufficient leisure to do anything carefully and thoroughly, is certainly not hopeful, and that the less legislation we have, the better for our jurisprudence, since what is done must be done in haste. Just to reflect upon a code for the empire State of New York, made by three counsellors in full practice at the bar all the time, in their fragments of leisure from severe toils; and that code disposing of subjects in ten or twenty pages, where reported cases on the topic are already numbered by scores, and in some cases by hundreds! The thing is simply preposterous.

DE L'INÉXÉCUTION DES OBLIGATIONS.

Toute obligation constitue pour celui qui en est tenu, une restriction de sa liberté naturelle. Sans elle il pourrait s'abstenir d'un certain acte ou le faire ; à cause d'elle il ne le peut plus qu' avec le bon plaisir de son créancier. Elle l'a mis dans la dépendance de celui-ci. Il se trouve astreint par la loi civile à faire cet acte ou à s'en abstenir.

Les auteurs appellent *prestation*, l'acte ou l'abstention à l'égard desquels la liberté du débiteur se trouve ainsi restreinte.

Cette prestation, dont la *necessité légale* restreint la liberté du débiteur, doit être exécutée dans un certain temps, en un certain lieu, et d'une certaine manière. En effet, nous venons de voir que l'obligation constitue une restriction de la liberté du débiteur. Or la liberté renfermant la faculté d'agir ou de ne pas agir toujours, partout, n'importe comment, les restrictions qu'on lui met ne peuvent être caractérisées qu'à ces trois points de vue.

Le temps, le lieu, et le mode d'exécution de la prestation qui en fait l'objet, sont donc des éléments essentiels de l'obligation. Par conséquent, si une obligation n'est pas exécutée au temps et au lieu où elle doit l'être, de la manière qui lui est propre, on peut dire qu'elle n'est pas exécutée du tout ; car, s'il est fait quelque chose par le débiteur sous prétexte de l'accomplir, ce quelque chose ne peut être, tout au plus, qu'un équivalent partiel.

Il peut se faire que le créancier se contente de cet équivalent. Il se peut aussi que le créancier ne soit pas disposé à s'en contenter, mais qu'il ne souffre aucun dommage à raison de l'inexécution de l'obligation. Il est évident qu'il ne peut alors avoir aucune action contre son débiteur, puisqu'il n'a pas d'intérêt a l'exécution de l'obligation, et que l'intérêt est la base et la limite des actions.

Mais il arrivera bien rarement que le créancier, ou bien n'ait aucun intérêt à l'accomplissement de l'obligation, ou bien veuille se contenter de l'équivalent partiel que fournit le débiteur. Le plus souvent donc, lors qu'une obligation n'est pas exécutée exactement au temps, au lieu et de la manière voulus, on voit s'élever la question de savoir quels sont les effets de son infraction totale ou partielle. A première vue, il semble que ces effets

sont faciles à comprendre. L'obligation constitue pour le créancier un droit ; or la violation de tout droit donne naissance à une action. L'infraction d'une obligation, lorsqu'il en résulte quelqu' effet, doit donc produire une action en faveur du créancier. Mais, quelles sont les conditions nécessaires pour que cette action existe, quels sont les faits qui peuvent l'empêcher de prendre naissance, quel en est l'objet ? Voila autant de questions subsidiaires, dont la solution est nécessaire pour résoudre cette question principale : quels sont les effets de l'inexécution d'une obligation ?

Avant d'aller plus loin, constatons bien un principe trop souvent méconnu. Suivant beaucoup d'auteurs, pour savoir quels effets produit l'infraction d'une obligation, il faut distinguer entre les obligations de donner, les obligations de faire et les obligations de ne pas faire. L'inexécution d'une obligation de l'une de ces deux dernières espèces donnerait toujours lieu à une action en dommages intérêts, pendant que l'infraction de l'obligation de donner pourrait quelquefois occasionner une action pour en obtenir l'exécution. La raison qu'on donne de cette distinction, c'est que personne ne peut être forcé à faire, *nemo precise cogi potest ad factum*, pendant qu'on peut forcer un débiteur à donner.

Cette distinction provient de ce qu'on ne fait pas attention à la nature propre de l'action en dommages-intérêts. Celle-ci est une action en indemnité c-à-d une action tendant à mettre le créancier comme il serait si l'obligation eût été exécutée. Or on indemnise presque toujours avec de l'argent, parceque celui-ci permet de se procurer toute espèce de choses. Mais il est évident qu'on pourrait aussi indemniser le créancier en lui donnant les choses qu'il voudra se procurer avec de l'argent. Voilà pourquoi, lorsqu'il est possible de procurer directement au créancier ce que lui aurait donné l'exécution de l'obligation, on le lui procure. Cela n'est possible, en général, que dans les obligations de donner ; cependant, la chose peut aussi se pratiquer quelquefois dans les obligations de faire, par exemple, dans l'obligation de construire une maison. Mais, même alors, il est évident que le créancier n'obtient qu'une indemnité, qu'un équivalent, car il avait droit de compter sur un certain exercise de l'activité du débiteur, et ici le débiteur reste inactif ; c'est l'autorité publique qui agit à sa place, bien qu'elle le fasse à ses dépens.

L'on se convaincra mieux encore de la vérité de ce qui précède, si l'on veut faire attention à la nature des obligations. Celles-ci sont des restrictions à la liberté du débiteur. La liberté de ce dernier consiste à faire tout ce que lui permet le droit commun, et à s'abstenir de tout ce qu'il ne lui ordonne pas. Pour qu'elle soit restreinte, il faut donc qu'il soit dans la *nécessité légale* de faire ou de ne pas faire quelque chose en dehors du droit commun. Cela est si vrai que l'obligation de donner est une espèce d'obligation de faire, c'est l'obligation de faire la remise d'une chose ou la translation d'un droit.

Il est donc constant, que toute obligation, lorsque sa violation la transforme en droit d'action, doit nécessairement donner lieu à une action en indemnité, c. à. d. en dommages intérêts.

Voyons, maintenant, quelles sont les conditions nécessaires pour qu'une obligation se transforme ainsi en action de dommages-intérêts. Sans doute, il faut, pour cela, qu'elle soit enfreinte, que le droit de créance du créancier soit violé, puisque toute action suppose nécessairement la violation d'un droit. Mais, quand une obligation peut-elle être considérée comme enfreinte par le débiteur? D'abord, ce ne peut être que lorsqu'il ne l'exécute pas exactement au temps, au lieu et de la manière qui lui sont propres.

Ceci nous amène à examiner le temps, le lieu et la manière dont un débiteur doit agir pour exécuter son obligation.

Quant au mode d'action nécessaire de la part du débiteur pour qu'il exécute son obligation, il n'y a presque rien de général à en dire. Toutes les obligations ont sur ce point un tel caractère d'individualité, qu'on n'y rencontre, presq'au aucun élément commun. Les seules obligations, à peu près, pour lesquelles on puisse à cet égard poser des règles générales, sont les obligations de genre, comme l'obligation de donner un cheval, et les obligations de quantités, comme l'obligation de fournir tant de minots de blé, tant de gallons de vin, surtout l'obligation de donner telle somme d'argent. Mais les règles générales sur le mode d'exécution de ces obligations sont si connues, qu'il serait oiseux de s'en occuper.

Le lieu où doit s'accomplir chaque obligation ne présente guère plus de difficultés. D'abord, il peut être déterminé par la convention, dans les obligations qui naissent des contrats. Il l'est même implicitement dans certains cas. C'est ainsi, par exemple, que l'obligation de livrer un immeuble ne peut être exécutée

qu'au lieu où il se trouve. Dans le doute sur l'étendue d'une obligation, celle-ci doit s'exécuter de la maniére la moins onéreuse pour le débiteur. S'il s'agit d'une obligation de donner, il peut donc alors l'exécuter soit au lieu où se trouve la chose à remettre, soit à son propre domicile. Quant aux obligations de faire ou de ne pas faire, le lieu de leur exécution est presque toujours déterminé par leur nature même.

J' arrive à la question de savoir à quel moment un débiteur doit exécuter son obligation. D'abord, s'il a un délai pour le faire, il est évident qu'il n'est pas obligé d'agir avant l'arrivée du terme. Mais, soit qu' ayant eu un délai celui-ci soit expiré, soit qu'il n'ait aucun délai, doit-il exécuter immédiatement son obligation ? Oui, s'il a été convenu avec le créancier que l'expiration du délai tiendrait lieu au débiteur d'un avertissement d'exécuter ; on bien si la loi a décidé que le débiteur n'aurait pas droit à un avertissement, ce qu'elle fait d'un manière générale pour toutes les obligations de ne pas faire, pour toutes celles qui ne peuvent être accomplies d'une manière utile pour le créancier que pendant un certain temps, et pour toutes les obligations commerciales pour l'accomplissement desquelles un terme a été fixé, parcequ'elle présume alors une convention dans ce but.

Dans tout autre cas, le débiteur n'est obligé d'exécuter son obligation que lorsque son créancier lui a demandé de le faire. Cette demande est exigée, parceque, sans elle, le débiteur peut croire que son créancier n'a pas besoin de la prestation, et ne souffre pas de ce que celle-ci est retardée. La demande peut se faire soit sous forme d'une interpellation en justice, soit sous forme de sommation extra-judiciaire. Cette dernière espèce de sommation doit, en général, se faire par écrit, et la meilleure forme alors consiste dans un protêt notarié. Toutefois, s'il s'agit d'une obligation née d'un contrat verbal, la demande peut se faire verbalement. (Articles 1067 à 1069 du Code Civil.)

Il est évident que puisque, la loi exige cette demande d'exécution, cette sommation du créancier, elle doit être faite aux frais de celui-ci, et non pas aux dépens du débiteur. C'est donc le créancier qui doit payer les frais du protêt ou de l'exploit d'ajournement signifiés à son débiteur, lorsque celui-ci a droit à une mise en demeure. C'est aussi ce que nos tribunaux décident sans difficulté à l'égard du protêt notarié ; mais, par un manque de logique des plus singuliers, si un créancier, au lieu d'avertir son débiteur au moyen d'un protêt notarié, l'avertit au moyen

d'un exploit d'ajournement; nos cours font invariablement payer les frais de celui-ci au malheureux débiteur, même si ce dernier avait les meilleures raisons de croire que son créancier n'avait pas besoin immédiatement de la prestation due.

Lorsqu' est arrivé le moment où le débiteur doit exécuter son obligation, s'il ne l'exécute pas de suite, on dit qu'il est *en demeure*, *in mora*, c'est-à-dire, en retard dans l'accomplissement de son obligation. Il enfreint alors celle-ci dans une de ses parties essentielles.

En résumé, la prestation qui fait l'objet d'une obligation quelconque se compose de trois éléments : le temps, le lieu et la mode d'exécution; l'obligation peut, par conséquent, être enfreinte soit quant à ces trois éléments à la fois, soit quant à l'un d'eux seulement. Si cette infraction produit des effets, ce ne peut être qu'une action de dommages-intérêts en faveur du créancier, et pour cela, il faut que le créancier ait eu intérêt à ce que l'obligation fût exécutée.

Voyons maintenant, dans quels cas le débiteur est tenu d'une pareille action, dans quel cas il en est exempt, quel est le but de l'action, et quelles en sont les limites.

D'abord dans quel cas l'inexécution totale ou partielle d'une obligation la transforme-t-elle en action de dommages-intérêts? On peut poser comme principe, que c'est dans tous les cas où la loi ne suppose pas qu'il a été impossible au débiteur d'exécuter son obligation. Il est évident, en effet, qu'aux yeux de la loi, comme aux yeux du bon sens, à l'impossible nul n'est tenu. Sans doute c'est au débiteur à prouver l'impossibilité dans laquelle il a été d'accomplir son obligation; mais dès qu'il l'établit, il n'est responsable ni de ce qu'il ne l'a pas exécutée au temps, ni de ce qu'il ne l'a pas exécutée au lieu, ni de ce qu'il ne l'a pas exécutée de la manière voulus, ni même de ce qu'il ne l'a pas exécutée du tout.

Il est donc très-important de savoir quand la loi considère qu'il y a eu une impossibilité suffisante pour dégager le débiteur de toute responsabilité. D'abord elle ne tient compte que d'une impossibilité *absolue*, c'est-à-dire d'une impossibilité qui existerait pour tout le monde, par exemple, l'impossibilité provenant de la mort du cheval, lors qu'il s'agit de l'obligation de fournir un cheval. La loi ne prend pas en considération l'impossibilité *relative*, c'est-à-dire, celle qui n'existe que pour le débiteur, comme serait l'obligation de donner cent louis pour celui qui n'a pas cent

sous. Voici pourquoi la loi exige ici une impossibilité absolue pour décharger le débiteur; ou l'obligation résulte d'un fait volontaire de sa part, et l'on ne saurait lui permettre de se plaindre qu'il s'est engagé à plus que ne lui permettent ses facultés qu'il devait connaître; ou bien son obligation provient d'un fait étranger à sa volonté, il est obligé par l'opération de la loi, et celle-ci ne peut lui permettre de soutenir qu'il est obligé au delà de ses forces, puisque ce serait l'accuser elle-même de manquer de sagesse.

Il n'y a donc qu'une impossibilité absolue à l'exécution d'une obligation, qui décharge le débiteur de toute responsabilité à l'égard des effets de l'inexécution totale ou partielle de la prestation. Or jamais ou presque jamais il ne peut exister une pareille impossibilité à l'égard des obligations de genre et des obligations de quantités. En effet, tant qu'il y aura un individu du genre, une quantité suffisante de l'espèce, il sera absolument possible de les fournir; et l'on sait que presque jamais les genres ne disparaissent, *genera non pereunt*. Le débiteur de l'une de ces obligations est donc toujours responsable des effets soit de leur inexécution complète, soit de leur exécution irrégulière, soit du simple retard dans leur exécution.

La question d'impossibilité ne peut donc se présenter que pour l'obligation d'une prestation individuellement déterminée. Ce n'est pas tout, il ne suffit pas qu'il y ait eu impossibilité absolue d'exécuter l'obligation; il faut, en outre, que le débiteur ait fait tout ce que la loi exige de lui, ait eu tout le soin, toute la diligence, se soit donné toute la peine qu'elle demande, pour rendre cette accomplissement possible.

Ceci nous amène à examiner la question de savoir quelle diligence, quels soins un débiteur doit avoir pour accomplir exactement son obligation au temps, au lieu et de la manière voulus.

D'abord, il peut arriver que ces soins aient été déterminés par une convention contre le créancier et le débiteur. Ceux-ci peuvent, par cette convention, astreindre le débiteur à plus ou à moins de soins que n'en exige la loi. Ils peuvent le rendre responsable même du cas fortuit et de la force majeure, c'est-à-dire, d'événements que, dans l'opinion du législateur, il ne peut contrôler. A l'inverse, ils peuvent le décharger des soins que la loi lui impose. En un mot, les parties jouissent ici de la liberté des conventions proclamée par le code civil. Mais aussi, elles sont soumises, ici comme ailleurs, à la restriction de cette liberté maintenue avec raison par ce code. Celui-ci défend, et annulle par la

même, toute convention contraire à l'ordre public ou aux bonnes mœurs. Comme il serait contraire aux bonnes mœurs de décharger d'avance le débiteur des conséquences de son dol, de sa mauvaise foi, la liberté des parties ne les autorise pas à acquitter d'avance le débiteur des conséquences de son dol. (Art. 13, 14, 1257, 1258, 1072 C. C.)

Le débiteur est donc toujours responsable de son dol, à l'égard de son obligation, c'est-à-dire, qu'il ne peut rien faire intentionnellement de mauvaise foi, pour rendre impossible l'exécution de cette obligation. D'un autre côté, il n'est jamais responsable de la force majeure ou du cas fortuit, à moins d'une convention entre lui et son créancier. (Art. 1072 C. C.)

En dedans de ces deux limites, il est toujours responsable de l'inexecution de son obligation. La loi veut que, pour rendre possible l'accomplissement de la prestation qu'il doit, il ait tous les soins, toute la diligence, qu'aurait *un bon père de famille.* (Code Civil, art, 1064).

Mais, que faut-il entendre ici par *soins d'un bon père de famille?* Sont-ce les soins que le débiteur a coutume d'avoir pour ses propres affaires? Sont-ce les soins qu'aurait un homme considéré comme ayant une diligence ordinaire, c'est-à-dire, comme n'étant ni un modèle de diligence, ni un exemple de négligence?

Sont-ce les soins qu'aurait un de ces hommes dont la vigilance et l'activité sont presque sans égales? Est-ce tantôt l'une de ces espèces de soins, tantôt l'autre, suivant la nature de l'obligation, suivant les circonstances dans lesquels elle a pris naissance? C'est là une des questions les plus importantes et les plus pratiques que puisse soulever l'interprétation du code civil. On doit donc regretter vivement que ce lui-ci ne l'ait pas traitée d'une manière plus complète et plus claire. En face des dispositions imparfaites qu'il contient sur la matière, ou peut soutenir à-peu-près toutes les opinions. Toutefois, il y a une chose certaine: c'est que les auteurs du code ont voulu proscrire la théorie de la prestation des fautes exposée par Vinnius et Pothier, théorie qui avait été adoptée par la jurisprudence en France et en Canada, (Voir art. 1064 C. C.; Rapport des codificateurs sur le titre des obligations, page 19). Puisque cette théorie a été mise de côté, il n'est pas inutile d'en rappeler les traits principaux, afin de savoir exactement quelle est la doctrine qui a été proscrite.

Ou bien le créancier seul était intéressé au contrat ou autre acte qui a produit l'obligation, ou bien le débiteur seul y avait

intérêt, ou bien le créancier et le débiteur étaient intéressés. Au premier cas le débiteur n'était responsable que de son dol et de la faute grossière, *lata culpa*, laquelle était assimilée au dol ; au second cas le débiteur répondait de la faute même la plus légère *culpa levissima ;* au troisième cas il repondait de la faute légère, *culpa levis.* La faute très-légère consistait dans la négligence des soins de l'homme le plus diligent qui se pût imaginer ; la faute lourde dans la négligence des soins de l'homme le plus négligent qui se puisse concevoir ; la faute légère dans la négligence des soins d'un homme diligent comme le commun des hommes. D'après cette théorie, le dépositaire ne devait répondre que de son dol ; le commodataire répondait même de la faute la légère, et le vendeur, le locataire, l'associé etc. étaient responsables de la faute lêgère.

Déjà Lebrun, avocat au Parlement de Paris du temps de Pothier, avait démontré que cette doctrine n'était pas celle du droit romain. Il aurait dû faire davantage, et prouver qu'elle est contraire, en bien des points, au bon sens, à l'équité, à la morale et aux principes généraux du droit. En effet, il est évident que, pour déterminer la conduite à tenir par un débiteur, on ne doit tenir compte que de ce qui le concerne ; on ne doit pas angmenter ou diminuer sa responsabilité pour des raisons tirées de personnes étrangères, pour des raisons qui ne touchent pas à sa conscience. Or, dans la doctrine que l'on vient de voir, la responsabilité du débiteur varie, non seulement avec l'intérêt qu'avait le débiteur au contrat, mais aussi avec celui qu'y avait son créancier. On aurait dû par conséquent, mettre cette doctrine de côté, même si elle eût été fondée sur le droit romain, puisque celui-ci, suivi seulement comme raison écrite, devait être abandonné dès qu'il était contraire à la raison. Mais il y a plus comme nous l'avons vu, Lebrun avait dejà prouvé qu'elle n'est pas fondée sur le droit romain. M. Hasse a de nos jours complété cette preuve. Il a fait plus : il a exposé la vraie théorie du droit romain sur la prestation des fautes. Il est à propos de la faire connaître ici, parcequ' on peut en tirer un grand parti pour établir quelle doctrine devrait être adoptée chez nous.

Une convention entre le créancier et le débiteur peut déterminer les soins que celui-ci doit donner à l'exécution de son obligation. Par cette convention sa responsabilité peut être augmenté, de même qu'elle peut être diminuée, sauf cette restriction qu'elle ne peut être réduite au point de la décharger de la responsabilité de

son dol. A défaut de convention voici la position du débiteur: ou bien il n'avait aucun intérêt à l'acte, que ce soit ou non un contrat qui a produit son obligation, ou bien il y avait intérêt. Au premier cas, c'est-à-dire, si le débiteur n'avait pas d'intérêt, et tel est le dépositaire, il n'est responsable que de son dol; il n'est obligé d'apporter aucun espèce de soins à l'exécution de son obligation. C'est déjà bien assez que le débiteur se trouve lié sans avoir reçu aucun équivalent pour son obligation; on n'a pas voulu étendre cette obligation au delà des limites les plus restreintes possible. Comme on le voit, la vraie doctrine du droit romain s'accorde pour ce premier cas avec celle que lui ont attribuée Vinnius et Pothier. Si le débiteur avait intérêt à l'acte en vertu duquel il est obligé, il doit pour exécuter son obligation tous les soins d'un *bon père de famille*, c'est-à-dire, d'un propriétaire qui a autant de diligence que le commun des hommes. Il n'est pas tenu d'avoir tous les soins qu'aurait un homme d'une diligence plus qu'ordinaire. D'un autre côté, il ne lui suffit pas d'être aussi diligent que pour lui-même, s'il a coutume d'être négligent pour ses propres affaires. Par exception, une telle diligence lui suffit, s'il a intérêt à l'exécution de son obligation, parceque comme dans la société, cette obligation se trouve être alors sa propre affaire. On peut voir que, pour le second cas, cette théorie diffère de celle exposée par Pothier surtout en deux points; jamais, à moins d'une convention expresse ou tacite, un débiteur n'est obligé à plus de diligence qu'on n'en trouve chez le commun des hommes; jamais on ne tient compte de l'intérêt que pouvait avoir le créancier à l'acte qui a produit l'obligation. Dans cette doctrine il ne peut pas y avoir trois dégrés, trois espèces de faute; il n'y a qu'une faute, et elle consiste dans l'absence des soins que doit donner le débiteur à l'exécution de son obligation.

Cette théorie est parfaitement conforme au bon sens, et a l'équité, parfaitement conforme aussi à l'intention du créancier et du débiteur. Lorsque celui-ci n'a aucun intérêt à *l'acte obligatoire* il rend un pur service au créancier en s'obligeant; l'équité ne permet pas qu'on étende son obligation au delà de ce qui est strictement nécessaire, et l'on ne peut supposer que le créancier soit assez déraisonnable, assez exigeant pour entendre l'astreindre à d'avantage. Quand au contraire le débiteur est intéressé, il reçoit un équivalent pour son obligation, on peut sans injustice, sans iniquité en étendre les limites. D'un autre côté on peut

raisonnablement supposer que le créancier, fournissant une valeur pour l'obligation, a entendu recevoir une valeur égale dans la prestation. Et comme il peut rarement connaître la manière habituelle d'agir de son débiteur, comme il ne peut d'ailleurs compter qu'il se comportera suivant ses habitudes ordinaires, il est à présumer que le créancier a dû compter, de la part de son débiteur sur la diligence du commun des hommes et que le débiteur a entendu s'y astreindre. N'oublions pas qu'il s'agit ici d'une question que les parties pouraient résoudre par une convention et que nous devons par conséquent rechercher quelle a dû être la volonté qu'elles n'ont pas declarcé expressement.

Puisque la vraie théorie du droit romain sur la prestation des fautes est conforme à la raison et à l'équité, il est évident que nous la devons adopter si le code ne lui est pas contraire. A-t-il des dispositions qui lui répugnent? Nous allons voir que non. Les articles qui déterminent les soins du débiteur dans l'exécution de son obligation sont, d'abord l'art. 1064 cité plus haut, qui pose la règle à l'égard de toutes les obligations de donner, puis les art. 290, 343, 1626, 1570, 1675, 1710 1768, 1802, 1825, 1843, 1844, 1973, dans les quels on trouve déterminée la diligence du débiteur dans la tutelle, la curatelle, le louage de choses, le louage d'ouvrage, les entreprises de transport, le mandat, le commodat, le dépot, le séquestre, la société, le nantissement. Quelle est la pensée qui ressort de ces dispositions si nombreuses? Elle me paraît être ceci, en général, à moins de convention au contraire le débiteur doit apporter à l'exécution de son obligation tous les soins d'un bon père de famille, c'est-à-dire d'un homme ayant la diligence du commun des hommes. A la différence du droit romain, cela s'applique même au cas ou il n'avait aucun intérêt à l'acte qui a engendré son obligation par conséquent au dépositaire, au mandataire, au tuteur. Toutefois même pour ceux-ci l'intention des auteurs du code paraît avoir été de se rapprocher du droit romain. En effet pour le cas ou le mandat est gratuit et par conséquent désintéressé de la part du mandataire, l'art. 1710 permet au tribunal de mitiger sa responsabilité. Il est vrai que le code ne dit rien du tuteur et du dépositaire, mais on doit sans hésiter leur appliquer la même décision, puisqu'aux yeux de la raison et de l'équité, il n'y a aucune raison de les traiter autrement, et que le droit romain se montrait moins sévère pour le dépositaire que pour le mandataire et mettait ce dernier dans la même position que le tuteur.

Quant à la restriction par le droit romain de la diligence du débiteur intéressé à l'exécution de son obligation, aux soins qu'il a pour ses propres affaires, il ne peut y avoir aucune difficulté de l'appliquer à notre droit, puisque les art. 1843 et 1844 en posent clairement le principe. En effet, on voit par ces articles que dans l'intention des rédacteurs du code, l'associé ne doit pas traiter mieux ses affaires que celles de la société. On en doit conclure qu'il n'est pas obligé non plus de les traiter plus mal. Il doit donc avoir, pour les affaires de la société, exactement les mêmes soins, la même diligence que pour ses propres affaires.

En somme voici la doctrine du code sur la prestation des fautes en l'absence de convention ; le débiteur doit dans l'exécution de son obligation, apporter les soins, mettre la diligence du commun des hommes ; il ne lui suffit pas d'y mettre la même diligence qu'il a coutume d'avoir pour ses propres affaires, s'il est habituellement négligent. Toutefois, cette diligence lui suffit s'il a intérêt à l'exécution de son obligation, c'est-à-dire, s'il en doit profiter, comme c'est le cas pour l'associé. Et même si le débiteur n'a pas un pareil intérêt, le juge peut mitiger sa responsabilité, quand il s'est obligé sans avoir intérêt à ce qui a produit l'obligation, comme c'est le cas pour le mandataire, le tuteur, le dépositaire.

Quelle que soit la doctrine que l'on adopte sur la diligence que le code exige du débiteur dans l'accomplissement de son obligation, il y a un point en dehors de toute discussion ; c'est que si le débiteur n'a pas eu tous les soins exigés de lui par la loi, il est responsable des suites de l'inexécution de son obligation, c'est-à-dire, de ce qu'elle n'est pas accomplie au temps, au lieu et de la manière voulus. Il est réputé l'avoir enfreinte, violée et, suivant le droit commun, il est tenu d'une action envers son créancier, d'une action en dommages intérêts, ou, si l'on veut, en indemnité. A plus forte raison, en est-il de même du débiteur qui contrevient intentionnellement, par dol, à son obligation. Dans les deux cas, toutefois, il ne répond que des suites directes, nécessaires, inévitables, de l'inexecution ; il n'est pas responsable des conséquences que cette inexecution a pu *occasioner*, mais dont elle n'a pas été la *cause inévitable*, que le créancier aurait pu écarter avec une diligence convenable ; car on peut dire avec raison, que ces conséquences sont dûes plutôt à la négligence, à l'inertie du créancier, qu'au dol ou à la faute du débiteur. (Art. 1070, 1071, 1072, 1075 C. C.)

