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# REVUE CRITIQUE

DE

# Législation et de Jurisprudence.

## THE GENEVA AWARD.

On the 14th day of September last, the arbitration tribunal sitting at Geneva, awarded to the United States the sum of $15,500,000, in settlement of the claims, commonly known as the Alabama Claims. This judgment was rendered by a majority of the Court, Sir Alexander Cockburn concurring, on other grounds, with respect to the privateer Alabama.

As might have been expected, this decision has not satisfied all parties. The English Conservative Press, which has uniformly denounced the Liberal Cabinet for the manner in which the Treaty of Washington has been carried out, looks upon it as a national humiliation; and that portion of the American Press which is hostile to the administration of President Grant, loudly asserts that the United States have gained nothing after all. It would seem, however, to the disinterested looker-on that these complaints are unfounded. It is not of the judgment rendered, but of the Treaty under which it was rendered, and especially of the erroneous opinions held by the law officers of the Crown with respect to the duties of neutrals, that the English public has a right to complain. The principle of the responsibility of neutrals, once conceded by England, as it was under the Treaty, nothing remained for the arbitrators but to decide whether the British Government had acted with "due diligence," and if not, to determine the amount of the damages suffered by the United States.

The Americans, again, should be the last to express dissatisfaction with the result of the proceedings at Geneva; for not only is the Treaty itself a great triumph for them and the world at

large, but the award gives them the full amount of their direct claims. At the sitting of the Joint High Commission, on March 8th, 1871, the American Commissioners stated "that the claims " for the loss and destruction of private property, which had " thus far been presented, amounted to about fourteen millions " of dollars, without interest." These claims constitute all that the Geneva Court could adjudicate upon; for the national losses, —such as the expenses incurred in the pursuit of the privateers, —forming the *Indirect Claims*, were thrown out, in June last, by the Court, as inadmissible, as well under the Treaty as in International Law.

The Geneva award has been published in full in a supplement to the *London Gazette* of the 26th of September last, together with the opinions or reasons of the arbitrators. These opinions are generally brief; that of Sir Alexander Cockburn, however, occupies 250 pages of the *Gazette*. Its length is not however a matter of surprise, when we consider that nearly one-half of it is devoted to considerations which did not affect the case, such as hostile criticisms of the three rules of neutrality assented to by Great Britain and a passionate vindication of English honour. In one place, he says:—

" Sitting on this Tribunal as in some sense the representative of Great Britain, I cannot allow these statements to go forth to the world without giving them the most positive and unqualified contradiction. They are wholly uncalled for, as being unnecessary to determine the question whether, in particular instances, Great Britain had been wanting in diligence; they are not only unjust, but in the highest degree ungenerous—I use the mildest expression I can find—on an occasion when Great Britain is holding out the hand of friendship and conciliation to America, and though, perhaps at a heavy sacrifice, is seeking to bury all sense of past grievance by submitting the claims of the United States to peaceful and friendly arbitration. But it is not only that these observations are ungenerous and unjust. There is in this extraordinary series of propositions the most singular confusion of ideas, misrepresentation of facts, and ignorance, both of law and history, which were perhaps ever crowded into the same space; and for my part I cannot help expressing my sense, not only of the gross injustice done to my country, but also of the affront offered to this Tribunal by such an attempt to practice on our supposed credulity or ignorance."

The better to demonstrate this generosity, the learned Chief Justice sharply criticises the three rules of neutrality which the Treaty made it his duty to carry out, not to criticise. He says:—

"I cannot but think, that it is to be regretted that the whole subject-matter of this great contest, in respect of law as well as of fact, was not left open to us, to be decided according to the true principles and rules of International Law in force and binding among nations, and the duties and obligations arising out of them, at the time when these alleged causes of complaint are said to have arisen."

Having sketched the history of The Treaty of Washington, and reviewed the opinions of many writers on International Law, as well as the practice of Great Britain and of the United States with respect to the duties of neutrals, the Lord Chief Justice comes to the conclusion that the three rules in question are contrary to the law of nations:—

"It seems to me, therefore, that the law relating to contraband of war must be considered, not as arising out of obligations of neutrality, but as altogether conventional, and that by the existing practice of nations the sale of such things to a belligerent by the neutral subject is not in any way a violation of neutrality. Then how stands the matter as to ships of war? In principle, is there any difference between a ship of war and any other article of warlike use? I am unable to see any. Nor can I discover any difference in principle between a ship equipped to receive her armament and a ship actually armed. A ship of war implies an armed ship, for a ship is not actually a ship of war till armed. Of the authors I have cited, and who hold ships of war to be contraband of war, no one of those who wrote before these disputes between the United States and Great Britain had arisen, with the exception of M. Hautefeuille, makes any distinction between ships equipped to receive their armaments and ships actually armed. M. Hautefeuille, who, as we have seen, refuses to a ship equipped for armament, but not armed, the character of contraband, treats the equipping and arming as a violation of neutrality; but he gives no reason and cities no authority, and seems to me herein—I say it with the utmost respect—inconsistent with himself."

It may not be devoid of interest to note the definition of International Law laid down by the Lord Chief Justice, and the degree of authority which he allows to text writers in cases of international disputes. He says:—

"The great authority of Chancellor Kent and of the majority of writers is in favour of the latter view. But, in truth, the question does not depend on the lucubrations of learned professors or speculative jurists. However authoritatively these authors may take upon themselves to write, and however deserving their speculations may be of attention, they cannot make the law. International Law is that to which nations have given their common assent, and it is best known as settled by their common practice. . . . . When the authority of M. Rolin Jacquemyns as to the culpability of

Great Britain is cited, I must protest against the question being determined not according to 'existing positive law,' but to the opinion of *savans* as to what the law should have been, or should now be made."

Passing over other portions of the argument of the English arbitrator, which are of minor importance and of little or no interest from a legal point of view, we come to that part wherein he defines and explains what constitutes "due diligence." This was the important, the only question of law, under the Treaty, coming within the province of the Geneva Court. It is also a point of deep interest in private jurisprudence; and this consideration, combined with the general attention which the award has attracted throughout the Dominion, has induced the writer to publish the opinions of all the arbitrators on the point.

D. GIROUARD.

Montreal, December 1st, 1872.

## "DUE DILIGENCE."

Sir ALEXANDER COCKBURN:—

"I proceed then to consider what is this 'due diligence' which the British Government admits that it was bound to apply to prevent the fitting-out and equipping of the vessels in question. I apprehend that such diligence would be neither greater nor less than any other neutral Government would be bound to apply to the preventing of any breach by its subjects of any head of neutral duty prescribed by International Law. The difficulty of the position is, that the question has not hitherto come within the range of juridical discussion on subjects connected with International Law. Hitherto, where a Government has acted in good faith, availing itself fairly of such means as were at its disposal, it has not been usual to consider it responsible to a belligerent Government for acts of its subjects that might have eluded its vigilance, or to submit the degree of diligence exercised by it to judicial appreciation. And no country has insisted more strongly on this as the limit of national responsability than that of the United States. We must endeavour to find a solution for ourselves. As I have already observed, I cannot agree that the question of what is 'due diligence' should be left to the unassisted mind of each individual Arbitrator; nor can I agree that the solution is to be found in the facts of each individual Case; and though Judges may be often disposed to apply the maxim, to which our honourable president has more than once referred, *ex facto jus oritur*, it is, I think, one which must not be pushed too far. I agree with M. Troplong, who, writing on this subject with reference to civil law, after referring to the different opinions of jurists on the subject of diligence, says:—

'Il est vrai que jusqu'à présent les Tribunaux se sont montrés assez indifférents sur ces disputes de la chaire; mais peut-être pourrait-on leur faire le reproche de n'avoir amorti la vivacité de la question, qu'en étouffant tout ce qui est discussion de système et point de droit, sous la commode interprétation des faits, et sous un équitable mais facile arbitraire. Néanmoins, dans cette matière, comme dans toutes les autres, il y a des règles qu'il faut se garder de dédaigner: elles aident le magistrat, elles font luire de précieuses lumières pour ceux qui ont mission de discuter sur les faits et de les juger. Ces règles m'ont paru simples et judicieuses; je vais les exposer comme je les entends dans tous les cas, et dussé-je me tromper, je prie le lecteur de ne pas m'adresser, comme fin de non-recevoir, le reproche de me livrer à d'oiseuses disgressions. De tous les systèmes, le moins excusable, à mon avis, c'est celui qui, sous prétexte de fuir l'esprit de système, se fait une loi de n'en avoir aucun.'

"It seems to me, therefore, right, before proceeding to deal with the facts, to seek in the domain of general jurisprudence for principles to guide us in judging how far the obligations of Great Britain have or have not been satisfied. No branch of law has been the subject of more discussion among juridical writers than that of *diligentia* and its correlative *culpa*, the latter being neither more nor less than the absence of the former. . . . . The jurists of the 17th century, among whom Vinnius occupies a prominent place, divided the *diligentia* and corresponding *culpa* of the Roman Law into three degree. Thus we have *culpa lata*, *levis*, *levissima*, taking the intermediate degree, or *culpa levis*, as being the absence of the diligence which a man of ordinary prudence and care would apply in the management of his own affairs in the given circumstances of the case. Though attacked by Donellus, this tripartite division of diligence and default held its ground among juridical writers for a considerable time; but on the formation of the French Code, the practical good sense of those by whom that great work was carried out, so visible in their discussions, induced them to discard it, and to establish one common standard of diligence or care as applicable to all cases of civil obligation—namely, that of the *bon père de famille*, the *diligens pater familias* of the Roman digest. The Code Napoléon has been followed in the Codes of other countries. Among others the Austrian Code has lately adopted the same principle."

French, German and American authorities are then cited. Quoting from Mr. Justice Story, Sir A. Cockburn continues:—

"Common or ordinary diligence is that degree of diligence which men in general exert in respect to their own concerns. It may be said to be the common prudence which men of business and heads of families usually exhibit in affairs which are interesting to them; or, as Sir William Jones has expressed it, it is the care which every person of common prudence and capable of governing a family takes of his

own concerns. It is obvious that this is adopting a very variable standard, for it still leaves much ground for doubt as to what is common prudence and who is capable of governing a family. But the difficulty is intrinsic in the nature of the subject, which admits of an approximation only to certainty. Indeed, what is common or ordinary diligence is more a matter of fact than of law, and in every community it must be judged of by the actual state of society, the habits of business, the general usages of life, and the changes, aa well as the institutions, peculiar to the age. So that, although it may not be possible to lay down any very exact rule, applicable to all times and all circumstances, yet that may be said to be common or ordinary diligence in the sense of the law which men of common prudence generally exercise about their own affairs in the age and country in which they live. It will thence follow, that in different times and in different countries the standard is necessarily variable with respect to the facts, although it may be uniform with respect to the principle; so that it may happen that the same acts which in one country, or in one age, may be deemed negligent acts, may at another time, or in another country, be justly deemed an exercise of ordinary diligence. . . . What is usually done by prudent men in a particular country in respect to things of a like nature, whether it be more or less, in point of diligence, than what is exacted in another country, becomes in fact the general measure of diligence."

