The Legal News.

Vol. VI. NOVEMBER 3, 1883. No. 44.

CIVIL RIGHTS IN THE UNITED STATES.

The Supreme Court of the United States, on Monday, Oct. 22, delivered judgment, by a majority of eight to one, on an important question of civil rights. The following is a summary of the points held by the Court:—

First—That Congress had no constitutional authority to pass the sections in question under either the thirteenth or fourteenth amendment to the constitution.

Second—That the fourteenth amendment is prohibitory upon the states only, and that legislation authorized to be adopted by Congress for enforcing that amendment is not direct legislation on matters respecting which states are prohibited from making or enforcing certain laws, or ordaining certain acts, but is corrective legislation, necessary or proper for counteracting or redressing the effect of such laws or acts; that in forbidding the states, for example, to deprive any person of life, liberty or property without due process of law, and giving Congress power to enforce the prohibition, it was not intended to give Congress the power to provide for due process of law for the protection of life, liberty and property, (which would embrace almost all subjects of legislation), but to provide modes of redress for counteracting the operation and effect of State laws obnoxious to the prohibition.

Third—That the thirteenth amendment gives no power to Congress to pass the sections referred to, because that amendment relates only to slavery and involuntary servitude, which it abolishes and gives Congress power to pass laws for its enforcement; that this power only extends to the subject-matter of the amendment itself, namely, slavery and involuntary servitude and necessary incidents and consequences of these conditions; that it has nothing to do with different races or colors, but only refers to slavery, the legal equality of different races and classes of citizens being provided for in the fourteenth amendment, which prohibits States from doing anything to interfere with such equality; that it is not an infringement of the thirteenth amendment to refuse to any person equal accommodations and privileges in an inn or place of public entertainment, however it may be violative of his legal rights; that it imposes upon him no badge of slavery or involuntary servitude, which imply some sort of subjection of one person to another, and the incapacity incident thereto, such as inability to hold property, to make contracts, to be parties in court, etc., and that if the original civil rights act, which abolished these incapacities, might be supported by the thirteenth amendment, it does not, therefore, follow that the act of 1875 can be supported by it.

Fourth—That this decision affects only the validity of the law in states and not in territories or in the District of Columbia, where the legislative power of Congress is unlimited; and it does not undertake to decide what Congress might or might not do under the power to regulate commerce with foreign nations, and among the several states, the law not being drawn with any such view.

Fifth—That, therefore, it is the opinion of the Court that the first and second sections of the act of Congress of March 1, 1875, entitled, "An act to protect all citizens in their civil and legal rights," are unconstitutional and void, and judgment should be rendered upon the indictments accordingly.

REFUSING A VERDICT.

We noticed lately a case, in British Columbia, in which the jury acquitted the prisoner in spite of the presiding Chief Justice's direction. We now find another case which was tried at Toronto on Friday, October 26, before Mr. Justice Galt, in which the jury wished to convict of murder, notwithstanding the Judge's instruction that the charge of murder had not been established. It was the case of Charles Andrews, indicted for the murder of one Moroney. It appeared that in a scuffle Andrews fired a shot which took fatal effect upon Moroney, but there was nothing to indicate premeditation. The jury, after being absent about an hour and a quarter returned with a verdict of "guilty of wilful murder," with a recommendation to mercy. We take from the *Mail* the following account of what ensued:—

There was complete silence in the court room, which was broken by his Lordship saying:—

"I wish you would reconsider that a little, gentlemen. Have you taken into consideration the assault made on that man (prisoner) before the affair?"

The Foreman—That is where the recommendation to mercy comes in, my Lord.

The Judge—I wish you would retire and reconsider the thing.

Mr. Britton, (the Crown Prosecutor)—No, my Lord, I submit that the evidence warrants their finding.

The Judge—No, no.

A Juryman—There appears to be a slight difference

of opinion among us with regard to the weight that attaches to malice aforethought.

The JUDGE—That is the whole crime, gentlemen.

The same JURYMAN—There are quite a number of us who are of opinion that there could be no malice in the matter. We were all agreed on that point as far as regarded malice, but we considered that the evidence entitled us to bring in this verdict.