Mais que comprennent ces dommages-intérêts, cette indemnité ? Ici encore, la convention des parties peut tout règler. Le créancier et le débiteur peuvent déterminer d'avance l'étendue et la nature des dommages qu'elles prévoient devoir résulter de l'infraction de l'obligation, et de l'indemnité qui devra être fournie, pour le cas ou le débiteur sera responsable de cette infraction. Il n'y a, en effet, aucune considération tirée de l'ordre public ou des bonnes mœurs, qui puisse venir restreindre ici la liberté des conventions. Autrefois les tribunaux se permettaient souvent de mettre de côté ces conventions; mais le code Art. 1076 leur a enlevé le pouvoir qu'ils s'étaient ainsi arrogé. Ils ne peuvent donc plus annuller une pareille convention, comme étant purement *comminatoire*, ni réduire l'indemnité fixée par elle. Tout ce qui leur est permis, c'est lorsque l'obligation a été exécuté en partie, de déterminer les dommages évités au créancier par là, et de dire quelle proportion de l'indemnité fixée correspond aux dommages réellement soufferts. Art. 1076, § 2.

Si les parties n'ont pas déterminé elles-mêmes l'indemnité payable au créancier, il faut alors que la loi le fasse pour elles, en prenant pour base leur intention probable qu'elles n'ont pas exprimée. D'après l'art. 1073, sauf toutefois la modification apportée par l'art. 1075, les dommages intérêts se composent de deux chefs: la perte subie par le créancier, et le gain qu'il a manqué de faire à raison de l'inexécution de l'obligation, *lucrum cessans*, *damnum emergeus*. En un mot, le créancier avait à l'accomplissement un certain intérêt appréciable en argent; le débiteur doit, pour l'indemniser, le désintéresser complêtement. Car indemniser une personne de quelque chose, c'est la mettre, au point de vue pécuniaire, dans la même position où elle serait si le fait qui lui a causé du dommage ne fût pas arrivé.

Il se peut faire que l'obligation, ou bien soit enfreinte pour le tout, ou bien soit enfreinte dans un ou plusieurs seulement de ses éléments essentiels que nous avons vus, savoir: le temps, le lieu, le mode d'exécution de la prestation. Le créancier, nous l'avons vu, et cela va de soi, n'a pas droit à une indemnité, si l'infraction ne lui cause aucun dommage; car alors il n'a pas d'intérêt à poursuivre son débiteur, et l'on sait que l'intérêt est la base et la mesure des actions. Même si l'infraction de l'obligation a été la cause directe de dommages pour le créancier, il n'a pas toujours droit de s'en faire indemniser entièrement par son débiteur. Il a ce droit d'une manière absolue, seulement si c'est par dol que

son débiteur n'a pas exécuté. Si c'est seulement par faute, le débiteur ne doit l'indemniser que des dommages qui ont pu être prévus. La raison de cette différence, c'est que le débiteur qui, par dol, intentionnellement, enfreint son obligation, est réputé avoir voulu se charger de toutes les conséquences de l'infraction quelles qu'elles puissent être. Au contraire, celui qui l'enfreint par faute, mais sans intention, ne peut être présumé s'être chargé d'une telle responsabilité à laquelle il n'a même pas songé. Il n'a dû penser aux conséquences possibles de l'infraction, que lorsqu'il a contracté son obligation, et c'est au moment où il l'a faite, qu'il faut se reporter, pour savoir de quoi il a entendu se rendre responsable. Ou bien encore : la responsabilité du débiteur coupable de dol est fondée sur un délit, dont les conséquences doivent s'apprécier comme celle des autres délits : la responsabilité du débiteur seulement en faute est fondée sur une convention tacite, et ne doit pas être étendue au delà de ce qu'ont dû vouloir les parties. (Art. 1074 C. C.)

Les règles que nous venons de voir s'appliquent aux obligations dont l'objet n'est pas une somme d'argent. Quant aux obligations de sommes d'argent, leur infraction donne toujours droit au créancier de réclamer les intérêts légaux sur la somme due, depuis la demeure du débiteur, et ce quand même cette infraction n'aurait causé aucun dommage. Mais à l'inverse, elle ne lui permet pas d'exiger davantage, quels que soient les dommages qu'il a soufferts. Voici la raison de cette exception : la loi présume que les intérêts légaux d'une somme représentent toujours exactement la valeur de l'usage de cette somme. Cette présomption est fondée sur une erreur économique ; car on sait que la valeur de l'usage des capitaux dépend du rapport entre l'offre et la demande qui s'en font, et ne peut être déterminée d'avance d'une manière absolue. Mais en admettant comme une vérité cette erreur du législateur, l'art. 1077 est parfaitement raisonnable. En effet, on peut toujours se procurer une chose eu en donnant la valeur ; on peut donc toujours avoir une somme d'argent, en donnant la valeur de son usage. Le créancier d'une somme d'argent peut donc toujours éviter les dommages résultant du défaut de paiement, en empruntant cette somme au taux légal d'intérêts. S'il souffre des dommages au delà du montant de ces intérêts, c'est donc par sa faute, et non par celle de son débiteur. D'un autre côté, sans prouver de dommages, le créancier a droit aux intérêts de la somme due, parcequ'on présume qu'il aurait pu la placer et en

retirer ces intérêts ; par conséquent, on présume que le défaut de paiement lui a fait manquer de la gagner. L'art. 1077 est donc, au fond, conforme à l'art. 1075.

Encore une fois l'art. 1077 est fondé sur une erreur économique. Aussi, malgré la règle qu'il établit, arrivera-t-il souvent qu'un créancier perde plus ou moins que l'indemnité qui lui est payée. Mais il y a un moyen bien simple d'éviter cet inconvénient : c'est de profiter de la liberté des conventions, pour fixer d'avance, ici comme ailleurs, les dommages dont le créancier devra être indemnisé par son débiteur.

En résumé, toute obligation astreint celui qui en est tenu à faire une prestation dans un certain temps, dans un certain lieu et d'une certaine manière. Il doit donner, à l'accomplissement de cette prestation, le soin qu'un homme ayant une diligence ordinaire donne à ses psopres affaires. Toutefois, lorsqu'il s'est obligé gratuitement, on peut ne pas exiger de lui toute cette diligence, pourvu qu'il en ait eu autant que pour lui-même, et cela lui suffit toujours, s'il doit profiter de l'accomplissement de son obligation. Dès qu'il n'a pas eu tout le soin exigé de lui, on dit qu'il est *en faute* s'il n'exécute pas exactement son obligation. Il répond alors de toutes les suites inévitables, nécessaires, de l'inéxécution, comme il en répond s'il n'a pas voulu remplir son engagement. Sa responsabilité consiste en ce qu'il doit indemniser ce dernier des dommages que lui cause l'infraction de l'obligation. Ces dommages se composent de la perte faite et du gain manqué par le créancier ; mais si le débiteur n'a été coupable que de faute, il ne doit indemniser que de ceux qu'il a pu prévoir. L'indemnité pour l'inéxécution d'une obligation d'argent consiste seulement, mais toujours, dans les intérêts légaux de la somme dûe. Enfin, les parties peuvent régler par convention les soins à donner par le débiteur, et l'indemnité qu'il devra payer au cas d'inéxécution de son obligation ; les tribunaux peuvent, à titre d'indemnité, faire exécuter la prestation aux frais du débiteur, lorsque cela est possible.

F. LANGELIER.

DEEDS OF COMPOSITION AND DISCHARGE BETWEEN COPARTNERS AND THEIR CREDITORS UNDER THE INSOLVENT ACT OF 1869.

(*Continued from page* 188, *No. II.*)

It may be interesting and at the same time productive of benefit, to consider the provisions of the law of France on the subject of composition and discharge in the matter of partnerships. It is unnecessary to go further back than the year 1808, although previous to that time the Ordonnance of 1673, and many other edicts, regulated proceedings against insolvent traders. The "Code de Commerce" of France came into force on the 1st January, 1808. Its third book bore the title "Des Faillites et des Banqueroutes," and constituted what would be called in English "An Insolvent and Bankrupt Act." It contained one hundred and seventy-eight sections, from number 437 to 614 both inclusive. Traders alone were subject to its provisions.

By the law of the 28th May, 1838, the third book of the "Code de Commerce," "Des Faillites et des Banqueroutes," was, save and except as regarded then pending proceedings, repealed, and another book was substituted therefor, containing the same number of sections, numbered from 437 to 614.

The failure of partnerships did not form under either the law of 1808 or that of 1838 the subject of a special series of provisions.* In that of 1838 partnerships are mentioned particularly in numbers 438, 531, and 604, and it would seem as if in all cases, save where there was special legislation on the subject, the intention of the codifiers was, like that of the British and Canadian legislatures, to apply to insolvent partners the provisions applicable generally to individual insolvent traders.

Composition and discharge, treated of by the 507th and following articles of the law of 1838, can only be effected and obtained by a trader who has been duly declared insolvent after what is called *la vérification des créances* has been completed, and the true state of his assets and liabilities is known by the return thereof made by *les syndics* (assignees) of his estate. The deed (concordat) of

* 1 Renouard 255.

composition and discharge must be consented to at a public meeting by a majority of *all* the insolvent's creditors, representing three-fourths of all claims sworn to and verified or admitted *par provision*. Secured or privileged creditors have no right to vote save on condition of forfeiting their security or privilege. The meeting is held in the presence of the *juge commissaire*, and if the requisite majorities are there present and consent, the deed is then and there signed; if but one of the requisite majorities is present and consents, the deliberation is put off for a week, and if on the day appointed the requisite double majority is not obtained, proceedings in insolvency are resumed, and the estate is wound up for the benefit of the creditors.*

The law of France differs from that of England on the subject of partnership in two very important particulars. In the former country an ordinary trading partnership is what is called an *être moral*, that is to say, a creation of the law distinct from the persons composing it, having rights and privileges, and partaking somewhat of the nature of an incorporated body under the provisions of the English law; in France the property of the partnership cannot be attached for the debts of one of the partners, nor can his share in any portion of the property of the partnership be levied upon or seized for such debt.† Even after the insolvency or bankruptcy of the partnership, the *être moral* still, according to the best authorities, continues to exist,‡ in fact, art. 531 specially provides for the case where *a concordat is refused to the partnership* for the granting of one to any of the partners, thereby admitting that the *être moral* exists, pending insolvency. In France, the individual members of the partnership are liable jointly and severally to the creditors of the partnership, and the separate creditors of the partners as a body have no privilege on their debtor's estates over the partnership creditors.

In England, on the other hand, at law the sheriff must take possession of the whole of the goods levied upon, and if there be two partners in a firm who have equal shares in the partnership property he must sell a moiety thereof undivided for the defen-

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* 2 Renouard, pp. 1—36.

† Masse Droit Com. No. 2666; Rolland de Villargues Dict. de Droit, vbo. Societé No. 11; Pardessus, Droit Com. No. 975.

‡ 1 Renouard p. 307, 308, § 20, art. 443; 5 Bravard Veyrières by Delangle, pp. 676, 677.

dant partner's debt, and the vendee will be tenant in common with the other partner.*

The bankruptcy of one of the partners dissolves the partnership as to all the partners.† The separate estate of each partner also is liable for the payment of the joint debts, subject, however, to the previous payment in full of the separate debts of such partner.‡

The foregoing are some of the points upon which differences in the law of partnership of England and France exist, and are cited for the purpose of exhibiting the difficulties which beset the settlement of the question of composition and discharge in this Province.

In England, under the law of 1861, in France and Canada, it is now admitted that when a firm is put into bankruptcy, or insolvency, each of the members of that firm becomes a bankrupt or an insolvent. In France alone the *être moral* of the partnership continues to exist.

In France, on the bankruptcy of a firm, the joint estate has its creditors, its *syndicat*, its *juge commissaire*, and its proper tribunal; and the separate estate of each partner has also its creditors, *syndicat*, *juge commissaire*, and tribunal. The different estates are kept perfectly separate; the same assignee may be appointed to all the estates, joint and separate; or others than the assignee of the joint estate may be appointed assignees of the estates of the different partners. Thus, where a firm is composed of two partners, A may be appointed assignee to the joint estate, B to the estate of one of the partners. C to the estate of the other. The creditors of the firm alone vote or act in the faillite of the firm, and they, together with his separate creditors, alone vote or act in the *faillite* of each of the partners. In questions of *concordat* (composition and discharge) where a firm is *en faillite*, in order to replace the members of the firm in possession of their joint and separate estates, a concordat must be entered into between the creditors of the firm and its members, and the creditors of each separate estate (therein included the joint creditors), with

* Heydon *vs.* Heydon, 1 Salk. 392; Johnson *v.* Evans, 7 M. & Gr. 250; Jacky *v.* Butler 2 Ld. Raym. 871; Holmes *v.* Meutze, 4 Ad. & E. 131.

† Hague vs. Rolleston, 4 Burr, 2174; Fox v. Hanbury Cowp. 448; Ex pte. Smith, 5 Vesey, 295; Ex pte. Williams, 11 Ves. 5.

‡ Griffith & Holmes Bankruptcy, p. 656.

the member of the partnership originally indebted to them, enter into the concordat. The compositions payable by each of the estates may be different. If the joint creditors refuse to enter into a concordat with the firm, concordats may be entered into by the partners individually with the creditors of their separate estates, by which they in consideration of certain conditions are released from their liabilities as individuals, but the joint estate in such case remains in bankruptcy, and is wound up for the benefit of the joint creditors. It will thus be seen that a certain harmony pervades the administration of the bankrupt law in France—a partnership remains an *être moral* distinct from the individuals comprising it. Only the creditors of a bankrupt vote in his estate, and they alone who are his creditors are entitled to grant him his discharge.*

In England, on the other hand, up to the passing of the Act of 1869, what confusion is apparent in the administration of the bankrupt laws. "From this principle," says Mr. Griffith,† "arose the practice formerly of taking out in cases of partnership failures, several commissions,—a joint commission against the partnership, and separate commissions against the partners; and this was for a long time the almost uniform course, in spite of the difficulties which were often urged against it, of which notice will presently be taken. Sometimes the two commissions were allowed to go on together, the joint assets being under the joint commission, distributed by the joint assignees among the joint creditors, and the surplus handed over, if any, to the assignees under the separate commissions, in the proportions of the interests of the several partners in the joint estate of the firm; and the separate estates being in like manner distributed among the separate creditors of the partners by the separate assignees, and the surplus, if any, handed over to the joint assignees of the firm, if the joint debts were still unpaid, for distribution under the joint commission.

The first difficulty was, that though a joint commission seems to have, in some respects, been founded on the analogy of a joint action, it had some results very far at variance from what would follow strictly from such an origin, at least by direct consequence.

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* 1 Renouard, p. 410, 441; 2 Renouard, p. 134–139, 141; 2 Namur, p. 519.

† Griffith & Holmes, p. 654.

It seems past doubt that the assignment under a joint commission passed all the property of the bankrupts, not only joint but separate; and a certificate under a joint commission discharged all the debts of all the bankrupts, both joint and separate, as effectually as if each debtor had been bankrupt separately. It would, therefore, seem most inequitable that separate creditors should be excluded from all rights under a joint commission, and practically they were not so excluded, though not allowed in general to prove as creditors under the joint commission. Their rights were at one time, as above remarked, commonly worked out by allowing the subsistence of separate commissions concurrently with the joint commission, though, where any conflict arose between the assignees under any of the commissions and those under another, the result was usually a bill fyled and the superseding of either the separate or the joint commission, with an order to the assignees of the subsisting commission to keep accounts separately of the joint estate and of the separate estates; and to distribute the joint estate first among joint creditors, and separate estates, first among separate creditors, and to transfer the surplus as before-mentioned, in the case of the several commissions subsisting together. At length, by a general order of Lord Loughborough, the course which was, up to that time, ordered in each case on bill fyled was ordered in every case, where a joint commission and separate commissions should be sued out. But even prior to this, separate creditors had often been let in indirectly under joint commissions, for the purpose of being heard, and obtaining dividends out of separate estate, though it does not seem they were ever formally recognized as having the rights of creditors under the commission. They seem to have been looked on more in the light of persons claiming liens on part of the assets than creditors; their presence was necessary to the proper taking of the accounts of the property, strictly speaking to be distributed under the commission; but neither they, nor any other person had, in respect of the joint estate merely, any rights personally under the commission. This was a necessary consequence of the introduction of the doctrine that joint assets were primarily to be applied in the payment of joint debts, separate assets in that of separate debts; for this principle once introduced it became necessary that an account of the separate debts should be taken, in order to see what surplus would remain, if any, of the separate assets applicable to the purpose of answer-

ing joint debts, if the joint assets were insufficient, and, as the payment of the joint debts out of assets applicable for the purpose was the primary object of the joint commission, these accounts were necessarily incident to the working out of the joint commission. This view will, it is believed, explain, at least in part, the cases in which it is said that separate creditors were entitled to be let in under joint commissions. An exactly similar course of argument would seem sufficient to explain the letting in of joint creditors under a separate commission, *and would leave the rights of each set of creditors under the other commission strictly analogous, one to the other;* but it is seen that joint creditors were allowed to vote in the choice of assignees under a separate commission; *an attempt has been made above to explain this anomaly on principle, if indeed it do not rest on mere arbitrary practice.* It may here be remarked that the doctrine that joint debts should be paid out of joint assets in the first instance, and separate debts out of separate assets, is not confined to the administration of estates in the Court of Bankruptcy. It extends to cases where one estate is administered in that Court and the other in Chancery, and would probably be the rule wherever insolvent estates came under administration in this country. . . . . When Lord Thurlow held the Great Seal, strongly impressed with the complexity of the rule as beforementioned, which gives a priority out of joint assets to joint debts and out of separate assets to separate debts, as well as with the gross injustice worked by it in very many cases, he endeavoured to supersede it; and we find, during his custody of the Seal, that in numerous cases the joint and separate estates were thrown into a common fund and proof allowed against the whole by joint and separate creditors *pari passu.* This practice had, at least, the merit of extreme simplicity, and was no more inequitable than that which it sought to supersede; it had also the advantage that it is the rule in many foreign countries, if not in all, and this is a great advantage where bankruptcies occur in the case of merchants trading abroad, as they rarely occur without some complications arising out of the foreign laws of insolvency, which would be much simplified if our own laws were the same as that of other countries in its essential features. But, as has been seen, the attempt made by Lord Thurlow to establish the new rule failed as soon as his assistance in maintaining it was withdrawn, and Lord Loughborough returned to the former rule,

which has ever since prevailed." * At p. 661 Mr. Griffiths says: "Though separate creditors had, as is seen, no right to prove for the purpose of voting in the choice of assignees, yet they were in some instances, where the interest of the joint creditors appeared *primâ facie* to be adverse to theirs, allowed to choose an inspector on behalf of the separate estate, and separate creditors alone could vote in the choice of the inspector. This practice is still in some cases continued."

Rule 54 of the orders of the 19th October, 1852, was merely declaratory of the law as it stood at that time, and conferred no right of voting for an assignee under a joint commission upon separate creditors.†

As already shewn (*ante*, p. 182), when the members of a firm entered into a deed of composition and discharge with their creditors, the creditors of every class were entitled to receive the same composition rate on their claims although the assets of one of the estates might have been *nil*.

Under the English system, then, great errors are apparent in the administration of the bankrupt laws up to 1869.

1o. The denial of the right of the joint creditors to rank concurrently with the separate creditors on the separate estates of the partners.

2o. The denial of the right to the separate creditors of the partners of a firm put into bankruptcy to appoint assignees to their debtor's estate, the right to appoint being vested in the joint creditors.

3o. The denial of the right to the separate creditors of a partner to enter into a deed of composition and discharge with him, relieving him from his individual liability.

The second and third errors seem to spring naturally from the first. It therefore becomes necessary to investigate the reasoning upon which is based the English rule, by which separate creditors are privileged over joint creditors upon the assets of separate estates.

One of the chief obligations imposed upon the members of commercial partnerships, and recognized throughout the civilized world is, that "where a partnership liability does exist, whatever

* Pages 654–657.

† Griffith & Holmes, p. 663.

may be its origin, each of the partners is bound by it, both in person and property, to its full extent.*

A debt contracted by a firm in England is, as in France, one for which each of its partners is jointly and severally liable to the creditors. In France such debt is contracted by an *être moral*, the partnership, and for its due payment the creditor holds the individual partners as securities. In England, on the other hand, the partnership is not an *être moral*, when a debt is contracted by the partnership, its members are primarily liable jointly and severally. In France the property of the *être moral* is liable exclusively for the debts of the partnership, and the creditors of the individual partners have no right to attach or seize either the whole or any portion of the partnership assets for the separate debts of the copartners. In England, the whole of the property of the partnership can be seized for the separate debt of one of the copartners, and his interest therein sold out. In France, then, the separate estates are in the nature of securities for joint debts, whilst in England, according to the principles of the law of partnership, they form but one mass with the joint estate for the payment of joint and separate debts. Taking, however, for granted, that both in France and England partners are regarded merely as *cautions solidaires* for the partnership debts, and applying the principles recognized in both countries to such cases of parties becoming bound jointly and severally with and on account of the debt of another, where all the parties so bound are in bankruptcy, it is clear that there is no provision by which the debts actually contracted for his own direct benefit by a party, have a preference over those contracted by him as security for another, even when his estate has derived no benefit from his becoming such security. Again where three individual estates (not of partners) are liable for one joint and several debt, the creditor, if nothing has been paid to him, can fyle his claim against each estate for its full amount, and take his dividends from all until paid in full, notwithstanding the fact that two of the estates have derived no benefit whatsoever from the debt contracted for the advantage of the other alone.†

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* Dixon on Partnership, p. 317, and authorities cited; Civil Code of L. C., art. 1865; Delangle Soc. Com. No. 226.

† Ex pte. Wildman 1 Atk. 109; 2 Ves. 113; Ex pte. Bank of Scotland, 2 Rose 197; 19 Ves. 310; Ex pte. Adam 2 Rose 39; Ex pte. Bigg 2 Rose 37; Ex pte. Rushforth, 10 Ves. 416; Griffith & Holmes, p. 601; Robson 176; art. 502 Code Napoleon; 2 Renouard 175–191.

In the case of partners it may be taken for granted that in the greater number of cases, their separate estates have been made and realized by their trade so carried on in partnership; that from the business of the partnership is withdrawn the amount of money necessary for the support of their families and themselves, and that if it be not so applied it is added to the separate estates of the partners. To the world at large, moreover, the separate estates of the partners are held out as forming part of the capital of the partnership, and it is not only on the assets of the partnership, but also on the assets of each of the partners, that parties dealing with the firm rely for payment.

It is therefore submitted that neither in law nor in equity, is there any foundation for the arbitrary rule of English practice, now in force in this Dominion under § 64 of the Insolvent Act of 1869.

2o. The second error pointed out is to a very great extent based upon the one just now discussed. But very great and manifest injustice is worked in England, by the refusal to allow separate creditors to vote at the nomination of an assignee to their debtor's private estate; it is true that the Courts there had the power of granting the privilege of appointing an inspector to the separate creditors, but the inspector had not the same powers as the assignee, and as the principle of the English Bankrupt Law was that the creditors of a debtor alone had the right of appointing an assignee to his estate, it is impossible to conceive how such a violation of it could possibly have been tolerated.

It would seem to be a principle of the English law, that immediately upon its bankruptcy, a partnership was dissolved, there being no *être moral* as in France, the partners became individually bankrupt, the estate of each being composed of his separate estate and his share in the joint estate, his creditors being his separate creditors and those of the extinct partnership. Thus A & B being in partnership, A's creditors after the bankruptcy would be his separate creditors and those of the firm; B's his separate creditors and those of the firm, A's assets would be composed of his separate estate and his share in the joint estate, whilst B's would consist of his separate, and his share of the joint estate. But B's separate creditors would not be creditors of A, nor would A's creditors be creditors of B, so that it is clear that neither A's nor B's creditors had, under a joint commission, the right of voting in the nomination of an assignee to the joint

estate, as thereby they would vote for and aid in the appointment of an assignee to the estate of a person who was not their debtor, and on whom they had no claim. Consequently the denial of the right of separate creditors to vote on the appointment of an assignee to the joint estate can be justified.

But a system which thus works injustice to the class of separate creditors, must be bottomed in error. The assignee of a bankrupt is a mere trustee for the creditors.* But clearly there should be vested in all the creditors of a bankrupt the right of voting for the appointment of such trustees, and any system which deprives a class of such right is inequitable and unjust.

The French system is evidently more equitable and just, and it may be with truth asserted that therein are not to be found the glaring discrepancies which disfigure the English practice. In France the carrying into practice of the principles of the bankrupt code is easy; there is no necessity for recurring to the extraordinary shifts, which have been introduced in England, in order to get over the difficulties produced by starting from a wrong ground of departure.

It would be far better in this Dominion were our legislators not attached so servilely to the principles of the common law, and the rules of English procedure. In mercantile matters, especially, for though it is now admitted that Bracton drew largely from the civil law commentators, Lord Mansfield, who is justly looked upon as the original moulder of the English commercial law, borrowed from the Ordonnance de Commerce many of the principles which adorn his judgments.

But if the fact that neither in England nor in Canada is the *être moral* of a partnership recognized, presents insuperable obstacles in the way of adopting the French system, there is nothing to prevent the placing the working in harmony with the principles of the insolvent law. Therefore as the insolvent law of Canada does evidently recognize the fact that so soon as a partnership is put into insolvency, the members thereof become individually insolvent, the *être moral* previously existing (if any), vanishing into thin air, the proper course to follow would be to hold in lieu of a meeting of joint creditors and of the separate creditors of the partners, the whole voting *en bloc* for the appointment of an assignee to the joint estate, as is the practice at present, for the

* Griffith & Holmes, p. 280, and auth. cited, note (c).

creditors of each partner, viz. the joint creditors of the firm and his separate creditors to vote at such meeting for the appointment of an assignee to each estate, and in the event of the same assignee not being appointed to the estates of all the partners, such assignees to hold jointly the assets of the firm in trust for the joint creditors.