"The same standard is, in practice, applied in the English Law. The older authorities, indeed, speak of three degrees of negligence, and of 'gross' negligence as being necessary in some cases to found liability; but the tendency of modern decisions has been to apply in all cases the sound practical rule that in determining the question of negligence, the true test is whether there has been, with reference to the particular subject matter, that reasonable degree of diligence and care which a man of ordinary prudence and capacity might be expected to exercise in the same circumstances I have cited these authorities because, in the absence of any reference to the question of diligence among writers on International Law, it seems to me that the principle that prevails as to men's conduct in the affairs of life may by analogy be well applied to the discharge of its duties by a Government. Applying this standard, one nation has a right to expect from another, in the fulfilment of its international obligations, the amount of diligence which may reasonably be expected from a well-regulated, wise, and conscientious Government, according to its institutions, and its ordinary mode of conducting its affairs, but it has no right to expect more. The assertion of the obligation of a neutral Government, as stated in the American Case,—that 'the diligence is to be proportioned,' not only to 'the magnitude of the subject,' but also to 'the dignity and strength of the Power which is to execute it' —as though there could be one measure of diligence for a powerful State and another for a weak one—a diligence 'which shall prevent

its soil from being violated'—which 'shall deter designing men,' &c. —thus making the neutral Government answerable for the event— and 'which prompts to the most energetic measures'—appears to me much too extensive, and altogether inadmissible. The diligence required of a Government to prevent infractions of neutrality may relate (1) to the state of its municipal law; (2) to the means possessed by it to prevent such infractions; (3) to the diligeuce to be used in the application of such means to the end desired." . . . . . But

"1. Is a Government, intending faithfully to discharge its duty towards another Government, to be held responsible for a mere error of judgment? As, for instance, in thinking a vessel not liable, in point of law, to seizure, when in fact she was so; or in thinking the evidence in a particular case insufficient when it was sufficient.

"2. Is a Government wanting in due diligence if it declines to seize a vessel at the instance of a belligerent, when properly satisfied that, though there may be circumstances of a suspicious character, the only evidence which can be adduced will not justify the seizure before the law, and that the vessel will therefore be released?

"3. Having seized a vessel and brought the matter before the proper legal authority, is a Government to be held responsible because, through some mistake of the Court, either of law or fact, there has been a miscarriage of justice?

"4. Is it to be answerable for accidental delay, through which an opportunity becomes afforded to a vessel to evade the eventural decision of the Government to seize her?

"5. Is a Government to be held responsible for error of judgment in its subordinate officers, especially when these officers are at great distance, and not acting under its immediate control? Is it, under such circumstances, to be answerable for their possible negligence, or even for their misconduct?

These are questions of infinite importance to neutral nations, who may be drawn within the vortex of wars in which they have no concern, if they are not only to be harassed and troubled by the demands and importunities of jealous and angry belligerents, but are, in addition, to be held responsible—to the extent, perhaps, of millions—for errors of judgment, accidental delay, judicial mistake, or misconduct of subordinate officers, acting not only without their sanction, but possibly in direct contravention of their orders. We are not informed whether the two Governments have, in compliance with the pledge contained in the Treaty of Washington, invited other nations to adopt its Rules; but if it is to be established that these Rules carry with them a liability so extensive, I should very much doubt whether such an invitation, if made, would be attended with much success. Any decision of this Tribunal founded on such a liability would have the effect, I should imagine, of making maritime nations look upon belligerent Powers with very considerable dread. It is to be remembered that a Government cannot be taken to guarantee the event; in other

words, to be answerable at all hazards and under all circumstances for a breach of neutrality by a subject, if it occurs. In spite of the law, and of the vigorous administration of the law, offences will take place, and neither at home nor abroad, can rulers be held, under all circumstances, answerable to those who suffer from them. All that can be expected of the Government of a country is that it shall possess reasonable means to prevent offences, and use such means honestly and diligently for the benefit of those who are entitled to its protection. The terms of the Treaty, which require no more than 'due diligence,' exclude all notion of an absolute unconditional responsibility. This being so, I have some difficulty in saying that a Government, acting in good faith, and desiring honestly to fulfil its obligations, can be held liable for errors of judgment, unless, indeed, these are of so patent a character as to amount to *crassa negligentia*. Prolonged and unnecessary delay is, in the very nature of things, incompatible with diligence. But delay, within reasonable limits, honestly intended for the investigation of facts or the due consideration of the proper course to be pursued, is not so. Delay arising simply from accident ought not to be imputed as negligence. Accident can never be made the ground of an imputation of negligence, though it may found a legal claim where a party is *in morâ*."

The Lord Chief Justice examines the five questions he has just asked with minuteness and answers them in the negative. He thus concludes this portion of his argument:

"While I readily admit that the measure of diligence which a Government applies to the affairs it has to administer, if the ordinary course of its administration is negligent and imperfect, is not necessarily to be taken—any more than it would be in the case of an individual—as the measure of diligence which it is to apply in the discharge of international obligations, yet credit should be given to a Government for a properly diligent discharge of public duty. Furthermore, if a given law and a particular system of administration have been found by practical experience sufficient to protect the interests of the Government in the important matter of the public revenue, and also to insure the observance of neutral duties on the occasion of all former wars, surely it is highly unreasonable and unjust to condemn the whole system as defective and the Government as negligent for not having amended it in anticipation of future events? It must not be forgotten that since the passing of the British statute wars have occurred in all parts of the world, but no complaints of the violation of that statute have occurred till American citizens had recourse to new modes of defeating or evading it. Such, in my opinion, are the principlse by which we should be guided in deciding whether Great Britain has or has not failed to satisfy the requirements of "due diligence."

Mr. ADAMS:—

"I have now reached the moment when it seems necessary to apply myself to the question so much discussed in the arguments laid before us by the respective parties to the litigation. What is the diligence due from one nation to another in preventing the fitting-out of any vessel which it has reasonable ground to believe intended to cruise against the other? Although my own judgment is distinctly formed upon it, I feel that this is not the place in which I can, with the most propriety, explain my reasons in full. It is enough for my purpose here to say that, in my mind, the diligence manifested by all the requisite authorities of Great Britain in the case now before us, does not appear to me to be that contemplated by the language of the Treaty, because it was not in any sense a spontaneous movement. So far as the papers before us are concerned, I cannot perceive that Her Majesty's Government acted in any case excepting after representation made by the agent of the United States, and even when they did act, they confined themselves exclusively to the allegations therein made, presuming that if they could report upon them satisfactorily to themselves, their obligations were fully performed. It must be obvious that such a method of action furnishes every possible opportunity to the parties implicated, if they be at all adroit, to escape conviction by resort to equivocation, if not absolute falsehood. I can form no definition of the word 'diligence' which does not embrace direct original action, preserved in not merely to verify acts of offence one by one, but to establish the general fact of intent as obtained from continuous observation of the operations going on; not merely to detect the motives for falsehood but to penetrate to the bottom of the truth. If there was a conspiracy of persons at home engaged in a treasonable effort to overthrow the Governent, would not due diligence comprehend in its meaning a close and constant observation of each and every one of the persons reasonably suspected of being engaged in it, and an immediate action to prevent any movement in advance of its maturity? Especially, would not such energy be called for in time of war, when the danger to the State from external co-operation might become extreme? Most of all, would it not be natural to expect from every Power in amity to furnish all the means it could command to render abortive every combination suspected to be forming within its borders to render assistance to the manœuvres of the malcontents at home? All these are parts of a complete whole —the maintenance of order at home and of peace abroad. That there did exist in Great Britain a combination of persons, composed partly of Americans and partly of British subjects, having for its object and intent the fitting out of vessels to carry on war with the United States, to the end of overturning the Government, is made perfectly plain by the evidence placed before us by the two parties. That Her Majesty's Government considered it no part of her duty to originate any proceedings tending to prevention, at the time of the outfit of the

Oreto, or to pass at all beyond the range of investigation especially pointed out by the agents of the American Government to its attention, appears to me certain. At a later stage of the difficulties, this policy appears to have been partially changed. The favourable effects of it are claimed as a merit in a portion of the papers before us, and I am ready at any and at all proper times to testify to my sense of its efficiency and value wherever it is shown. But after close examination I fail to see any traces of this policy in the present instance."

Farther on, Mr. Adams thus gives his views in full on the subject of due diligence:—

"These words, which are found in the first and third of the Rules prescribed by the Treaty of Washington for the government of the Arbitrators in making up their judgment, have given rise to much discussion in the preparatory arguments of the opposing parties. On the side of Great Britain an explanation of them is given in the 9th, 10th, and 11th propositions, laid down on the 24th and 25th pages of the Case. The subject is again considered in pages 21 and 22 of the volume, called the Counter-Case. It is again referred to in the 8th and 9th pages of the volume called the Argument or Summary. Lastly, it is treated in a more general way in the argument presented by Sir Roundell Palmer, counsel on behalf of Her Britannic Majesty, on the 25th of July last. On the side of the United States, an explanation is presented in pages 150 to 158 of the volume called the Case. It is again referred to in the sixth page of the Counter-Case. The subject is again treated in pages 316 to 322 of the Argument or Summary. Lastly, it is discussed in a more general way in the argument submitted by the counsel on behalf of the United States on the 5th and 6th of August. The objection which I am constrained to admit as existing in my mind to the British discussion, is that it appears to address itself for the most part to the establishment of limitations to the meaning of the words rather than to the explanation of the obligations which they imply. The objection which I am constrained to find to the American definition is that I do not find the word 'due' used in the sense attributed to it in any *Dictionary* of established authority. Yet it does not appear to me so difficult to find a suitable meaning for these words. Perhaps, it may have been overlooked from the very fact of its simplicity. I understand the word diligence to signify not merely work, but, to use a familiar phrase, work with a will. The force of the qualifying epithet 'due' can be best obtained by tracing it to its origin. All lexicographers derive it from the Latin verb '*debere*,' which itself is a compound of two words '*de*' and '*habere*,' which means '*quasi de alio habere*,' that is, in English, to have of or from another. Assuming this to be the primary meaning, I now come to the second step. The first having implied something received by one person from another, the second implies equally an obligation incurred thereby. '*Debere*,' in Latin,

means to owe. In French it becomes '*devoir*,' which is equivalent to debt, to duty, or to obligation. In English it is thus defined by two eminent authorities :—Richardson.—'That which is owed ; which any one ought to have; has a right to demand, claim, or possess.' Webster.—'Owed, that ought to be paid or done to another. That is due from me to another, which contract, justice, or propriety requires me to pay, and which he may justly claim as his right.' I have searched a great variety of other authorities, but do not cite them. as they only repeat the same idea. Hence it may be inferred that the sense of the words 'due diligence' is that of 'earnest labour owed to some other party,' which that party may claim as its right. But, if this definition be conceded, it must naturally follow that the nature and extent of this obligation cannot be measured exclusively by the judgment or pleasure of the party subject to it. If it could, in the ordinary transactions between individuals, there would be little security for the faithful performance of obligations. If it were not that the party, to whom the obligation has been given, retains a right to claim it in the sense that he understands it, his prospect of obtaining justice in a contested case would be but slight. If this view of the meaning of the words be the correct one, it follows that when a neutral Government is bound, as in the first and third Rule laid down in the Treaty for our guidance, to use 'due diligence' in regard to certain things, it incurs an obligation to some external party, the nature and extent of which it is not competent to it to measure exclusively by its own will and pleasure. Yet the assumption that it is competent appears to me to underlie the whole extent of the British position in this controversy. It may, indeed, be affirmed that no Sovereign Power in the last resort is accountable to any other for the results of the exercise of its own judgment arrived at in good faith. This proposition may be admitted to be true in point of fact, but it is obvious that proceedings under it gain no sanction under any law but that of superiority in physical force. To escape this alternative resort has been had to an attempt at definition of a system of rights and obligations, to which the assent of civilized nations imparts authority in the regulation of their reciprocal duties. Under that system all the nations recognizing it are placed on a perfectly equal footing, no matter what the nature of their relative force. To borrow a sentence from the British Counter-Case :—

"'Her Majesty's Government knows of no distinction between more dignified and less dignified Powers; it regards all Sovereign States as enjoying equal rights and equally subject to all ordinary International obligations; and it is firmly persuaded that there is no State in Europe or America which would be willing to claim or accept any immunity in this respect on the ground of its inferiority to others in extent, military force, or population.'