The JUDGE—That won't do, gentlemen. You must retire and reconsider the verdict. The law says if a person designedly uses a weapon which is calculated to take life, that would be murder; but the law also says this: That when two persons are fighting together, and one of them uses a weapon by which the life of the other is forfeited—unless one of them did it premeditatedly, and not on the spur of the moment—he would be guilty of manslaughter, and not murder. You had better retire, gentlemen, I could not accept that verdict.

The jury again retired, but were immediately recalled, and his Lordship said that if their recommendation was based on the point that they doubted whether or not there was malice, they should bring in a verdict of manslaughter. If they persisted in the verdict of wilful murder he would be compelled not to accept it, but would consult his brother Judges regarding it.

After being absent half an hour the jury returned with a verdict of "Manslaughter."

THE GOVERNOR GENERAL.

An *Extra* of the *Canada Gazette*, of date Oct. 23, says:—

On this day, at nine o'clock in the forenoon, His Excellency the Most Honourable Henry Charles Keith Petty-Fitzmaurice, Marquis of Lansdowne, in the County of Somerset, Earl of Wycombe, in the County of Bucks, Viscount Caln and Calnstone in the County of Wilts, and Lord Wycombe, Baron of Chipping Wycombe in the County of Bucks, in the Peerage of Great Britain; Earl of Kerry and Earl of Shelburne, Viscount Clanmaurice and Fitzmaurice, Baron of Kerry, Lixnaw, and Dunkerron, in the Peerage of Ireland, proceeded to the Chamber of the House of Assembly, of the Province of Quebec, in the City of Quebec.

His Excellency having been by Commission under the Royal Sign Manual and Signet, dated at *Osborne House*, Isle of Wight, on the 18th day of August last, constituted and appointed by Her Majesty, Governor General in and over Her Dominion of Canada, took the prescribed oaths before the Honourable Sir William Johnston Ritchie, Knight, Chief Justice of the Supreme Court of Canada, a Court of Record of Her Majesty in Canada, by whom they were tendered and administered to His Excellency.

The same *Extra* contains the following appointments by His Excellency:—

Major the Viscount Melgund, to be Secretary and Military Secretary to the Governor General of Canada.

Lieutenant Henry Streatfield, Grenadier Guards, to be Aide-de-Camp.

Lieutenant, the Honourable Henry James Anson, Highland Light Infantry, to be Aide-de-Camp.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, October 31, 1883.

Before JOHNSON, J.

LAWRENCE v. RYAN.

Goods seized by Customs Officers—Notice of Claim—40 Vic. c. 10, s. 111.

Where goods are seized by the Customs authorities, and the owners wish to claim them, notice in writing of claim must be given within one month from the day of seizure.

PER CURIAM. The defendant is collector of customs at this port, and the plaintiff sues him as such, giving the month's notice of action required in cases against public officers.

The declaration avers that about the 28th of December last two books, one being the philosophical works of Voltaire and the other Paine's "Age of Reason," were entered in the Custom House as the plaintiff's property, and for the purpose of allowing the defendant to levy on them such duty as the law directs. That the defendant illegally refused to deliver them, though the proper Customs duties were duly offered, and that he still illegally keeps them. Then, there is an allegation that the defendant has injured the plaintiff in the eyes of the public by creating an impression that he was importing immoral and indecent books, and has thereby caused him damage to the extent of $102. That the books in question are not immoral or indecent; and the conclusion is that "the said defendant be adjudged and condemned to deliver to the plaintiff the said two books within fifteen days from the date of the judgment, upon payment and tender by the plaintiff of the dues and Customs duties on the same, and that the defendant be also condemned to pay a sum of fifty dollars to plaintiff, for the illegal detention of the said books, and for damages suffered as aforesaid; and that in default of the said defendant delivering over said books within said delay, he be condemned to pay and satisfy unto plaintiff the sum of one hundred and two dollars, with interest and costs."