30. The difficulties which surround the making of a valid deed of composition and discharge in matters of partnership are traceable to the rule already discussed of "to each estate the payment of its own debts by privilege." Under the English system, in the words of a recent writer on Composition Deeds, "the effect of these decisions on composition deeds is to render it doubtful whether any valid deed can be made by a member of a partnership if he has separate creditors, if the deed operates as a release of debts."*

The first principle maintained, as already shewn, *ante* p. 182, was that perfect equality, so far as the composition was concerned, should reign amongst *all* the creditors of the insolvent or insolvents entering into such deed, consequently when two persons who had been in partnership together entered into a deed of composition and discharge with their creditors, the joint creditors of the firm and the separate creditors of each partner had to become, in requisite majority, parties to the deed, and all receive the same composition rate, although the different estates were of different values. Thus A & B were partners and became bankrupt. The joint estate was worth 10s. in the £ of the liabilities, A's private estate 5s. in the £, and B's private estate 2s. in the £ on its liabilities. Wound up in bankruptcy, the joint creditors would receive say 10s., A's creditors 5s., and B's 2s. in the £. But if the partners wished to execute a joint deed of composition and discharge with their creditors and recover their joint and separate estates, the composition based upon the aggregate value of the estates would entail a loss upon the joint and in all probability confer a benefit on the separate creditors. In justification of the ruling it was pretended that the value of the estates should not be the measure of the composition, as a third person might pay a composition in order to free the bankrupt from his liability to his creditors,† and thereby creditors might obtain a larger dividend than if the estate were wound up

* Sills on Com. Deeds, p 20.

† Walker vs. Nevill, 3 H. & C. 416.

in bankruptcy. But experience shows clearly that as a general rule the value of the estate is the measure of the composition, and creditors expect to receive from their debtors entering into a composition with them as nearly as possible the value of the estate, be it separate or joint, on which they have privileged claims, a small deduction being made for the expenses of realization. If then the rule in matters of bankrupt partnerships that each estate is to pay its own debts by privilege is to be maintained, our law in the matter of composition and discharge requires reform to place it in harmony with the other portions of the Insolvent Act.

As the law at present stands it would seem as if in the cases of insolvent partnerships but two courses are open to the insolvents and their creditors.

1o. To place the creditors of the firm and the separate creditors of the partners on the same footing as regards the composition, the majority of creditors in such case being the requisite majority in number and value of all such creditors regarded but as one *masse*.*

2o. To treat each partner as individually insolvent, the deed of composition and discharge being entered into between him and the joint creditors and his own separate creditors, all being placed upon the same footing as regards the composition. The said deed not to contain any reconveyance of either estate to the insolvent, but be merely a discharge from his liabilities, the estates to remain in insolvency. In such case, a sale of any or all of the estates might be effected to the insolvent after his discharge under the provisions of §42.

By adopting the course lastly pointed out, the commission of injustice would be avoided and the difficulties now surrounding composition and discharge in matters of partnership be removed.

WILLIAM H. KERR.

* Walker vs. Neville, 3 H. & C. 403.

WILLS AND INTESTACY.

The increased intercourse between the different Provinces of the Dominion brought about by Confederation, renders desirable a more general knowledge of the differences between them in the laws regulating the ordinary transactions of life. The business man from Ontario would be very apt to suppose that what he could do and would do in Ontario would under similar circumstances be a rule of conduct for him in Nova Scotia and New Brunswick. The same of the business man from Nova Scotia or New Brunswick in Ontario. Called by the pursuits of trade to take up his temporary or permanent residence in one of the provinces other than that in which he had been previously living, it is important to know how the wealth he is accumulating may be disposed of by himself; or if he failed to will it, how the law would do it for him. There are few things more ruinous to the peace of families than a disputed will; few more conducive to the well-being of a people than a judicious law of intestacy. It is proposed to examine the provisions made in Ontario, New Brunswick, and Nova Scotia in these respects.

FIRST AS TO WILLS.

In *New Brunswick*, a testator may, by his will, dispose of all property, and rights of property, real and personal, in possession or expectancy, corporeal or incorporeal, contingent or otherwise, to which he is entitled, either in law or equity, at the time of the execution of his will, or to which he may expect to become at any time entitled or be entitled to at the time of his death, whether such rights or property have accrued to him before or after the execution of his will.

In *Nova Scotia*, the same.

In *Ontario*, there is no provision of this general character, but by the Consolidated Statutes of Upper Canada, chapter 82, section 11, real estate, acquired subsequently to the execution of a will, would pass under a devise conveying such real estate as testator might die possessed of.

In *New Brunswick* and *Nova Scotia*, a testator must be twenty-one years of age.

In *Ontario*, there is no provision to this effect.

In *Nova Scotia*, a married woman may, with the consent of her husband testified in writing, make a will of her personal property; a will of real and personal property to which she may be entitled in her own right, or for her separate use, and wills in a representative character. The last three, not in the language of the statute having the husband's assent appended to the clause.

It is presumed there must have been in Nova Scotia some judicial construction upon this section.

In *New Brunswick*, a married woman's right to make a will is left exactly as it was before passing of the Act, chapter 110, 1st volume Revised Statutes, 1854, and the husband's assent is therefore requisite, except in case of desertion by her husband, when the right of disposal of property acquired by herself after desertion without his assent, might be presumed from 3rd section, chapter 114, 1st volume Revised Statutes "of the real and per-"sonal property of married women."

On this latter point, however, all doubt has since been removed, and the power greatly extended by Act of 1869, chapter 33rd.

In *Ontario*, it is specifically enacted that after the 4th May, 1859, a married woman may make a will, in presence of two witnesses—neither of whom is her husband—of her separate property, real and personal, to her children, and failing issue, then to her husband, or as she may see fit, as if *sole;* but husband's tenancy by the courtesy is not to be affected. Consolidated Statutes, Upper Canada, 794, 22 Vict., chapter 73, section 15.

The mode of the execution of wills in New Brunswick and Nova Scotia is the same. They must be in writing, executed by the testator at the foot thereof, or his signature thereto acknowledged by him in the presence of two witnesses, present at the same time, and attesting in his presence and the presence of each other; but in New Brunswick, there is a further provision that though not signed at the foot thereof, its execution shall be deemed good, if it be apparent, from the will and position of the signature, or from the evidence of the witnesses thereto, that testator intended it as his last will.

In *Ontario*, there is no general statute as in Nova Scotia and New Brunswick, with reference to wills; but in the Consolidated Statutes, Upper Canada, chapter 82, section 13, it is provided

that any wills affecting lands, executed after 6th March, 1834, in the presence of and attested by two witnesses, shall be as valid as if in the presence of three, and attested by three, and it is sufficient if such witnesses subscribe in presence of each other, though not in the presence of the testator; in this latter respect differing from the laws of the other Provinces as well as from the law of England.

The Imperial Act of 7th, William IV. and 1st, Victoria, chapter 26, in amendment of the law with respect to wills, puts an end to the power existing under the pre-existing law, which infants male at 14, and infants female at 12, had of disposing by will of personal property (*vide* Jarman); but as this Statute does not operate in Canada, and there is no local Act on the subject, the law in this respect, in Ontario, differs from the law in New Brunswick and Nova Scotia.

In *New Brunswick* and *Nova Scotia*, soldiers in service and seamen at sea may dispose of their personal estate as before, and in Ontario, by section 83, chapter 16, the Act regulating Surrogate Courts, the same provision is made with reference to soldiers and seamen, with addition that no nuncupative will made after that Act came in force should be good (5th December, 1859); this latter provision was not necessary in New Brunswick and Nova Scotia, as it was there enacted that all wills should be in writing, saving the exception just named.

In *New Brunswick* and *Nova Scotia*, wills executed as provided under their Statutes, are valid without publication.

In *Ontario*, there is no such statutory provision. (Memo. It has been held in England that it is not necessary—though Hardwick, Chancellor, had previously decided that it was—of freehold lands. *Vide* Jarman, 1st volume, 74.)

In *New Brunswick* and *Nova Scotia*, incompetency of witnesses (by reason of interest arising from devise or legacy) to the execution of the will has been removed. The will is not thereby rendered invalid or incapable of proof. The witnesses are admitted, and, if proved, the will is declared valid; but the devise or legacy is made void, even if it be to the husband or wife of witness.

In *Ontario*, there is no statutory provision of this character (the Act, chapter 13, 1869, of the Ontario Legislation to amend the Law considered below); and while the Imperial Act 25th George II., chapter 6, which makes void the devise or legacy to the witness himself is in operation in Ontario, the 1st Victoria,

chapter 26, extending the same consequence to a devise to the wife or husband of the witness, is not.

In *New Brunswick*, creditors, whose debts are by the will charged upon the estate, are not incompetent as witnesses.

In *Nova Scotia*, similar provision.

In *Ontario*, none, but would come in under George II., chapter 6.

In *New Brunswick*, no witness is rendered incompetent by reason of his being declared executor.

In *Nova Scotia*, the same.

In *Ontario*, no similar provision.

In both New Brunswick and Nova Scotia, objections as to the competency of witnesses in all legal proceedings (and, therefore, necessarily in the proof of wills) arising from interest or crime have long been removed by the Acts allowing parties to a cause to be witnesses; but those Acts in no way affect the provisions in the Acts relating to wills which declare legacies and devises to such parties void.

In *Ontario*, the law on this subject is apparently in a somewhat anomalous position. There are no such provisions relating to wills in any of the statutes which refer to wills, and it may be a question whether under the Act passed by the Ontario Legislature in December, 1869, entitled: "An Act to amend the Law of Evidence in Civil Cases," which removes the incompetency of witnesses arising from crime or interest, the difficulty of the question would be removed.

Under the English Law as prevailing before 1st Victoria, chapter 26, whether a will of freehold estate attested by a witness whose wife or husband had an interest in the will as devisee or legatee, would be invalid or not, was to some degree uncertain, though if the devise or legacy had been to the witness himself, under 25th George II, chapter 6, the doubt as to the invalidity is removed, because it clearly makes him competent, and declares the devise or legacy void. The Statute, 1st Victoria, chapter 26, repealed the 25th George II, chapter 6, except as to the Colonies in America, extended the removal of the incompetency of the witness, and the forfeiture of the devise and legacy to the husband or wife of the witness as well as to the witness himself, and to personal estate as well as to real estate (it having been decided that the 25th George II, chapter 6, did not extend to wills of personal estate), but the 1st Victoria, chapter 26, is not

in force in Ontario, and equivalent provisions to those in New Brunswick and Nova Scotia have never been enacted in Ontario.

The Statute of Ontario of December, 1869, which admits an interested witness to give evidence, says nothing about devises or legacies to witnesses to wills being void. Thus, in the absence of any knowledge, as to what may have been done by the Courts of Upper Canada on this subject, it would appear that on the first point as to the validity or invalidity of a will of freehold, witnessed by one to whose wife or husband a devise or legacy has been left (under the Statute, George II), the question remains open; secondly, if the devise or legacy was to the husband or wife of the witness, it would not be affected at all if the will was sustained; and thirdly, it having been decided that the statute did not apply to personal property, a person directly interested by a legacy to himself, or his wife, in sustaining a will, may be admitted as a witness to prove the will creating the interest without forfeiting or affecting the legacy—a principle inconsistent with the policy of the same Act (Ontario, December, 1869), which, while allowing parties to a cause, or interested in its results, to give testimony in their own favour, yet, in an action brought by or against executors or administrators, excludes the testimony of the survivor, as to what may have been said or done to him by the deceased, whose representatives are the other party to the suit; thus, the testator being dead, a claimant who is a witness to a will of personal property, might prove the document, giving to himself or his wife £500; but in a suit brought by him to recover £5 from the testator's estate, he would not be admissible as a witness to prove that the testator promised to pay him £5.

The 1st Victoria, chapter 26, has been substantially re-enacted in New Brunswick and Nova Scotia; not so in Ontario.

The revocation of a will by a subsequent marriage, and its non-revocation by a change of circumstances, or otherwise, than by a will or codicil duly made, is the same in all three Provinces.

In *New Brunswick* and *Nova Scotia*, obliterations, interlineations, or alterations made in a will after its execution (except when the words or effect of the will before alteration is not apparent) shall have no effect, unless alteration is executed as required for a will; and no will or codicil which has been revoked is to be revived, otherwise than by a duly executed will or codicil reviving it.

In *Ontario* no such provisions.

In all three Provinces, a conveyance of a part of an estate made after the execution of a will, is not to affect the operation of the will upon the part not conveyed.

In *Ontario* and *New Brunswick*, both with reference to real and personal estate, the will is to be construed as if executed immediately before the death of the testator.

In *Nova Scotia* the same provision exists, and there is also a clause that executors are to be trustees for the conveyance of real or personal property contracted to be sold, though the same may have been disposed of in the will.

In *New Brunswick* and *Ontario*, there is no clause of this latter character. Such a case would be left to the operation of law either by a bill for specific performance, or an action on the contract for damages.

In *New Brunswick* and *Nova Scotia*, specific provisions are made, that devises failing, become part of the residuary estate; a devise of freehold to comprehend leasehold, when no freehold existed answering the description in the will; and the provisions with reference to the execution of powers of appointment as to real and personal estate are the same in both Provinces.

In *Ontario*, none.

In all three Provinces it is provided that devises of real estate without words of limitation, pass the freehold or the entire estate of the testator, unless the contrary clearly appears from the will.

In *New Brunswick* and *Nova Scotia*, similar provisions with reference to the lapsing of estates-tail or quasi-entail, in case of the death of the devisee during the lifetime of the testator, leaving inheritable issue, are made, declaring that such devise shall not lapse, but take effect as if the death of the devisee had happened immediately after the death of the testator.

In *Ontario*, none.

In *New Brunswick*, there is an express provision that a devise of real estate to a trustee without any express limitation of the estate to be taken by him, and without any remainder over after the trust has been executed, shall vest in the trustee the fee simple or other entire legal estate of the testator, and not an estate determinable after the trust has been satisfied.

In *Nova Scotia* and *Ontario* there is no such provision.

In *New Brunswick* and *Nova Scotia*, provision is made that a devise to a child, who dies in the lifetime of the testator leaving issue, shall enure to the benefit of the issue.

In *Ontario*, none.

In *New Brunswick* and *Nova Scotia*, provisions are made for the construction of the words in a will.

In *Ontario*, none.

In the three Provinces, wills affecting lands must be registered; but the term within which a subsequent purchaser may be affected by the non-registration varies in each.

In *New Brunswick*, if there has been suppression, or concealment, or delay arising from the will being contested, under certain circumstances the term varies from six months to three years.

In *Ontario*, under the Registry Act, 1868, chapter 20, to affect subsequent purchasers, wills must be registered within twelve months next after the death of the devisor, testator or testatrix, or in case the devisee is disabled from registering the will within the said time, by reason of its being contested, or other inevitable difficulty, without his or her wilful default or neglect, then within twelve months after attainment of the will or probate, or removal of the impediment preventing the registration.

In *Nova Scotia* there are no exceptions or provisions of this character; but there is a provision, that for the suppression of a will, there shall be a forfeiture of £5 for every month "the offender shall suppress a will after the lapse of the first thirty days." (Section 28.)

In *New Brunswick*, there is the same penalty of £5 for any person guilty of suppressing a will, in the Act regulating Courts of Probate; or if the executor does not prove and cause the will to be registered, or renounce his executorship within thirty days after the death of the deceased without just excuse for the default.

In all three Provinces, stealing or fraudulently suppressing or destroying a will is provided for under the head of Crimes.

In Quebec the law respecting Wills is in part laid down in the Civil Code as follows:—

Art. 831. Every person of full age, of sound intellect, and capable of alienating his property, may dispose of it freely by will, without distinction as to its origin or nature, either in favour of his consort or of one or more of his children, or of any other person capable of acquiring and possessing, and without reserve, restriction, or limitation; saving the prohibitions, restrictions, and causes of nullity mentioned in this code, and all dispositions and conditions contrary to public order or good morals.

Art. 184. A wife may make a will without the authorization of her husband.

Art. 842. Wills may be made: 1. In notarial or authentic form; 2. In the form required for holograph wills; 3. In writing and in presence of witnesses, in the form derived from the laws of England.

Art. 843. Wills in notarial or authentic form are received before two notaries, or before a notary and two witnesses; the testator, in their presence and with them, signs the will or declares that he cannot do so, after it has been read to him by one of the notaries in presence of the other, or by the notary in presence of the witnesses. Mention is made in the will of the observance of the formalities.

Art. 844. Authentic wills must be made as originals remaining with the notary. The witnesses must be named and described in the will. They must be of the male sex, of full age, and must not be civilly dead, nor sentenced to an infamous punishment. Aliens may serve as witnesses. The clerks and servants of the notaries cannot. The date and place of its execution must be stated in the will.

Art. 845. A will cannot be executed before notaries who are related or allied to the testator or to each other, in the direct line, or in the degree of brothers, uncles, or nephews. The witnesses, however, may be related or allied to the testator, to the notary, or to one another.

Art. 849. Wills made in Lower Canada, or elsewhere, by military men in active service out of garrison, or by mariners during voyages, on board ship, or in hospital, which would be valid in England as regards their form, are likewise valid in Lower Canada.

Art. 850. Holograph wills must be wholly written and signed by the testator, and require neither notaries nor witnesses. They are subject to no particular form. Deaf mutes who are sufficiently educated, may make holograph wills, in the same manner as other persons who know how to write.

Art. 851. Wills made in the form derived from the laws of England (whether they affect moveable or immoveable property), must be in writing, and signed at the end with the signature or mark of the testator, made by himself or by another person for him in his presence, and under his express direction (which signature is then or subsequently acknowledged by the testator as having been subscribed by him to his will then produced, in presence of at least two competent witnesses together, who attest and sign the will immediately, in presence of the testator and at his request. Females may serve as attesting witnesses, and the rules concerning the competency of witnesses are the same in all other respects as for wills in authentic form.

Art. 853. In wills made in the last mentioned form, legacies made to any of the witnesses, or to the husband or wife of any such witness, or to any relations of such witness (in the first degree) are void, but do not annul the other provisions of the will. The competency of testamentary executors to serve as witnesses to such wills, is subject to the same rules as in wills in authentic form.

Art. 846. Legacies made in favour of the notaries or witnesses, or to the wife of any such notary or witness, or to any relation of

such notary or witness in the first degree, are void, but do not annul the other provisions of the will. Testamentary executors, who are neither benefitted nor compensated by the will, may serve as witnesses to its execution.

Art. 2098. All acts *inter vivos*, conveying the ownership of an immoveable, must be registered at length or by memorial. In default of such registration, the title of conveyance cannot be invoked against any third party who has purchased the same property from the same vendor for a valuable consideration and whose title is registered.

Registration has the same effect between two donnees of the same immoveable.

Every conveyance by will of an immoveable must be registered either at length or by memorial with a declaration of the date of the death of the testator.

SECONDLY AS TO INTESTACY.

Real and Personal Estate.

In New Brunswick, the Act regulating Intestate's Estates is extremely short.

21st Vic., cap. 26, as explained by 22 Vic., cap. 25, A.D. 1858 and 1859.

As to Real Estate.

The Real Estate is to be divided equally (regard being had to advancements made before his death by the Intestate, so as to make all equal) amongst the children or their legal representatives, including in the distribution, children of the half-blood, reserving the widow's right as dower.

In case there be no children of the Intestate, then the next of kindred in equal degree and their representatives.

The Personal Estate (1st Vol. Rev. Stat. 283,) is apportioned one-third ($\frac{1}{3}$)to widow, residue in equal proportions among children and their representatives (*per stirpes*). The heir-at-law, notwithstanding an advancement to him of Real Estate by Intestate in his lifetime, shall nevertheless receive an equal share with the other children; but any other child having received any such advancement, shall be entitled only to such equal share, deducting the value of his advancement.

(*Memo.*) This is the only difference at present existing in favor of the heir-at-law, and probably escaped attention when 21st Vic., cap. 26, was passed.) If there be no children, or legal representatives of them, one-half goes to the widow, the residue equally

to next of kin, in equal degree, and their representatives; but no representation among collaterals after brother's and sister's children.

If no widow, equally among children, and if no widow and no children, to next of kin in equal degree. (Same as 22, 23 Charles II, cap. 10, as explained by 29 Charles II, cap. 30.)

If after the death of the father, any of his children shall die in the lifetime of the mother, intestate without wife or children, every brother and sister and their representatives shall have equal share *with the mother*. (Same as 1st James II, cap. 17, differing in this respect from Real Estate.)

In *Ontario*. Con. Stat. cap. 82, p. 829. The Real Estate, in case of Intestacy, goes:

1st. To children and their representatives, *per stirpes* in equal parts.

2nd. If Intestate dies without descendants, *leaving a father*, the estate will go to the father, unless the Intestate acquired it on the part of the mother, and she be living, and if *such* mother be dead, then the estate so acquired goes to the father for life, reversion to the brothers and sisters; if no brothers or sisters, or descendants, &c., to father absolutely.—Sec. 27.

If Intestate die without descendants, and without a father (or a father entitled, as under the last section), and leaving a mother, and a brother or sister, then the estate goes to the mother for life, reversion to the brother or sister, or their descendants, &c.; and if no brother or sister, or descendants of any, then to mother absolutely.—Sec. 28.

If Intestate dies without descendants, and without father or mother, then estate goes to brothers and sisters, and their descendants, *per stirpes*, however remote.—Sects. 29, 30, 31.

If no heirs, under any of the preceding sections, then the estate, if acquired on the father's side, shall go to the brothers and sisters of the father of the Intestate, and their descendants, in equal shares, *per stirpes* (or their descendants); and if none on the father's side, then to those on the mother's side.—Sects. 32, 33.

If the estate should have come on the mother's side, failing heirs, &c., then to the brothers and sisters of the mother, and their descendants, *per stirpes*, in equal shares, &c.; and if none on the mother's side, then to those on the father's side.—Sect. 34.

If acquired neither on father or mother's side (failing *ut ante*), then estate shall go to brothers and sisters of father and mother, alike, and their representatives, *per stirpes*.—Sec. 35.

Half-blood succeeds with whole-blood.—Sec. 36.

And, failing heirs, under all those Sections, the estate goes to next of kin, according to the rules of the English Statute of Distribution of Personal Estate.—Sec. 37.

Posthumous children to inherit as if born in lifetime.—Sec. 39.

With respect to Real Estate.

The law of New Brunswick differs from that of Ontario in this, that while the Law of Ontario, in case of failure of lineal descendants, provides, specifically, that the estate shall go to the father or mother, or their representatives, *quoad*, the fact, from whom the estate may have been derived; the New Brunswick Law simply provides, "that in case there be no children of the "Intestate, then it shall go to the next of kindred, in equal "degree, and their representatives."

The next of kindred would be determined by the Civil Law, and is the same as in the distribution of Personal Estate, (under 22nd and 23rd Charles II., cap. 10, as explained by 29, Charles II., cap. 30 in England, and in New Brunswick by 1st vol. Revd. Stat., page 283). And, therefore, the *mother*, as well as the father, would conjointly succeed to the Real Estate of the deceased (inasmuch, as they, being next of kin *in equal* degree, would succeed to the Personal Estate of the Intestate, who, leaving no widow, died without issue, in exclusion of his brothers and sisters); and, assuming the father was dead, she, being the nearest of kin, according to the Civil Law, would be entitled to the whole.

(The Stat. of 1st James II., cap. 17, which provides, that the father being dead, the mother, and brother and sisters, shall share alike, applies only to Personal Estate, and in no way alters the Rule as to who next of kin may be under the Civil Law, so that with reference to Real Estate in New Brunswick, the mother is in a better position than she is with reference to Personal Estate.)

As to Personal Property.

The Law in Ontario and New Brunswick is the same; the Stat. 22 & 23 Charles II. cap. 30, modified by 1st James II.,

cap. 17, prevailing in Ontario under the Act respecting property and Civil Rights (chap. 9, page 30, Cons Stat.); and in New Brunswick by specific re-enactments of their several provisions.

The Nova Scotia law differs from both,—See Revised Statutes, 3rd series, 747.

With reference to Real Estate.

1st. It first provides for an equal destribution among children and their descendants, *per stirpes.*

2nd. If no children, one half of Real Estate goes to father; the other half to widow, in lieu of dower; if no widow, all to father.

3rd. If no children and no father, one-half to widow; the other half, in equal shares, to his mother, brothers and sisters, and their representatives, and failing all these, then to next of kin, in equal degree. If there be no kindred, all to widow for her own use, if there be one. Minors unmarried, without father or mother, property to brothers and sisters in equal degree.

The Civil Law to prevail, and half-blood to inherit with whole-blood.

With reference to Personal Property.

1st. Widow has all her paraphernalia, apparel, ornaments, apparel of minor children, and provisions for 90 days, and such other necessaries as shall be allowed by Judge of Probate, deceased's wearing apparel, to $40 value, to be distributed among family by the administrator.

2nd. Residue of Personal Estate, after payment of the debts of deceased, &c., to be distributed, one-third to widow, residue to persons entitled to the Real Estate, and if no widow, all residue to the latter. (Changed from one-half, R.S. 747, to $\frac{1}{3}$ by Amend. Stats., 1865, chap. 3.)

3rd. There is a provision under the Law relating to Intestacy, that a posthumous child, unprovided for by the Testator in his will, shall have the same interest in the estate, both Real and Personal of the father, as if *the father had died intestate*, and for such purposes, all the devises and bequests made in the will shall abate proportionably.

4th. Advancements to be taken into consideration in the apportionment, and if exceeding the proportion, that would come to the child on a division, he is to be excluded from the division, but cannot be called on to refund.

5th. All gifts and grants are to be deemed advancements, if stated to be so made in the gift or grant, if charged in writing as such, or acknowledged in writing, or on examination before the Judge of Probate on oath, and not otherwise.

6th. — Tenancy by courtesy, or of a widow in dower, not affected.

Of both Real and Personal Property, by amended Statutes of 1865, chap. 3, sec. 2.—"If a married woman shall die intestate, "without issue surviving, one-half of the Real and Personal "Estate owned by her, in her own right, or held by her for her "separate use, shall go to her husband, and the other half to her "father; if she have no father, then to her mother, brothers and "sisters, in equal shares; and the children of any deceased "brother or sister, by right of representation, and if there be no "issue, father, mother, brother or sister, or child of brother or "sister, the whole shall go to her husband."

In the Province of Quebec the law respecting Intestacy is thus laid down in the Civil Code:—

Art. 625. Children or their descendants succeed to their father and mother, grandfathers and grandmothers, or other ascendants, without distinction of sex or primogeniture, and whether they are the issue of the same or of different marriages.

They inherit in equal portions and by heads when they are all in the same degree and in their own right; they inherit by roots when all, or some of them, come by representation.

Art. 626. If a person dying without issue, leave his father and mother, and also brothers or sisters, or nephews or nieces in the first degree, the succession is divided into two equal portions, one of which devolves to the father and mother, who share it equally, and the other to the brothers and sisters, nephews and nieces of the deceased, according to the rules laid down in the following section:

Art. 627. If, in the case of the preceding article, the father or mother had previously died, the share he or she would have received accrues to the survivor of them.

Art. 629. In the case of the preceding article, the succession is divided equally between the ascendants of the paternal line and those of the maternal line. The ascendant nearest in degree takes the half accruing to his line to the exclusion of all others.

Ascendants in the same degree inherit by heads in their line.

Art. 630. Ascendants inherit, to the exclusion of all others, property given by them to their children or other descendants who die without issue, where the objects given are still in kind in the succession, and if they have been alienated, the price, if still due, accrues to such ascendants.