"Admitting this position in its fullest extent, it may, at the same time, be affirmed that, if Her Majesty's Government were to enter into

a contract with these various States, as a neutral Power, to use due diligence in certain emergencies, not one even of the smallest of them would fail to deny that Her Majesty's Government was the exclusive judge of the measure of its obligations, contracted under those words. What is, then, the rule by which tho actual performance of this duty can be estimated? It seems to me tolerably plain. Whatever may be the relative position of nations the obligation between them rests upon the basis of exact and complete reciprocity.

Hence the compact embraced in the words 'due diligence' must be fulfilled according to the construction placed upon the terms by each separate nation, subject to reasonable modificaéions by the just representations of any other nation with wnich it is in amity, suffering injury from the consequences of a mistake of negligence or intention. These may very naturally grow out of the great difference in their relative position, which should properly be taken into consideration. In the struggle which took place in America 'due diligence' in regard to the commercial interests of one of the belligerents meant a very different thing from the same words applied to the other. The only safe standard is that which may be reached by considering what a nation would consider its right to demand of another were their relative positions precisely reversed. If the due diligence actually exercised by one nation towards another does not prove to be exactly that diligence which would be satisfactory if applied to itself under parallel circumstances, then the obligation implied by the words has not been properly fulfilled, and reparation to the party injured is no more than an act of common justice. Such seems to be the precise character of the present controversy. Her Majesty's Government denies that the measure of diligence due by her as a neutral to the United States as a belligerent during the late struggle was so great under the law of nations as it has been, with her consent, made by the terms of the Treaty. But, in either case, she claims to be the exclusive judge of her fulfilment of it, apart from the establishment of this Tribunal, to which she has consented to appeal. But this very act implies the consciousness of the possibility of some debt contracted in the process by the use of these terms that may justly be claimed by another party. Of the nature and extent of that debt, and how far actually paid, it is the province of this Tribunal to determine after full consideration of the evidence submitted. Such is the construction I have placed upon the words 'due diligence.'"

Mr. le Vicomte D'ITAJUBA:—

"La question spéciale, soumise à la décision du Tribunal d'Arbitrage, a pour but de déterminer l'étendue que l'on peut accorder à l'effet de la commission dont un navire de guerre se trouve pourvu—si cet effet est le même pour un navire construit en observation des lois de la neutralité que pour un navire construit en violation de ces lois, c'est-à-dire si, par le fait de posséder une commission, un navire, construit en violation des lois d'un Etat neutre, a le droit d'exiger de

cet Etat d'être traité dans ses ports de la même manière que tout autre navire de guerre appartenant à des Etats belligérants et régulièrement construit. La position de la question en ces termes porte sa réponse en elle-même. En effet, le neutre qui veut garantir sa neutralité doit s'abstenir d'aider aucune des parties belligérantes dans leurs opérations de guerre; il est obligé de veiller fidèlement à ce que, sur son territoire, on ne construise ni n'arme des navires de guerre destinés à l'une des parties belligérantes; et selon la dernière partie de la Première Règle de l'Article VI. du Traité de Washington, il est obligé 'd'employer également les dues diligences pour empêcher le départ hors de sa juridiction de tout navire destiné à croiser ou à faire la guerre comme il est dit ci-dessus, un tel navire ayant été adapté spécialement, en tout ou en partie, dans les limites de sa juridiction, à un emploi guerrier.' Si tels sont les devoirs d'un neutre, il a par contre le droit d'exiger des belligérants qu'ils respectent son territoire; et il est du devoir des belligérants de ne point commettre, sur le territoire de l'Etat neutre, des actes contraires à cette neutralité. Ce n'est qu'en observant scrupuleusement ce devoir que les belligérants acquièrent le droit incontestable d'exiger du neutre une parfaite impartialité. Si donc un navire, construit pour le compte d'un belligérant sur le territoire d'un neutre, par fraude et à l'insu du neutre, se présente dans les limites de la juridiction du Souverain dont il a violé la neutralité, il doit être saisi ou détenu, car il n'est pas possible d'accorder à un tel navire les mêmes droits d'exterritorialité que l'on accorde aux autres navires de guerre belligérants, construits régulièrement et en dehors de toute infraction à la neutralité. La commission dont un tel navire est pourvu ne suffit pas pour le couvrir vis-à-vis du neutre dont il a violé la neutralité. Et comment le belligérant se plaindrait-il de l'application de ce principe? En saisissant ou détenant le navire, le neutre ne fait qu'empêcher le belligérant de tirer profit de la fraude commise sur son territoire par ce même belligérant; tandis que, en ne procédant point contre le navire coupable, le neutre s'expose justement à ce que l'autre belligérant suspecte sa bonne foi. Ce principe de saisie, de détention, ou tout au moins d'avis préalable qu'un navire, dans de telles conditions, ne sera pas reçu dans les ports du neutre dont il a violé la neutralité, est équitable et salutaire en ce qu'il évite les complications entre les neutres et les belligérants, et contribue à dégager la responsabilité des neutres en prouvant leur bonne foi vis-à-vis d'une fraude commise sur leur territoire. Le principe contraire froisse la conscience, car ce serait permettre au fraudeur de retirer bénéfice de sa fraude. Les règles établies par l'Empire du Brésil consacrent le principe que nous venons d'exposer, car dans ses règlements sur la neutralité il est ordonné:—'§ 6. De ne pas admettre dans les ports de l'Empire le belligérant qui aura une fois violé la neutralité,' et—'§ 7. De faire sortir immédiatement du territoire maritime de l'Empire, sans leur fournir la moindre chose, les navires qui tenteraient de violer la neutralité.'

En résumé :—La commission dont un navire de guerre se trouve pourvu n'a pas pour effet de le couvrir vis-à-vis du neutre dont il a précédemment violé la neutralité.'

M. STAEMPFLI :—

« M. Staempfli déclare qu'il ne trouve pas très-opportun de se perdre, pour les trois questions des dues diligences, de l'effet de commissions, et des approvisionnements de charbon, dans de longues discussions et interprétations théoriques. Il developpe oralement et sommairement ses vues y relatives, en se réservant de motiver de plus près leur application dans chaque cas spécial, et se borne pour le moment à poser les seuls principes suivants, qui lui serviront de direction générale.

« Principes généraux de droit.—(Programme inséré dans le Protocole X., Art. litt. A, No. III.)

« Dans ses considérants juridiques, le Tribunal doit se guider par les principes suivants :—1. En premier lieu, par les trois règles posées dans l'Article VI. du Traité, lequel porte que

« ' Dans la décision des matières à eux soumises, les Arbitres seront guidés par les trois règles suivantes, que les Hautes Parties Contractantes sont convenues de regarder comme des règles à prendre comme applicables à la cause, et par tels principes du droit des gens qui, sans être en désaccord avec ces règles, auront été reconnus par les Arbitres comme ayant été applicables dans l'espèce :—

« ' REGLES.

« ' Un Gouvernement neutre est tenu :—1. De faire des dues diligences pour prévenir la mise en état, l'armement en guerre ou l'équipement (fitting out, arming, or equipping), dans sa juridiction, de tout vaisseau qu'il est raisonnablement fondé à croire destiné à croiser ou à faire la guerre contre une Puissance avec laquelle ce Gouvernement est en paix ; et de faire aussi même diligence pour empêcher le départ hors de sa juridiction de tout navire destiné à croiser ou à faire la guerre comme il est dit ci-dessus, ce navire ayant été spécialement adapté, en tout ou en partie, dans les limites de sa dite juridiction, à des usages belligérants. 2. De ne permettre ni souffrir que l'un des belligérants fasse usage de ses ports ou de ses eaux comme d'une base d'opérations navales contre l'autre, ni pour renouveler ou augmenter ses munitions militaires ou son armement, ou s'y procurer des recrues. 3. D'exercer les dues diligences dans ses propres ports et eaux, et à l'égard de toutes personnes dans les limites dé sa juridiction, afin d'empêcher toute violation des obligations et devoirs précédents.'

« D'après le Traité, ces trois règles prévalent sur les principes que l'on pourrait déduire du droit des gens historique et de la science.

« 2. Le droit des gens historique, ou bien la pratique du droit des gens, ainsi que la science et les autorités scientifiques, peuvent être considérés comme droit subsidiaire, en tant que les principes à appli-

quer sont généralement reconnus et ne sont point sujets à controverse, ni en désaccord avec les trois règles ci-dessus. Si l'une ou l'autre de ces conditions vient à manquer, c'est au Tribunal d'y suppléer en interprétant et appliquant les trois règles de son mieux et en toute conscience.

"3. Les lois sur la neutralité, propres à un Etat, ne constituent pas un élément du droit des gens dans le sens qu'elles ne peuvent être, en tout temps, changées, modifiées ou complétées sans la co-opération ou le consentement d'autres Etats, le droit des gens lui-même étant absolument indépendant de ces lois municipales; cependant, tant que dans un Etat il subsiste des lois pareilles et qu'elles n'ont pas été abrogées, des Etats belligérants ont le droit d'en réclamer l'observation loyale, puisque sans cela il pourrait se commettre des fraudes ou des erreurs au détriment de l'un et de l'aure des belligérants; comme, par exemple, quand subsiste publiquement, bien qu'on ne l'observe pas, l'ordonnance qui défend à un navire belligérant de séjourner plus de vingt-quatre heures dans un port, ou d'embarquer plus de charbon qu'il ne lui en faut pour regagner le port de son pays le plus rapproché, ou de s'approvisionner de nouveau au même port avant que trois mois se soient écoulés. Ce principe implique en même temps que le manque de toutes lois municipales ou le manque de lois suffisantes sur la matière ne déroge en rien au droit des gens, soit aux obligations et aux droits internationaux. En outre, sont admis encore les principes suivants, que l'on cite ici afin d'en éviter la répétition dans le jugement à porter sur chacun des vaisseaux:—

"4. Les 'dues diligences' à exercer comprennent implicitement la propre vigilance et la propre initiative dans le but de découvrir et d'empêcher toute violation de la propre neutralité; un Etat belligérant n'a ni le devoir ni le droit d'exercer la surveillance, ni de faire la police dans un Etat neutre à la place des autorités du pays.

"5. Le fait qu'un vaisseau, construit contrairement aux lois de la neutralité, s'échappe et gagne la mer, ne décharge pas ce vaisseau de la responsabilité qu'il a encourue pour avoir violé la neutralité; il peut donc être poursuivi s'il rentre dans la juridiction de l'Etat lésé. Que ce navire ait été cédé ou commissionné dans l'intervalle, ce fait ne détruit pas la violation commise, à moins que la cession ou le commissionnement, selon le cas, n'ait eu lieu *bonâ fide*."

Le Comte SCLOPIS, president de la Cour:—

"Nous allons aborder les questions de principes; la première qui s'offre à nos yeux, celle qui nous servira comme de boussole morale dans les appréciations qu'ils nous faudra faire, parcourant les différents cas pratiques qui attendent notre décision, c'est la véritable signification à attribuer aux mots 'due diligence' qui ont été employés dans la première des trois Règles établies par l'Article VI. du Traité de Washington. . . .