There is confusion in this declaration. First, it says that the plaintiff has suffered $102 damages by being supposed, in consequence of the defendant's illegal conduct, to have imported

indecent books. If that had stood alone, and those damages for injury to character merely had been prayed in the conclusion, the Court would of course have known how to deal with the case: the action would then have been one for injury to character by certain means alleged, and nothing more; but I have to deal not so much with what a party says—though, of course, that is always important—as with what he asks, for that is what we have to grant or to refuse according to the facts and to the law in the particular case. Now what he asks here in the prayer or conclusion of his declaration is that the books should be delivered to him, and also that a sum of fifty dollars should be paid to him for their illegal detention—a sum not giving jurisdiction here—and no value being put upon the books themselves; and then he asks that the defendant, in default of restoring the books, should be made to pay $102 damages; so that it is certain that the books themselves are claimed by the action, although their pecuniary value has been omitted to be claimed ; and the only damages asked within the jurisdiction of this Court are undoubtedly prayed as the alternative for the books themselves not being restored.

The defendant pleaded, 1st, a demurrer, which was dismissed, 2ndly, he pleaded by exception, that he had seized and taken the books on the 28th December, as forfeited, under the Customs laws, and the plaintiff never gave any notice in writing to the defendant, the seizing officer or other chief officer of Customs, within one month from the day of seizure as required by law, that he claimed, or intended to claim them; whereby they became condemned absolutely, and without suit or proceeding of any kind, at the expiration of one month from their seizure. A third plea set up the insufficiency of the notice of action, and also a variance between the grounds stated in the action and those stated in the notice. The fourth plea was that no regular or lawful entry of these goods had ever been made; that the duty chargeable on them was 15 per cent, *ad valorem*, and was never even offered, and consequently they were taken to the warehouse, and kept at the risk and charge of the owner, and no entry having been made of them within one month they became subject to be sold. By his fifth plea the defendant alleged that these books were of an immoral and indecent character, and were prohibited by law from being imported into this Province, and were lawfully detained, and became forfeited without process.

There were, therefore, several questions put before the Court; 1st, the demurrer having been disposed of, the same point was more properly raised by the first exception, viz., that the books being detained and seized as prohibited, became forfeited and condemned without suit, in the absence of a notice of claim within a month, under the one hundred and eleventh section of the Customs Act (40 Vic., c. 10).

I say nothing now as to whether the demurrer ought to have been dismissed or not. I have merely to deal with the exception, and I am quite clear that, whether the point, depending as it did upon allegations of fact, (and that would appear to have been the ground of the decision) was cognizable under a demurrer or not, it must be passed upon now, for this exception alleges as matter of fact that the books were detained as forfeited, and there was no notice of claim given. The words of the 111th section are, "All vessels, vehicles, goods and other things seized as forfeited under this act or any other law relating to Customs, or to trade or navigation, shall be placed in the custody of the nearest collector, and shall be deemed and taken to be condemned, without suit, information or proceedings of any kind, and may be sold," &c. &c., &c., "unless the person from whom they were seized, or the owner thereof, or some person on his behalf do, within one month from the day of seizure, give notice in writing to the seizing officer, or other chief officer of the Customs at the nearest port, that he claims or intends to claim the same; and the burden of proof that such notice was duly given in any case shall always lie upon such owner." Therefore this exception will be well founded, if these facts are true—viz., that there was a seizure, and a condemnation without any necessity of process, and if there has been no notice of claim—which the plaintiff has to show the giving of. Now both of these facts are incontestable. The proof is that no entry was ever made, because the examining officer took the books at once to the collector who refused to allow them to be entered, and ordered them to be detained, as clearly appears by the evidence of Mr. O'Hara. The provision of law which the defendant in-