They also inherit the right which the donee may have had of resuming the property thus given.

Art. 631. If the father and mother of a person dying without issue, or one of them, have survived him, his brothers and sisters, as well as his nephews and nieces in the first degree, are entitled to one-half of the succession.

Art. 632. If both father and mother have previously died, the brothers, sisters, and nephews and nieces in the first degree, of the deceased, succeed to him, to the exclusion of the ascendants and the other collaterals. They succeed either in their own right, or by representation.

Art. 633. The division of the half or of the whole of the succession coming to the brothers, sisters, nephews or neices, according to the terms of the two preceding articles, is effected in equal portions among them, if they be all born of the same marriage; if they be the issue of different marriages, an equal division is made between the two lines paternal and maternal of the deceased, those of the whole blood sharing in each line, and those of the half blood sharing each in his own line only. If there be brothers and sisters, nephews and nieces, on one side only, they inherit the whole of the succession to the exclusion of all the relations of the other line.

Art. 634. If the deceased, having left no issue, nor father nor mother, nor brothers, nor sisters, nor nephews, nor neices in the first degree, leave ascendants in one line only, the nearest of such ascendants takes one-half of the succession, the other half of which devolves to the nearest collateral relation of the other line. If, in the same case, there be no ascendant, the whole succession is divided into two equal portions, one of which devolves to the nearest collateral relation of the paternal line, and the other to the nearest of the maternal line. Among collaterals, saving the case of representation, the nearest excludes all the others; those who are in the same degree partake by heads.

Art. 935. Relations beyond the twelfth degree do not inherit. In default of relations within the heritable degree in one line, the relations of the other line inherit the whole.

Art. 636. When the deceased leaves no relations within the heritable degree, his succession belongs to his surviving consort.

Art. 637. In default of a surviving consort, the succession falls to the Crown.

Art. 2098. The transmission of immoveables by succession must be registered by means of a declaration setting forth the name of the heir, his degree of relationship to the deceased, the name of the latter, the date of his death, and, lastly, the designation of the immoveable.

So long as the right of the purchaser has not been registered, all conveyances, transfers, hypothecs or real rights granted by him in respect of such immoveable are without effect.

J. H. GRAY.

CONSTITUTIONAL LAW.

CHURCH AND STATE.

In every country and in every age, among the heathen as well under the sway of nations professing Christianity, two powers have almost continually disputed for supremacy over mankind. This endless struggle has lately been renewed before the Courts of this Province in an important cause between the Catholic Bishop of Montreal and the *Institut Canadien*, which has been decided by the recognizance of exclusive ecclesiastical jurisdiction in spiritual matters. The reader will perceive that we allude to the cause of Dame Henriette Brown, widow Guibord, and the *Curé* and Churchwardens of the Parish of Montreal. Passing over the details of this memorable conflict, the fundamental point was whether or no the Catholic Church—whose cemeteries are by ancient usage divided into two parts, one for the burial of the non-Catholics, the other for the burial of those recognized by the authorities of the Church as in her communion at the hour of death—is amenable to the civil tribunals for her refusal to bury in the Catholic section (in consecrated or unconsecrated ground), as also for the motives of such refusal. A desire to collect the doctrine established by the judges' decision in this *cause celèbre*, better known under the name of the *Guibord* case, has led us to examine in the following articles the civil status of all the Churches in Canada, 1st in spiritual matters, and 2nd in temporal and mixed matters.

I. IN SPIRITUAL MATTERS.

In France, before the principles of the Revolution of 1793 came into force, the ecclesiastical authorities of the Roman Catholic Church, the only church recognized or tolerated by the State, were undoubtedly, and without excepting the Pope himself, subject to the jurisdiction of the civil courts in matters purely spiritual. The French King, as a Catholic Prince, protector of the faith, and eldest son of the Church, regarded himself as supreme judge of the maxims and canons of the Catholic Church, and consequently decided upon the validity of the decisions and

decrees of the ecclesiastical authorities, upon appeal from them to the civil tribunals—an appeal known as *l' appel comme d'abus aux parlements.* This controlling power was not only claimed openly by the civil authority, but was acquiesced in and supported by the French or Gallican clergy. The articles of that clergy's declaration of the 19th March, 1682, are a complete proof of our assertion :

Art 4. Quoique le Pape ait la principale part dans les questions de foi et que ses décrets regardent toutes les Eglises et chaque Eglise en particulier, son jugement n'est pas irréformable, si le consentement de l'Eglise n'intervient. Ce sont les maximes que nous avons reçues de nos pères et que nous avons arrêtés d'envoyer *à toutes les Eglises Gallicanes* et aux Evêques que le Saint Esprit y a établis pour les gouverner, afin que nous disions tous la même chose, que nous soyons tous dans les mêmes sentiments et que nous tenions tous la même doctrine.

The decisions of the French Courts go still farther than the Declaration of 1682. Mr. Joseph Doutre, Q.C., of counsel in the Guibord case, has gathered together in his elaborate argument a great number of decisions of the French tribunals of so extraordinary a character that we cannot refrain from quoting them as historical curiosities.

Arrêts de Des Maisons. Vo. Excommunication, en 1662, l'Evêque de Clermont envoya un prêtre avertir le Lieutenant Criminel et le Procureur du Roi de ne point recevoir la communion pascale, vu qu'ils avaient mis la main sur un prêtre, avec violence et blessure, pendant qu'ils l'arrêtaient pour la commission d'un crime. L'evêque leur faisait ainsi intimer qu'ils avaient par là encouru *ipso facto* l'excommunication, mais il ne la prononçait pas lui-même. Ces deux officiers prenant cet avertissement comme une excommunication et une entreprise sur l'autorité du Roi, interjetèrent appel comme d'abus, comme d'une excommunication. L'avocat général Bignon soutint l'appel et il s'appuya d'un arrêt dont l'espèce était presque semblable, rendu au Parlement d'Aix, contre le Cardinal de Sourdis, archevêque de la même ville, qui fut condamné à une somme de 2,000 écus de réparation envers un officier qu'il avait excommunié, s'il ne levait pas l'excommunication durant le même jour. La Cour reçut le Procureur Général appelant comme d'abus de la prétendue excommunication et sur icelle appointa les parties au conseil.

Arrêts de Brillion. Vo. Excommunication. No. 3. " Charlemagne dans ses capitulaires fait défense aux prélats d'user d'excommunication, sans de fortes raisons et causes légitimes.

" Le Sieur de Joinville écrit que le Roi St. Louis, répondant à quelques prélats qui imploraient son autorité pour maintenir leurs com-

raunications, dit : "Je le ferai volontiers, mais il faut que mes officiers connaissent si la cause de l'excommunication est légitime."

"Sous le règne de Charles VI, le Parlement de Paris par arrêt du 10 Sept. 1407 déclara nulle et abusive la bulle d'excommunication de Benoit XIII, fulminée contre ceux qui s'opposaient aux vacances et aux annates qu'il voulait exiger sur le clergé et ordonna que les excommuniés seraient absous et relaxés.

"L'interdit que le Pape Martin V avait fulminé contre la ville de Lyon fut déclaré nul et abusif, par arrêt de l'an 1422.

"Charles VII, en 1440 défend aux cours du Parlement de laisser publier des censures et excommunications contre les Pairs et Officiers.

"L'excommunication lancée par Innocent VIII contre les habitants de Gand et de Bruxelles et autres flamands, à la sollicitation même de leur comte, fut déclarée nulle par arrêt du Parlement, le 18 mai, 1488.

"Charles IX par l'Ordonnance d'Orléans, Art. 18 défend les excommunications sinon pour crime et scandale public et affaires de grande importance, et par son édit de 1571, il restreint les excommunications et révoque la coutume de porter certaines censures.

No. 4 Le Parlement a modéré la rigueur des Canons en certains cas, rapportés au t., 1er p. 79 de la bibliothèque canonique.

"Avant que les appels comme d'abus fussent introduits, si les évêques abusaient de leur pouvoir par des excommunications injustes, leur temporel était saisi sous l'autorité des cours et eux condamnés à l'amende.

No. 5. Arrêt du parlement de Provence, déclarant que le juge d'Eglise ne peut excommunier que pour cause juste et de conséquence.

No. 9. Arrêt du 15 mars 1409 qui condamne l'Archevêque de Rheims, sur peine de saisie de son temporel de faire absoudre un excommunié.

Arrêt du parlement de Paris en 1582, contre le Nonce du Pape, pour avoir excommunié les Cordeliers de Paris et ordre à l'archevêque de Paris de les absoudre a *cautele*.

Arrêt du 30 juin 1623, qui déclare l'excommunication prononcée par l'Evêque d'Angers contre son Grande Vicaire abusive, et le condamne à la rétracter, plaçant son temporel sous saisie jusqu'à l'exécution de la sentence.

No. 10. Arrêt du 6 aout 1373, ordonnant que le temporel de l'Archevêque de Rouen serait mis en la main du Roi et exploité à son profit jusqu'à ce qu'il ait levé les excommunications.

Arrêt du 1 avril 1408, condamnant l'Evêque du Puy à faire cesser, à peine de saisie de son temporel, ou tenir en suspens durant le procès toutes les peines d'excommunication : et quant à ceux qui sont morts ainsi excommuniés et enterrés en terre profane, ils seront mis en terre sainte.

Arrêt du parlement de Paris du 15 mars 1409, par lequel l'Arche-

vêque de Rheims ayant fait excommunier Guillaume Matro par affiches, fut condamné à une amende pécuniaire et à le faire absoudre à ses dépens, à peine de saisie de son temporel.

Papon rapporte un arrêt du parlement de Toulouse du 22 mars 1457, qui condamne l'Official de Toulouse à révoquer plusieurs excommunications contre les officiers de la cour.

Arrêt du Parlement de Paris du 11 Juillet 1502, à la requête de Louis Pot, Evêque de Tournay, ordonnant que l'abbé de St. Amant sera contraint par emprisonnement de sa personne à faire casser, révoquer et annuler à ses dépens les monitions, censures et procédures faites en cour de Rome,—et qu'il sera procédé par prise de corps contre les porteurs, exécuteurs et solliciteurs de telles monitions et censures de cour de Rome.

Arrêt du 7 septembre 1503, déclarant abusives certaines monitions et censures émanées de cour de Rome et condamnant l'impétrant à les faire casser à ses dépens.

Arrêt du grand conseil du 7 juillet 1523, (après les lettres patentes du roi François 1er) cassant la sentence de l'Archevêque de Bordeaux qui excummuniait les religieux de l'ordre de St. François. En exécution de cet arrêt, l'Archevêque révoqua ses censures.

Arrêt du Parlement de Paris du 7 janvier 1537, déclarant que l'Evêque d'Amiens avait abusivement procédé *cessando à divinis* à cause des excommuniés.

Ajoutons dit le même auteur, que les incidents ou oppositions qui surviennent à l'exécution d'un Mandement ou fulmination, sont de la connaissance du juge séculier. Ainsi jugé par un arrêt du Parlement de Normandie du 16 janvier 1542.

Le 32 décembre 1626, François de Lorraine, évêque de Verdun, excommunie ceux qui entreprennent sur les batiments et droits de l'église. Sentence du Lieutenant du Roi du 1er janvier 1627, autorisant l'appel comme d'abus et ordonnant que les publications et affiches seront levées et otées. Excommunication publiée par l'évêque de Verdun contre Jean Gillet, lieutenant en la justice royale pour avoir fait afficher la sentence contre son Monitoire, le 2 janvier 1627. Jugement rendu le 13 février 1627, par le Parlement de Metz, par lequel les prétendus monitoires et excommunications de l'évêque de Verdun sont déclarés abusifs, scandaleux et remplis d'imposture et faux faits, —ordonné qu'ils seront lacérés et brulés par l'exécuteur de la haute justice,—et pour réparation d'un tel attentat par le dit évêque de Verdun, il est dit qu'il sera mené sous bonne et sûre garde en la bastille, et les revenus de ses bénéfices mis sous la main du roi, le Sieur évêque condamné en cent mille livres d'amende et qu'il sera procédé contre ses complices par voie extraordinaire, comme perturbateurs du repos public.

Arrêt du Parlement de Toulouse du 24 mai 1677, déclarant abusive l'excommunication lancée par l'évêque de Cahors, contre la Dame Delon, parce qu'elle refusait de vivre avec son mari, qui la mal. traitait,

Arrêt du Parlement de Provence, du 23 juin 1664, déclarant que le juge d'église commet abus en excommuniant un usurier condamné pour usure par le juge laïque.

Arrêt du 7 février 1668, déclarant abusive l'excommunication prononcée par l'évêque d'Amiens contre le doyen de l'église collégiale de Saint-Florent de Roye pour n'avoir pas voulu quitter l'*étole* devant lui lors de sa visite dans la dite église.

Arrêt du Parlement de Paris rendu à la demande faite le 23 janvier 1688, par l'avocat-général Talon, déclarant abusive la bulle d'Innocent XI du 12 mai 1687, sur laquelle avait été fondée l'interdiction de l'église de St. Louis et des ecclésiastiques qui la desservaient, pour avoir admis à l'église le marquis de Laverdin, ambassadeur du Roi de France, et lui avoir administré les sacrements.

No. 18. Arrêt du Parlement de Paris du 26 janvier 1373, déclarant que, lorsque par censure la juridiction temporelle est troublée, le Roi peut y pourvoir par ses officiers.

Arrêt de l'an 1399, contre l'Archevêque de Rouen et contre l'Archevêque de Tours qui avaient excommunié quelques officiers du Roi.

Arrêts des 16 et 26 février 1410, contre l'Archevêque et l'Archidiacre de Rheims, par lesquels il est dit qu'un Pair de France ou Officier ne pouvait être excommunié.

Arrêt du 17 avril 1707, déclarant qu'une monition générale n'atteignait pas les officiers du Roi ni les greffiers pour les choses qu'ils font comme officiers.

Arrêt du 1er Sept. 1427, déclarant que le Roi peut révoquer les entreprises des évêques contre les Officiers Royaux, par amende et saisie du temporel.

Arrêt du 22 décembre 1457, condamnant l'Archevêque de Toulouse à révoquer plusieurs excommunications contre les juge, avocat du Roi et Greffier de la Sénéchaussée et qu'il y serait contraint par la saisie de son temporel.

Arrêt du Parlement de Toulouse du 9 Sept. 1599, par lequel l'Evêque de Castres est condamné en deux mille écus, pour avoir excommunié deux conseillers de la Cour.

Arrêt du Parlement de Bordeaux du 30 Déc. 1606, condamnant le Cardinal de Sourdis, Archevêque de Bordeaux, à 15,000 livres d'amende, à prélever par la saisie et vente de ses biens temporels pour avoir excommunié les Officiers de la Cour et Officiers du Roi, et lui défendant de persister dans cette voie à peine d'encourir crime de Lèze-Majesté.

Arrêt de 1601, condamnant l'Archevêque d'Aix à révoquer l'excommunication qu'il avait prononcée contre les Présidents et les officiers de la Chambre criminelle d'Aix pour avoir condamné à mort et fait exécuter un homme trouvé coupable de sodomie.

Id. No. 20.

Arrêt du 9 avril 1545, contre l'Archevêque de Bourges qui avait excommunié un abbé, pour refus de payer le droit de procuration prétendu par Archevêque. L'abbé fut relaxé *ad cautelam*.

Arrêt de janvier 1569, déclarant abusive l'excommunication prononcée par l'Official de Noyon, contre un prêtre qui était dans l'impossibilité de satisfaire ses créanciers—et sur un appel comme d'abus d'une excommunication de l'Evêque de Nevers, il fut jugé que les censures *de relevé* sont abusives.

Arrêt du 26 avril 1602, qui déclare abusive la suspension d'une prêtre *à divinis*, parcequ'il ne payait pas ce qu'il devait à un autre prêtre.

Arrêt conforme du Parlement de Bretagne du 5 septembre 1570.

Arrêt entre Jean Percevaux, chanoine de Léon, appelant comme d'abus, et Jean de la Truche, Doyen de Nantes, intimé. Celui-ci obtint à Rome contre l'appelant une sentence qui l'excommuniait faute de payer les arrérages d'une pension constituée sur un bénéfice, défense à ses amis, jusqu'au nombre de quarante, de converser avec lui, sous peine d'excommunication, mandé au Roi et aux Princes *auctoritate apostolica ut per captionem personæ, ac bonorum distractionem in hunc insurgant.* Le Parlement de Bretagne, le 4 septembre 1559, déclare cette excommunication abusive et ordonne que, dans trois mois, l'intimé apportera absolution de Rome sur peine de saisie de son temporel et cependant l'appelant pourra prendre absolution *ad cautelam* de l'evêque de Nantes ou de son vicaire. L'intimé condamné aux dépens.

Arrêt du Parlement de Bretagne du 12 février 1554, qui déclare abusive la commission de l'Official de Rome portant contrainte de payer sous trois jours, à peine d'excommunication et de suspension *à divinis.*

Arrêt conforme du même Parlement rendule 3 Octobre 1555, contre les censures ecclesiastiques décrétées contre Ives Cuzial.

Arrêt conforme du Parlement de Rouen du 16 décembre 1547, contre l'excommunication d'un prêtre, faute de paiement d'une somme qu'il devait à un marchand.

Arrêt conforme du Parlement de Toulouse du 14 avril 1549. Autre arrêt du 2 Juin 1540, qui enjoint aux ecclésiastiques d'absoudre ceux qui sont excommuniés pour dette, à peine de saisie de leur temporel. Arrêt du Parlement de Toulouse du 5 Mai 1671, déclarant abusive l'excommunication lancée par le Métropolitain et le prêtre Navarre, pour dettes.

Id. No. 23. "Les rois et magistrats souverains, à qui ils communiquent leurs pouvoirs out autorité sur la police de l'eglise et ont souvent arrêté le cours des excommunications injustes."

It is contended that courts of justice, in the Province of Quebec, have a right to intervene in purely ecclesiastical matters, since (it is alleged) such a right existed under the French *régime* before the cession of the colony to the British Crown. In other words, it is contended that the whole body of the ecclesiastical law of France passed into the colony together with the body of law of the French kingdom, and still forms part of the laws of the Province of Quebec.

§ 1. *Ecclesiastical Law under the French Crown.*—The last, or at least one of the last documents relating to ecclesiastical matters under the French Crown (19th April, 1741), published by the King, and having reference to the Papal bull nominating Mgr. de Pontbriand to the See of Quebec, runs to the following effect:—

"Ayant fait voir en notre conseil les bulles et provisions apos-
"toliques de l'évêché de Québec, octroyées à notre aimé et féal
"conseiller en nos conseils, le sieur Henri-Marie Du Briel de
"Pontbriand, et ne s'y étant trouvé aucune chose contraire ni
"dérogeante à nos droits, indult, concession et concordat d'entre
"le Saint-Siége et notre royaume, *ni aux priviléges, franchises et*
"*libertés de l'Eglise Gallicane*, nous avons admis le dit sieur
"évêque à nous prêter le serment de fidélité qu'il nous devoit à
"cause du dit évêché, ainsi qu'il paroit par le certificat ci-attaché
"sous le contrescel de notre chancellerie; à ces causes, nous
"l'avons mis et installé, mettons et installons par ces présentes
"signées de notre main, en la pleine, libre et paisible jouissance
"des biens, fruits et revenus du dit évêché.

"Si vous mandons, qu'en faute du dit serment non fait, ils
"étoient mis et saisis en notre main, vous ayez à lui en faire,
"comme nous faisons dès à présent, main-levée et délivrance, *à*
"*la charge néanmoins de nous rendre les foi et hommage pour les*
"*terres qu'il tient, relevant de nous*, et d'en donner des aveux et
"dénombremens dans le tems porté par nos ordonnances si fait
"n'a été; car tel est notre plaisir."

The King exacts in this document the oath of allegiance due to him *à cause du dit Évêché*. But the order rendered in the *Chambre des comptes* on the 4th of May following, explains that this oath was taken "*pour raison et à cause de la temporalité du dit Évêque.*"

Mr. Gonzalve Doutre, the present President of the *Institut Canadien*, who has published this edict in his *Histoire Générale du Droit Canadien*, observes on page 213: "La preuve la plus incontestable qu'il soit possible de donner pour affirmer que les Evêques de la Nouvelle France se sont conformés à la Déclaration de 1682, est dans l'Edit de l'Installation de Mgr. de Pontbriand que nous avons déjà reproduit en entier. Cet Edit s'appuyant sur les *libertés Gallicanes*, il était nécessaire d'indiquer en quoi elles consistent."

We cannot discover in this Edict the proof found in it by Mr. Doutre.

It is well known that at first the Archbishop of Rouen claimed jurisdiction over Monseigneur de Laval, ordained in 1658 bishop of Petrea *in partibus infidelium*, as holding under him and consequently under the Church of France. As early as the year following his induction (1659), a Royal *lettre de cachet** says: "Quelque lettre que j'aie accordée à l'archevêque de Rouen, mon intention n'est pas que lui ou ses grands vicaires s'en prévalent, jusqu'à ce que, par l'autorité de l'Eglise, il ait été declaré si cet archévêque est en droit de prétendre que la Nouvelle France soit de son diocèse. Notre Saint Père le Pape n'en est pas persuadé, et ce serait un scandale si dans une Eglise naissante, la juridiction de celui que Dieu a établi chef de l'Eglise Universelle venait à être contestée.

Meanwhile the negotiations with the Holy See for creating Mgr. de Laval titular bishop of Quebec, advanced slowly. The cause of this delay is explained in a letter from the King to his ambassador at Rome, dated the 15th December, 1673: "Après avoir examiné le mémoire que vous m'avez envoyé sur les difficultés qui se sont trouvés dans l'expédition des Bulles d'érection de l'Evêché de Québec, j'ai jugé à propos de vous ordonner de ne plus insister sur la demande que vous aviez faite que *cet Evêché dépendît de l'Archevêché de Rouen, ou de quelqu' autre de mon Royaume.*" †

Upon this declaration, the Pope in 1674, founded the diocese of Quebec on the condition that it should hold directly from the Holy See,‡ *qu'il dépendrait immédiatement de Rome.*

Mr. Doutre quotes Father Charlevoix to explain the words *dépendre immédiatement de Rome.* According to the historian of *La Nouvelle France*, they do not prevent the See of Quebec from being united in a certain way, *en quelque façon*, to the clergy of France, in the same way as the See of Puy, which was holding directly from Rome. The expression, *en quelque facon*, is extremely vague, and neither Charlevoix, nor Mr. Doutre himself informs us *in what way* either the See of Puy, or that of Quebec, was united to the Clergy of France, whether by the bonds

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* Archives de l'Archevêché de Québec, Reg. A.

† See Charlevoix t. 1, p. 406.

‡ The Abbé Faillon, t. 3, p. 428; Charlevoix, t. 1, p. 406; The Abbé Ferland, t. 2, p. 102; Abbé Brassard, t. 1, p. 162; Garneau, t. 1, p. 174.

of charity and Christian love, or by the private relations which the Canadian clergy, incessantly recruited in France, kept up with the French clergy. As to the civil status of the Canadian clergy, the King's letter of the 15th December, 1673, which we have copied from Mr. Doutre, of itself constitutes a complete proof that such a legal union did not exist.

Mr. Doutre, page 181, adds that M. de Laval had been *named* by the King and *ordained* by the Pope, bishop of Quebec, agreeably to the concordat of 1615. Be it so. Does that prove the introduction into Canada of the liberties of the Gallican Church? The *concordat*, according to Mr. Doutre himself, "n'avait pas d'autre effet que d'attribuer au Pape l'institution pour les bénéfices électifs sur la présentation du Roi, qui s'était reservé la nomination à tous les bénéfices; c'est-à-dire, au roi la nomination, au pape l'institution."

The *concordat* could certainly not have reference to the *appel comme d'abus*, or to the liberties of the Gallican Church. The right of nomination, or rather of *presentation*, could be nothing more than a purely honorary one, inasmuch as it was always optional with the Holy See to confirm or annul the royal nomination. At any rate, we cannot conclude from the royal exercise of the right of nomination in the case of the bishop of Quebec, (supposing it to be a fact) that the King must have had a certain ecclesiastical jurisdiction over him, for his nomination was accompanied with the renunciation of the King's demand that he should hold from the Church of France, and was confirmed by the Pope on the condition that he should hold directly from Rome.

Mr. Doutre says again, p. 192: "Le Grand Vicaire de Bernières prétendait exercer la juridiction ecclésiastique sous forme d'officialité. La Conseil, le 1er juillet 1675, lui enjoint de produire les titres en vertu desquels il prétend exercer cette officialité.

"Il a été tenu, au Canada, une officialité ainsi que cet arrêt le fait entrevoir. Ce fût un des premiers actes de Mgr. Laval que d'en établir une. M. de Lauzon-Charny fut nommé official et M. Forcapel, Promoteur. M. de Lauzon-Charny exerça publiquement et paisiblement les pouvoirs en Canada. En 1660 le Gouverneur de Montréal reconnut une sentence de l'official qui annulait un mariage."

The *arrêt* alluded to, far from showing the existence of an *officialité*—that is of an *officialité* possessing civil jurisdiction,

juridiction contentieuse, as in France—proves the very contrary; for the Grand Vicar is ordered to produce the titles by virtue whereof he pretends to exercise this officiality (*est enjoint de produire les titres en vertu desquels il prétend exercer cette officialité*). The officiality itself must have been as obscure as its titles, when an order for their production was thus rendered necessary in 1675.

The attempt made to prove that the Governor of Montreal recognized a judgment of the officiality annulling a marriage is hardly more conclusive; for in 1866 Judge Polette, at Three Rivers, in a cause of *Vaillancourt* vs. *Lafontaine*, recognized a *décrêt* of Mgr. Cook, likewise annulling a marriage.

That there was an officiality in *La Nouvelle France* just as one could be established to-day by any Catholic or Anglican Bishop, cannot be called in question; but it was a merely private ecclesiastical court and not the *officialité contentieuse of France.* We see on page 191 of Mr. Doutre's work that this Canadian officiality was not recognized and that the Superior Council in the case of the Abbé Morel (28th June, 1675) requested the Attorney-General to report upon this pretended ecclesiastical jurisdiction.

"Le 28 Juin, 1675, Messire Jean Dudouyt, se disant promoteur en la *prétendue officialité de Québec*, présente au Conseil une requête tendant à demander que M. Morel accusé devant le Conseil soit remis sous sa juridiction ecclésiastique. M. de Peiras, M. de Vitray, Conseillers, sont d'opinion *qu'un grand nombre d'arrêts du Conseil n'ont pas reconnu cette officialité.* Le Gouverneur veut que le Procureur-Général donne ses conclusions sur cette *prétendue* juridiction ecclésiastique. Le Conseil adopte cette dernière opinion.*

Mr. Doutre does not inform us whether this report was ever made, nor what was the final decision in this leading case under the old *régime*, but on page 193 we read that Mr. Morel was liberated on bail.

It must be added that the minutes of the Superior Council's sitting of the 28th June, 1675, of which Mr. Doutre has published only the above *résumé*, are still more explicit. These were the precise terms of the judgment of the Council: †

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* Doutre, p. 191.

