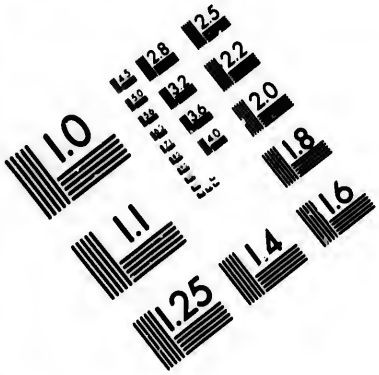

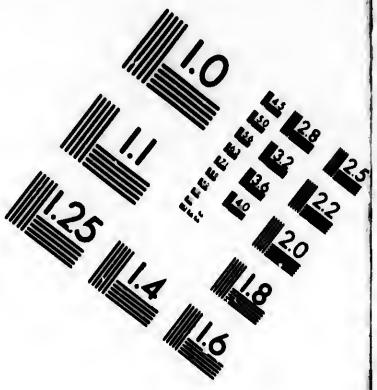

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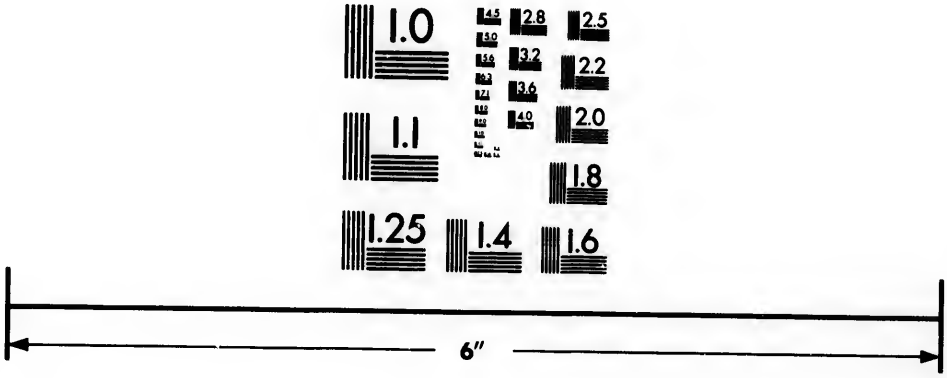

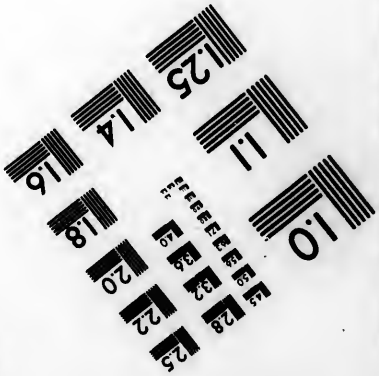

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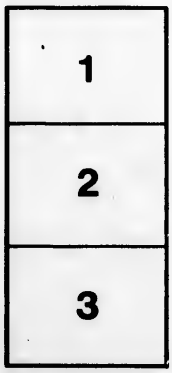

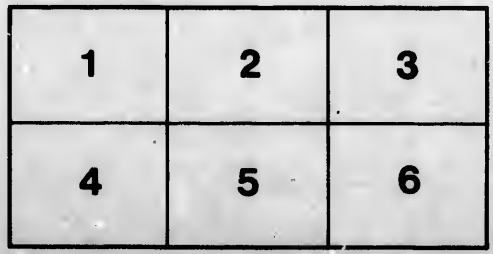

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AN INQUIRY

INTO

THE MEANING

AND

EXTENT OF OPERATION

OF THE

10th Sec. of the 2d Cap.

OF

THE ORDINANCE OF 1785.

BY AN ADVOCATE,

M. M. L. L. A.

L. Fisher Esq 2. C.

MONTREAL:

PRINTED AT THE MONTREAL HERALD AND
NEW MONTREAL GAZETTE OFFICE.

1829.

TO THE PRESIDENT, OFFICERS AND MEMBERS OF THE MONTREAL LAW LIBRARY ASSOCIATION.