vokes is a very old one in the Customs laws, and I have always seen it acted upon, and I particularly asked the defendant's counsel at the hearing whether he insisted upon it, and his explicit answer was that his instructions did not allow him to do otherwise. Therefore there has been some time spent in vain upon a discussion which took a very wide range under the pretensions set up by the fifth plea, and on which I am not now permitted to enter; and my duty is to dismiss the action under the defendant's first exception. This may be somewhat disappointing; but it cannot, of course, be a surprise. I am aware that the learned counsel for the defendant accompanied his statement that he insisted on his exception by expressing a hope that I might reach the merits. This either meant that he might see his way to withdraw his pretensions under the exception, or it did not. The exception has not been withdrawn; but it remains, and, of course, must be decided. I have fully considered all that the plaintiff's counsel said, both at the hearing and in his factum since sent up; but he will, I think, see at once that the notice of action is quite a different thing from what is required by the 111th section. The first is required by law in all cases as a protection to public officers acting as such. The second is peculiar to the laws of the Customs, and makes seizures of this sort final, without suit or process of any kind, unless the claimant of the goods gives notice in writing within one month from the date of seizure, as a prerequisite to his right of action; nor, on any other ground that I can see, can the notice of action be possibly confounded with the notice of claim under section 111, for the latter notice must be given within a month, and the notice of action here was only given long afterwards. The only way of getting over the omission to give the notice of claim would have been for the collector to consent to a bond under the subsection 2 of 111. It cannot be doubted, after reading the statute, that the officer of Customs has power—a very extensive, but probably a necessary power—to detain as forfeited anything imported which he may deem prohibited by law. Of course he does this at his own risk, if the thing seized should turn out not to be prohibited; but the only way of trying his right, where the action, as here, is to get the goods restored, and to get damages only in case of their not being restored, is to give the notice under section 111, otherwise the goods must, to use the very words of the statute, be deemed and taken to be condemned absolutely and without any proceeding or formality whatever—a result of law with which the plaintiff's right to get them back without the notice of claim cannot co-exist. I caught from an expression used by the plaintiff's counsel that his idea was possibly that the seizure under the circumstances would only give the officer the right to sell; and that the defendant does not plead that he has sold these books; but that can make no difference; for, of course, if the power is given, it can and may be exercised (whether it has or not is immaterial), for it never could be exercised at all if the plaintiff had a co-existing right to get the goods back without giving the notice.

The result of this ruling is to put the plaintiff out of court, and it is of course impossible to proceed to adjudicate upon the merits of a case no longer *sub judice*. If the defendant's counsel, however, meant to invite my opinion as to whether the books in question are prohibited by law as immoral or indecent, an opinion which now can have no legal effect upon the case, I must decline to exercise my office uselessly and without authority.

Action dismissed with costs, under defendant's first exception.

Doutre & Co. for plaintiff.
H. Abbott, Jr., for defendant.

COURT OF QUEEN'S BENCH.

MONTREAL, September 19, 1883.

DORION, C.J., MONK, RAMSAY, CROSS and BABY, JJ.

CHAVIGNY DE LA CHEVROTIERE (plff. below), Appellant, & THE CITY OF MONTREAL (deft. below), Respondent.

Public Thoroughfare—Prescription by ten years' open and uninterrupted use.

Where land was given to the City of Montreal to be used as a public market, and the City, long after, converted it into a public thoroughfare, and registered the same in the register of public streets and squares: held, that the donors were not entitled after the lapse of ten years, to claim the rescission of the donation on the ground of such conversion.

The action of the appellant in the court below claimed the rescission of a deed of do-

nation made in 1803 of the property in the city of Montreal known as Jacques Cartier Square.

It appears that in the year 1803 the property now called Jacques Cartier Square, was a garden belonging to the Fabrique of Montreal. The Fabrique decided to sell it, and a committee was appointed to divide it and dispose of it in such manner as should appear most advantageous. Two of the members, Durocher and Perinault, became the purchasers for the sum of £3,500, but the same day they disposed of the property in lots at an advance of £800, to a number of persons who acquired their lots with the stipulation that the central portion should be reserved as a public market. The deeds carrying out this arrangement were completed on the 26th and 27th of the same month (December, 1803). The vendors, Durocher and Perinault, in order to conform to the condition that the central space should be a public market, made application to the justices of the peace then in charge of the city affairs, and by a deed of date 29th December, 1803, they ceded to the city the land in question to be used as a public market, stipulating that if the land were at any time applied to other uses the deed should be considered null and void. The square was thenceforward occupied as a market for more than forty years. A market house stood in the middle, with a street on each side, namely, Fabrique street on one side and St. Charles street on the other. Meantime changes took place in the city government. A city council succeeded to the charge which formerly devolved on magistrates, and in 1846 the old market place was abolished, a more spacious market being erected elsewhere, and the old site was turned into a public square. But in 1858 the concourse at the new Bonsecours Market was so great that Jacques Cartier square was again used as a market for grain.

The present proceeding was instituted in 1876 by the appellant, alleging that he represents the original proprietors, Durocher and Perinault, and complaining that the condition of their donation to the city, namely that the ground should be used as a public market, has not been complied with, and therefore the deed should be annulled, and the land should revert to the plaintiff.