† We are indebted to Mr. Doutre's kindness for a copy of these minutes. The learned gentleman contributed them to the editorial department of the Review, as a sample of the *jugements motivés* of the Superior Council, and he will no doubt be pleased to find them pressed into service in the present discussion.

"Le Conseil assemblé, auquel présidait Mgr. le Gouverneur, et où était D'amours, Dupont de Perras, de Vitray et le Procureur-Général en personne.

"Vu la requête ce-jourd'hui présentée au Conseil par Messire Jean Dudouyt se disant promoteur en la *prétendue officialité de Québec* tendant à ce que Messire Thomas Morel, Prêtre détenu au Chateau St. Louis, soit rendu à son juge Ecclésiastique avec les informations et autres procédures faites par le Sieur Dupeiras, Conseiller, commissaire en cette partie, pour être, s'il y a cas privilégié par le juge Ecclésiastique et le dit Sieur Commissaire ou autre, procédé conjointement dans le tribunal ecclésiastique à l'instruction commencée. Et ainsi qu'il est plus au long porté par la requête, le réquisitoire du Procureur-Général par lequel il demande communication de la dite requête pour y donner ses conclusions aux premiers jours du Conseil.

"OPINIONS.

"M. de Perras, Rapporteur, pour le réquisitoire de M. le Procureur-Général : Que la requête lui soit communiquée pour donner ses conclusions sur les qualités prises par le dit Sieur Dudouyt; que pour le surplus elle soit rejetée, y ayant été pourvu par plusieurs arrêts du Conseil et notamment par celui du dix de ce mois signifié au Sieur de Bernières.

"M. Dupont: Que la dite requête soit communiquée au dit Procureur-Général ainsi qu'il l'a demandé pour sur ses conclusions être fait droit.

"M. Damours: *idem.*

"M. de Vitray: Que la requête soit rejetée et que dans l'arrêt, il soit fait mention des raisons pourquoi, *attendu qu'il y a été pourvu et que le conseil n'a point jusqu'à présent reconnu l'officialité.*"

"Mgr. le Gouverneur: Que la requête soit rejetée, attendu que le Sieur Morel et le Sieur de Bernières ont été par arrêt déboutés du renvoi par eux prétendu, et que néanmoins, le Procureur-Général sera averti de la qualité de promoteur que le dit Sieur Dudouyt prend dans la dite requête qui sera paraphée *ne varietur* et demeurera au greffe, afin d'y avoir recours; pour aviser que le dit Procureur Général à ce qu'il a à requérir sur la *dite prétendue officialité* pour les intérêts de Sa Majesté et des sujets tant ecclésiastiques que laïcs.

M. Duperra se range à cet avis.

M. de Vitray: *idem.*

Arrêté: Que la dite requête est rejetée, attendu que le Sieur Morel et le Sieur de Bernières ont été par arrêt du Conseil déboutés du renvoi par eux prétendu et que néanmoins le Procureur-General sera averti de la qualité de promoteur que le dit Sieur Dudouyt prend dans sa dite requête qui pour cet effet sera paraphée *ne varietur* et demeurera au greffe afin d'y avoir recours; pour aviser par le dit Procureur-Général à ce qu'il a à requérir sur la prétention de la dite officialité pour les intérêts de Sa Majesté et des sujets tant ecclésiastiques que laïcs." *

After these testimonies it is not astonishing to find Marriot (Quebec Code of Laws, p. 148) remarking: "The less objections can arise to this restriction, because it is stated in the report of Governor Carleton and of the Chief Justice W. Hey that there was no ecclesiastical court in the colony. By which I must understand that there is no court of an Official."

Many other documents published by Mr. Doutre furnish convincing proof that neither the liberties of the Gallacan Church nor the *appel comme d'abus* were ever introduced into Canada. Among others the Edict of Creation of the Company of the Hundred Associates (1627) declares that the company is formed "afin d'essayer, avec l'assistance divine, d'amener les peuples qui y habitent à la connaissance du vrai Dieu, les faire policer et instruire à la foi *et religion Catholique, Apostolique et Romaine.*" By their charter (1664) the *Compagnie d'Occident* bound themselves to convey into the colony a sufficient number of ecclesiastics "pour y prêcher le Saint Evangile et instruire ces peuples en la créance de la *religion Catholique, Apostolique et Romaine.*"

On page 13 of Mr. Doutre's *Histoire Générale du Droit Canadien* appears the following declaration of the Canadian colonists:—

"Sachent tous qu'il appartiendra que l'an de grâce, 1621 le dix huitième jour d'août par la permission du Sieur lieutenant (noble homme Samuel de Champlain) capitaine ordinaire pour le Roi en la marine, lieutenant général ès dits pays et terres, se serait faite une assemblée générale de tous les français habitants de ce pays de la Nouvelle France, afin d'aviser des moyens les plus propres sur la ruine et désolation de tout ce pays et pour chercher les moyens de conserver la religion *Catholique, Aposto-*

* Jugements et déliberations du Conseil Superieur Rég. A, t. 1, fol. 234.

lique et Romaine, l'autorité du Roi inviolable et l'obéissance dûe au dit seigneur vice-roi, après que, par les Sieurs lieutenant, religieux et habitants, présence du Sieur Baptiste Guers, commissaire du vice-roi, a été conclu et promis de ne vivre que pour la conservation de la dite religion, obéissance inviolable au roi et conservation de l'autorité du dit seigneur vice-roi.

In all these official papers, reference is only made to the Catholic Apostolic and Roman Church; not a word is said of the liberties of the Gallican Church.

The instructions given by the French Cabinet to Gaudais, under date the 7th May, 1663, four months before the creation of the Superior Council and some years before the erection of the diocese of Quebec, declare:

"Pour ce qui est de la religion, monsieur l'évêque de Pétrée étant venu ici pour rendre compte au roi de ce qui se pourrait pratiquer, pour étendre la foi parmi les sauvages de ces contrées là, pour bien policer cette nouvelle église et pour cultiver les bonnes dispositions que les Français ont de se conformer entièrement aux maximes du christianisme, *il serait superflu que le dit sieur Gaudais s'appliquât à cette matière, parcequ'elle est particulièrement du fait du dit sieur évêque, auquel Sa Majesté a donné et donnera ci-après toutes les instructions dout il aura besoin pour la conduite de son troupeau et pour l'avancement de ses pieux desseins.*"

Finally, in a letter to the King's Minister of date the 13th November, 1681, after the creation of the Council and of the See of Quebec, the Intendant Duchesneau says: "Vous verrez, Monseigneur, par la lettre que j'ai écrite aux propriétaires des terres en Justice et en Fief tant pour eux que pour leurs habitants, qu'après avoir conféré avec Monsieur l'Evêque, *comme vous m'ordonnez de le faire pour tout ce qui regarde le spirituel de ce pays.**

The Edict of creation of the *Compagnie d'Occident*, 1717, art. 53, binds them to maintain a certain number of ecclesiastics *pour y prêcher le Saint Evangile, faire le serirce divin et y administrer les sacrements, le tout sous l'autorité de l'évêque de Québec.*

According to Baron La Hontan, an authority quoted with so much respect in Mr. Joseph Doutre's argument, it would appear

* Doutre p. 209.

that the Catholic clergy was very far from being subject to the civil power. The following are his observations on the state of affairs in Canada between 1683 and 1692:

"Les gouvernements, politique, civil, ecclésiastique et militaire, ne sont, pour ainsi dire, qu'une même chose en Canada, puisque les procureurs généraux les plus rusés ont soumis leur autorité à celle des ecclésiastiques. Ceux qui n'ont pas voulu prendre ce parti s'en sont trouvés si mal qu'on les a rappelés heureusement. J'en pourrais citer plusieurs qui, pour n'avoir pas voulu adhérer aux sentiments de l'évêque et des Jésuites, etc., ont été destitués de leurs emplois, et traités ensuite à la Cour comme des étourdis et des brouillons."

Do not all these documents establish in the clearest manner that the Gallican rights or the ecclesiastical laws of France in spiritual matters did not pass into the colony, undoubtedly for the reason that they were unsuitable to the circumstances in which it was placed? And here we may quote the judicious remarks of the late Chief Justice Sir L. H. LaFontaine, Bart., also cited by Mr. Doutre, p. 20: "S'il est encore vrai (vérité fondée sur la nécessité) que lorsque des habitants d'un pays civilisé le quittent, pour aller fonder une colonie dans un pays nouveau, inhabité, et par conséquent non soumis à aucun système de lois reconnues par les sociétés chrétiennes, ils sont censés emporter avec eux les lois de la mère patrie qui réglaient leur liberté, leurs droits de citoyens et leurs propriétés, il n'en est pas moins vrai que cette règle de droit public et politique ne peut comprendre que celles de ces lois qui peuvent tout naturellement convenir à la position nouvelle qu'ils se sont faite, eu égard aux circonstances et à leurs besoins, dans le pays où ils vont ainsi s'établir."

What scandals would not the yet infant Church and Government of Canada have exhibited, if the civil authorities had possessed a right of intervention in religious matters? The following passage taken from Mr. Doutre (p. 191), suffices to give us an idea of the respect and harmony which existed between the Clergy and the Superior Council. "Le Conseil Supérieur dans sa séance du 15 juin 1675 se plaint que le Procureur-Général néglige le service du Roi et porte atteinte à l'autorité du Conseil, *en adoptant constamment, dans ses conclusions, les vues des Ecclésiastiques incriminés.*" Now, if the reader bear in mind the prosecution in the burial case of Mgr. St. Vallier, of the chapter and canons of the see of Quebec, the only one exist-

ing in the colony, he will see that those *incriminés* comprised neither more nor less than the whole clergy of Canada.

On the supposition that the canonical law of France, which permitted the civil courts to exercise jurisdiction over spiritual matters by means of the *appel comme d'abus* or otherwise, passed into New France as forming part of its common law; even in that case, it cannot be maintained that that law was sacred and could not be changed by the legislative authority. Now the King of France—the supreme legislative authority in *La Nouvelle France*—declared that the courts had jurisdiction *in civil and criminal matters, dans toutes les matières civiles et criminelles*, thereby excluding from their jurisdiction every question ecclesiastical and military.

In 1659, and before the creation of a regular judicature in the colony, the King issued an edict by which he enjoined the inhabitants to sue before the inferior courts already established by the company then governing the colony, and to carry their appeals to the governor in all *civil, criminal and police matters* not of sufficient importance to be brought before the Parliament of Paris.*

In 1663, the Superior Council was established, and its jurisdiction, which did not undergo any change during the whole period of its existence, that is to say, till the cession to Great Britain,—is thus defined by the Edict creating it:

"Avons au dit Conseil Souverain, donné et attribué, donnons et attribuons le pouvoir de connaitre de toutes *causes civiles et criminelles*, pour y juger souverainement et en dernier ressort, selon les Lois et Ordonnances de notre royaume, et procéder *autant qu'il se pourra* en la forme et manière qui se pratique et se garde dans le ressort de *Notre Cour du Parlement de Paris.*"

The commission to the Intendant Duchesneau (1675) contains the following: "Le Conseil Souverain, auquel vous présiderez, ainsi que dit est, juge *toutes matières civiles et criminelles*, conformément aux Edits et Ordonnances du Roi et à la coutume de Paris."

Let us next see whether the jurisprudence of the country was agreeable to these ordinances.

The answer of the King's Minister to Frontenac for having caused the Abbé Fénélon to be prosecuted before the Superior

* Garneau, vol. 1, 139; Doutre, p. 44.

Council on account of a sermon which the Governor considered abusive, runs thus: "Il fallait remettre l'abbé Fénélon entre les mains de son Evêque ou du Grand Vicaire *pour le punir par les peines ecclésiastiques.*"

The ordinances of Dupuy and of the Superior Council rendered against the chapter and canons of Quebec, who had refused to recognize any tribunal, not even the Superior Council, as capable of judging their ecclesiastical disputes, are invoked as proving the right of the civil power to intervene in ecclesiastical matters by the *appel comme d'abus.* In his ordinance of the 6th January, 1728 (Edits et Ord. vol. 2, p. 327) he says: "Vu le peu de temps qu'il y a d'assembler extraordinairement le Conseil Supérieur et le voir prononcer contre une publication aussi téméraire, faite uniquement dans le dessein d'exciter les peuples; nous croirions que ce serait manquer à notre devoir que de ne pas prendre assez tôt sur cela de justes mesures pour mettre le dit Conseil en état de punir et de sévir contre les auteurs d'une pareille entreprise, laquelle ne tend qu'à séduire le peuple à la faveur de sa simplicité et *de la connaissance qui lui manque pour distinguer la puissance ecclésiastique d'avec la puissance séculière;* le peuple ne pouvant pas savoir avec assez de précision que *la puissance propre aux ecclésiastique n'est que sur le spirituel* et sur les choses qui concernent le salut des âmes, les ordres à conférer aux ministres de l'Eglise, l'administration des sacrements et ce qui s'en suit des effets du sacrement de mariage et des autres sacrements; que tous les autres droits et prérogatives des ecclésiastiques et séculiers entre eux sont matières *purement temporelles,* dévolues à la puissance du roi *et partant* à la connaissance des juges qui sont chargés de sa justice sur tous ses sujets sans distinction dont les ecclésiastiques (pour l'exemple qu'ils doivent au peuple) doivent se montrer les plus soumis.

"L'Eglise étant dans l'Etat et non l'Etat dans l'Eglise, faisant partie de l'Etat sans lequel elle ne peut subsister, les ecclésiastiques étant d'ailleurs si peu les maîtres de se soustraire un seul moment à la justice du prince que sa Majesté enjoint à ses juges, par les ordonnances du royaume de les y contraindre par la saisie de leurs revenus temporels, n'étant nécessaire, pour en convaincre tout le peuple de cette colonie inviolablement attaché au culte dû à Dieu et à l'obéissance dûe au roi par l'exprès commandement de Dieu, que de lui donner connaissance, ainsi que nous allons le faire, de la déclaration publique que les Evêques de France, assemblés à

la tête du clergé, ont donné le 19 mars de l'année 1682; laquelle déclaration porte en propres termes, que Saint Pierre et ses Successeurs, vicaires de Jésus-Christ, et que toute l'Eglise même, n'ont reçu de puissance de Dieu *que sur les choses spirituelles* et qui concernent le salut, et non point sur les choses temporelles et civiles: Jésus-Christ nous apprenant lui-même que son royaume n'est pas de ce monde, et, en un autre endroit, qu'il faut rendre à César ce qui est à César, et qu'il s'en faut tenir à ce précepte de l'apôtre Saint Paul, que toutes personnes soient soumises aux puissances des rois, car il n'y a point de puissance qui ne vienne de Dieu, c'est pourquoi celui qui s'oppose à la puissance des souverains résiste à l'ordre de Dieu; en conséquence, poursuit la dite déclaration du clergé, nous déclarons que les rois ne sont soumis à aucunes puissances ecclésiastiques par l'ordre de Dieu dans les choses qui concernent le temporel.

"Ce sont ces vérités reconnues et annoncées par un clergé aussi auguste que l'est le clergé de France dont les prélats et ecclésiastiques qui le composent, ont toute la science et la capacité convenable pour ne point se tromper eux-mêmes et ne point induire les peuples en erreur, aussi bien dans les affaires du gouvernement de l'État que dans les plus grandes vérités de la religion; ce sont, disons-nous, ces principes qu'il convenait d'apprendre ici au peuple, plutôt que d'abuser de cette chaire de vérité où l'on ne doit prêcher que l'obéissance dûe à Dieu et au roi, pour faire de la part des dits chanoines et chapitre un acte de désobéissance formel à la puissance du roi et à l'autorité légitime; c'est donc pour aller au-devant de ce désordre et mettre le conseil supérieur en état de punir les coupables que nous ordonnons qu'il sera informé contre le Sieur de Tonnancourt, chanoine de la Cathédrale et autres, de la publication du prétendu mandement et manifeste par devant le Sieur André de Leigne, Lieutenant-Général, civil et criminel....."

The intendant Dupuy in this document does not appear to assert the supremacy of the civil power in matters purely ecclesiastical or spiritual as laid down in the 4th article of the Declaration of 1682, and in numerous text-books and decisions of the French courts of justice. If the "*puissance propre aux ecclesiastiques*" extended only to spiritual matters, the *puissance propre* of the State could have had nothing to do with those matters.

Moreover, as His Honor Mr. Justice Berthelot observed in his able opinion in the *Guibord* case, the ordinances of the Intendant

and the *arrêts* of the Superior Council rendered thereupon were disallowed by Governor de Beauharnois.*

"Ces deux ordonnances," says Mr. Justice Berthelot, "parurent si étranges et si peu justifiables au Gouverneur français M. de Beauharnois, que ce dernier rendit une ordonnance du 8 Mars 1728, au nom du Roi, dont je reproduis l'extrait suivant. Il y est dit:

'Le Conseil ne pouvait ignorer les *ordres de sa Majesté* qui y ont été *enrégistrés*, par lesquels il lui est *défendu* de faire aucuns règlements généraux qu'en présence du Gouverneur-Général et de l'Intendant. Nous avons lieu de nous flatter que dans des matières aussi importantes et aussi extraordinaires que le sont celles dont il est question, il n'aurait pas pris des résolutions aussi vives que celles qu'il a prises sans nous avoir demandé auparavant notre avis.

'Nous espérions aussi que cette compagnie, informée des mauvais effets que ses arrêts multipliés faisaient dans tous les esprits, se porterait à cesser toutes ses poursuites et à attendre la décision de Sa Majesté sur des matières aussi douteuses et aussi contestées.

'Nous défendons de la part du Roi aux officiers du Conseil Supérieur de Québec, de recevoir dès à présent aucune requête ou réquisition, ni aucune réponse de la part des parties citées, et de rendre directement ou indirectement aucuns arrêts sur les matières en question; et suspendons l'exécution de toutes ordonnances jusqu'à ce qu'il ait plu à Sa Majesté d'en ordonner.

'Voulons que notre présent ordre soit porté au Conseil Supérieur au premier jour d'assemblée pour y être lu, puis publié et affiché en tout lieu où besoin sera.'

"Peu de temps après ce désaveu par le Gouverneur, des ordonnances de l'Intendant Dupuy et du Conseil Supérieur sur cette matière, il y eut un ordre du Roi enrégistré au dit Conseil Supérieur, le 27 Septembre, 1728, et il s'y trouve en ces termes aux Régistres pour l'enrégistement des arrêts du Conseil Supérieur de Québec, 1728, folio 43.†

"Vendredi, le 17 septembre 1728.

"Le Conseil extraordinairement assemblé, où étaient M. le Gouverneur-Général, MM. Deleno, Macart, Sarrazin, Lotbinière,

* Garneau, vol. 1, p. 213–15. L'Abbé Faillon, Hist. de la Col. Fr. vol. 3, p. 495–538.

† The King's order is not published in the official collection *des Edits et Ordonnances.*

Hazeur, St. Simon, Guillermin, Crespin et Lanouillier, Conseillers, ce dernier faisant les fonctions de Procureur-Général du Roi.

"Vu au Conseil l'extrait de la lettre de Monsieur le Comte de Maurepas, Ministre et Secrétaire d'Etat, adressé à Monsieur le Marquis de Beauharnois, Gouverneur et Lieutenant-Général pour le Roi en toute la Nouvelle France, datée à Versailles le 1er juin dernier, qui notifie au Conseil Supérieur de Québec que l'intention de Sa Majesté est qu'il ait à donner main levée des saisies et amendes ci-devant prononcées par les arrêts du dit Conseil, en date des 5, 12 et 26 janvier, 3 et 16 février, 1er et 8 mars derniers, tant contre les Dignitaires, Chanoine et Chapitre de l'Eglise Cathédrale de Québec, que contre le Sieur Boullard, Vicaire-Général et Curé de la paroisse et les Pères Récollets de la ville; ouï le Procureur-Général du Roi, le Conseil, pour donner à Sa Majesté des preuves de sa profonde soumission, fait dès à présent main levée des dites saisies prononcées par les dits arrêts; décharge des dites amendes, ordonne la restitution d'icelles, si aucunes en tout ou partie ont été exigées; déclare ceux entre les mains de qui les dites saisies auront été faites, bien et valablement déchargées, en payant aux parties saisies ce qui leur est dû sur l'expédition du présent arrêt.

"(Signé) DE LINA.

"Certifié vrai.

"PERRAULT ET BURROUGHS,
"P. B. R."

One word more, and we conclude our notice of the ecclesiastical law of Canada on purely spiritual matters of the Catholic Church prior to the cession. We read in Guyot, Vo. *Colonie*: "L'intendant et le Gouverneur connaissent seuls de tout ce qui concerne les affaires de religion et la police de culte, parceque l'intention du roi est que les ecclésiastiques ne soient pas repris avec éclat dans les colonies et que s'ils y commettent des fautes graves, ils soient renvoyés en France pour y être punis."

These terms clearly show that there existed in the French colonies no ecclesiastical tribunal properly so called, and that the Superior Councils or Parliaments had no jurisdiction in religious matters, as they had in France. They prove that the civil tribunals of Canada were not invested with the powers exercised by the courts of justice in the mother country. Not only so, but we see that even in case of *fautes graves*—an expression which

in the language of French criminal law would include criminal offences,—in order to avoid scandal, the accused ecclesiastic was not to be judged in the colony, but was to be sent to France as soon as possible.

Few Canadian jurists have expressed an opinion on the ecclesiastical law of New France in spiritual matters.

Mr. Justice Beaudry in his *Code des Curés*, seems to be of opinion that the liberties of the Gallican Church were never introduced into Canada; for he says (pp. 2, 3): "La déclaration du clergé de 1682, ne paraît pas avoir été enregistrée, *ni mise en force en Canada*."

Mr. Justice Berthelot, *in re Guibord*, expressed himself to the following effect, with reference to the terms of the Edict of creation of the Superior Council.

"Il est évident que ces termes sont restrictifs, et il est impossible d'y voir aucune attribution judiciaire donnée au Conseil Supérieur *en matières ecclésiastiques et spirituelles*, ou sur les appels comme d'abus qui étaient spécialement réservés par les articles 81 et 82 des libertés gallicanes, telles que rapportées par Pithou au vol. 3 de Durand de Maillane, "pour n'être adjugées que par la Grande Chambre du Parlement qui était le lit et siége de justice du Royaume, composée *de nombre égal de personnes, tant ecclésiastiques que non ecclésiastiques*, même pour les personnes des Pairs de la Couronne, qui est un fort sage tempéramment pour servir comme de lien et entretien commun des deux Puissances. . . . .

"L'on ne doit donc pas affirmer que le droit gallican ou le droit ecclésiastique français tel qu'il existait en France avant mil sept cent cinquaute neuf, etait recomm comme le droit ecclésiastique de la colonie de la Nouvelle France, puisque le Conseil Supérieur ne paraissait pas jouir et n'avait pas le droit de jouir de la juridiction ecclésiastique en matière religieuse et spirituelle."

In appeal, Mr. Justice Monk expressed himself as follows: "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."

Mr. Justice Drummond did not hesitate to assert that under the French dominion, the *appel comme d'abus* existed in Canada; but the learned Judge did not support his statement by any authorities.

The same remark may be made concerning Mr. Justice Badgley, who, be it said *en passant*, so far forgot his position as inter-

preter of the laws of our country as to seize this opportunity to inveigh with unwarrantable violence against what he calls the intolerance of the Church of Rome. Circumspection, caution, and calmness were especially to be looked for from him, seeing that he was the only Protestant Judge on the Bench, and that the matter under consideration was a dispute within the fold of the Catholic Church. In an age like ours, in which the principles of religion and public morality are so evidently on the decline, the Honorable Judge should have followed the example of his learned colleagues and *coréligionaires* of the other Court, and have refrained from assailing the doctrines of a Church whose members constitute the immense majority throughout the Province.

But to return. Mr. Justice Badgley said: "It is not necessary, as the case presents itself, and simply for that reason, to examine the jurisdiction and powers of the Civil Courts in this Province in matters of *abus* before the cession of 1763."

However, he adds farther on: "I presume it would be 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 more than once declared to have inherited all the 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 jurisdiction of the courts in such matters, if the occasion required it."

It is to be regretted that the Honorable Judge did not condescend to enlighten the public mind upon the jurisdiction of the courts in the French colony in matters of ecclesiastical abuse, especially as he professed to find the task so easy.

Mr. Justice Mondelet, who rendered the first judgment *in re Guibord*, is the only judge who cited any authority to support the doctrine that the whole body of the ecclesiastical law of France was introduced into the colony: "Rien de mieux établi. Nous n'avons pas à decider si, invariablement, les parlements en France qui étaient, sous le régime de ce pays, ce que sont nos cours, nos tribunaux, nous n'avons pas, dis-je, à décider si, invariablement, ils se sont tenus dans les limites de la loi et de leurs attributions. Je pourrais, sans hésiter, avançer qu'en plusieurs occasions, ils ont commis des abus de pouvoir révoltants. Et cela, c'est comme qui dirait avec vérité, que parfois nos tribunaux

rendent des jugements qu'on ne peut faire corriger que par les cours d'appel. Mais ces observations ne détruisent pas le fait de l'existence d'un droit commun quelconque. Or, dans le cas de la France, il était de droit commun, que les tribunaux étaient en droit de s'occuper des appels comme d'abus, des actes du pouvoir religieux. Les autorités fourmillent et les arrêts sont par centaines qui l'établissent. Cela est si bien établi, c'est si peu douteux, que la défense n'a pu le nier, l'a admis même, et a eu à se retrancher derrière les articles de la capitulation, pour se débarrasser de ce droit commun qui a existé durant des siècles en France, et qui, *va sans dire, était le droit commun du Canada, lors de la cession du pays à l'Angleterre. Ce serait une perte de temps, que d'insister sur une vérité qui n'est pas même contestée.*"

We do not wish to deny that loss of time and especially of the time of a judge, is a great loss; the reasoning, however, *cela va sans dire*, is scarcely convincing. But patience; the authorities immediately follow. "Mais," continues the learned Judge, "ce qui rend la chose plus sensible, c'est que tout récemment, nous avons eu la déclaration formelle de Mgr. Désautels, dans son 'Manuel des Curés,' publié en 1864, quant à ce qu'est le droit commun ecclésiastique en Canada. Et comme Sa Grandeur l'Evêque de Montréal a approuvé et recommandé par écrit, (au commencement de l'ouvrage,) ce manuel, l'on peut sans difficulté, affirmer que ce qui suit est l'opinion de l'Evêque de Montréal:

'Nous ne saurions douter que le Droit Commun Ecclésiastique qui était celui de la France, avant la cession du Canada à l'Angleterre, est le Droit Ecclésiastique particulier au Canada. En effet, l'arrêt du Conseil d'Etat du Roi, pour la création du Conseil Supérieur de Québec (1663) donne au dit Conseil le pouvoir de juger souverainement et en dernier ressort, selon les lois et coutûmes du Royaume de France"—Nous ne devons regarder comme obligatoires en Canada, que ce qui était reconnu être, jusqu'à 1663, le droit commun ecclésiastique de France—Nous ne devons pas nous arrêter à tous les arrêts de Réglement, mais seulement prendre pour règle, disons-nous, ce qui était le droit commun de France, avant 1663.' Je ne m'étonne pas qu'en 1864, Monsg. Désautels, et Sa Grandeur Monsg. de Montréal, fussent de cet avis, mais ce qui doit nous surprendre, c'est qu'en 1870, l'on mette en doute, ce qui n'en est pas susceptible; je me trompe, qu'on nie avec autant d'assurance qu'on le fait, ce que l'Evêque, de Montréal a expressément déclaré, par Mgr. Désautels, être le droit commun ecclàsiastique du Bas Canada!"