Il me paraît que la voie la plus simple pour arriver à fixer légalement nos idées sur la matière est de se fixer sur les idées suivantes:

—Les mots 'diligence due' contiennent nécessairement l'idée d'un rapport du devoir à la chose; il est impossible de définir *à priori* abstraitement un devoir absolu de diligence. C'est la chose à laquelle cette diligence se rapporte qui en détermine le degré. Prenons l'échelle des imputabilités selon le droit Romain, en partant du *dolus* pour descendre par la *culpa lata* et la *culpa levis* jusqu'à la *culpa levissima*, et nous trouverons que les applicabilités se modifient d'après les objets auxquels elles se réfèrent. Je passe sur la responsabilité du tuteur, du dépositaire, et sur plusieurs autres cas spécifiés dans les lois, pour ne citer que l'exemple des cas où la responsabilité est encourue par la *culpa levis* ou même par la *levissima*. Telle est celle, par exemple, qui frappe celui qui est chargé de garder des matières explosibles, ou qui doit veiller à la sûreté des digues dans le temps des inondations, celui qui garde un dépôt de papiers d'une importance exceptionnelle. Toutes ces personnes, par le seul fait qu'elles ont accepté ces fonctions sont tenues d'exercer une diligence déterminée par l'objet spécial de ces mêmes fonctions. En se portant sur le terrain politique, la plus grande étendue que l'on puisse attribuer aux devoirs de diligence d'un neutre sera de lui imposer d'en agir à l'égard du belligérant comme il agirait pour son propre intérêt dans des cas analogues. Il est juste sans doute de tenir des exigences d'un belligérant à l'égard d'un neutre, mais il ne faut point les pousser au point de gêner le neutre dans l action normale de ses droits, dans l'organisme de ses fonctions gouvernantes. J'admets volontiers, d'autre part, que les devoirs du neutre ne puissent pas être déterminés par les lois que cette puissance se serait faites dans son propre intérêt. Il y aurait là un moyen facile de se soustraire à des responsabilités positives que l'équité reconnaît et que le droit des gens impose. Les nations ont entre elles un droit commun, ou si on aime mieux un lien commun, formé par l'équité et sanctionné par le respect des intérêts réciproques; ce droit commun se développe surtout en s'appliquant aux faits qui se passent sur la mer, là où les confins ne sont point tracés, où la liberté doit être d'autant plus assurée par un droit commun sans lequel il serait impossible de se mettre à couvert des plus flagrantes injustices par des garanties positives. C'est ce qui faisait dire à cet ancien, nourri dans les habitudes du servilisme: 'L'Empereur est le maître de la terre, mais la loi est la maîtresse de la mer.' J'accorde donc, au belligérant, d'exiger que le neutre ne mette point à couvert sa responsabilité sous des règles qu'il se serait fixées dans des vues de son seul intérêt, et j'entre pleinement dans les vues de l Article VI. du Traité de Washington, qui ne fait que donner la preférence aux règles de l'équité générale sur les dispositions d'une législation particulière quelle qu'elle puisse être. Il ne me paraît pas cependant admissible qu'un belligérant puisse exiger du neutre que, pour remplir ses devoirs de neutralité, il augmente son pied militaire, son système ordinaire de défense. Il y aurait là une infraction à l'indépendance de chaque Etat, qui, pour se trouver involontairement dans une

position spéciale à l'égard du belligérant, n'est pas tenu d'abdiquer une portion de sa souveraineté matérielle. On peut demander au neutre de mettre en pleine activité les ressorts de son Gouvernement pour maintenir sa neutralité ; on ne peut pas raisonnablement attendre de lui qu'il modifie l'organisation de sa machine gouvernementale, pour servir les intérêts d'une autre puissance. Il faut bien se garder de rendre la condition des neutres par trop difficile et presque impossible. On parle toujours de l'importance de circonscrire la guerre, et si on accable les neutres d'un fardeau de précautions et d'une responsabilité qui dépasse l'intérêt qu'ils ont à rester dans la neutralité, on les forcera à prendre une part active à la guerre ; au lieu d'une convenable inaction, on aura une augmentation d'hostilités. Il n'y aura plus de *medii* entre les combattants ; les désastres de la guerre se multiplieront, et le rôle de médiateurs, que les neutres ont souvent entrepris et conduit à bonne fin, sera effacé à jamais. Plaçons-nous donc à ce point de vue qui puisse engager les neutres et les belligérants à se respecter mutuellement. Prenons pour base les deux conditions de neutralité telles qu'elles sont posées par le Docteur L. Gessness, c'est-à-dire que les conditions de la neutralité sont :—1. Qu'on ne prenne absolument aucune part à la guerre et qu'on s'abstienne de tout ce qui pourrait procurer un avantage à l'une des parties belligérantes. 2. Qu'on ne tolère sur le territoire neutre aucune hostilité immédiate d'une partie contre l'autre.

Quant à la mesure de l'activité dans l'accomplissement des devoirs du neutre, je crois qu'il serait à propos d'établir la formule suivante :—Qu'elle doit être en raison directe des dangers réels que le belligérant peut courir par le fait ou la tolérance du neutre, et en raison inverse des moyens directs que le belligérant peut avoir d'éviter ces dangers. Cette formule nous conduit à résoudre la question, si souvent débattue dans les documents produits, de l'initiative à prendre par le neutre au profit du belligérant pour sauvegarder sa neutralité. Là où les conditions ordinaires du pays, ou des circonstances particulières survenues sur le territoire du neutre, constituent un danger spécial pour le belligérant qui ne peut avoir des moyens directs de s'y soustraire, le neutre est tenu d'employer son initiative afin que l'état de neutralité se maintienne à l'égard des deux belligérants. Cette iniative peut être mise en mouvement soit par un cas flagrant de quelque entreprise de l'un des belligérants contre l'autre, soit sur l'instance du belligérant qui dénonce un fait ou une série de faits qui violeraient à son égard les règles de la neutralité, c'est-à-dire qui rendraient meilleure la position d'un belligérant au détriment de celle de l'autre. Il ne parait pas que le neutre puisse, dans pareil cas, se décharger de sa responsabilité en exigeant du belligérant qu'il lui fournisse les preuves suffisantes pour instituer une procédure régulière devant les tribunaux. Ce serait réduire le belligérant à la condition d'un simple sujet du Gouvernement du pays.

Le droit des gens ne se contente pas de ces étroites mesures de

précautions, il lui faut plus de largeur d'assistance ; ce n'est pas seulement la *comitas inter gentes* qui la réclame, c'est le besoin réel qu'ont les nations de se prêter réciproquement aide et protection pour maintenir leur indépendance et garantir leur sécurité. Plus donc il y aura pour le belligérant de dangers réels sur le territoire du neutre, plus celui-ci sera tenu de veiller sur sa neutralité, en empêchant qu'elle ne soit violée au profit de l'un ou de l'autre des belligérants. La chose se présente un peu différemment lorsque le belligérant peut, à lui seul, par l'emploi de ses forces, tenir en échec son ennemi, même sur le territoire neutre. Ce cas se présente surtout lorsque la position géographique d'un Etat suffiit d'elle-même à assurer les moyens de réprimer promptement l'entreprise préparée sur le territoire neutre. Dans ces circonstances, le neutre ne serait plus tenu de prendre une initiative qui serait sans objet. Il ne pourra pas cependant tolérer par respect pour lui-même qu'on viole sa neutralité, et il sera tenu de déférer à toute juste demande qu'on lui adresserait d'éviter toute espèce de connivence avec l'un ou l'autre des belligérants. Si des principes abstraits, nous passons à la considération des faits particuliers sur lesquels les Etats-Unis croient que la responsabilité de l'Angleterre est engagée, nous devons d'abord parler de la construction des navires et des circonstances au milieu desquelles ces constructions eurent lieu. Le fait, en effet, de la construction des vaisseaux, de leur armament et équipement, de l'exportation des armes de guerre, prend un aspect différent, selon les circonstances des temps, des personnes et des lieux où il s'accomplit. Si le Gouvernement sur le territoire duquel le fait se passe a connaissance d'un état de chose permanent, auquel vienne se rattacher une probabilité marquée que de semblables constructions, armements et exportations, se fassent dans le but de servir aux projets d'un belligérant, le devoir de surveillance de la part de ce Gouvernement devient plus étendu et plus pressant.

Le Gouvernement Britannique était pleinement informé que les Confédérés Américains du Sud avaient établi en Angleterre comme une succursale de leurs moyens d'attaque et de défense vis-à-vis des Etats-Unis. Un comité de représentants du Gouvernement de Richmond avait été établi à Londres, et il s'était mis en rapport avec le Gouvernement Anglais. Lord Russell avait reçu les délégués des Confédérés, mais sans caractére officiel. La première visite avait eu lieu le 11 Mai, 1861—c'est-à-dire, trois jours avant la Proclamation de la Neutralité de la Reine et quatre jours avant l'arrivée de M. Adams à Londres en qualité de Ministre des Etats-Unis. Le Gouvernement Anglais ne pouvait pas ignorer non plus que de fortes maisons de commerce soignaient les intérêts des Confédérés à Liverpool, ville très-prononcée dés lors en faveur de l'Amérique du Sud. Il ne tarda pas à se prononcer en plein Parlement une opinion tout à fait favorable aux insurgés du Sud. Les Ministres de Sa Majesté la Reine, eux-mêmes, ne dissimulèrent point que dans leur manière de voir il était

très-difficile que l'Union Américaine pût se rétablir telle qu'elle était auparavant. Alors, chose étrange, on vit des membres les plus influents de la Chambre des Communes se détacher, sur cette question, du Ministère dont ils avaient été de puissants auxiliaires. La voix de M. Cobden et celle de M. Bright se firent entendre en faveur des Etats-Unis. Les Américains du Nord ne pouvaient avoir d'avocats plus dévoués à leur cause, et ils ne manquèrent pas de se prévaloir de leur autorité. Ces grands mouvements de l'opinion publique dans des sens opposés l'un à l'autre formaient comme une atmosphère d'agitation qui devait tenir éveillé le Ministère Britannique, afin de pouvoir se maintenir dans des rapports parfaitement égaux avec les deux parties belligérantes. Passons maintenant de ces remarques sur les faits à des considérations sur ce droit spécial.

Dans la première des Règles posées à l'Article VI. du Traité de Washington, il est parlé de la due diligence à empêcher les constructions, équipements, et armements de vaisseaux qu'un Gouvernement est tenu de déployer, quand il a un '*reasonable ground*' de croire que ces constructions, armements, et équipements ont pour objet d'aider, pour l'usage de la guerre, un des belligérants. Les mêmes mots se retrouvent dans la troisième Règle; ils manquent dans la seconde. 'Pourquoi cela?' demandait Lord Cairns dans la discussion sur le Traité susdit qui eut lieu dans la Chambre de Paris le 12 Juin de l'année dernière. Il me semble qu'on pourrait répondre; c'est parce que dans les cas de la première et de la troisième Règle, il y a lieu à des investigations de personnes et de choses pour certifier les faits incriminés, au lieu que la seconde se rapporte à une série de faits évidents sur lesquels il n'y a pas de recherches à faire en matière de crédibilité.

"'Quel est donc l'étalon,' poursuivait à dire le noble Lord, 'd'après lequel vous pouvez mesurer la due diligence? Due diligence à elle seule ne signifie rien. Ce qui est due diligence avec tel homme et tel Gouvernement ne l'est plus avec tel autre homme, tel autre Gouvernement plus puissant.'