Several grounds of defence were set up by the city. It was alleged that the object of Durocher and Perinard was merely to discharge the obligation they had assumed towards the parties who bought their lots, and the latter had never complained of the change from a market to a square. The city had a possession of 73 years, and the plaintiff had never complained, and the present action was a purely speculative proceeding. It was also pleaded that the square had existed for more than ten years, and had been registered in the register of streets, and was now public property. Subsequently, the defendants filed an additional plea, alleging that Jacques Cartier Square had been converted into a grain market, so that the original condition was fulfilled.

The Superior Court dismissed the action, the grounds being in substance as follows: 1st. The condition as to cancellation of the donation in the event of the property being converted to other uses was held to be a penal clause. 2nd. It was proved that part of the land had been used since 1803 as a public street. 3rd. The persons from whom the plaintiff derived his rights had ceded all the adjoining properties more than fifty years ago; that they would not be troubled in respect thereof, and the plaintiff was without interest in bringing the suit. 4th. The land in question was now actually used for the purpose of a public market.

Lacoste, *Q.C.*, for the appellant, contended that the grounds upon which the judgment was based were untenable. These grounds are, first, that the clause in the original donation by which the land was to revert to the donors if applied to other purposes was comminatory; secondly, that the appellant was without interest to complain; and thirdly, that the donee was in time up to the rendering of the judgment, to re-establish the market, which had been done. In coming to the consideration of the case, it might be observed thot the appellant was in the rights of the donors as heir as well as transferee. It was admitted by the city that the destination of the ground had been changed for a period less than 30 years before the suit. The pretension of the appellant was that the moment the respondent declared (as it did in 1847) that the land was to be turned to a different use, the city ceased to be proprietor, and the rights of the parties were the same as before the deed of 1803. This deed was drawn with great care; the object for which the land

was given to the city was explicitly stated; and there was a reservation in the plainest and strongest language that could be employed, that the donors should re-enter into possession *de plein droit*, if the land was converted to any use other than a public market. This was not a comminatory clause, but a right expressly stipulated in a deed of donation. It is undoubted that donors may attach to their donations such conditions as they think proper, provided they be not contrary to law, public order, or good morals. Here the stipulation was perfectly legitimate, and the city had recognized its validity by re-establishing the market in Jacques Cartier Square when the present suit was served. It was submitted, however, that this did not affect the rights of the appellant to avail himself of the clause, and to be declared proprietor. The second ground of the judgment was that the appellant had no interest, as his *auteurs* had sold, more than 50 years ago, all the land which they owned adjoining that donated in 1803; that there is no fear of *trouble* on account of the conversion of the property into a public square. This ground would apply only if the fulfilment of the condition was demanded, but the appellant simply asked for the resolution of the deed of donation. Moreover, the donee has no right to inquire into the motive or interest which the donor has in the fulfilment of the condition. He had a right to impose it, and if it is not fulfilled, the donation becomes void. Further, the interest of the appellant was that by the default of the city, the property reverted to him. It was his part to watch over the fulfilment of the condition, as the resiliation of the gift was dependent on the faithful carrying out of the stipulation. The last ground assigned in the judgment was that the city could at any time re-instate the market, and the fact that it had done so after the institution of the suit was sufficient for its protection. This appears to the appellant an extraordinary proposition, because the donation became null the moment the use of the ground was changed. Besides, the appellant submitted that a market had not been regularly established in the square, and that the Corporation had made a mere pretence of complying with the conditions.

Roy, Q.C., for the respondent, submitted that there was no ground for the present litigation. The donors were under the obligation to obtain the establishment of a market on the site, and it was to acquit themselves of this obligation that they induced the city to have the market there. The condition was to establish a market, and the moment a market was put there the donors were relieved from all liability to the purchasers of lots, and the market fell under the ordinary rules of the municipal authority. There was no obligation to erect a building, but merely to level the ground. The Corporation, in 1847, when the market was removed, had full power to change the site. The recourse of those interested was not to claim the property back, but to recover damages for the loss occasioned by the change. Another ground on which the Corporation relied was that under existing legislation, any street or public square possessed by the city during ten years and entered on the register of streets becomes the property of the Corporation. The ground claimed had been possessed for more than ten years, and had been registered as a public square. It was too late for the appellant to complain now. It was also urged that the appellant did not stand before the Court in a favourable light. He had obtained transfers of rights from other parties, knowing that he was buying a law suit.