It is plain that, in ecclesiastical law, the Honorable Judge entertains a higher respect for his Bishop than for the Pope. He concluded his argument as follows: "Il ne me reste plus qu'à exprimer mon étonnement, qu'un des savants conseils des défendeurs aient poussé ses prétentions jusqu'à citer à la Cour le *Syllabus* et à s'en étayer pour réduire en proposition, que 'la compétence de ce tribunal, dans l'espèce actuelle, est condamnée par l'Eglise'; il suffit de signaler une telle prétention pour en apprécier la valeur."

Finally, the Honorable Judge invoked the authority of Sir L. H. LaFontaine: "Dans la cause de Varrennes, Jarret et Sénécal, en appel, en Mars 1860—Le juge en chef Sir Louis H. LaFontaine en parlant du *factum* du savant conseil de l'appelant, M. Cherrier, s'exprime comme suit: (L. C. Jurist, vol. 4, p. 213, et surtout p. 233.)

'Je les approuve les raisonnements, d'autant plus que je vois avec plaisir, qu'il a puisé tous les principes qu'il a énoncés et soutenus, exclusivement dans l'ancien droit ecclésiastique de la France, *qui est* celui du Bas-Canada, et par conséquent, celui d'après lequel, *nous avons fait serment de juger.*'"

We do not see that either the learned and much regretted Chief Justice or Mgr. Desautels held or declared that the *appel comme d'abus* ever existed in Canada, or that the civil courts had the right to intervene in spiritual matters. Doubtless the ecclesiastical law of the country is the same as the one in force in Canada at the cession, so far as consistent with the political transformation of the colony under British rule, as we shall see in our next number, but that ecclesiastical law had reference only to temporal matters, and not to things purely spiritual, which were beyond the reach of the laws and courts of the land.

In the case of *Sénécal* above referred to, the question was not a spiritual but a purely temporal one, and as such was necessarily decided by the old law of France. It was: Who had the right to preside at meetings of *fabriques*,—the curé or the oldest churchwarden?

Furthermore, in a written opinion to the Seminary of Montreal in 1847, cited by Mr. Justice Berthelot, Sir L. H. LaFontaine, expressed himself thus: "L'examen de ces deux questions conduit nécessairement à celui de plusieurs autres questions incidentes. Les unes et les autres présentent toutes les difficultés qui se rattachent ordinairement aux questions de droit ecclésiastique, diffi-

cultés qui sont d'autant plus grandes pour l'avocat canadien, que pour des raisons qu'il est inutile d'expliquer, mais que justifie pleinement *la situation particulière du pays, au point de vue religieux*, il est pour ainsi dire, *sans boussole et sans voie tracée*, lorsqu'il est obligé de se mettre à la recherche des principes ou des règles de *l'ancien droit ecclésiastique français qui peuvent recevoir leur application dans le Bas Canada.*"

After reading this opinion, it is impossible to cite Sir L. H. LaFontaine as holding that the whole body of French ecclesiastical law was introduced into Canada.

The learned Judge is equally unfortunate in his quotation from Mgr. Desautels, whose *Manuel des Curés* treats only of the temporal government of parishes and *fabriques*. Nowhere in that book can there be found an admission that the French ecclesiastical law in spiritual matters was ever in force in Canada. And upon reading the circular of the Bishop of Montreal approving thereof, will be found the following proposition, which is far from admitting the liberties of the Gallican Church and the ecclesiastical law of France as it existed in France at the time of the cession to the British Crown, or of the establishment of the Superior Council of Quebec, 1663:

"1o. *La puissance spirituelle doit être, pour le bien de la societé chrétienne, distincte et indépendante de la puissance civile, quoiqu'en puissent dire les ennemis de la puissance spirituelle.*"

Finally, Mr. Justice Mondelet's argument contains statements which can hardly be reconciled with each other.

At page 6 he says: "Dans la cause même du curé Naud contre l'Evêque Lartigne qu'a citée la défense, la cour a statué au fond, bien que très correctement elle se soit déclarée incompétente quant aux raisons qui avaient induit l'Evêque à suspendre M. Naud de ses fonctions sacerdotales. Cela, en effet, regardait l'Evêque et le curé seuls, et la Cour n'avait rien à y voir. L'Evêque est et doit être seul juge de l'opportunité de changer de curé, ou missionnaire dans l'intérêt même des cures; et souvent pour de graves causes et raisons, il importe qu'on ne connaisse pas les circonstances qui ont amené ce déplacement."

At page 7 he says: "Il est bon de faire, de suite, justice d'une objection un peu spécieuse, mais qui ne peut soutenir un examen sérieux. Allez-vous, a-t-on dit, obliger un prêtre de faire des prières au cimetière, et prêter son ministère contre ses convictions? Cela est purement spirituel, les tribunaux n'ont rien à y voir.

Mais remarquez donc que les tribunaux, non seulement en France, et c'était le droit commun ecclésiastique et la jurisprudence constatée par des arrêts sans nombre, mais en Canada, les cours ont été bien plus loin que d'ordonner ce dont il est question ici, la simple sépulture ecclésiastique, laquelle n'est pas un sacrement, mais simplement une cérémonie, les tribunaux ont contraint le prêtre d'administrer le sacrement de baptême. *Or ce sacrement est bien une chose sprirituelle, réligieuse.*

What! a Bishop is not amenable to a civil court, to show cause why he has removed a *curé* and yet he is subject to be judicially compelled to administer the sacraments! The *appel comme d'abus* exists in the latter case but not in the former!! Surely a state of affairs so illogical never could have existed in France.

A word now as to the status of Protestant Churches in Canada before the cession, and we conclude for the present number. It is well known that in France the Catholic Church was the only State Church. At the time when the Colony of New France was organized in 1608, while the Edict of Nantes (1598) was still in full force, it was the only recognized Church in the colony, but not to the exclusion of Protestant Churches, which were tolerated under the regulations prescribed by that Edict. In 1621 we find the inhabitants of Canada complaining of this in a Petition to the King, wherein they pray for the establishment of Catholicism and the exclusion of the Huguenots. In 1627 when the Company of The Hundred Associates was incorporated, one of the conditions of their charter was that the country should be colonized with *naturels français catholiques.* (Art. 2 of the Edict.)

According to Art. 23 of the Charter of the *Compagnie de Occident*, in 1717, only the resident foreigners of Canada who were professing the Catholic, Apostolic and Roman faith were allowed to exercise the rights of French subjects (*régnicoles*). A Protestant foreigner, therefore, could not inherit, receive property by gift or legacy, or in any beneficiary way, without naturalization.

The revocation of the Edict of Nantes, 1685, not having been registered by the Superior Council, was never law in this country. However, in an ordinance of the Intendant Duschesneau in 1676, but which cannot be regarded as constitutional inasmuch as it clashes with the Edict of Nantes, we find the following severe

restrictions: "Défenses aux personnes de la religion prétendue réformée de s'assembler pour faire l'exercise de leur religion dans l'étendue de ce dit pays, sous peine de châtiment suivant la rigueur des ordonnances, lesquelles ne pourront hiverner à l'avenir en ce dit pays, sans permission, et que si quelqu'un y hivernoit pour cause légitime, ils n'auront aucun exercice de leur religion, et vivront comme des Catholiques sans scandale."

That under the sway of these laws, the exercise of the Protestant worship was greatly, if not totally, restricted is unquestionable; but it seems that none of them went so far as to deprive Protestant French subjects of their civil rights. In this respect, the Edict of Nantes, which tolerated the "*so called reformed Church*," was the political law or charter of Protestant Churches in *La Nouvelle France*.

D. GIROUARD.

Montreal, 7th October, 1871.

(*To be continued.*)

THE ELECTION LAWS.

The coming year of 1872 will be one of much importance to the Dominion. The first Parliament will have closed its career, and the people will be called upon to choose those to whom they desire the public affairs shall be entrusted. The machinery of Government applicable to a large confederation having been devised and set up by the Parliament which will have passed away, the approval or condemnation of its acts must be submitted to those from whom, under our English constitution, the power emanates. No uniformity in the mode of selecting the Representatives to the House of Commons having been agreed upon by Parliament, the selection will be left to each Province, to be made aocording to its own laws. By an act passed at the last session of the Dominion Parliament, 34 Vic. c. 20, entituled "The Interim Parliamentary Elections Act, 1871," and to be in force for two years only from the time of its passing, section 2, it is declared: "The laws in force in the several Provinces of "Canada, Nova Scotia, and New Brunswick, at the time of the "Union on the 1st of July, 1867, relative to the following mat-"ters—that is to say—the qualifications and disqualifications of

" persons to be elected or to sit or vote as Members of the Legis-
" lative Assembly, or House of Assembly, in the said several
" Provinces respectively—the voters at elections of such Mem-
" bers—the oath to be taken by voters—the powers and duties
" of Returning Officers—and generally the proceedings at and
" incident to such elections, shall be provided by the British
" North America Act, 1867, continue to apply respectively to
" elections of Members to serve in the House of Commons for the
" Provinces of Ontario, Quebec, Nova Scotia, and New Bruns-
" wick." There are certain exceptions, as to the polling in Ontario and Quebec lasting only for one day, and that the qualification of voters in Ontario shall be such as was by law in force on the 23rd of January, 1869; and a provision that the Revisors in Nova Scotia shall add to the list of voters the names of such Dominion officials and employees as would have been qualified to vote under the laws in force in that Province on the 1st of July, 1867, but who may have been disqualified by act of the Legislature of that Province passed since that day. There are also provisions respecting Quebec, British Columbia and Manitoba, and on some other points, but not of a bearing necessary to be observed upon in this article.

Without commenting upon the propriety or impropriety of having the same House composed of Representatives chosen under different laws, with different statutory qualifications, and elected in different ways, it is sufficient to say that Parliament in its wisdom thought proper to prefer such a course, leaving to the House hereafter to be chosen to determine whether the continuance of such a course shall be prudent for the future or not. The important questions of the qualifications of the candidates, of the nature and extent of the franchise, and of the mode of election, whether by ballot and simultaneous polling or not, will no doubt form during the discussions preceding, and the canvas pending the elections, the subject of many and exciting arguments.

Assuming that all are desirous of doing what is best for the country, it may be useful to compare the existing laws, and thus by contrast enable the people of all the Provinces to select from the legislation of each that which may be deemed best, not simply in theory but in practical working. For this purpose it is proposed briefly to point out the salient features of the election laws in the three Provinces of Ontario, New Brunswick, and Nova Scotia—Quebec is not touched upon,—and with reference to both

British Columbia and Manitoba, it is manifest a little time must be allowed to those two Provinces to develop their own systems.

In the three Provinces referred to, the Election Laws differ very materially, both as to the qualification of the Electors and the Candidates, the mode and time of voting, and the restrictions imposed upon the exercise of the franchise.

First:—As to the qualification of the Voters.

In *Ontario*, every male person 21 years of age, a British subject by birth or naturalization, not coming under any legal disqualification, duly entered on the last revised and certified List of Voters, being actually and *bona fide* the owner, tenant, or occupant of real property of the value hereinafter mentioned, and being entered in the last revised assessment roll for any city, town, or village, as such owner, tenant, or occupant of such real property, namely:—

In Cities, of the actual value of	$400
In Towns " " "	300
In Incorporated Villages, of the actual value of	200
In Townships, " " "	200

shall be entitled to vote at Elections for Members for the Legislative Assembly.

Joint owners or occupiers of real property rated at an amount sufficient, if equally divided between them, to give a qualification to each, shall each be deemed rated within the Act; otherwise, none of them shall be deemed so rated.

"Owner" means in his own right, or in right of his wife, of an estate for life or any greater estate.

"Occupant," *bona fide* in possession, either in his own right or in right of his wife (otherwise than as owner or tenant) and enjoying revenues and profits therefrom to his own use.

"Tenant" shall include persons who, instead of paying rent in money, pay in kind "any portion of the produce of such property."

In *Nova Scotia* every male subject by birth or naturalization, 21 years of age, not disqualified by law, assessed on the last revised assessment-roll, in respect of real estate to the value of $150, or in respect of personal estate, or of real and personal together, of the value of $300, shall be entitled to vote.

Also, when a firm is assessed in respect of property sufficient to give each member a qualification, the names of the several persons comprising such firm shall be inserted in the List, but no

member of a corporate body shall be entitled to vote or be entered on the List in respect of corporate property.

Also, when real property has been assessed as the estate of any person deceased, or as the estate of a firm, or as the estate of any person and son or sons, the heirs of the deceased in actual occupation at the time of the assessment, the persons who were partners of the firm at the time of the assessment, and the sons in actual occupation at the time of the assessment shall be entitled to vote, as if their names had been specifically mentioned in the assessment, on taking an oath, if required, in accordance with the facts coming within the separate classification of the above provisions.

In *New Brunswick* every male person 21 years of age, a British subject not under any legal incapacity, assessed for the year for which the Registry is made up:—In respect of real estate to $100, or personal property, or personal and real, amounting to $400, or on an annual income of $400, shall be entitled to vote.

Thus, in both Nova Scotia and New Brunswick the franchise is more extended than in Ontario. In Ontario it still savours of the real estate. In New Brunswick and Nova Scotia it is based upon personal estate, *per se*, as well as real estate.

In *Ontario* certain persons are forbidden to exercise the franchise whether qualified or not, namely:—Judges of the Supreme Courts, of County Courts, Recorders of cities, officers of the Customs of the Dominion, Clerks of the Peace, County Attorneys, Registrars, Sheriffs, Deputy Sheriffs, Deputy Clerks of the Crown, Agents for the sale of Crown lands, Postmasters in cities and towns, and Excise Officers, under a penalty of $2000, and their votes being declared void.

Again, no Returning Officer, Deputy-Returning Officer, Election clerk, or Poll clerk, *and* no person who at any time, either during the election, or before the election, is, or has been employed in the said election, or in reference thereto, or for the purpose of forwarding the same, by any candidate, or by any person whomsoever, as counsel, agent, attorney, or clerk at any polling place at any such election, or in any other capacity, whatever, and who has received, or expects to receive, either before, during, or after the said election, from any candidate, or from any person whomsoever, for acting in any such capacity as aforesaid, any sum of money, fee, office, place, or employment, or any promise, pledge or security whatever, therefor, shall be entitled to vote at any election.

No woman shall be entitled to vote at any election.

In *New Brunswick* and *Nova Scotia* there is no restriction as to the exercise of the franchise by persons who are duly qualified. On the contrary, express provisions are made to enable presiding officers, poll clerks, candidates and their agents, when acting in the discharge of their various duties connected with the election, to poll their votes in districts where, otherwise but for such provisions, they would not be entitled to vote.

As to the Qualification of Candidates.

In *Nova Scotia* the candidate must possess the qualification requisite for an elector, or shall have a legal or an equitable freehold estate in possession, of the clear yearly value of eight dollars.

In *New Brunswick* the candidate must be a male British subject, 21 years of age, and for six months previous to the test of the writ of election have been legally seized as of freehold for his own use of land in the Province of the value of £300, over and above all incumbrances charged thereon.

In *Ontario* by the Act of 1869, 33 Vic., chap. 4, passed to amend the Act of the previous Session, entitled: "An Act respecting elections of Members of the Legislative Assembly" (the 32 Vic., chap. 21), it is enacted "That from and after the passing of that Act, no qualification in real estate should be required of any candidate for a seat in the Legislative Assembly of Ontario; any statute or law to the contrary notwithstanding, and *every such last mentioned statute and law is hereby repealed.*"

Neither the said 32 Vic., chap. 21, nor the preceding Acts of the same Session, chaps. 3 and 4, defining the privileges, immunities and powers of the Legislative Assembly, and for securing the independence of Parliament, point out what shall be the qualifications of a candidate, and the previous Acts in the Consolidated Statutes on the subject have been repealed.

By the 23rd sec. of 32 Vic., chap. 21, 1868 & 9, the electors present on nomination day are to name the person or persons whom they wish to choose or represent them in the Legislative Assembly. There is no restriction as in Nova Scotia, that a candidate must have the qualification of an elector, which, among others, is that he shall be a male subject by birth or naturalization, or, as in New Brunswick, specifically, that he must be a "male British subject."

In the Ontario Act, 32 Vic, chap. 21, sec. 4, it enacts: "No woman shall be entitled to vote," but there is no restriction in

the 23rd section as to the sex of the person or persons whom the electors shall choose to represent them in the Legislative Assembly, nor is there any clause in the two Acts, chaps. 3 and 4, above referred to, from which any such restriction can be inferred. The 61st sec. of 32 Vic., chap. 21, declares "That no candidate shall, with intent to promote *his* election, provide or furnish, &c." But by the General Interpretation Act, passed by the Legislature of Ontario, chap. 1, 31st Vic. (1867–8), sec. 6, clause 8, it is enacted that "words importing the singular number, or the *masculine* gender, shall include more persons, parties, or things of the same kind than one, and *females* as well as males, and the converse."

And by the 3rd sec. of the same Act the interpretation clauses were to apply to all Acts thereafter passed.

Thus it would appear, that if the electors present on nomination day choose a female as a candidate, and, in case of a poll being demanded, she should be elected, she would be entitled to take her seat as a Member in the Legislature of Ontario.

In this respect Ontario differs from the other two Provinces, and may be said to be in advance of both England and the United States on this point.

This difference—assuming that the above construction of the Ontario Act is correct—is one of so much discussion at the present day, that it may not be uninteresting to refer to a very important argument and decision which took place in the Common Pleas in England almost at the time the Act was under consideration in the Ontario Legislature, and which it is presumed must have come under the observation of the very able legal men in that House. The argument was commenced early in November, 1868, and judgment given in January, 1869. The case of Charlton (appt)., vs. Lings (respt).* The name of Mary Abbott, with a large number of other women, appeared upon the lists of voters for members of Parliament for the Borough of Manchester. Her name was objected to and struck off by the Revising Barrister. Her statutory qualification otherwise than as a woman was not disputed. On appeal from the decision of the Revising Barrister, the case was argued by Coleridge for the appellant, by Mellish for the respondent. The decision which was to govern the other cases as well as her own was that she had not a right

* *Law Times*, new series, 1868–9, 534, 4 L.R.C.P. 374.

to vote. In the course of the argument, some observations were made by the counsel and the judges, which will aid us in the construction to be put upon the Ontario Acts, bearing in mind that the question here is not the right of the woman herself to exercise a right or privilege, but *the right of the electors* not *to be restricted* in *the exercise of their rights—that is the right* of *selection*. And further, whether when in a particular statute, dealing with an entire question, a particular resolution is made with regard to a particular class of persons, it does not negative the application of any other restriction to the same class, than the restriction named, assuming that in other respects the requisitions under the statute are complied with. The Ontario Statute first gives the franchise to every "male person," &c., then as if that was not sufficiently explicit, as if to remove the very doubt which has been raised in England, and to show that the consideration of woman's rights and her position had not been overlooked, it declares "no woman shall be entitled to *vote* at any election." When it comes to the nomination of candidates, it requires the sheriff to call upon the electors present to name the "person" or "persons" whom they desire to choose without any restriction in such selection as in the case of the franchise to the *persons* being male. By a subsequent Act, c. 4, 1869, the Legislature abolishes the qualification in real estate, thus removing the inference to be drawn as to Knight's service and the feudal tenure referred to by one of the judges in Charlton vs. Lings. Then assuming that the selection is of a woman of full age—a feme sole—*compos mentis*—not under any restraint from infancy or marriage or any legal incapacity from crime—does she not come sufficiently under the term "person" to be within the Act. In the case referred to, Mr. Mellish in his very able argument against the construction of the English statute, which Sir John Coleridge was contending for; viz., that woman had the right to vote, because, under Lord Romilly's Act, words imputing the masculine gender included the feminine, says: "No one can doubt that in this Act (that is the Representation of the People Act, 1867), the word "man" is used instead of the word "person" for the express purpose of excluding "woman," thereby admitting that if the word "person" had been used (in the absence of anything else in the Act, to control it) woman would have been included." Chief Justice Bovil, in referring to the Reform Act of 1852, and to the Representation of the People Act, 1867, says: "The con-

clusion at which I have arrived is that the Legislature used "*man*" in the same sense as "*male person*" in the former Act, and this word was intentionally used to designate expressly the male sex, and that it amounted to an express enactment and provision that every man, as distinguished from woman, possessing the qualification, was to have the franchise, and in that view Lord Romilly's Act does not apply to this case, and will not extend the word "man" so as to include woman." The other judges, Willes, Byles and Keating, fully concurred with the Chief Justice as to the construction to be put upon the Statute, saying that the words "man" and "male person," together with the context of the statute throughout, shewed conclusively that it was not intended to confer the franchise on women. Judges Willes and Byles went further, expressing their opinion that women were under a "legal incapacity" from either being electors or elected; the latter observing that "women for centuries have always been considered legally incapable of voting for members of Parliament, as much so as of being themselves elected to serve as members," and he hoped "that the ghost of a doubt on this question would henceforth be laid for ever." Even the casual opinion of such eminent men is entitled to the highest respect, though the point actually under their consideration and decided by them, was the construction of a particular statute as to *the right of a woman to vote*, not as to the right of the electors to choose one as their representative. The language of the statutes before them was different from the language of the Ontario statute. The latter is the one which governs here. It professes to deal with the whole question—being essentially a question—with which the Ontario Legislature had the exclusive power to deal. It classifies and deals with the voters and the candidates separately and exhaustively, and throughout the whole contest there is nothing inconsistent with such a conclusion.

Ansley (Thomas Chasholm) in his able Review of the Representation of the People's Act, 1867, and of the Reform Act of 1832, ably handles the whole subject, and differs entirely from the views laid down by the learned Judges on the case referred to—not upon the broad question, but upon the construction of the Statute. His work was written in 1867, their decision given in 1869. In the course of his work he gives Mr. Denman, Q.C., as authority for the statement that the word "person" used in an act of the Legislature of one of the Colonies of Australia had given the franchise to women.

It is also further to be observed, that in the Imperial Act 33 and 34 Vic., c. 75, entitled "An Act to provide for Public Elementary Education in England and Wales," (passed in 1870, since the decision in Charlton vs. Lings), which regulates the distribution and management of the Parliamentary annual grants, in aid of public education, and provides for such distribution and management by means of a Board or School Parliament, with great powers, chosen by election by the ratepayers, the word "person" is used throughout with reference to those chosen to form the Board, and under that designation women have been held eligible and taken their seats, notwithstanding that in speaking of such members the word "himself," and other words of the masculine gender only, are used. It would seem, therefore, taking all points into consideration, to require an arbitrary and unusual construction to be put upon such word, to deprive the electors of Ontario of the right of choosing a female representative for their own Legislature, if they be so minded.

In all three of the Provinces persons holding offices of profit or emolument under the Crown, excepting Members of the Executive Government, are debarred from holding seats in the Assembly. In all the three Provinces there must be a registration of Voters, the foundation in all being the same, namely—the Assessment List of the District—the details for the Register of Voters, simply varying according to the qualifications which give the vote, and which entitles the Voter's name to be put upon the List—the exceptional instances in Nova Scotia being when the representatives of a deceased party, or the members of a firm assessed are entitled to vote; and in New Brunswick, when there has been no assessment in the parish for the year for which the List ought to be made up.

In Ontario the voting is *viva voce*.

In New Brunswick and Nova Scotia—By Ballot—introduced in Elections in New Brunswick in 1855; in Nova Scotia in 1870.

The Mode of Conducting the Election.

The mode of conducting the Election by ballot is very much the same in Nova Scotia as it is in New Brunswick, the most material distinction between the two being that in the several Polling Districts in New Brunswick the Ballots are openly counted at the close of the Poll at each Polling Place, in the presence of the Candidates, or their Agents, duly added up openly in the

presence of all parties, entered in the Poll Books or Check List, signed by the Poll Clerk, and countersigned by the Candidates or their Agents, and the Ballots then forthwith destroyed, the countersigned Poll Book or Check List with a written statement of the result of the Poll at that District, with the signatures of the Candidates or their Agents is then forthwith enclosed, sealed up, and publicly delivered to the presiding officer to be transmitted to the Sheriff to be opened on Declaration Day.

Whereas, in Nova Scotia the Ballot Boxes, with the Ballots are sealed up and sent. This mode was in accordance with the Law first introducing the Ballot in New Brunswick, but, being found liable to abuse, was subsequently amended as above mentioned.

In Nova Scotia—The 17th sec. of the Act of 1870, introducing the Ballot, abolishes the Public Meeting held by the Sheriff on Nomination Day, but he is to attend at the Court House, or other place prescribed, between 11 a. m. and 2 p. m., for the purpose of receiving the names of the Candidates, and he shall exclude all persons not having business in connection with the Election.

In Ontario and Nova Scotia, in case of a General Election, the Polling must be simultaneous throughout the whole Province.

In New Brunswick it is not so; the Sheriff or the Presiding Officer for the County or City selects such time within the writ as he deems most suitable for the convenience of the Electors within his County.

As under the Dominion Act, with the exceptions pointed out, the elections are to be held under the laws which were in force on the 1st of July, 1867, the reforms introduced into Nova Scotia, by the Act of 1870—of the ballot and the abolition of the hustings on nomination day—will not be applicable.

J. H. GRAY.

LEGAL ETHICS.