GENTLEMEN,

The Author of the following observations, or rather the Compiler of them, (for they are all taken from authority,) submits them to the legal criticism of your learned body. The remarks which compose this little Essay, cannot, in themselves, be the subject of praise or censure, as respects the Writer, since they have repeatedly been made by law authors of the very highest character. The only question with regard to him, will be, as to the application of them to the question which he has undertaken to agitate. If it should appear that his observations are altogether foreign to the matter in discussion, they

will justly incur the severe reproach : *vox et præterea nihil.* If, on the other hand, you should see that they have some legitimate bearing on the point examined, your learning and your candour are sufficient pledges that you will do justice to an attempt which, at all events is well meant, though its execution is undoubtedly deficient.

MONTREAL, 2d December, 1829.

AN INQUIRY, &c.

It has been decided by the Court of King's Bench at Montreal, that the introduction of the English Rules of Evidence in Commercial Cases, has operated the absolute exclusion of evidence formerly admissable under the law of France.

For example—to instance a particular case—according to the law of France, the books of account of a trader were received in mercantile cases, sometimes as full proof, and at others as a semi-proof, which, when supported by favourable circumstances, and especially when sustained by the oath which it was competent to the Court to order to be taken, was sufficient to maintain an action, or to establish a defence. The law of England, on the principle that no man shall make evidence for himself, does not admit that any proof shall, in any instance, result from the books of a party. And, on this reasoning, the case alluded to was decided.

Notwithstanding my feelings of respect for the learned men who pronounced this judgment, it seems to me, for the reasons which I shall hereafter detail, that the decision in question is unwarranted by the ordinance involved to support it. I mean the Ordinance of 1785.

The words of the 10th section of the 2d chapter of that law are these :—" In proof of all facts " concerning commercial matters, recourse shall " be had, in all the Courts of Civil Jurisdiction " in this Province, to the rules of evidence laid " down by the laws of England."

Now, to authorize the putting of an exclusive construction on this clause, it is incumbent on the advocates of such a construction to establish, that it contains an express negation ; or, at the least, a negative by implication. That it has no words in it which convey to the mind the idea of an express negation, needs not, I apprehend, to be proved. It is necessary, therefore, to inquire, whether the Legislature *intended* something more than it thought fit to express ; or, in other words, it remains to be ascertained, whether the clause has in it any phrase which will warrant the opinion contended for on a supposed implied negative. The word *all*, which occurs twice in the enactment in question, is the only expression which can, in the most remote degree, be made to sustain the supposition of an

implied negative. But, it is to observed, that this word has no possible relation to the word *proof.* It qualifies facts and Courts—and the rules of construction of the English language forbid us, for an instant, to believe, that the word *proof* can be at all affected by an adjective, which, from its place in the sentence, manifestly refers to other words. And certainly, because the ordinance intended to admit the English rules of evidence in proof of *all* facts of a particular kind, it does not follow, as a legitimate consequence, that no other species of evidence is to be received.—If the word proof had been preceded by the words *all* or *sole,* no doubt could ever have been entertained with respect to the operation of the clause. But that is not the case—and in the absence of all negative phrase, the law of 1785 is *simply affirmative.* This much I hope will be readily conceded, for it would be most idle and preposterous to be built on a foundation incapable of sustaining the superstructure which it is intended to support.

To proceed :—The ordinance in question was passed, as its preamble witnesses, for the *ease and conveniency* of the subject. According to the law previously in force, relations could not be witnesses for or against each other—nor was proof by witnesses easily allowed. These were some of the mischiefs of the old law. The pro-

hibitory principles of Jurisprudence in these respects, were extremely inconvenient to the commercial classes of the community; and it was seen to be necessary to get rid of restrictions so unfavourable to the prosperity of trade. The ordinance, therefore, in its nature *enlarging* and *remedial*, for the ease and conveniency of the subject, extended only (as I contend) the facilities of proof, by opening additional sources of testimony, but without intending, in any particular, to seal up those then resorted to.

The spirit and meaning here ascribed to the ordinance may, I respectfully conceive, be most fully justified by arguments founded on authorities, numerous and respectable. The Legislature itself has not been silent on a point of so much importance. And the application of the English rules of statutory interpretation, is most clear and pointed.