La due diligence se détermine donc, à mon avis, ainsi que je l'ai déjà dit, par le rapport des choses avec l'obligation imposée par le droit. Mais quelle est la mesure de la raison suffisante? Ce sont les principes du droit des gens et la qualité des circonstances qui nous la donneront. Et ici, pour ne pas rester dans le vague, j'examinerai quelques-unes des propositions contenues dans l'Argument du Conseil de Sa Majesté Britannique sur le premier des points indiqués par le Tribunal dans son Arrêté du 24 Juillet. Je ne me laisserai guider que par mes propres vues, tout en rendant pleine et entière justice à la finesse des observations et à la richesse de la doctrine de l'illustre jurisconsulte rédacteur de cette pièce, digne d'être mise sur une même ligne avec les autres également remarquables sorties de la plume des Conseils du Gouvernement Américain. Je lis, à la page 4 de cet Argument, que le cas d'un navire qui quitte le pays neutre sans arme-

ment est tout à fait différent du cas d'un navire qui, armé en guerre vendu à un belligérant sur le territoire neutre et en état d'attaquer et de se défendre, quitte ce territoire sous l'autorité de l'acheteur belligérant; que son départ n'est en aucune façon une opération de guerre; qu'il n'est coupable d'aucune violation du territoire neutre, ni d'aucun acte hostile. Il me paraît que lorsqu'un vaisseau a été construit et préparé pour la guerre, qu'il y a de fortes raisons de croire qu'il est acheté pour le compte d'un belligérant et qu'il va soudain prendre la mer, il y a bien des motifs de supposer qu'à peu de distance des eaux territoriales on apportera à ce vaisseau des armes et des munitions, des vêtements à sa taille. C'est bien le cas de se servir d'une phrase de Sir Roundell Palmer—"to act upon suspicion, or upon moral belief going beyond suspicion," qu'on lit dans son discours à la Chambre des Communes, le 13 Mai, 1864. La fraude est trop facile pour qu'elle ne doive pas être présumée. Il suffira de charger sur un vaisseau, strictement de commerce, des armes et des engins de guerre de toute sorte, et que ce vaisseau rejoigne le premier en haute mer ou dans des eaux neutres différentes de celles du territoire primitif d'où il est parti, pour que le tour soit fait. C'est l'histoire du Prince Alfred, du Laurel, de l'Alar, de l'Agrippine, et du Bahama, de toutes ses combinaisons qui ne pourraient, à mon avis, diminuer en rien la responsabilité qu'auraient encourue l'Alabama, le Florida, le Shenandoah, le Georgia, &c. Ces évasions par fragments, cette complication de formes d'action différentes, dans un intérêt identique, ne doivent point fourvoyer l'esprit du juge. Un vaisseau tout préparé pour la guerre quitte, sans recevoir son armement, les plages sur lesquelles il a été construit; un vaisseau tout simplement de commerce se charge de transporter l'armement; le lieu du rendez-vous est fixé, là se complète l'armement en guerre du vaisseau. Le tour est fait. Mais la raison et la conscience du juge ne peuvent se laisser prendre à ces ruses. Bien au contraire, ce manége ne servira qu'à mieux faire ressortir la culpabilité des deux vaisseaux. J'en reviens donc à ce que disait Sir Robert Peel dans un mémorable discours prononcé à la Chambre des Communes, le 28 Avril, 1830.—'Si les troupes étaient sur un vaisseau et les armes sur un autre, cela faisait-il une différence?' et je n'hésite point à dire—si le vaisseau était appareillé pour la guerre et prêt à recevoir l'armement et les armes étaient sur un autre navire, cela ne faisait aucune différence. . . . . Je suis d'accord qu'on ne puisse pas demander qu'on exécute des choses naturellement impossibles; c'est le cas de la force majeure; *ad impossibile nemo tenetur*. Mais je me refuse à reconnaître l'impossibilité politique invoquée dans l'Argument du Conseil de Sa Majesté Britannique. Rien n'est plus élastique que ces mots: ce serait livrer l'exécution de cette partie vitale du Traité aux courants des intérêts temporaires, des accidents du moment. On dirait: Oui, j'ai consenti à poser la règle, mais les moyens d'y satisfaire me manquent; tant pis pour la règle. J'ajoute, pour en finir, qu'il n'y a pas à craindre que l'application de ces règles puisse

arriver au point de violer les principes sur lesquels reposent les Gouvernements nationaux. La nature de l'engagement ne va pas jusque là. Il est très-possible que cette application gêne quelquefois les Gouvernements dans leur conduite politique, mais elle empêchera plus souvent des désordres capables de produire des malheurs qu'on ne saurait assez déplorer. Les Règles de l'Article VI. du Traité de Washington sont destinées à devenir des principes de droit commun pour la garantie de la neutralité. La texte même le dit, et M. Gladstone et Lord Granville ont toujours, et avec raison, insisté sur cette prévision d'un bienfait acquis à la civilisation. Pour que cela se réalise, il faudra que les différents Gouvernements prennent des mesures afin d'avoir les moyens convenables pour exécuter la loi. Pour le passé, il y avait de grandes variétés en cette matière dans la législation des différents peuples. Les Etats-Unis avec leurs Attorneys de district, leurs maréchaux, officiers de police organisée, étaient mieux assistés que l'Angleterre avec ses seuls employés de la douane et de l'accise. Je ne doute point que l'on n'entre dans ces vues, si l'exécution du Traité de Washington doit être chose sérieuse; et ce serait un grand malheur s'il ne l'était pas."

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La sentence est arbitrale dans ces termes:

Attendu en vertu de l'article 1er du traité conclu à Washington, le 8 mai 1871, entre les Etats-Unis d'Amérique et Sa Majesté la Reine du Royaume-Uni de la Grande-Bretagne et d'Irlande;

Les Etats-Unis d'Amérique et S. M. la reine du Royaume-Uni de la Grande-Bretagne et d'Irlande;

Etant convenus par l'article I du traité signé et conclu à Washington le 8 mai 1871 de soumettre toutes les réclamations "connues sous le nom générique de réclamations de l'*Alabama*," à un tribunal d'arbitrage composé de cinq arbitres nommés;

l'un; par le président des Etats Unis;

l'un; par Sa Majesté Britannique;

l'un; par Sa Majesté le roi d'Italie;

l'un; par le président de la Confédération suisse;

l'un; par Sa Majesté l'empereur du Brésil;

et

Le président des Etats-Unis,

Sa Majesté Britannique,

Sa Majesté le roi d'Italie;.

Le président de la confédération Suisse et S. M. l'empereur du Brésil, ayant respectivement nommé leur arbitre, savoir:

Le président des Etats-Unis;

Charles Francis Adams, Esquire:

Sa Majesté Britannique;

Le très honorable sir Alexandre-Jacques-Edmond Cockburn, conseiller de Sa Majesté Britannique en son conseil privé, lord chief-justice d'Angleterre;

Sa Majesté le roi d'Italie;

Son Excellence M. le comte Frédéric Sclopis de Salerano, chevalier de l'ordre de l'Annonciade, ministre d'Etat, sénateur du royaume d'Italie;

Le président de la Confédération suisse;

M. Jacques Stæmpfli:

Sa Majesté l'empereur du Brésil;

Son Excellance M. Marcos Antonio d'Araujo, vicomte d'Itajubá, grand de l'empire du Brésil, membre du conseil de S. M. l'empereur du Brésil, et son envoyé extraordinaire et ministre plénipotentiaire en France;

Et les cinq arbitres ci-dessus nommés s'étant réunis à Genève (en Suisse) dans une des salles de l'hôtel de ville, le 13 décembre 1871, conformément à l'art. II du traité de Washington, du 8 mai de la même année, et ayant procédé à l'examen et à la vérification des actes de leurs nominations respectives, trouvés en bonne et due forme.

Le tribunal d'arbitrage s'est déclaré constitué;

Les agents nommés par chacune des hautes parties contractantes en vertu du même article II, savoir:

Pour les Etats-Unis d'Amérique;

M. John C. Bancroft Davis, esquire;

et

Pour Sa Majesté Britannique;

Charles Stuart Aubrey, lord Tenterden, pair du Royaume-Uni, compagnon du très-honorable ordre du Bain, sous-secrétaire d'Etat adjoint, pour les affaires étrangères.

Dont les pouvoirs ont également été trouvés en bonne et due forme.

Ont alors remis à chacun des arbitres le mémoire imprimé, rédigé par chacune des deux parties, accompagné des documents, de la correspondance officielle et des autres preuves sur lesquelles chacune d'elles se fonde, le tout aux termes de l'art. III du dit traité.

En vertu de la décision prise par le tribunal dans la première séance, le contre-mémoire, accompagné de documents, de la cor-

respondance officielle et des preuves additionnelles dont il est parlé à l'article IV du dit traité, a été remis par les agents respectifs des deux parties au secrétaire du tribunal, le 15 avril 1872, dans la salle des conférences, à l'hôtel de ville de Genève.

Le tribunal, conformément à l'ajournement fixé dans sa deuxième séance tenue le 16 du mois de décembre 1871, s'est de nouveau réuni à Genève, le 15 du mois de juin 1872, et l'agent de chacune des deux parties y a remis à chacun des arbitres et à l'agent de l'autre partie, le plaidoyé mentionné dans l'article V du traité.

Le tribunal, après avoir pris connaissance du dit traité, des mémoires, contre-mémoires, documents, preuves et plaipoyers sus-énoncés, ainsi que des autres communications qui lui ont été faites par les deux parties dans le cours de ses séances et les avoir impartialement et soigneusement examinés:

A décidé ce qui est consigné dans le présent acte:

Vu les articles VI et VII du dit traité:

Considérant,

Que les arbitres sont tenus, en vertu du dit art. VI, de se conformer dans la décision des questions qui leur sont soumises, aux trois règles qui y sont énoncées, et à tels principes du droit des gens qui, sans être en désaccord avec ces règles, auront été reconnus par les arbitres comme ayant été applicables dans l'espèce;

Considérant,

Que les "dues diligences," dont il est parlé dans la première et dans la troisième des dites règles doivent être employées par les gouvernements neutres en raison directe des dangers qui pourraient résulter pour l'un ou pour l'autre des belligérants du manque d'observance de devoirs de la neutralité de leur part;

Considérant,

Que les circonstances, au milieu desquelles se produisirent les faits qui forment le sujet de la cause, étaient de nature à éveiller toute la sollicitude du gouvernement de Sa Majesté Britannique, touchant les droits et les devoirs de la neutralité proclamée par la Reine, le 13 mai 1864;

Considérant,

Que les conséquences de la violation de neutralité commise par la construction, l'équipement et l'armement d'un navire ne s'effacent point par le fait d'une commission gouvernementale, que le belligérant, au profit duquel la neutralité a été violée, aurait par a suite accordée au dit navire;

Qu'il est en effet inadmissible, que la cause finale du délit devienne le motif de l'absolution du délinquant, et que de l'œuvre de la fraude accomplie surgisse le moyen d'innocenter le fraudeur;

Considérant,

Que le privilége d'extorritorialité accordé aux navires de guerre a été introduit dans le droit public, non comme un droit absolu, mais seulement comme un procédé de courtoisie et de déférence entre les différentes nations, et qu'il ne saurait être invoqué pour couvrir des actes contraires à la neutralité;

Considérant,

Que l'absence d'un avis préalable ne peut être envisagé comme un manque des égards commandés par le droit des gens, là où le navire porte avec lui sa propre condamnation;

Considérant,

Que pour attribuer aux approvisionnements de charbon un caractère contraire à la deuxième règle, concernant l'interdiction pour un port ou pour des eaux neutres de servir de base d'opérations navales pour un belligérant, il faut que les dits approvisionnements se rattachent à des circonstances particulières de temps, de personnes et de lieux, qui concourent pour leur attribuer ce caractère;

Attendu,

Quant au navire nommé *Alabama*,

Que de tous les faits relatifs à la construction de ce vaisseau, désigné d'abord par le chiffre "290" dans le port de Liverpool, à son équipement et armement sur les côtes de Terceira par les soins des bâtiments l'*Agrippina* et le *Bahama* venus d'Angleterre, il ressort clairement que le gouvernement de la Grande-Bretagne, a négligé d'employer les dues diligences pour le maintien des devoirs de sa neutralité, puisque malgré les avis et réclamations officielles des agents diplomatiques des Etats-Unis pendant le cours de la construction du "290," le dit gouvernement ne prit aucunes mesures convenables en temps utile, et que celles finalement prises pour faire arrêter le dit navire, furent si tardivement ordonnées qu'elles ne purent être exécutées;

Attendu,

Que les mesures prises après l'évasion du dit navire pour le faire poursuivre et arrêter furent si incomplètes qu'elles n'amenèrent aucun résultat et ne peuvent être considérées comme suffisantes pour dégager la responsabilité encourue par la Grande-Bretagne;

Attendu,

Que malgré les infractions à la neutralité de la Grande-Bretagne commises par le "290," ce même navire, alors connu comme croiseur confédéré *Alabama*, fut encore à plusieurs reprises librement admis dans les ports de colonies britanniques, quand il aurait fallu procéder contre lui dans tous les ports soumis à la juridiction britannique où il aurait été rencontré;

Attendu,

Que le gouvernement de Sa Majesté Britannique ne saurait se justifier du manque de due diligence en alléguant l'insuffisance des moyens légaux dont il pouvait disposer.