"Practice four hours every day in a pistol-gallery," was the advice given seventy years ago, by an eminent member of the Irish bar to a youthful *confrère*, as the most certain means of rising in the profession in the Emerald Isle. The day, however, of duellists is over, it is impossible for any man to shoot himself into practice now-a-days; more peaceful means must be resorted to in order to secure advancement; and although industry, learning and talents may be insufficient to secure a leading position, a careful cultivation of the judges will in a number of instances produce the desired effect; that is if the *dictum* of a judge be recognized by the other members of the bench as an authority in such matters. "My dear ....," said he, "whenever I have a doubt in a case pleaded before me, I always give its benefit to my friend." What charming *naiveté*, what delicious simplicity were exhibited in that outburst of confidence, how they remind one of the honied words of the poet,

> "A sympathy
> Unusual join'd their loves;
> They pair'd like Turtles; still together drank,
> Together eat, nor quarrell'd for the choice,
> Like twining streams both from one fountain fell
> And as they ran still mingled smiles and tears

Verily, if the judges adopt the *dictum* in question, thanks will be due to them for simplifying the administration of the law in this Province. Parties will no longer be distracted by the anxieties now attendant on the prosecution of a suit, counsel will be absolved from the necessity of studying the points of their cases, judges will be relieved from the frightful labour of poring over musty records. The only point requiring care and attention will be the retaining of counsel rejoicing in the friendship of the judges. It may so happen that in order to secure a judgment, three counsel must be engaged, but the increase in numbers retained will redound to the interest of the bar. Kind and liberal feelings between bar and bench will be created and fostered—dependent upon each other, the bench will be entitled to the *liberality* of the bar, and the bar, or at least its favoured members, will receive

the *moral* support of the bench. It may be asked, how is this happy condition of affairs to be brought about? What means should be adopted to insure possession of this legal Utopia? Judges although immeasurably above the common herd of men, superior to the ordinary vices of humanity, and generally impressed with the idea that they possess all attainable knowledge in the science of the law, are, with all due deference be it said, human in some respects. Impecuniosity may afflict some, a craving for the good things of this world may affect others. Relieve the one, satisfy the other, and behold the foundations of *doubtful* friendships. A man's capacity for friendship is either in his purse or in his stomach; fill both and it is impossible for him to resist the kindly feeling. Let, then, the maxim of the profession be "Entertain and Indorse." If carried into practice, the experiment at first may be expensive, but the speculation will be sure to pay in the end.

The benefits which will follow from the adoption of the principle in question will be shared, not only amongst ordinary suitors but also amongst men of means or influence who, in the ardor of the moment, have been tempted to commit crime. It is excessively unjust that men of a high and educated stamp should by the law be regarded in the same light as poor uninfluential fellows, so far as what is technically called crime is concerned. In the one case the respectability of the offender's family is tarnished, he himself is torn from the charms and comforts of his home, his money is useless, and he wastes his years in a penitentary. The poor devil on the contrary without means and friends, save perhaps his wife and children, who commits a crime, should be punished as an example to his wealthier fellow subjects—his imprisonment redounds to his own benefit—half-starved before, he is now well-fed—ragged and out of elbows at large, he rejoices in his new clothes in prison—his wife and children beg, but they are well rid of their disreputable husband and father. Of old, the benefit of clergy was admitted in mitigation of punishment; would it not be a good idea to legalise it as an excuse for crime in this our day? Poverty in this workday world of ours is a crime, wealth is a virtue. A man's depravity grows with his poverty; his virtues increase in proportion to his wealth. A poor man cannot be honest. A millionaire cannot be a rascal. Wealth gilds everything, and would cast a halo round the head of a criminal. Let us picture to ourselves a trial in such a case,—the wealthy

victim in the dock, the counsel defending, the friendly judge upon the bench; how tender towards the prisoner would be the judge's conduct; how majestic and condescending his deportment towards the jury; how he would define, and refine upon, the points of law; how he would doubt everything, even his own existence, save the respectability and wealth of the unfortunate accused, and how at the last he would dilate upon his vast properties as irrefragable evidence of his innocence. Gracious Heavens! no jury could resist his fascinations, and a verdict of Not Guilty would save him the trouble of reserving a case and discharging the accused from custody on trifling bail. Capital would thus at last acquire its proper position, and secure immunity from punishment to its fortunate possessor. The Bar would receive large fees, and the Bench would be indorsed by the signature of every man seeking advancement in his profession.

If, however, it be pretended that the course pointed out is immoral and even disgraceful, and it is desired to secure perfect impartiality in the administration of justice, what means can be taken to secure the desired end. Universal satisfaction upon the subject now pervades all classes of society. It is impossible, say all people, that justice could be administered in a better manner than in the Province of Quebec. The judges are industrious beyond all precedent, in fact, from excess of work they are worn down to skeletons; they are impartial, learned, and talented; charming in their manners, courteous in their behaviour, their civility to the members of the bar is only equalled by their forbearance and brotherly love to each other. The country, in fact, does not appreciate them as it ought, the paltry salaries they receive are no compensation for the immense benefits they daily heap upon society. The temptations to which they are exposed, are incredible, and it is unfair in the highest degree to submit human nature on the Bench to the trials of poverty. The rich man who has never known indigence, who has never experienced the kind attentions of a bailiff, or felt the pangs of hunger, knows not the fascinations of crime, and condemns the poor devil who, to save his wife's life, steals a loaf of bread. Worse, infinitely worse, than that of a man dying of hunger, is the position of a judge, bound to keep up respectable appearances on an insufficient income; day by day he plunges deeper into debt, and becomes the bond-slave of his creditors—his independence lost, his spirit broken, his impartiality destroyed, he must be more than mortal if he can

decide against a member of the bar, who holds one or two judgments against him, and who in the anger of the moment may put an execution into his house. Let us flatter ourselves with the idea that such a state of things does not exist in Quebec, but at the same time let us take the precautions necessary to prevent the occurrence of such a calamity.

If in lieu of the enlightened, talented and learned Bench that we now possess, the highest court in the Province was composed of men—lazy, idle, partial—seeking solely to gorge their salaries as the reward of the smallest possible quantity of work; what would be the consequence to the country at large? Would it be possible for it to flourish with the fountain of its justice impure and polluted. Would not that impurity and pollution be carried through all grades and classes of society? Would commerce flourish, secure from the harpies who would rise and devour all the profits of the fair trader? Would property be safe from the machinations of the ring of conspirators, who would fatten on the labour of honest men? Would life be secure from the rowdies and ruffians who would congregate in our streets, and purchase immunity for their own crimes by being the willing instruments of others higher in the social scale.

If an example be wanted of a great city trodden down into the mire, regard New York. The Corporation of that city within two years plundered to the extent of millions of dollars! The majority of voters ruled by a despicable minority of rogues and cheats—Property insecure—Human life not regarded. And what are the causes productive of this state of affairs? The corruption of the Bench—the indifference of the better classes of society. That enlightened Christianity which there has insured the adoption of the Malthusian doctrine, permits judges to dispose of themselves to the highest bidder. The spirit which accorded freedom to the negro and abolished slavery, has struck the shackles from the limbs of the white judge and allows him to sell himself into bondage. A millionaire may now own any number of fast horses and judges as his private property; the horses for his pleasure, the judges for his business. What a convenient arrangement! "If you have a case at law, go buy a judge," says Mr. James Fisk, "I can recommend to you Judge Barnard," and accordingly Judge Barnard is bought, as one purchases a leg of mutton at a butchers, a little higgling, a little haggling, but all comes right in the end.

Is it wrong then to consider this question of friendship with a judge as one of legal ethics? Friendship in such guise is but a wedge which driven home will so split, rive and destroy our liberties as to leave us but small reason to congratulate ourselves on the administration of justice in the Province of Quebec.

WILLIAM H. KERR.

THE QUEEN VS. COOTE.

The prisoner in this case, after conviction for arson, has been liberated on bail by a Judge in Chambers. A detail of the proceedings in the case will enable the profession in the other Provinces of the Dominion, and elsewhere, to form an opinion of the singular tenderness for convicted criminals which pervades the administration of justice in the Province of Quebec.

At the late term of the Court of Queen's Bench, presided over by Mr. Justice Badgley, a true bill was found against Edward Coote for arson. The indictment contained four counts, in each charging him with setting fire wilfully, feloniously &c., to a warehouse belonging to a person of the name of Roy, but in each varying the intent. To this indictment, Coote pleaded not guilty, and a jury being impanelled, he was tried and found guilty. Two depositions sworn to by Coote before the Fire Commissioner for the City of Montreal, then holding an inquiry into the origin of the fire, previous to any charge of arson being made against any person, were, after being duly proved, read to the jury on the trial. On the day appointed for sentence, Coote, through his counsel, made two motions, one that the trial should be declared a mistrial, the verdict quashed and that he should be tried again on the ground that his two depositions taken before the Fire Commissioners had been improperly received in evidence and read to the jury, the other in arrest of judgment, including, amongst some trifling technical grounds, the one relied on in the motion for a mistrial. After argument, Mr. Justice Badgley overruled the motion for a mistrial, &c., in an elaborate judgment, and reserved the motion in arrest of judgment for the consideration of the Court of Queen's Bench, Appeal Side—the Court of Criminal Appeal in the Province of Quebec. No further order was made, and Coote returned to gaol. The court closed on the 11th October.

On the 12th October, in the morning, a petition was presented in Chambers to Mr. Justice Monk, for a writ of Habeas Corpus to bring up Coote in order that he might be liberated on bail. Mr. Justice Monk referred the petition to Mr. Justice Badgley, and it was then and there determined by the two judges to grant the prayer of the petition and they fixed the bail, Coote in the sum of $2,000 and two sureties in $1,000 each, exactly the same amount of bail as before trial. Mr. Justice Badgley signed the order for the writ, the bond was acknowledged before him, and Coote was thereupon discharged.

The wording of our Statute regulating Reserved Cases upon the subject of retaining the accused in custody or discharging him upon bail is as follows: "and in either case the court before which the case trial was had in its discretion shall commit the person convicted to prison, or shall take a recognizance of bail with one or two sufficient sureties, and in such sum as the court thinks fit, conditioned to appear at such time or times as the court shall direct, and receive judgment or render himself in execution, as the case may be." (C.S.L.C. c. 77, s. 57).

The Habeas Corpus Act thus provides for the issue of the writ of Habeas Corpus in vacation "and if any person is committed or detained as aforesaid, for any crime (unless for felony or treason, plainly expressed in the warrant of commitment) in the vacation time, and out of term or sessions such person (not being convicted or in execution by legal process) or any one on his behalf may complain to one of the Judges of the Court of Queen's Bench who . . . . shall upon request, made in writing by such person, or any one on his behalf . . . . award and grant a writ of Habeas Corpus under the seal of the court of which such judge is a member directed to the officer or person in whose custody the party so committed or detained is returnable immediate before the said Judge." *

It will thus be seen that in the Court reserving a case, is alone vested the power of admitting to bail the criminal whose case is so reserved. Further no Judge in vacation has the power of discharging on bail a criminal convicted of felony. In this case the Court of Queen's Bench, Crown Side, did not order Coote to be admitted to bail; and yet a Judge in Chambers, with the approval of one of his brethren discharged Coote after he had been convicted of felony.

* C. S. L. C. c. 95, s. 4.

Apart from the want of jurisdiction apparent in this matter and in these illegal proceedings, a want of discretion, to use the mildest term possible, was manifested by the Judges of the Court of Queen's Bench in the affair. No one knew better than Mr. Justice Badgley that there was nothing in the grounds of the motion reserved to disturb the verdict. A lawyer of six months standing who is not aware of the fact that the improper reception of evidence on a trial is not a ground for arrest of judgment, is ignorant of one of the first principles of his profession, as for the other reasons urged in the motion, they were merely put in as padding and not argued by Coote's counsel. Mr. Justice Badgley must therefore have been intimately convinced that the result of his reserved case would be the rejection of Coote's motion in arrest of judgment and yet he admitted him to bail. To save an unfortunate criminal, who had been convicted of a felony for which he might be condemned to fourteen years Penitentiary, from an imprisonment of two months in gaol, two of the Judges of the highest Court in the Province agree that it is expedient and proper to discharge him upon a bail-bond, which, in all probability, is not worth the paper on which it is written.

For more than ten years bills have been found against many persons for arson, but no case has within that time, save Coote's resulted in a conviction; yet, thanks to the judges of the land, the terror with which incendiaries had been stricken is immediately dissipated, and arson is regarded as an innocent diversion in which any one possessing influence to obtain a reserved case may indulge with perfect impunity.

WILLIAM H. KERR.

DIGEST OF RECENT DECISIONS.

QUEBEC DECISIONS.

COURT OF REVIEW.

Montreal, 29th April, 1871.

Burnett vs. Monaghan, et al.—With reference to Monaghan's note maturing on the 11th February, Lanctot, the endorser, gave to the holder the following memorandum: "My note maturing the 10th instant, good for ten days after date." The note referred to was maturing on the eleventh. No other note existed. No protest was made except on the 24th February. Held by the Circuit Court, St. Hyacinthe, that the endorser was liable, and this judgment confirmed in Review. Mondelet J. diss.

Kingley vs. Dunlop.—A special replication (*réplique*) is admissible without the permission of the Court. Mackay and Torrance, JJ. Mondelet, J. dissenting.

Wicksteed et Corporation of North Ham.—1o. A front road cannot be less than 36 feet wide, French measure. 2o. At a sale made under the Municipal Act by a Secretary-Treasurer, he is incompetent to buy for himself. Sale set aside. Mondelet, Mackay and Torrance, JJ.

Montreal, 30th June, 1871.

Adams vs. McCready.—A purchaser of real estate on which exist mortgages which are prescribed, cannot plead fear of trouble by reason of these mortgages. Mondelet, Torrance and Beaudry, JJ.

Conlan vs Clarke.—A wife has no action against her husband for alimentary allowance on the ground that she cannot be comfortable in the house of her husband. She must reside with him. Mondelet, Mackay and Beaudry, JJ.

Corporation of Montreal vs Donigani.—Mrs. Selby and her brother made a donation of the usufruct of certain real estate to their father. Held that they did not thereby relieve themselves from the obligation to pay the city assessments. Mackay, Torrance and Beaudry, JJ.

Martineau vs. Béliveau.—The proprietor of a horse and carriage may be liable for the damages caused by the negligence or fault of the lessee or borrower driving the said horse. Mackay and Beaudry JJ. Torrance, diss.

Montreal, Sept. 30th, 1871.

In re Morison and Dame Ann Simpson, claimant vs. Henry Thomas, Contg. Party.—The decision of Mr. Justice Torrance, recorded at page 243 of *La Revue* was reversed in Review, Mackay J. dissenting. Messrs. Justices Mondelet and Berthelot were of opinion that section 57 of the Insolvent Act of 1869 did not apply to dower and other *gains de survie* dependent upon the contingency or condition of survivorship to the husband, these special rights of our civil laws not being expressly mentioned in the provision of the Act. Mr. Justice Mondelet further remarked that even if they had been so mentioned, the provision of the Act would be unconstitutional, the Parliament of Canada having no control over the civil laws of the Province. Mr. Justice Mackay was in favour of Mrs. Morison's claim, because it was founded upon our Insolvent law, interpreted in the way in which the English Courts had interpreted a similar section in the English Statute, the way in which the Courts in Ontario, or New Brunswick, would interpret it.*

Lacombe vs. Ste. Marie & al.—An information for perjury contained in three depositions prepared by counsel was laid before two justices of the peace before arrest. After the arrest no examinations were made of witnesses, nor did the accused confess; yet he was committed to jail, there to be kept till discharged by course of law. The accused was discharged on *Habeas Corpus*, and afterwards for want of prosecution. Action in damages against the Justices for $5,000. Held, reversing the judgment of Superior Court, that the commitment not being based upon information reduced to writing before the magistrates, was null, and that the magistrates were responsible for the false arrest. Judgment for $100 and costs. Mackay, Berthelot, Beaudry, JJ.

Whyte vs Bisson & al.—A guardian under a writ of compulsory liquidation in Insolvency matters has a right to take out a *saisie revendication* against a seizing bailiff and the creditor, who, although well aware of the issuing of the compulsory writ, persist in holding the estate of the Insolvent under an ordinary writ of execution—in this case a writ of *saisie gagerie*. The bailiff, Mercier, was condemned, jointly and severally with the landlord, to deliver the estate to the guardian and to pay the costs. Mercier was further ordered by the Court, *suo et proprio motu*, to be struck off the list of bailiffs of the Superior Court. Mackay, Torrance and Beaudry, JJ.

SUPERIOR COURT.

Montreal, 29th April, 1871.

Lafond vs. Rankin.—The purchaser of the book debts of an Insolvent Estate cannot complain that some of these debts have been collected

* In the case of Morison, the assignment had been made under the Insolvent Act of 1864; but the claim was not fyled till 1870.

by the assignee previously to the auction sale, although the list of debts shewed no such collection when the sale was made. Mondelet J.

Lavoie vs. Lavoie.—Plaintiff being aware that the Defendant was a married man sued him in damages for seduction. Held that no action then lies. Berthelot, J.

Lainé vs Clarke.—The word "months" which had been omitted in a note after the word "three" had been inserted by the holder without the knowledge of the indorser. Held, that this was not alteration, and that the indorser was liable. Torrance, J.

Ex parté Lalonde for *certiorari.*—Under the Agricultural Act, the right of certiorari was taken away; but still the writ does lie if the conviction mention no reason for which it was made. Torrance, J.

Montreal, 31st May, 1871.

Matthews vs. The Northern Assurance Co.—Introducing into the insured premises a gasoline machine of a dangerous character without the consent of the insurer is a violation of the policy. Mondelet, J.

Maguire vs. The Corporation of Montreal.—A corporation is not responsible for the negligence of others in leaving obstructions in the street, when it appears that the driver might have avoided the obstructions. Mondelet, J.

Vallée vs. Kennedy.—A simple clause in a lease against subletting without the consent of the landlord does not give rise to the immediate resiilation of the lease; the court will first grant to the Defendant a delay to re-establish things as before the sub-lease. In this case the sub-tenant vacated the premises before judgment, and the defendant was only condemned to pay the costs. Mackay, J.

Montreal, 30th Sept. 1871.

Massawippi Valley R.R. Co. vs. Walker.—No stock of an incorporated Company can be called for, unless the conditions antecedent to such call have been complied with. Mondelet, J.

Brown vs. The Corporation of Montreal.—Action in damages for libel. The defendants demurred upon the ground that an action for libel did not lie against a corporation. Held that civil corporations are governed by the laws affecting individuals. Demurrer dismissed. Beaudry, J.

CIRCUIT COURT.

(APPEALABLE).

Montreal, 30th Sept. 1871.

Dumaine vs. The Corporation of Montreal.—Held that a City Treasurer had no authority to take a note for City assessments. Mackay, J.

Campbell vs. The Grand Trunk Railway.—Notwithstanding notice of special conditions given by common carriers, limiting their liability

and their knowledge thereof, they are responsible for the damage caused by their fault or the fault of those for whom they are responsible. Torrance, J.

COURT OF QUEEN'S BENCH.

(APPEAL SIDE).

Montreal, 9th June, 1871.

Shaw vs. Laframboise.—Under a clause in a lease the tenant had promised to pay *all the taxes on the premises, ordinary and extraordinary, foreseen and unforeseen* during the lease. Held, that this clause did not comprize taxes for the widening of streets, for which compensation had been paid to the landlord. Badgley, Monk, Drummond, JJ. Dissenting, Duval, C. J. and Caron, J.

Proulx & Dorion.—A intervened in a deed and agreed to pay a debt due to B, not a party to the document. B brings his action for the amount against A, without previous acceptance of the delegation. Held that B had no right of action. Duval, C.J., Badgley and Drummond, JJ. Dissenting, Caron and Monk, JJ.

Montreal, September 6th.

The Corporation of Montreal & Doolan.—Rights of individuals against a corporation are governed by the French law, and according to that law a corporation is liable for the damage caused by the assault and battery of one of its officers when on duty. In this cause, two policemen had illegally arrested and ill-treated a cab driver :

Held . That the Corporporation was liable in damages. Caron, Monk and Drummond.—Dissenting; Duval and Badgley.

Brown & Lemieux.—That a lease of moveable property containing at the same time a promise of sale, dependent on the payment of certain instalments is a conditional sale, and therefore on non-payment of the balance of the same, the vendor cannot proceed by *saisie revendication* against the purchaser. The action should be for resiliation of the sale. Caron, Badgley, Monk, Drummond, JJ. Dissenting; Duval, C.J. Messrs. JJ. Caron, Badgley and Drummond, would not, however, dismiss Plaintiff's demand for a condemnation against the purchaser to pay the instalments due. Action maintained *pro tanto*, but *saisie revendication* set aside. Mr. Justice Monk, with the Court of Review, thought that in a *saisie revendication* no such condemnation could be made.

Corporation of Eton and Rogers.—Municipal corporations are responsible for injuries sustained by an accident at a certain bridge, which was not a public one, but was regarded as such.

Attorney-Général Ouimet & Hon. J. H. Gray et al. Held: That with preliminary pleas fyled in time, the fyling of pleas to the merits *without demand* is not a waiver by Defendant of the benefit of a preliminary

plea, v. g. *an exception déclinatoire.* Duval, C.J., Caron, Drummond, Badgley, JJ. Dissenting; Monk, J.

Montreal, 8th Sept., 1871.

Grand Trunk Railway & Gutman.—Notice of arrival of goods being given by the Company to the owners or consignees that they "remain here entirely at the owner's risk, and that this Company will not hold themselves responsible for damage by fire, the act of God. civil commotion, vermin or deterioration of quantity or quality, by storage or otherwise, but if stored, that a certain rate of storage would be charged for the storage of the goods," and which was paid to the Company by the owners.

Held: That though the liability of the Company as common carriers had ceased, by the arrival of the goods, the Company was still liable for damage as warehousemen and bailees for hire; but that in this cause the evidence did not show any negligence on the part of the railway company. Duval C.J., Monk and Stuart (*ad hoc*) JJ. Contrà, Badgley and Drummond, who held that by law negligence was presumed if damage shewn, and the onus of proof of care was on the Company, who had made no proof whatever to rebut the presumption against the Company.

September 9th.

Papineau & Guy.—Monies deposited with the Prothonotary are held under judicial authority, and recourse can be had to the survivor of the then Joint Prothonotaries by a rule or summary petition to enforce payment, even by imprisonment or *contrainte par corps.* Per Duval, Caron and Polette *ad hoc*, JJ. Contrà, Badgley and Drummond, who contended that recourse should be by action only.

September 7th.

Brown & La Fabrique de Montréal, or the Guibord case.

Mr. Justice Badgley: A *mandamus* or *requête libellée* attached to it, will be quashed and set aside if more than one duty or right, complete in itself, is demanded from the same party, who is not bound or held in law to perform more than one of those demanded, and consequently as widow Guibord demanded *civil burial*—which duty was within the province of the *Fabrique* to perform—and also the *registration of the burial*—which duty belongs to the *Curé* alone—the proceedings are bad and informal, and must be quashed. The learned Judge was of opinion, however, that the writ of summons speaially ordered by the Judge to issue with *requête libellée* attached thereto and the order indorsed on the writ of summons, was sufficient.

Mr. Justice Caron: 1. That under article 1022 of the Code of Civil Procedure a writ of mandamus must be specific as in England. A simple writ of summons annexed to Petition containing all the necessary avernments, is not sufficient. 2. In this case the proceedings were illegally directed against the *Fabrique;* the burial as well as its entry in the register of deaths being within the province of the *Curé* alone, who was not in this cause. 3. That civil burial only was

demanded, and that the immemorial usage prevailing with respect to Montreal Catholic cemetery, and in all the Catholic cemeteries of this Province, under which civil burial was only made in that part of the cemetery reserved for the burials of *non Catholics*, known as *le cimetière des enfans morts sans baptême*—was law, and should be enforced as such.

Mr. Chief Justice Duval: The proceedings were bad; 1. Because the writ was a writ of summons and not a writ of *mandamus* in the English form. 2. Because they were directed against the *Fabrique* alone, and not at the same time against the *Curé* of the parish. 3. Because the demand of burial in the Petition, *conformément à l'usage et à la loi*, is vague and uncertain, it being known that there are two modes of interments recognized by law and usage, the civil and ecclesiastical.

Mr. Justice Monk: Interment in the Roman Catholic cemetery, *conformément à l'usage et à la loi*, is an act partaking partly of ecclesiastical and partly of civil function. Courts of justice have no jurisdiction over the ecclesiastical part. The burial of Guibord being asked in that part of the cemetery destined by ancient usage to the interment of those who alone are entitled to ecclesiastical burial, courts of justice therefore have no jurisdiction to order the same. As to civil burial it has been offered.

Mr. Justice Drummond was of opinion that as the demand was of an ecclesiastical or spiritual nature, courts of justice in this country, governed by a Protestant Sovereign, could not interfere, as they would have done before the cession to the British Crown, especially in face of the Treaty of Paris assuring the free exercise of the Church of Rome in Canada.

In fine, MM. Justices Drummond and Monk were of opinion that the form of the proceedings was correct.

We are indebted to Mr. Colston for the following digest of cases lately decided in the City of Quebec:—

COURT OF QUEEN'S BENCH

(APPEAL SIDE.)

Quebec, 19th June, 1871.

De la Gorgendière vs Thibodeau.—The 4th Vic. c. 3, s. 36, does not prohibit a wife from renouncing to the exercise of her hypothec for matrimonial rights in property sold by her husband, and such renunciation is valid and binding though subsequently she obtains a *separation de biens* from her husband. Dissenting, Duval C.J., and Drummond, J.

Harris & Schowb et al.—The declaration herein alleged that on the 27th day of August, 1870, C. & J. Lortie made their draft at 3 days on

J. Redpath & Son, Montreal, which they handed to Harris, who on the 29th endorsed it over to Schowb et al; that the latter presented it for acceptance on the 1st of September following, which was refused, and that said draft was protested for non-acceptance on the 8th day of September.

Held: That plaintiffs did not use legal and sufficient diligence in and about presentment and protest of the draft, and action dismissed. Dissenting, Badgley J.

Poulin & Wurtèle.—The appellant, defendant in Superior Court, was served with the writ of summons on the 4th of November, the 15th of that month being the day of return, and his domicile being distant 19½ miles from the Court House at Quebec, where he was ordered to appear.

Held: That the service was good, the delay between service and return being sufficient. There must be full five leagues in excess of the first five to give a defendant the right to an additional day.

Villeneuve & Bédard.—Jugé: Que la démence, la folie et la fureur du mari ne sont pas des motifs qui peuvent justifier une demande en separation de corps de la part de la femme. Dissenting, Duval C.J., and Drummond J.

COURT OF REVIEW.

Quebec, 4th May, 1871.

Hall vs Devany, 1360.—Payment on account of interest or principal interrupts prescription, and in commercial matters before the Code parol testimony of such payment was admissible. The payment, however, must be accompanied by such circumstances as would warrant a jury in inferring a promise to pay the balance.

A payment on account, therefore, by a person claiming a further credit of £20 is at most an acknowledgement of the debt less £20.

Bélanger vs Blais, 931.—The plaintiff held, without title, part of the unconceded lands of the Crown and made thereon considerable improvements. He subsequently ceded the same by donation duly enregistered to one Sans-Souci, subject to a life rent, for securing which Sans-Souci mortgaged the property in question. Sans-Souci obtained from the government a location ticket and subsequently sold to the defendant, who knew of the donation. The defendant afterwards obtained Letters Patent from the Crown in his own name. Action by Plaintiff en declaration d'hypothèque against Blais. Judgment for Plaintiff. Meredith C.J. dissenting.

28th June, 1871.

Present:—Meredith C.J., Stuart and Taschereau JJ.

Joseph v. Turcotte, 641.—Prior to the proclamation declaring American silver uncurrent the Defendant made his note in favour of the

Plaintiff, payable in silver at par. The note matured after such proclamation.

Held: That the proclamation did not affect subsisting contracts, and that a tender, which would have been accepted before it, was valid thereafter. Stuart, diss.

Pacaud vs. Provencher, 362.—Held: That a hypothecary action will not lie on a transfer which has not been notified to the original debtor.