Ramsay, J.—Action by appellant to be declared proprietor of $\frac{7293}{8064}$ undivided parts of a certain piece of land situate in the city of Montreal, and known as the Place Jacques Cartier. The appellant in his declaration, in fact, sets up that his *auteurs*, Joseph Perinault and Jean Baptiste Durocher, by deed of donation of the 29th December, 1803, gave to the *auteurs* of the Corporation respondent the land in question, subject to the following stipulations and reserves:

"Pour établir et servir de place publique de "*marché* en cette ville, sans pouvoir être diverti "ni employé à d'autres fins; pourtout le dit "terrain servir à toujours de place publique de "marché public, ... avec réserve pour "les donateurs, leurs hoirs et ayant cause à l'ave-"nir, du droit de canal qui est fait sur une "partie du dit terrain, et de faire sur icelui tels "canaux dont ils pourraient avoir besoin. * *

"Comme aussi de rentrer de plein droit en "la propriété et possession du dit terrain, si on

"voulait la convertir à d'autres usages qu'une "place de marché public."

That a market was established on the property. That in 1847 it was demolished, in virtue of a by-law of the Corporation, and the ground turned into a public street, and that it has ever since been so used, and that, therefore, he has a right to resume possession of the property so given.

This action was met by several pleas, which, after amendment, in effect stand thus :

1st. That the object of the donors, in making this stipulation, was to give value to property of theirs adjacent to this intended market. That the market, having been established, and while it was so established, appellant's *auteurs* sold, at a profit, their adjacent property, and are not *troublés* by the conversion of the market into a public road or square.

2nd. That the Corporation in converting it into a public square, acted in virtue of powers conferred by 8 Vic., c. 59, and that, therefore, appellant cannot complain, or, if he has any claim, it is for damages.

3rd. That respondent had been in possession for 73 years, and that the Corporation had a right to use the land as they thought fit, aud they had used the ground for public purposes, it having become inadequate to serve as a market.

3. *Acquiescement* by appellant.

4. More than ten years have elapsed since it was made a street, and was as such duly enregistered in the corporation books.

5. Appellant's rights are litigious rights.

The learned judge in the court below held, that a portion of the property had from the first been a public street, that the clause was *comminatoire*, that appellant, having sold all his property, had no interest in exacting its fulfilment, and that it still could be fulfilled; and he therefore dismissed the action.

It appears to me that several of these pretensions may be dismissed without much difficulty. I particularly refer to the third and last proposition as grouped above. I cannot see that the Corporation, more than any other person, could prescribe against its title, and so if this was a reservation not prohibited by law, 73 years' possession could no more than one year give them rights beyond their title.

Again, as to what are litigious rights, there may often be some difficulty under our law, for we have not adopted the simple rule of the Code Napoleon, Art. 1700. But in this case there can be no difficulty, for appellant is a coproprietor. (4 Toullier, No. 488.)

I cannot concur with the learned judge in the court below in considering that this clause, even if *comminatoire*, affects appellant's pretentions. The answer of the respondent is not "the Corporation is willing, in such delay as is mentioned, to re-establish the market," but that appellant has no right. Nor do I consider we can make up by conjectures from the testimony what were likely to be the motives of appellant's *auteurs*, unexpressed in the deed. It would be to prove *outre le contenu de l'acte*, and to wander into a perfectly imaginary field of speculation. To all intents and purposes, this deed is a pure donation, and we have nothing to do with whether the donors gave the land in the hope of gain, or of the glory which attaches, sometimes, to the memory of public benefactors.