To establish this, let us inquire, in the first place, by virtue of what law it was that in France a party's books (taking the instance before cited) were admitted as proof in mercantile cases. Was this done by virtue of the common law, or under the authority of some ordinance? The common law of a country I understand to be made up of those principles of Jurisprudence and those practices of the Courts, which have long been recognized to be just and correct, on account of

their inherent truth and propriety, and which enjoy authority without the sanction of any legislative enactment. If I am correct so far, I will be so bold as to assert that the books of a party were so received as evidence by the *common law* of France. Because, they had often been received in evidence long prior to the ordinance of 1673; and that ordinance is the first that makes mention of books of account *quoad* evidence in ordinary cases.—It may be said that this species of evidence was admissable in the Consular Jurisdictions only—and that the Courts in Canada, not having these jurisdictions, are not at liberty to adopt their usages. This answer carries us back to the establishment of the *Juges Consuls*, and to the state of the law of France, as to mercantile cases, previous to the erection of the Consular Jurisdiction. Now, previous to the year 1549, when Francis the First originated this commercial tribunal, the books of a party, in conformity to the principles of the Roman law, were considered, in the *ordinary* Courts of Justice in France, as being admissable proof in mercantile cases. (1) This is clearly established by Dumoulin, who, in commenting on the law, 3, *de reb. cred.*, says:—*Rationes ejus quamvis non plenam probationem, nec omnino semiplenam inducant, tamen adferunt aliquam præsumptionem, ex qua possit ei deferri Juramentum, ita ut per se ra-*

tiones probant. So that the books verified by the oath of the party were sufficient proof in any Court of Justice. M. Pothier too, in his Treatise on Obligations, No. 753, elucidates and confirms the doctrine there laid down; and, what is very material to this discussion, he observes that the books are considered to be entitled to some credit, though not to make full proof, in cases where a *marchand* is suing a *particulier*—that is, a person who is not a *merchant*, for articles which he may have sold to him. Now, it is important to observe, that such an action would not have been a subject matter of the Consular Jurisdiction. (2) It is plain, therefore, that what Dumoulin and Pothier have said was applicable to the Courts of ordinary Jurisdiction, and has, in those passages of their works where it occurs, no reference whatsoever to the Consular Courts. The sentiments, therefore, of these authors, prove beyond the possibility of doubt, *that the books of a trader were, by the common law of France, admissable evidence in a mercantile case, even in the ordinary Courts.* (3)

Now, the common law of France, as it stood at the time of its introduction to this Province, is as much the common law of Lower Canada, as the common law of England is her common law. By the law of nations, the French, when they took possession of this country, virtually brought the

common law of their Nation with them. There needed no ordinance to establish it here. It came into full existence (if not into full operation) the moment they leaped upon our shores, taking possession of them for their fellow-countrymen and their King. That it still remains our common law, is notorious. The learned Chief Justice of the Province, in his decision of the case of Poyer —Meiklejohn (4), repeatedly mentions the common law; that is, said the learned judge, the law which was in force at the Conquest. As to the effect, therefore, which statutory enactments may have on any part of it, or the changes which they may work in it, we must unquestionably have recourse to those rules of interpretation which have been established by the luminaries of the law as fit to be observed in the construction of legislative acts. These very rules have themselves acquired the binding force of law; and if we reject their guidance, we are as much guilty of a breach of the law as if we had infringed a positive statute.

Taking it, therefore, for granted, that the interpretation of the words and intentions of lawmakers must be by principles as immutable and as obligatory as the laws themselves, I observe that it is a rule of the strictest inflexibility in this respect, that a statute in *merely affirmative* terms, does not take away the common law (5):

on the contrary, it has been repeatedly held that remedies given by statute are *cumulative* to those at common law. (6) The common law has always been esteemed to be a thing of too much solemnity to be frittered away by mere implication: and to this purpose spoke the learned Chief Justice of this District, in a decision which he pronounced (in a cause of which I forget the title,) on the 13th October, 1828. The point in contest was the right of a Canadian to have his writ in his own language; and, indeed, to suppose that a beneficial part of the common law is abolished, simply because it is not expressly stated to be retained, is to do violence to all those inferences of probability on which men are sometimes obliged to form their opinions. In fact, if the Legislature, on giving a new remedy, intend to take away the old, it can do so; at least it might have done so with respect to the clause in question, by the addition of *four simple words*. For instance, after stating that recourse shall be had to the rules laid down by the laws of England, it might have subjoined, *and to no others*. This would have disposed of the common law at once. And if the Legislature had, in truth, entertained the idea imputed to it, surely that personification of wisdom would not have neglected a method at once so obvious and so easy of demonstrating its intention.