Quatre des membres du Tribunal par ces motifs, et le cinquième par des motifs à lui propres, sont d'avis;

"Que la Grande-Bretagne a manqué par omission aux devoirs "prescrits dans la première et la troisième des règles établies "dans l'article VI du traité de Washington."

Attendu,

Quant au navire nommé *Florida*,

Que de tous les faits relatifs à la construction de l'*Oreto*, dans le port de Liverpool, et à sa sortie de ce port, lesquels faite n'amenèrent pas de la part des autorités britanniques l'emploi des mesures propres à empêcher la violation de la neutralité de la Grande-Bretagne, malgré les avis et réclamations réitérées des agents des Etats-Unis, il ressort que le gouvernement de Sa Majesté Britannique a négligé d'employer les dues diligences pour le maintien des devoirs de sa neutralité;

Attendu,

Que de tous les faits relatifs au séjour de l'*Oreto* à Nassau, à sa sortie de ce port, à l'enrôlement d'un équipage, à son approvisionnement, à son armement avec l'aide du navire anglais *Prince Alfred*, à Green Key, il ressort qu'il y a eu négligence de la part des autorités coloniales britanniques;

Attendu,

Que malgré les infractions à la neutralité de la Grande-Bretagne, commises par l'*Oreto*, ce même navire, alors connu comme croiseur confédéré *Florida*, fut encore à plusieurs reprises librement admis dans les ports de colonies britanniques;

Attendu,

Que l'acquittement judiciaire de l'*Oreto*, à Nassau, ne saurait dégager la Grande-Bretagne de la responsabilité encourue en vertu du principe du droit des gens;

Attendu,

Que le fait de l'entrée du *Florida* dans le port confédéré de Mobile et de son séjour dans ce port pendant quatre mois, ne saurait détruire la responsabilité encourue par la Grande-Bretagne ;

Par ces motifs,

Le tribunal,

A la majorité de 4 voix contre 1,

Est d'avis,

Que la Grande-Bretagne a manqué par omission aux devoirs prescrits dans la première, dans la deuxième et dans la troisième des règles établies dans l'article VI du traité de Washington.

Attendu,

Quant au navire nommé *Shenandoah*,

Que de tous les faits relatifs au départ de Londres du navire marchant le *Sea King*, et à la transformation de ce navire en croiseur confédéré sous le nom de *Shenandoah*, près de l'île de Madère, il ressort que l'on ne saurait accuser le gouvernement de Sa Majesté Britannique d'avoir négligé jusque-là d'employer les dues diligences pour le maintien des devoirs de sa neutralité :

Mais attendu,

Que de tous les faits relatifs au séjour du *Shenandoah* à Melbourne et notamment à l'augmentation opérée clandestinement, ainsi qu'il a été admis même de la part du gouvernement britannique, de son équipage dans ce port, et qu'ainsi il ressort qu'il y a eu négligence de la part des autorités britanniques :

Par ces motifs,

Le tribunal est d'avis à l'unanimité ;

Que la Grande-Bretagne n'a manqué ni par action, ni par omission, aux devoirs énoncés dans les trois règles de l'article VI du traité de Washington, ou reconnus par les principes du droit des gens qui ne sont pas en désacord avec ces règles, quant au navire nommé *Shenandoah*, antérieurement à son entrée dans le port de Melbourne ;

Et à la majorité de 3 voix contre 2 :

Que la Grande-Bretagne a manqué par omission aux devoirs énoncés dans la deuxième et dans la troisième des susdites règles, quant à ce même navire, postérieurement à son entrée à Hobson's Bay, et qu'elle est responsable pour les actes commis par ce navire après son départ de Melbourne, le 18 février, 1866.

Quant aux navires :

" *Tascaloosa*,"

(Tender de l' " *Alabama.*")

" *Clarence*,"

" *Tacony*,"

" *Archer*,"

(Tenders du " *Florida ;* ")

Le tribunal est d'avis, à l'unanimité ;

Que les *Tenders* ou navires auxiliaires devant être considérés comme accessoires, doivent forcément suivre le sort des navires principaux et être soumis aux mêmes décisions qui frappent ceux-ci.

Quant au navire nommé " *Retribution.*"

Le tribunal, à la majorité de 3 voix contre 2 est d'avis.

Que la Grande-Bretagne n'a manqué ni par action, ni par omission, aux devoirs énoncés dans les trois règles de l'article VI du traité de Washington, ou reconnus par les principes du droit des gens qui ne sont pas en désacord avec ces règles.

Quant aux navires nommés :

" *Georgia*,"

" *Sumter*,"

" *Nashville*,"

" *Tallahasse*,"

" *Chickamauga*,"

Le tribunal est d'avis, à l'unanimité,

Que la Grande-Bretagne n'a manqué, ni par action, ni par omission, aux devoirs énoncés dans les trois règles de l'article VI du traité de Washington, ou reconnus par les principes du droit des gens qui ne sont pas incompatibles avec ces règles.

Quant aux navires nommés :

" *Sallie*,"

" *Jefferson Davis*,"

" *Music*,"

" *Coston*,"

" *V. H. Joy*,"

Le tribvnal a été d'avis, à l'unanimité,

De les illiminer de ses délibérations, faute de preuve.

Quant à la demande d'indemnité formulée par les Etats-Unis,

Le tribunal,

Considérant,

Que " les frais de poursuites" des croiseurs confédérés doivent

se confondre avec les frais généraux de la guerre soutenue par les Etats-Unis;

Est d'avis, à la majorité de 3 contre 2.

Qu'il n'y a lieu d'adjuger aux Etats-Unis aucune somme à titre d'indemnité de ce chef.

Considérant,

Que les "profits éventuels" ne sauraient être l'objet d'aucune compensation, puisqu'il s'agit de choses futures et incertaines;

Est d'avis, à l'unanimité,

Qu'il n'y a lieu d'adjuger aux Etats-Unis aucune somme à titre d'indemnité de ce chef.

Considérant,

Que pour établir une compensation équitable des dommages soufferts, il faut écarter les "réclamations doubles" et n'admettre les réclamations pour "frets," qu'en tant qu'elles représentent le "fret net;"

Considérant,

Qu'il est juste et raisonnable d'allouer des intérêts dans une proportion équitable;

Considérant,

Que, suivant l'esprit et la lettre du traité de Washington, il est préférable d'adopter le système de l'adjudication d'une somme en bloc, plutôt que de déférer au conseil d'assesseurs prévu par l'article X du dit traité, les discussions et délibérations ultérieures, et faisant usage du pouvoir qui lui est conféré par l'article VII du dit traité;

Le tribunal, à la majorité de quatre voix contre une.

Adjuge aux Etats-Unis la somme en bloc de quinze millions et cinq cent mille dollars en or.

A titre d'indemnité.

Que la Grande-Bretagne devra payer pour toutes les réclamations déférées au tribunal, conformément aux prescriptions du dit article VII.

Et conformément à l'article VI du dit traité.

Le tribunal,

Déclare entièrement, absolument et définitivement réglées toutes les réclamations mentionnées au traité et soumises au tribunal.

Il déclare, en outre, que chacune des dites réclamations, qu'elle lui ait été ou non notifiée, faite, présentée ou soumise, est et demeure définitivement réglée, annulée et désormais inadmissible.

En foi de quoi, le présent acte de décision a été expédié en double original et signé par les arbitres, qui y ont donné leur assentiment, le tout conformément à l'article VII du dit traité de Washington.

Fait et délibéré à l'hôtel de ville de Genève (en Suisse), le quatorzième jour du mois de septembre de l'an de Notre-Seigneur, mil huit cent soixante-et-douze.

(Signé) C. F. ADAMS,
(Signé) FRÉDÉRIC SCLOPIS,
(Signé) STÆMPFLI,
(Signé) Vicomte D'ITAJUBA.

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## THE TREATY OF WASHINGTON BEFORE THE PARLIAMENT OF CANADA.

The Treaty of Washington has been more successful than was expected. The indirect Alabama claims, which for a time seemed to threaten the very existence of the Treaty, have been thrown out by the Geneva Court of Arbitration. The direct claims have been finally adjusted by the award of the 14th September last. The San Juan difficulty has also been removed in the way that we had anticipated.

The British Claims Commission, sitting at Washington, reports progress daily. That portion of the Treaty which concerns the British Provinces, has been ratified by the Parliament of Canada. In fact, in order to come into full effect, the Treaty now requires only the sanction of the Congress of the United States, as provided for by article 33. The action of the Legislature of New Brunswick, in fact, is only needed with regard to the lumber duties on the River St. John, to give to British subjects an unconditional right to the coasting trade, granted by article 30. The last question likely to be determined will be the value of the Canadian fisheries, forming the subject matter of enquiry by the Halifax Commission under article 22.

The debate on the ratification of the Treaty in the Canadian Parliament led to the publication of many official documents of importance to the history of the public law of Canada.*

* Message, despatches and Minutes of the Privy Council relating to the Treaty of Washington, printed by order of Parliament, Ottawa, 1872.

A writer in *La Revue de Droit International* lately observed that the opinion, expressed in this Review,—that the Crown has no power to surrender any portion of the fisheries, or the navigation of the St. Lawrence, without the assent of Parliament,—was utterly unfounded, *foncièrement erronée*, because, as he asserts, the right ceded is only a right of use, *un droit d'usage*. But it is clear, at a first glance, that the permanent right of navigating the St. Lawrence is a *servitude*, and therefore a part of the right of property therein, *un démembrement de la propriété*. Moreover, this point can no longer be raised under our constitutional law. On the 10th March, 1871, exactly one month after the publicatiou of our article on the *Joint High Commission*, we find the Government of Canada representing to the British Government that, in their opinion, "the Canadian fisheries cannot be sold without the consent of the Dominion." On the 17th of the same month, the British Government transmitted the following reply:

"My Lord,—In answer to your telegram, received on the 10th instant, stating that in the opinion of your Government, the Canadian fisheries cannot be sold without the consent of the Dominion, I have already informed your Lordship by telegraph that Her Majesty's Government never had any intention of advising Her Majesty to part with those fisheries, without such consent.

"When the Reciprocity Treaty was concluded, the Acts of the Nova Scotian and New Brunswick Legislatures relating to the Fisheries were suspended by Acts of those Legislatures, and the Fishery rights of Canada are now under the protection of a Canadian Act of Parliament, the repeal of which would be necessary in case of the cession of those rights to any Foreign Power.

"I think it right, however, to add, that the responsibility of determining what is the true construction of a Treaty, made by Her Majesty with any foreign power, must remain with Her Majesty's Government, and that the degree to which this country would make itself a party to the strict enforcement of treaty rights, may depend not only on the literal construction of the treaty, but on the moderation and reasonableness with which these rights are asserted.—I have, &c.,

(Signed) Kimberley.

Governor-General
The Right Honorable Lord Lisgar,
G.C.B., G.C.M.G., &c., &c., &c."