Milot vs. Chagnon, 426.—Held: That where there was reasonable and probable cause for issuing a *capias* no damages will be granted though the *capias* had been quashed for defect in form.

Basin vs. The School Commissioners of St. Anselme, 456.—Notice of action must be given to School Commissioners before an action of damages can be brought against them.

5th October, 1871.

Sheppard vs. Dawson, and Dawson, oppt.—Under Art. 453, C. P. C., a party to a suit must after discontinuing any proceedings actually pay the costs incurred thereon by his adversary, before he can begin again. The obligation to pay costs in this case can only be extinguished by payment, and not v. g. by compensation. Stuart, dis.

Phillipsthal vs. Duval.—This case, an action of damages for slander, came before a jury and at the trial the defendant having examined no witnesses, the Court (Stuart J.) held that the Plaintiff had no right to address the jury in reply. On motion for new trial based on this and other grounds it was held, by Stuart J.: That under the circumstances no right of reply existed; by Meredith C. J.: That the refusal of the right to reply was no ground for a new trial, where, as in this case, no injustice had resulted from it. Motion dismissed. Taschereau, dis.

SUPERIOR COURT.

Quebec, 8th April, 1871.

Hunt vs. Home Ins. Co., 1130.—A chirographic creditor has no insurable interest in the stock-in-trade of his debtor, and cannot hold an insurance against fire thereon. Stuart J.

6th May, 1871.

Tardif vs. Gingras & Jobin contest., 658.—A supplementary distribution will be ordered, after homologation of a report, upon proof of error in the certificate of registrar, and that no hypothec exists in favour of the person collocated. Taschereau J.

Evanturel vs. Evanturel.—The clause in a will depriving a legatee of his legacy in case he contests the will, is contrary to public order, illegal and null, and will be regarded as *comminatoire* only. Taschereau J.

7th October.

Lemesurier vs. Ritchie, 1544.—The defendant pleaded to the action herein that the notes in which the action was based were not stamped as required by law. Motion by the Plaintiff for leave to affix the necessary stamps. Granted on payment of costs, and with privilege to defendant to plead *de novo*. Stuart J.

Paquet vs. McNab, 826.—Held: that the reason assigned by the Plaintiff in his affidavit for a *capias*, for believing that the defendant—a person domiciled without the Province—was about to leave the Province with intent, &c., "que le defendeur est prêt de partir dans son dit batiment pour faire voile pour l'Europe ou autres parties du monde," is insufficient. *Capias* quashed. Stuart J.

A manuscript written nearly forty years ago, by L. Adams, advocate of the City of Montreal, now in the hands of our friend Mr. Girouard, contains the following unreported decisions. We quote *verbatim*.

Ricard vs. St. Denis.—On an opposition claiming a privilege for rent the Court held that the opposant could only have a lien by verbal lease for three terms expired and the current one. 20th Oct., 1826.

Wilson vs. Spencer & Smith opp.—Judgment for rent on *saisie gagerie*. Execution issued, sale of goods advertised, but money paid before sale or on the day fixed, and returned into Court: opposant claimed a dividend on the ground of defendant's insolvency, and founded her demand on the circumstance of the goods not having been sold, but the debt paid, and there being no privilege upon money paid upon an execution for rent, but only on the proceeds of the sale of goods seized upon the premises and sold. *Per curiam:* Judgment must go for the plaintiff, and the opposition dismissed, on the ground that the money levied or paid represented the goods which had been seized, they having been given up and discharged in consequence. 20th Feb. 1828.

Gates & al. vs. another.—Judge Pyke: an assignment by bankrupt estate vests in the assignees, who may bring action thereon in their own name without notice. No notice of assignment necessary, when debt remains due and not attached by other creditors, even on common assignments.

Olivier vs. Bélanger.—On *opposition afin de distraire* on the ground that only bidders were the crier and bailiff. *Per curiam:* Sale must have been made or a new writ issued. The plaintiff had a right to bid either for himself or another, and the *saisi* had no right to complain if there are no bidders; he should have procured them. There is no necessity that there should be three, two, or more than one, if no friend appears. Opposition dismissed.

Stein vs. Seath.—Action for obstructing a navigable river. *Per curiam:* No person can obstruct a navigable river with impunity, and award plaintiff £50 for injury done his raft. The removal not ordered, as the obstruction became more properly the object of public prosecution, and that part of demand dismissed.

McKenzie and Quebec Bank.—Held that when a trader in business ceases, and his debts remain unpaid, this is a *faillite* which would exclude all preference. In Appeal, April, 1830.

Frost & al. and *Cameron* and *Gray & al.*, T. S.—On attachment by *saisie arrêt* of monies of the defendant in the hands of the *tiers saisis.* Judgment of the Court below reversed. The Court were of opinion that the delay was stipulated in favour of the *tiers saisis*, that they should not be held to pay what they owed to the respondent, until after six months' notice had been given to them, could not affect the rights of the respondent's creditors, who were entitled under their judgment to attach all the debts and property of their debtor, however held, or in whatever manner due. That here the money in the hands of the *tiers saisi* was a debt they owed to the respondent, the nature of which could not be varied by the delay allowed for the payment of it; and as all that the *tiers saisi* could demand was a six months' notice before they were bound to pay, the appellants here were entitled to obtain the money on giving that notice. In this there could be no injustice—a contrary principle might lead to it. In Appeal, April, 1830.

Montgomery & Price.—On declaration made by Alexander C. Montgomery, as Garnishee—which was contested in the Court below. Judgment of Court below affirmed. The Court were of opinion that the possession taken by the appellant of the debtor's property was a matter which might be brought into discussion by the contestation raised on the declaration made by the appellant in the Court below, and as this possession was in fraud of the creditors, that he was liable to pay to those creditors the full value of that property. That this value having been ascertained, and it appearing that the appellant had disposed of the goods as his own property, the Court had rightly directed that value to be paid by the appellant and to be secured for the benefit of the creditors. In Appeal, April, 1830.

Gerrard & Hays & al.—Action brought by residuary legatees of the late David David for £10,590 16s. 5d., amount of promissory note in his favour. The defendant Gerrard denied that the respondents were the legal representatives of the late David David. A trial by jury was asked and granted. In appeal. Mr. Justice Kerr said that on the first question, namely, whether this case should be submitted to a jury, the Court were unanimous that this was one of the cases that should go before a jury. The action was brought by persons who were the representatives of a merchant—based upon a promissory note given by one merchant to another. We must look to the con-

tract at its inception—it was evidently mercantile—and as to any questions of law that may arise during its investigation, the judge will direct the jury as to what is the law, or they may return a special verdict, and the point of law be reserved for argument. Chief Justice Sewell fully agreed as to this being a proper jury case; and repeated the same reasons urged by Mr. Justice Kerr on that subject. It would be very dangerous to refer the facts of any case to two different tribunals, because the Court might be of opinion *pro*, and the jury *contra*. That decision therefore must be confirmed. In Appeal, Nov. 1830.

Patterson vs. Usborne.—As far back as 1809, the premises in question, situated in Hope street, Quebec, were sold by Usborne to Patterson, and were described as 131 feet towards Hope street. It turned out, however, that there was only 100 feet front, but the back of the premises extended to 175 feet, and the lot contained even more than was intended to be conveyed. Finally, the deed of sale contained a full description of the boundaries on each side, beginning at one described spot, and going round to that spot again. Hence the present action in damages for the deficiency. Mr. Justice Bowen considered that the question was whether the deed of sale was a sale by measurement or not; if by measurement, natural guarantee of the original seller remained; here the bounds were not only described, but the measurement, to a single foot, was stated in the deed. . . . . This question has already been twice adjudged, and must be determined the same way now as then. Mr. Chief Justice Sewell said, that departure from a former judgment, if an erroneous one, was no impeachment of justice; in this instance he thought it could not be said that the Court had formerly done wrong. The sale could not be denied to be one by admeasurement, and no one who sells 100 feet as 131 feet, can be allowed to take money for that which he does not deliver. Judgment for plaintiff. In Appeal, 13th June. June term.*

Fraise vs. Harricker.—Action in damages for seduction. Sewell, C. J. It was with great reluctance the Court was called on to decide similar cases, and could not, in any way encourage or protect such connections as had been proved to exist in this instance. It was therefore impossible that anything could be given in the way of damages for seduction. A woman who submits to evil in the way of a kept mistress can claim none: damages for seduction in the first instance are always claimable, but a woman who consents to live in an unmarried state with a man, is entitled to none. It was quite different, however, with regard to the issue of such connection; the court was bound when called on, to interfere and protect them; to see that they were duly supported and taken care of, according to the circumstances of the parties. K. B., 7th June.*

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* N.B.—1830 or 1831.

Gibson vs. Heney.—Action for £96 10s. 8d. for goods sold and delivered to defendant's wife, 1829. Plea that they were bought without his authorization and knowledge and that the articles were of luxury and extravagance. At *enquête*, it appeared that Mrs. Heney was the daughter of the late Hon. Judge Foucher, and the wife of an Alderman of the City of Montreal—that articles of dress of similar description as those bought by Mrs. Heney, both as to quantity and quality, were worn by ladies in a society below that in which Mr. H. allowed his lady to move. That they lived happily together, and had entertained and were entertained by the Governor—that Mr. H. generally saw the articles worn by his lady, and especially a rich embroidered robe and thread lace trimming to receive the Governor at her house, and a satin slip and turban, with ostrich feathers, to attend his Levee. In the court below, K. B. reduced the account to £21 11s. 5d. and rejected 4-5th's of the account *as extravagant and luxurious.* In appeal, this judgment was confirmed, the appellants (milliners) being condemned to pay the costs of appeal, the court citing two cases from Dallas and 5 Taunton, p. 356; Bentley v. Griffin. July term. *

Symard vs. Lynch.—Judgment was this day rendered in this cause by the Chief Justice and Mr. Justice Pyke, maintaining the principle that application should be made of payments on account of principal and not on account of interest till after the principal was paid. J. Rolland, dissenting. 20th April, 1831.

Dunn vs. Campbell and Campbell.—Per curiam: Application of payments should be made on account of principal. Instructions sur les Conventions, 331; Poth. No. 544; Argou, 398, 399; Ord. 1667.

Parker vs. Richard.—P. C. Monies paid must be applied to the payment of the principal, when no application is made. Rep. v. *Imputation;* Argou: Denizart, N.; Pigeau, 608.

ONTARIO DECISIONS.

Pew vs. Lefferty.—A bequest was made to the son of the testatrix, payable on his attaining twenty-one, provided he continued a steady boy and remained in some respectable family until that time, with a bequest over if he did not do so. Without any reason being assigned therefor, the legatee enlisted and served as a private soldier in the army of the United States during the time hostilities were carried on against the then Confederate States.

Held: That the son by such conduct had not performed the condition upon which alone he was to be paid the legacy given by his mother's will.—U. C. C. C. (or Court of Chancery Reports) vol. xvi, p. 408.

Allan vs. Clarkson.—In 1869, C lent money to N, on an express agreement that it was to be secured by mortgage on certain property,

and on the 3rd July, following, the mortgage was given accordingly, and on the 2nd August the mortgagor became insolvent.

Held: That the morgage was valid. C. C., vol. xvii, p. 570.

Buchanan vs. Smith.—An insolvent compounded with his creditors and had his goods restored to him; he thereupon resumed his business with the knowledge of his assignees and creditors, and contracted new debts. It was subsequently discovered that he had been guilty of a fraud which avoided his discharge, whereupon he absconded, and an attachment was sued out against him by his subsequent creditors.

Held: That they were entitled to be paid out of his assets in priority to the former creditors.

In such a case the assignee, as representing the former creditors, was ordered to pay the costs of a suit brought by the subsequent creditors to enforce their rights. C. C., vol. xviii, p. 41.

Kirby vs. Hall.—In an action on a promissory note, by a subsequent holder, the only question raised by the plea was, whether or not, when he became the holder or received the note, the Plaintiff had complied with the Stamp Act by availing himself of the privilege of affixing the double stamps, the note having been formerly held to have been insufficiently stamped in the hands of a previous holder, who had, in consequence, failed to recover upon it.

The evidence, however, clearly shewed that when the note was received by the Plaintiff, which he swore it was in good faith and for value, he did affix the double stamps, which were also duly cancelled, *but that he was aware, when he took it, of the former difficulty about the stamps.*

Held: That the Defendant could not avail himself, under the pleadings of this fact, if a defence, but that, as the record stood, plaintiff came within the protection of sec. 9 of 27 & 28 Vic. chap. 4. U. C. C. P., vol. xxi, p. 377.

Royal Canadian Bank vs. Shaw et al.

Held: That the Plaintiffs, a banking institution, having stipulated for and retained, in discounting a note, interest at a larger rate than 7 per cent., were not entitled to avail themselves of the provisions of their Act of Incorporation (27 & 28 Vic., ch. 85, sec. 21), allowing them to charge the same rate after maturity that they had charged on discounting the note, supposing the original charge to have been not more than 7 per cent., which was *held* to be the meaning of the Act, and that therefore, the note bearing no rate of interest on its face, they were not entitled to more than 6 per cent. from its maturity. C. P., vol. xxi, p. 455.

Maunder vs. Royal Canadian Bank.—Plaintiff deposited with Defendants a sum of money and received from them the usual deposit receipts, stipulating for payment of interest provided the money remained not less than three months from date of deposit, and providing for fifteen day's notice to be given of its withdrawal, on which notice

interest was to cease. Subsequently Plaintiff signed his name thereto and delivered it to the endorsees. Before S. & Co. notified Defendants of the transfer to them, Plaintiff gave them notice that he revoked and countermanded it, but Defendants, notwithstanding, paid it over to S. & Co. on receiving an indemnity from them. Plaintiff subsequently made a formal demand upon Defendants for the money, which was not complied with.

Quære: In an action by Plaintiff against Defendants how far they were authorized to set up in answer, as a payment good in equity, that the deposit receipt had been transferred by Plaintiff to S. & Co., and that they had paid the amount to S. & Co. accordingly. C. P., vol. xxi, p. 492.

Munro vs. Cox.—Declaration on a note payable to G, or order. Plea *non fecit*. The note when produced was payable to G or order, "for the use of M."

Held: No variance, for it was declared on according to its legal effect.

There was also an equitable plea, setting out facts which, if true, shewed that M, was not entitled to the money, and alleging that the Plaintiff, the endorsee of G, took it with notice.

Held: That the fact of the note being expressed to be for the use of M, was no evidence of such notice, for this shewed only M's right as against G, whereas the plea was in denial of his right. U. C. Q. B. vol. xxx, p. 363.

Macklem & al. vs. Thorne & al.—Upon a sale of hides by weight, of specified qualities, according to inspection, *i. e.* "cured and inspected No. 1 hides" &c.

Held: That the weight was ascertained and marked by the Inspector, under 27–28 Vic., ch. 21, and 29–30, Vic. ch. 24, were binding upon the parties, in the absence of anything in the agreement to the contrary.

Held, also: That the seller must pay the Inspector's fees, the agreement not providing otherwise.

Held, also: That upon the evidence, set out in the case, the Defendants were acting as principals, not as agents for the Plaintiffs, the purchasers, and therefore could not charge commission. Q. B., vol. xxx, 464.

McInnes vs. Milton.—Where the Defendant signed, as maker, a printed form of a promissory note, and handed it to A, by whom it was filled up for $855, and the Plaintiffs afterwards became endorsers of it for value without notice.

Held: That the Defendant was liable, though it might have been fraudulently or improperly filled up or endorsed. Q. B., vol. xxx, p. 489.

The Royal Canadian Bank vs. Kerr.—A banking firm in Toronto, having become embarassed by gold operations in New York, applied

to the Plaintiffs to whom they owed $50,000, to advance them $15,000 more; and in order to obtain the advance, they offered to secure both debts by a mortgage on the real estate of one of the partners, worth $30,000. The Plaintiffs agreed, made the advance and obtained the mortgage. In less than three months afterwards the debtors became insolvent under the Act. They were indebted beyond their means of paying at the time of executing the mortgage, but they did not consider themselves so; nor were the mortgagees aware of it. The mortgage was not given from a desire to prefer the mortgagees over other creditors, but solely as a means of obtaining the advance which they thought would enable them to go on with their business and pay all their creditors.

Held: That as respects the antecedent debt, the mortgage was valid as against the assignee in insolvency. C. C., vol. xvii, p. 47.

The Queen vs. Pattee. A *scire facias* to set aside a patent at the instance of a private relator without the fiat of either the Attorney-General of the Dominion or of Ontario having been first obtained. Held: 1. That a fiat was necessary. 2. That the Attorney-General of Ontario was the proper authority to grant the fiat in such a case. Canada Law Journal, vol. 7, p. 71.

Clemens qui tam vs. Berner. Returns of convictions and fines for criminal offences being governed by the Dominion Statute, 32–33 Vic., cap. 31, sec. 76, and not by the Law Reform Act of 1868, are only requested to be made semi-annually to the General Sessions of the Peace. *Semble*, that the right to legislate upon this subject belongs to the Dominion Parliament, and is not conferred upon the Provincial Legislatures by the B. N. A. Act, 1867. (7 C. L. J. 73).

ENGLISH DECISIONS.

Bill of Lading.—B bought cotton for A, at his request, and B transmitted a bill of lading and invoice thereof to C, his correspondent. The invoice, a duplicate of which was sent to A, described the cotton as shipped "on account and risk of A." C sent A the bill of lading, with a bill of exchange unaccepted, but retained the bill of lading. C stopped the delivery of the cotton to A.

Held: That accepting the bill of exchange was a condition precedent to the right to hold the bill of lading, and that in this case the cotton remained the property of B.

Shepherd & Harrison. 5 L. R. H. L. 116; s. c. 4, L. R. Q. B. 196, 493.

Contempt.—By the Constitution Act for the Colony of Victoria, (The Imperial Statute 18 & 19 Vic. c. 55, s. 35, and the Colonial Act 20th Vict. No. 1) power is given to the Legislative Assembly of Vic-

toria to commit by a general warrant for contempt and breach of privilege of that Assembly.*

G. was declared, by the House of Assembly of Victoria, to have committed a contempt and breach of privilege, and, under the Speaker's Warrant, which was in general terms, without specifying any specific offence; G. was committed to gaol. G. was afterwards brought up by Habeas Corpus and discharged out of custody by the Chief Justice of the Supreme Court in the Colony, on the ground that the above Constitution Statute and Colonial Act did not confer upon the Legislative Assembly the same powers, privileges and immunities as are possessed by the House of Commons. On appeal *held* by the Judicial Committee:

First: That the Statute and Act gave to the Legislative Assembly the same powers and privileges as the House of Commons had at the time of the passing of the 18 & 19 Vic. c. 55, of committing for contempt.

Secondly: That, incident to those powers and privileges, there was vested in the Legislative Assembly the right of judging for itself what constituted a contempt, and of ordering the commitment to prison of persons adjudged by the House to have been guilty of a contempt and breach of privilege by a general warrant without setting forth the specific grounds of such commitment; and

Thirdly: That as G. had been guilty of a contempt and breach of the privileges of the Legislative Assemhly, and had been duly committed; therefore, the Supreme Court had no power to discharge him out of custody.

Special leave to appeal granted, on the ground that the question raised was one of public interest, involving the Constitutional rights of a Colonial Legislative Assembly. On reversing the order of the Court below, no costs were given, as the appeal was only allowed to decide the abstract question.

The Speaker of the Legislative Assembly of Victoria, Appelt., & Hugh Glass, Respdt. 3 L. R., P. C. 560.

CONTRACT.—A pianist engaged to play on a certain day, but was prevented by illness.

Held: That there was an implied condition in the contract that illness should excuse her.

Robinson vs. Davidson. 6 L. R. Ex. 269.

CRIMINAL LAW.—A woman living apart from her husband, and having custody of their infant child, left it at her husband's door,

* *See* for like power given to Senate and House of Commons of Canada, The British North America Act 1867 & 31 Vic. c. 23, s. 1 (Canada).

telling him she had done so. The husband allowed it to remain from 7 P.M. to 1 A.M.

Held: That the husband was guilty of wilfully abandoning and exposing the child.

Reg. vs. White. 1 L. R. C. C. 311.

The Defendant killed a number of rabbits, left them in bags in a ditch, in the grounds where killed, as a place of deposit, and subsequently returned and took them away.

Held: That the killing and taking away were one continuous act, and the Defendant was not guilty of larceny but felony.

Reg. vs. Townley. 1 L. R. C. C. 315.

A reduction to writing of an oral statement previously given under oath, is a deposition, though not itself sworn to.

Reg. vs. Fletcher. 1 L. R. C. C. 320.

DOMICILE.—A British subject domiciled in France, had two illegitimate children by a French woman, whom he afterward married, when the children were legitimated according to the law of France.

Held: That the status of the children in Englan was to be determined by the law of France.

Skottowe vs. Young. 11 L. R. Eq. 474.

RAILWAY.—Plaintiff took a ticket from Defendant, railway company, from A to C, at B, between A and C, said company's line joined the line of another company, over which the Defendants had, by Act of Parliament, running powers to C, on payment of tolls, the traffic arrangements being with the second company by said Act. Defendants train ran into a train of the other company, through negligence of the latter, and the Plaintiff was injured.

Held: That the Defendants were liable for such negligence. It seems the contract is that reasonable care shall be exercised by all by whom such care is necessary, for reasonably safe conveyance to the end of the journey.

Thomas vs. Rhymney Railway Co. 6 L. R. Q. B. 266, s. c. 5 L. R. Q. B., 226.

WILL.—Testator owning real estate in England and Scotland devised "all the rest, residue and remainder of my real estate situate in any part of the United Kingdom, or elsewhere," in trust for his two sons. The will was incompetent to pass the Scotch estate, which descended to the eldest son as heir.

Held: That the heir must elect, between the Scotch estate and the benefits under the will.

Orrell vs. Orrell. 6 L. R. Ch. 302.

AMERICAN DECISIONS.

Merchants' Bank vs. State Bank.—The Merchants' Bank of Boston bought certain gold, in certificates and coin, under a contract with M, by which M had a right to purchase of the bank the same amount on certain terms. After this, M. & S., cashier of the State Bank, came together to the Merchants' Bank, and said they had come for gold, S. saying that he would pay for it by certifying M's. checques. The gold was delivered to S. who wrote on two cheques drawn by M. on the State Bank, "Good," signed by himself as cashier, and gave them to the cashier of the Merchants' Bank, the next day. The president of the latter presented them for payment at the State Bank, when S. told him that the certificates had been there, but were not there now and that he would get the money and pay the checques. It was not shown what became of the gold. M. had no deposit in the State Bank, and it refused to pay the checques, denying its cashier's authority to certify them. Both banks were organized under the National Banking Act, and had the powers given by it; among others the power of buying gold. The by-laws of the State Bank made the cashier "responsible for the moneys, funds and other valuables of the bank," and required that all contracts, cheques, drafts, receipts, &c., and all indorsements necessary to be made by the bank, "should be signed by him or the president. The directors had not defined his duties more specifically, but it appeared that S. was intrusted by the directors with large powers, without a special delegation of authority; that an account was kept between him and the bank, which represented his transactions; that he gave cheques in lieu of bills, when discounts were made; gave cheques for the purchase of exchange, and for money borrowed of other banks, and had done so to a very large amount. A large number of cashiers from other banks in Boston testified that they exercised the same powers, and were authorised to borrow and lend the money of their banks, and to each other, and to pledge the credit of their banks; and that these transactions were uniformly conducted on the faith of the cashier's implied powers. There was no proof that either S. or any of them had ever certified cheques or purchased gold; the Supreme Court of Massachusetts having decided that a teller could not certify cheques.

Held: 1. That if the certificates and the gold actually went into the State Bank, the bank was liable for money had and received, whatever defect there may have been in the cashier's authority to buy them. 2. If they did not, it was a question for the jury upon the evidence as to the powers exercised by him and the usage of the other banks, whether his power to bind the bank by his contract might not fairly be inferred, applying the rule that where an innocent party deals with a corporation, unaware of any defect in its agent's authority, and there being nothing to excite suspicion, if the contract can in fact be valid under any circumstances, the party has a right

to presume their existence, and the corporation is estopped to deny it. 3. That a bank can certify that a cheque is good, such certificate being equivalent to an acceptance. 4. That the cashier has authority to certify a cheque by virtue of his office. 5. That the question whether S. had authority to buy the gold was a question for the jury, on the evidence and principles above given. Clifford & Davis, JJ. dissenting. U. S. S. C. Rep. 10, Wallace, 604.

Luellen vs. Hare.—The defendants signed a blank form for a bill of exchange as drawers, and delivered it to W. for his accommodation. Without their knowledge, W. filled it up as a promissory note payable to the plaintiff's order, and gave it to him.

Held: That the alteration discharged the defendants from liability. 32 Ind. 211.

Kember vs. Southern Express Co.—The defendant, a common carrier, received from the plaintiff a package of gold, with full knowledge of its contents, and gave a receipt with the printed condition, "if the value of the property is not stated by the shipper at the time of shipment, and specified in the receipt, the holder thereof will not demand of the company a sum exceeding fifty dollars" for loss or damage. The charges were to be paid by the consignee. The property was lost, and the defendant claimed that it was not liable for more than fifty dollars, because the value was not specified in the receipt.

Held: That this was no defence. 22 La. Ann. 158.

Rainey vs. Lang.—A testator bequeathed a large amount of money to a religious corporation whose charter provided that it should not "take and hold" property yielding an annual income of more than $10,000. At the date of his death the annual income of the corporation far exceeded that amount. His heirs-at-law claimed that the bequest was void.

Held: That the corporation could take, and it was a question for the State whether it should be allowed to hold. 58 Barb. 453.

Terry vs. McNeil.—The report of prices-current, printed for public information in a newspaper is admissible in evidence to show the price of grain in the market at the date of publication. 58 Barb. 241.

Goodrich v. Weston.—A copy, sworn to be correctly made from a press copy, of a letter, is admissible as secondary evidence to prove its contents, without producing the press copy. 102 Mass. 362.

Rees vs. Jackson.—After fruitless search for an original telegram, the copy received by the person to whom it was sent is evidence with the record of the receipt of such a telegram at the office. 64 Pa. 486.

Spooner vs. Holmes.—Certain coupons of United States bonds were stolen from the plaintiff and delivered to the defendant by one who received them from the thief, and by him sold and turned into money,

which he paid to the person of whom he received them. It appeared that the defendant acted only as this person's agent, without personally deriving any benefit from his acts; that he received the coupons without knowing, and without gross negligence in not knowing that they had been stolen; and that the plaintiff had never demanded them or their proceeds of him.

Held: That he was not liable for their conversion. 102 Mass. 503.

French vs. Vining.—The defendant having a lot of hay on which he knew that white lead had been spilt, tried to separate the damaged hay from the rest, and thought that he had succeeded. From what was left he sold to the plaintiff a quantity, knowing that it was bought as food for a cow, which on eating it sickened and died, from the effects of lead that still remained on it.

Held: That the plaintiff could recover the value of the cow. 102 Mass. 132.

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