Further to establish this, it may be remarked that there are numerous authorities to shew that nothing less than an express negative has strength sufficient to destroy the common law. The effect of implied negatives being permitted in the cases only of former statutes.

On the whole of this question, let us hear the sentiments of the learned Blackstone (7): "Where the common law" says he, "and a sta-"tute differ, the common law gives place to the "statute, and an old statute gives place to a new "one. But this is to be understood only when "the latter statute is couched in negative terms, "or where its matter is so clearly repugnant, that "it necessarily implies a negative." And among other examples which he gives in illustration of this doctrine, he places the following: "If by "a former law an offence be indictable at the "Quarter Sessions, and the latter law make the "same offence indictable at the Assizes: here "the jurisdiction of the Sessions is not taken "away, but both have a concurrent jurisdiction, "and the offender may be prosecuted at either; "unless the new statute subjoin express nega-"tive words, as, that the offence shall be indicta-"ble at the Assizes, *and not elsewhere*."

I cite this passage at length from the learned Commentator, because it seems to me to be very strongly in point, since the clause he is there

speaking of appears to have been framed with exactly the same quantity of negation that the 10th section of the ordinance contains. That is, no more than can result from the mention of one thing apart from another.

Another authority very conclusive on the same point, is to be found in Viner (8): and in order that the reader may see its value without the trouble of reference, it will be proper to give it a place here: "It is enacted," says he, "by the "42d Ed. III. cap. 2, that pannel in assize shall "be arraigned four days before the day of as- "size; yet, if there are two days before the day "of assize, this suffices, *for when a statute is in* "*merely affirmative terms, (as here)* this does not "tell the common law."—Very many authorities of a similar purport may be found by turning to Viner, at the letter here cited.

When, in addition to these authorities, we come to consider the nature, and the manifest meaning, of the Provincial Statute of the 41st Geo. III. cap. 15, I confess I know not what arguments can remain to those who contend for the total abrogation of the French Rules of Evidence in commercial cases. The statute last cited sets forth that—whereas it has been doubted, whether in commercial cases the decisory oath can be admitted as in other civil matters, *since the English rules of evidence are followed*;

and in order to *set aside all doubt*, it enacts that the Courts shall admit the *serment decisoire in commercial as well as in other cases.* What species of enactment is this? Most lawyers will, I presume, agree that this is a declaratory law. Here it becomes material to define distinctly the meaning of a law of this nature. In Tomlins, (9) it is stated to be an act by which the Parliament, where the old custom of the Kingdom is almost fallen into disuse, or become disputable, has thought proper, *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is, and ever hath been.—Thus the statute of treasons, 25 Ed. III., doth not make any new species of treasons, but only for the benefit of the subject, declares and enumerates those several kinds of offence which *before* were treasons at the *common law.* So the Provincial Statute, 41st George III., doth not introduce any new species of evidence, but, for the benefit of the subject, declares that the *serment decisoire is, and ever hath been,* a legal mode of procuring evidence. In other words, it has most explicitly declared that the *serment decisoire* never was affected by the 10th section of the ordinance of 1785. Now, it is clear that the decisory oath was a part of the common law of France ; and as the Legislature hath declared, is now and ever hath been a part of the

common law of Lower Canada. We have, therefore, the opinion of the Legislature against that of the Judges. Because, if the 10th section of the ordinance of 1785 had abolished any of the common law French rules of evidence, it abolished the whole of them ; and the decisory oath (which no one will deny to be a mode of proof,) must have been annihilated in the general destruction which is supposed to have overwhelmed the French commercial code of evidence, as it existed previous to the erection of the Consular Jurisdiction. On the other hand, if there be any species of evidence that remains unaffected by the clause introductive of the English rules, every other species must also remain untouched, because the enactment in question, worded as it is, must operate generally, or not operate at all.