Another despatch from the Colonial Office, dated the 23rd November, 1871, to the Executive Committee of Canada, contains the following:

"The Committee seem to be under the impression that the right to participate in the Colonial Inshore Fisheries has been conceded to the United States without the previous consent of Canada. On this I have to observe that provision has been made for obtaining the assent of Canada in the manner which is strictly in accordance with constitutional usage, namely by stipulating that the fishery articles shall not come into force without the previous assent of the Dominion Parliament. If the Crown were to conclude a similar Treaty as regards the Fisheries of the United Kingdom, the assent of the Imperial Parliament would be reserved in no other manner."

It also appears from the documents laid before our Parliament that the Canadian Government met the Treaty of Washington with a strong protest, dated the 28th July, 1871. It is gratifying to find that the views expressed in *La Revue Critique* a few weeks previous, coincide so closely with the opinions expressed in that protest:

"The Committee of the Privy Council have had under their consideration the Earl of Kimberley's despatch to Your Excellency, dated the 17th June ult., transmitting copies of the Treaty signed at Washington on the 8th May last, by the Joint High Commissioners, and which has since been ratified by Her Majesty and by the United States of America; of the instructions to Her Majesty's High Commissioners, and of the protocols of the Conferences held by the Commission; and likewise the Earl of Kimberley's despatch of the 20th June ultimo, explaining the failure of Her Majesty's Government to obtain the consideration by the United States Commissioners of the claims of Canada for the losses sustained owing to the Fenian raids of 1866 and 1870.

"The Committee of the Privy Council have not failed to give their anxious consideration to the important subject discussed in the Earl of Kimberley's despatches, and they feel assured that they will consult the best interests of the Empire, by stating frankly for the information of Her Majesty's Government the result of their deliberations, which they believe to be in accordance with public opinion in all parts of the Dominion:—

"The Committee of the Privy Council readily admit that Canada is deeply interested in the maintenance of cordial rela-

tions between the Republic of the United States and the British Empire, and they would therefore have been prepared without hesitation to recommend the Canadian Parliament to co-operate in procuring an amicable settlement of all differences likely to endanger the good understanding between the two countries. For such an object they would not have hesitated to recommend the concession of some valuable rights, which they have always claimed to enjoy under the Treaty of 1818, and for which, as the Earl of Kimberley observes, Her Majesty's Government have always contended, both Governments having acted on the interpretation given to the Treaty in question by high legal authorities. The general dissatisfaction which the publication of the Treaty of Washington has produced in Canada, and which has been expressed with as much force in the Agricultural Districts of the West as in the Maritime Provinces, arises chiefly from two causes:—

"1st. That the principal cause of difference between Canada and the United States has not been removed by the Treaty, but remains a subject for anxiety.

"2nd. That a cession of territorial rights of great value has been made to the United States, not only without the previous assent of Canada, but contrary to the expressed wishes of the Canadian Government.

"The Committee of the Privy Council will submit their views on both those points for the information of Her Majesty's Government, in the hope that by means of discussion, a more satisfactory understanding between the two Governments may be arrived at. The Earl of Kimberley has referred to the rules laid down in Article VI. of the Treaty of Washington, as to the international duties of neutral Governments, as being of special importance to the Dominion; but the Committee of the Privy Council, judging from past experience, are much more apprehensive of misunderstanding, owing to the apparent difference of opinion between Canada and the United States as to the relative duties of friendly States in a time of peace. It is unnecessary to enter into any lengthened discussion of the conduct of the United States, during the last six or seven years, with reference to the organization of considerable numbers of the citizens of those States under the designation of Fenians. The views of the Canadian Government on this subject are in possession of Her Majesty's Go-

vernment, and it appears from the protocol of conference between the High Commissioners, that the British Commissioners presented the claims of the people of Canada, and were instructed to state that they were regarded by Her Majesty's Government as coming within the class of subjects indicated by Sir Edward Thornton, in his letter of 26th January last, as subjects for the consideration of the Joint High Commissioners. The Earl of Kimberley states that it was with much regret that Her Majesty's Government acquiesced in the omission of these claims from the general settlement of outstanding questions between Great Britain and the United States; and the Committee of the Privy Council, while fully participating in that regret, must add that the fact, that this Fenian organization is still in full vigour and that there seems no reason to hope that the United States Government will perform its duty, as a friendly neighbour, any better in the future than in the past, leads them to entertain a just apprehension that the outstanding subject of difference with the United States is the one of all others which is of special importance to the Dominion. They must add that they are not aware that during the existence of this Fenian organization, which for nearly seven years has been a cause of irritation and expense to the people of Canada, Her Majesty's Government have made any vigorous effort to induce the Government of the United States to perform its duty to a neighboring people who earnestly desire to live with them on terms of amity, and who during the civil war loyally performed all the duties of neutrals, to the expressed satisfaction of the Government of the United States. On the contrary, while in the opinion of the Government and the entire people of Canada, the Government of the United States neglected until much too late, to take the necessary measures to prevent the Fenian invasion of 1870, Her Majesty's Government hastened to acknowledge by cable telegram, the prompt action of the President, and to thank him for it.

"The Committee of the Privy Council will only add, on this painful subject, that it is one on which the greatest unanimity exists among all classes of the people throughout the Dominion, and the failure of the High Commissioners to deal with it has been one cause of the prevailing dissatisfaction with the Treaty of Washington. The Committee of the Privy Council will proceed to the consideration of the other subject of dissatisfaction in Canada, viz, the cession to the citizens of the United States of the

right to the use of the inshore fisheries, in common with the people of Canada. The Earl Kimberley after observing that the Canadian Government took the initiative in suggesting that a joint British and American Commission should be appointed, with a view to settle the disputes which had arisen as to the interpretation of the Treaty of 1818, proceeds to state that 'the 'causes of the difficulty lay deeper than any question of inter- 'pretation, that the discussion of such points, as the correct de- 'finition of bays could not lead to a friendly agreement with the 'United States,' and that it was necessary therefore 'to endeavour to find an equivalent which the United States might be willing to give in return for the fishery privileges.' In the foregoing opinion of the Earl of Kimberley, the Committee of the Privy Council are unable to concur, and they cannot but regret that no apportunity was afforded them of communicating to Her Majesty's Government their views on a subject of so much importance to Canada, prior to the meeting of the Joint High Commission.

"When the Canadian Government took the initiative of suggesting the appointment of a Joint British and American Commission, they never contemplated the surrender of their territorial rights, and they had no reason to suppose that Her Majesty's Government entertained the sentiments expressed by the Earl of Kimberley in his recent despatch. Had such sentiments been expressed to the delegate appointed by the Canadian Government to confer with His Lordship a few months before the appointment of the Commission, it would at least have been in their power to have remonstrated against the cession of the inshore fisheries, and it would moreover have prevented any member of the Canadian Government, from acting as a member of the Joint High Commission, unless on the clear understanding that no such cession should be embodied in the treaty without their consent.

"The expediency of the cession of a common right to the inshore fisheries has been defended on the ground that such a sacrifice on the part of Canada should be made in the interests of peace.

"The Committee of the Privy Council, as they have already observed, would have been prepared to recommend any necessary concession for so desirable an object; but they must remind the Earl of Kimberley that the original proposition of Sir

Edward Thornton, as appears by his letter of 26th January was that 'a friendly and complete understanding should be come to between the two Governments, as to the extent of the rights which belong to the citizens of the United States and Her Majesty's subjects respectively, with reference to the fisheries on the coasts of Her Majesty's Possessions in North America.' In his reply, dated 30th January last, Mr. Secretary Fish informs Sir Edward Thornton that the President instructs him to say that 'he shares with Her Majesty's Government the appreciation of the importance of a friendly and complete understanding between the two Governments with reference to the subject specially suggested for the consideration of the proposed Joint High Commission.'

"In accordance with the explicit understanding, thus arrived at between the two Governments, Earl Granville issued instructions to Her Majesty's High Commission, which, in the opinion of the Committee of the Privy Council, covered the whole ground of controversy. The United States had never pretended to claim a right, on the part of their citizens, to fish within three marine miles of the coast and bays, according to their limited definition of the latter term; and although the right to enjoy the use of the inshore fisheries might fairly have been made the subject of negotiation, with the view of ascertaining whether any proper equivalents could be found for such a concession, the United States was precluded by the original correspondence from insisting on it as a condition of the Treaty. The abandonment of the exclusive right to the inshore fisheries, without adequate compensation, was not therefore necessary in order to come to a satisfactory understanding on the points really at issue.

"The Committee of the Privy Council forbear from entering into a controversial discussion, as to the expediency of trying to influence the United States to adopt a more liberal commercial policy. They must, however, disclaim, most emphatically, the imputation of desiring to imperil the peace of the whole empire, in order to force the American Government to change its commercial policy. They have, for a considerable time back, ceased to urge the United States to alter their commercial policy; but they are of opinion that, when Canada is asked to surrender her inshore fisheries to foreigners, she is fairly entitled to name the proper equivalent.

"The Committee of the Privy Council may observe that the opposition of the Government of the United States to reciprocal free trade in the products of the two countries, was just as strong for some years prior to 1854, as it has been since the termination of the Reciprocity Treaty, and that the Treaty of 1854 was obtained chiefly by the vigorous protection of the Fisheries which preceded it; and that but for the conciliatory policy on the subject of the Fisheries, which Her Majesty's Government induced Canada to adopt after the abrogation of the Treaty of 1854, by the United States, it is not improbable that there would have been no difficulty in obtaining its renewal.

"The Committee of the Privy Council have adverted to the policy of Her Majesty's Government, because the Earl of Kimberley has stated that there is no difference in principle between a money payment and 'the system of licenses calculated at so many dollars a ton, which was adopted by the Colonial Government for several years after the termination of the Reciprocity Treaty.'

"Reference to the correspondence will prove that the license system was reluctantly adopted by the Canadian Government, as a substitute for the still more objectionable policy pressed upon it by Her Majesty's Government, it having been clearly understood that the arrangement was of a temporary character. In his despatch of the 3rd March, 1866, Mr. Secretary Cardwell observed:—"Her Majesty's Government do not feel disclined to allow the United States, for the season of 1866, the freedom of fishing granted to them in 1854, on the distinct understanding that unless some satisfactory arrangement between the two countries be made during the course of the year, this privilege will cease, and all concessions made in the Treaty of 1854, will be liable to be withdrawn."

"The principle of a money payment for the concession of territorial rights has ever been most repugnant to the feelings of the Canadian people, and has only been entertained in deference to the wishes of the Imperial Government. What the Canadians were willing under the circumstances to accept as an equivalent, was the concession of certain commercial advantages, and it has therefore been most unsatisfactory to them that Her Majesty's Government should have consented to cede the use of the inshore Fisheries to foreigners, for considerations which are deemed wholly inadequate.

"The Committee of the Privy Council need not enlarge further on the objectionable features of the Treaty, as it bears on Canadian interests. These are admitted by many, who think that Canada should make sacrifices for the general interests of the Empire. The people of Canada, on the other hand, seem unable to comprehend that there is any existing necessity for the cession of the right to use their inshore fisheries without adequate compensation. They have failed to discover that in the settlement of the so-called *Alabama Claims*, which was the most important question in dispute between the two nations, England gained such advantages, as to be required to make further concessions, at the expense of Canada, nor is there anything in the Earl of Kimberley's despatch to support such a view of the question.

"The other parts of the treaty are equally, if not more advantageous to the United States than to Canada, and the fishery question must consequently be considered on its own merits; and if so considered, no reason has yet been advanced to induce Canada to cede her inshore fisheries for what Her Majesty's Government have admitted to be an inadequate consideration.