On the other points, I am with respondent. It seems to me that the Corporation had generally the right to transfer a market from one place to another, and they certainly had a right at common law to open a street on their own property. By other statutes, they had a right to expropriate. There was no need to expropriate when they were in possession as owners. Under these circumstances, the donor saw a great public improvement going on and accomplished, and he remained perfectly silent for nearly thirty years. Then, almost as prescription was acquired, he turns on the Corporation, a public body, to stop up a great public thoroughfare and hand it back to him. The results of a proceeding of this kind should have warned the appellant that such a pretention is untenable in law, the rule of which is perfectly clear. We laid it down in the case of *Guy & The Corporation of Montreal.** If a person unmistakably abandons to the use of the public any real property, so that rights are acquired upon it by the public, he cannot resume its possession as against them. The Corporation of Montreal as a public corporation, that is, one on which certain governmental powers are conferred, represents this public right, and it cannot be compelled to do that which would only lead to individual contests with the public. The abandonment by the

* 3 L. N. 402.

corporation of Jacques Cartier Square, the annulling of the deed of donation, would not determine the right of each person who desired to pass that way; and as the corporation holds not only by its deed of donation but by its representative character, it appears to me manifest that this action cannot be maintained. It is possible that there may be an action of damages against the corporation, but this question is not before us on this appeal, and I have no opinion to express upon it. I am to confirm.

Judgment confirmed.

Lacoste, Globensky & Bisaillon, for Appellant.

R. Roy, Q.C., for the Respondent.

THE CASE OF BETTY JOHN.

From a scarce and singular volume by W. Hutton, containing decisions of the Court of Requests at Birmingham, we extract the following unique case for the entertainment of our readers :—

A plaintiff wished to sue a person in this court, but, not knowing whether the party was male or female, was at a loss by what name to begin. The defendant had been many years known in Birmingham, in the dress and character of a woman called Elizabeth, and had been many years known in the dress and character of a man, who answered to the name of John. The plaintiff after fruitless inquiries, determined to trap the person, let the sex be what it would, and, therefore, filled up the summons with *Elizabeth alias John Haywood*.

Whatever was the gender, the animal appeared in court in a female habit, was rather elegant, of a moderate size, tolerably handsome, about thirty-two, had a firm countenance, and manly step, no beard, eyes susceptible of love, a voice tending to the masculine, with manners engaging, and was rather sensible. A husband was pleaded in bar, and that the court had no power over a wife. The trial continued three or four days, during which the defendant acquired the appellation from the people of *Betty John*. As it attended the court in female dress, I shall take the liberty of treating it with a feminine epithet.

It appeared, from undoubted evidence, that, while she dressed like a man, she was suspected to be a woman; but in both dresses was strongly suspected to be a man. The common opinion of the ignorant was that she was an hermaphrodite, partaking of both sexes. When she carried a male dress, she spent her evenings at the public house with her male companions, and could, like them, swear with a tolerable grace, get drunk, smoke tobacco, kiss the girls, and now and then kick a bully. Though she pleaded being a wife, she had really been a husband, for she courted a young woman, married her, and they lived together in wedlock till the young woman died, which was some years after and without issue. She afterwards, like people of higher rank, kept a mistress, and ran away with her.

Forcible evidences like these were sufficient to convince the wisest head upon this bench, or any other, that a man in disguise stood before them. Her wife living peaceably with her all her days without one complaint of a breach of the marriage covenant, evinced there was no defect. Neither would a girl sacrifice her reputation by becoming a mistress to a woman in breeches. Besides, a woman receives very little more pleasure in saluting a living woman than a dead one; whereas, a man, like the figure before the bench, seemed to receive a pleasure inexpressible. Her being versed in the art of kicking further proved she was a man, because it is an art never thoroughly understood by the beautiful part of creation, nor has it been practiced since the days of Queen Elizabeth. Again, she spoke but little, which was no indication of her being a woman.

The court, not satisfied she was a wife, and no further evidence arising, entered an order against her. On her neglecting payment she was served with an execution, and committed to prison. Two days after, it appeared from incontestible proof that she was a real woman, and a real wife.—*Soule & Bugbee's Legal Bibliography.*

APPOINTMENTS.—The following appointments have been gazetted :—John Anderson Ardagh, junior judge of the county court of the County of Simcoe, to be judge of the same court, *vice* James Robert Gowan resigned; Hon: M. W. T. Drake, and A. E. B. Davie, of Victoria, B. C., to be Queen's Counsel; Right Hon. Sir J. A. Macdonald, K. C. B., to be President of the Queen's Privy Council for Canada, and Superintendent General of Indian affairs; Hon D. L. Macpherson to be Minister of the Interior; Hon. Wm. Miller to be Speaker of the Senate of Canada.