Another ground of argument against the putting of an exclusive construction on the ordinance of 1785, is to be derived from the practice of the Courts with respect to *faits et articles*. It is well known to every man who frequents our tribunals, that parties in commercial, as well as in other cases, are every day ordered to answer on these interrogatories. Either, therefore, the ordinance has not the exclusive meaning attached to it, or the Judges, in this particular, exercise, daily, a power which is not vested in them. Is it not, in the highest degree, incon-

sistent to assert, that the French code of evidence is totally abolished, and, at the same time, without the authority of an Act of Parliament, to authorize modes of proceeding unknown to that system by which it is supposed to be superseded? Surely there is something most anomalous in this. It may be said, that in England a party may obtain an answer in Chancery which he may use as evidence in an action at law: and by analogy to this proceeding, it may be contended that the Courts here have a power to compel a party to testify against himself. But, with much deference I say it, this is hardly an answer. At most, it proves too little; and, indeed, I doubt if it prove any thing at all. In the first place, it may be inquired, if it be understood that the Judges in the Colonies possess the powers of the Lord Chancellor. And, in the second place, supposing that they do so, I observe, that an answer in Chancery is only *one* mode of obtaining evidence, whereas the decisory oath and *faits et articles* are *two*, totally distinct and governed by principles altogether inconsistent. So that, admitting the Judges here to hold a Chancery jurisdiction, it is plain that their power, whencesoever derived, exceeds, in this particular, that of the Lord Chancellor, and cannot, therefore, be justified by an analogy which, in point of fact, does not exist.

In the case of Oakley vs. Morrogh (10), which

was a mercantile case, the point respecting the admissability of *faits et articles* was discussed; and it was upon the argument which I have cited above, that one of the most eminent Advocates in the Province urged their legality. It is much to be regretted, that the question remained undecided, as the judgment of the learned Chief Justice would, most probably, have settled the law in this respect on a foundation less questionable than the one on which it now rests.

Another decided cause which tends to shew the inconsistency of supposing that the French rules of evidence are altogether excluded is, that of Gamelin vs. Badgley, where the action was for goods sold by one merchant to another—and in which it was ruled, that the statute of limitation was rightly pleaded: but, at the same time, it was held, that the defendant, in order to make his exception effectual, should have tendered his oath that he had paid for the goods. In England this plea would have been a complete bar to the action (12); and the oath required by the Court here, would have been altogether out of the question. The plea would have succeeded if its allegations were true. Such an oath, indeed, as the one held to be necessary in the case of Gamelin, is totally unknown to the English law. The learned Judges, therefore, in requiring it, must have proceeded on the principles of the French law. Now, if the French rules

had been abolished, by what reasoning can it be shewn that the Courts were still at liberty to enforce them?

All these anomalies which I have detailed, are, I humbly submit, the offspring of a departure from the plain and simple rules of interpretation which are prescribed for the construction of laws. The tenth section of the ordinance is unquestionably, an enlarging and a remedial enactment. Its object clearly was to take off restrictions, not to impose them; but, if the decision of the Court, with respect to books of account be correct, the clause in question must, in the very face of the preamble of the law, be considered a *restraining* enactment.

For these reasons, I humbly conceive that the theory which I have the honour to submit, is the only one under which any *meaning at all*, can be ascribed to the 41st George III., and the only one according to which the decisions of the Courts, with respect to *faits et articles* and the statute of limitation, can be maintained or rendered intelligible. The other theory, which enjoys the sanction of the Court at Montreal, surpasses, I confess, the limits of my comprehension. And although with a solemn precedent to the contrary, I hardly dare to hold my own opinion to be right; yet, after attempts repeated without success, I have ceased to labour to persuade myself that it is erroneous.

AUTHORITIES CITED IN THE FOREGOING PAGES.

(1) Toubeau Instit. du Droit Consulaire—liv. II, tit. II, cap 4.
Repert. Verbo Consul.—4 vol., p. 564.

(2) Repert.—same word, same vol., p. 560.
Lange—1 vol. p. 104 ; and vide *Arrêt*, there cited.

(3) Grand. Comment. Cout. de Paris—art. 127, 2 vol., p. 533, 1st column.

(4) Cases argued and determined at Quebec.

(5) Comyn's Digest.—word Parliament, R. 23.
Viner's Abridgment—verbo Statute, E. 6, No. 2.
Bacon's Abridgment—verbo Stat.
Shepherd's Epitome—same word.

(6) 1 Term Reports, p. 103, 7 same, p. 620.

(7) Blackstone's Comment.—1 vol., p. 89.

(8) Viner's Abridgment—verbo Stat., E. 6, No. 2.

(9) Tomlin's Law Dict.—2d vol., verbo Statute.

(10) Cases argued and determined at Quebec.

(11) Gamelin-Badgley.

(12) Blanshard on Limitation.