"Having thus stated their views on the two chief objections to the late Treaty of Washington, the Committee of the Privy Council will proceed to the consideration of the correspondence between Sir Edward Thornton and Mr. Fish, transmitted in the Earl of Kimberley's despatch of the 17th June, and of His Lordship's remarks thereon. This subject has already been under the consideration of the Committee of the Privy Council, and a report dated the 7th June, embodying their views on the subject, was transmitted to the Earl of Kimberley by your Excellency.

"In his despatch of the 26th June, acknowledging the receipt of that report, the Earl of Kimberley refers to his despatch of the 17th of that month, and "trusts that the Canadian Government will, after mature consideration, accede to the proposal of the United States Government on this subject."

"The Committee of the Privy Council, in expressing their adherence to their report of the 7th June, must add, that inapplicability of the precedent of 1854, under which the action of the Canadian Parliament was anticipated by the Government, to the circumstances now existing, appears to them manifest. The treaty of 1854 was negotiated with the concurrence of the

Provincial Governments represented at Washington, and met with the general approbation of the people, whereas the fishery clauses of the late treaty were adopted against the advice of the Canadian Government and have been generally disapproved of, in all parts of the Dominion.

"There can hardly be a doubt that any action on the part of the Canadian Government, in anticipation of the decision of Parliament, would increase the discontent which now exists. The Committee of the Privy Council request that Your Excellency will communicate to the Earl of Kimberley the views which they entertain on the subject of the Treaty of Washington, in so far as it affects the interests of the Dominion.

(Certified) "WM. H. LEE,
"Clerk Privy Council."

There is no doubt that after this patriotic protest, numerous despatches were exchanged between the Imperial and Canadian Governments, only a part of which was afterwards laid before the Canadian Parliament. The Government, in fact, announced that they withheld some of the despatches, as being of such a character as not to warrant publication, and, at the time the debate on the Treaty took place, April and May, 1872, it was well known in Ottawa, that the Canadian Government was put to the alternative of either accepting the Treaty or abiding the consequences. Upon this, the Canadian Government, as late as the 20th of January, 1872, proposed a compromise which was accepted by the Imperial Government in these terms:—

"DOWNING STREET, 18th March, 1872.

"MY LORD,—Her Majesty's Government have given their most careful attention to the report of the Committee of the Canadian Privy Council enclosed in Your Lordship's despatch No. 13, of January 22.

"The Committee state that, while adhering to their opinion as to the Fishery Articles of the Treaty of Washington, they are yet most anxious to meet the views of Her Majesty's Government, and to be placed in a position to propose the necessary legislative measures. They maintain that Canada has a just claim for compensation for expenses incurred in consequence of the Fenian raids, but they are of opinion that the adoption of the principle of a money payment in satisfaction of those expenses would be of no assistance with refereuce to the Treaty,

and would be open to objection on other grounds. They therefore suggest another mode of settlement by which in their opinion their hands might be so materially strengthened that they would be enabled, not only to abandon all claims on account of Fenian raids, but likewise to propose to the Dominion Parliament, with a fair prospect of success, the measures necessary to give effect to the Treaty.

"Their suggestion is, that Her Majesty's government should propose to Parliament a gurantee for a Canadian Loan, not exceeding four millions sterling, being half the amount (£8,000,000) which it is intended to raise for the purpose of constructing the railroad through British territory to the Pacific, and of enlarging and extending the Canadian canals.

"Her Majesty's Government have considered this suggestion with an earnest desire to remove the difficulties which are felt by the Canadian Government, and I have now to convey to you the conclusions at which they have arrived.

"They are of opinion that the most convenient course will be that it should be provided in the Acts to be passed by the Dominion Parliament to give effect to the Treaty that such acts should only come into force upon the issue of a Proclamation by the Governor-General in Council bringing them into operation. On their part Her Majesty's Government will engage that, when the Treaty shall have taken effect by the issue of such proclamation, they will propose to Parliament to guarantee a Canadian loan of £2,500,000, such loan to be applied to the purposes indicated by the Council, namely, the construction of the railroad through British Territory from Canada to the Pacific, and the improvement and enlargement of the Canadian canals, and to be raised at the same time and in equal proportion with the Canadian unguaranteed loan for the same objects, on the understanding that Canada abandon all claims on this country on account of the Fenian raids.

"As regards the request of the Privy Council that Her Majesty's Government will enable them to assure the Dominion Parliament that any recommendation made by Canada to terminate the articles of the Treaty numbered 18 to 25 inclusive, and likewise article 30 in conformity with article 33, would be acted on; I may observe that no such assurance was asked or given in the case of the Reciprocity Treaty, but Her Majesty's Government recognize that it is not unreasonable that Canada should

desire some assurance on this point, and they have therefore no hesitation in declaring that the greatest deference would be paid to the expression of the wishes of the Dominion, signified by Addresses from both Houses of the Dominion Parliament, and that those wishes would certainly be attended to; subject, of course, to the necessary reservation of Her Majesty's discretion to take into consideration in the interest of the whole empire the state of her relations with foreign powers at the particular juncture.

"I have already conveyed to your Lordship by telegraph the substance of this despatch.

"I have, &c.,

(Signed) KIMBERLEY.

"Governor-General,
The Rt. Honble. Lord Lisgar,
G.C.B., G.C.M.G., &c., &c., &c."

On these conditions, the Treaty was accepted by the Canadian Government on the 15th of April, 1872 (the very day of the opening of the Session) "both in the interests of Canada and the Empire at large," and in May following was consented to by the Parliament of Canada.

And on the whole, the Dominion may congratulate itself on having so generously contributed to the settlement of the international difficulties of the Mother Country with a foreign power. The verdict of history, however, may be that this might have been done in a more honorable way.

D. GIROUARD.

Montreal, 6th December, 1872.

## THE BENCH AND BAR OF QUEBEC.

Can any member of the Bench or Bar, placing his hand *sur sa conscience*, after the fashion of speech of our compatriots, say that the legal profession holds the place which it should occupy in the Province of Quebec? No judge, no lawyer can by any possibility have so low an idea of his profession as to answer the preceding question in the affirmative. What then have been the causes productive of this degradation? Is it that with the increase in importance and wealth of the mercantile class, the learned professions must lose weight in society? Is it that the capacity to make and keep money is recognized now-a-days as the most virtuous and useful occupation of man? or is it that within the last fifty years both Bench and Bar have deteriorated, and judges and lawyers at the present day are inferior to their predecessors half a century ago?

There can be no doubt that the increase of commerce and the large fortunes realized thereby have tended to raise socially the position of men engaged in trade. Whilst but very few practitioners at the Bar have realized an independence, and not one a fortune, since the commencement of the century, men are seen in the streets of Montreal every day, who, with but little education, have in the course of a few years, by successful trade or lucky speculations, amassed large fortunes and retired from business, in the flower of their age, to enjoy the delights and intellectual charms of society. To the Quebec lawyer no pleasant prospect of ease and competence in the decline of life presents itself. His life path is montonous, shadeless, arid, dusty, resembling one of those roads traversing some of the departments in France, straight as an arrow and losing itself in the distance, without a solitary tree to break the sameness of its aspect, or to cast its grateful shade over the aching head of the way-worn traveller. The upright practice of his profession brings no reward. His learning, his talents, are of no avail in the race, for his honesty is too crushing a weight for him to live the pace with others unburthened by scruples of conscience. Verily it would seem as if it had been for the last twenty years the aim and desire of our rulers to degrade the Bar, and to abase the Bench. To be a Queen's Counsel, one need not be an honorable man or a distinguished lawyer; to be a judge, it is not requisite to be a jurist.

Let it not be supposed that the picture here presented is overdrawn. What is herein embodied is spoken of openly in our Court-rooms, loudly in our streets; it is a matter of public reproach to the profession and to the Government. It is known to and admitted by ninety out of every hundred of our lawyers and judges, and is regretted by all save those who profit by this monstrous prostitution of patronage.

In no profession does the horror of coming out boldly against abuses affecting itself, exist so strongly as in that of the Bar. Lawyers as a rule are conservative in their ideas after ten years' practice. They have a dislike to washing the soiled linen of the profession in public; they are afraid of exciting the enmity of the judges if they attack the Bench, or any of its members. They are occasionally restrained from giving public utterance to their opinions by feelings of friendship, and they avoid attacking the action of the Government, lest they might perchance prevent their own promotion. All these dislikes, motives, doubts and fears make the Bar exceedingly patient and long suffering in public. But to compensate for this public cowardice, this retiring modesty, so far as society at large is concerned, in private no man is more candid in his opinion of his *confrères* and the judges, than a Quebec advocate.

Fifty years ago the Bar of Lower Canada stood high; its members moved in the foremost ranks of society, and in the political arena were supreme.

The object of this paper is to examine into the causes of the decline of the legal profession in this Province.

In the year 1849 the Act incorporating the Bar of Lower Canada was passed by the Legislature of the Province of Canada. Divided into sections according to the several districts, members of the Bar were entitled to elect their own officers, and to manage their own affairs in each section. The principle of universal suffrage was admitted, and the attorney of one day's standing had an eqnal voice in the administration of affairs with the barrister of thirty years' practice. Politicians eager for the interests of their respective parties saw therein opportunities of gaining strength, and consequently the nominees of some four or five gentlemen who met in caucus and decided on the persons who should be the officers of the Bar for the then current year, have been for a long time past duly elected. So high on many occasions has party feeling run, that the candidates for the office of

Bâtonnier, or their friends, have paid the subscriptions of members of the Bar, who had fallen into arrears, to secure the votes of the defaulters. Is it necessary to say that such a course of proceeding is disgraceful and demoralizing to all parties concerned. One of the consequences of this universal suffrage is that the elections are generally carried by the votes of the younger members, who in very many instances have no idea of their responsibility, and but very little *esprit de corps*. Canvassed it may be for weeks before hand, they are marshalled by their leaders on the day of election, and vote blindly for the man who is the selected of their party, without caring for or inquiring into his qualifications to be the representative man of the Bar for a year.

The annual election of Bâtonnier is also a mistake—that officer should be the leading man of the Bar, and should continue in office until he loses his position, when his successor in reputation should be appointed.

Now-a-days, thanks to the errors in the system and the malpractices adverted to, the office of Bâtonnier has been shorn of its *prestige*, and is open to any one willing to canvass the Bar, and expend fifty pounds in paying arrears.

Another great cause of the decadence of the Lower Canadian Bar has been the laxity displayed in admitting to its ranks men who might perhaps have graced a shoemaker's bench, but who simply disgrace a learned profession. Within the last few years however a change for the better has been effected, and it is now impossible, if the examiners are but true to themselves and their profession, for men to be admitted to practice, without being to a certain extent qualified.

When complaints are brought against members of the Bar for improper or unprofessional conduct, it frequently occurs that the members of the Council, constituting the tribunal before which the charge must be investigated, are approached by the complainant or the defendant, or by friends, seeking to influence them in favor of one of the parties. It is also rumored that the examiners, on the eve of an examination, have been spoken to by members of the Bar in favor of certain of the candidates. It is to be hoped that such solicitations have not induced any of those gentlemen to swerve from the path of duty. Placed in positions of the highest trust, the mere attempt to influence members of the Council, or of the Board of Examiners, is as heinous an offence as the endeavor to corrupt a judge.

Of all legislative enactments, decentralization is the one most fraught with fatal effects to the Bar and to the Bench. Life in a country district is destruction to a judge. His faculties rust, his energy declines, his learning is forgotten. In certain cases, without society, in a few years he neglects his duties as a judge, and ends by forgetting his duty as a man and a Christian. In lieu of being an example to his fellow citizens, he becomes a reproach to the community at large. To the lawyer in many of the country districts, the monotonous life he leads exposes him to many temptations, to which alas! he very frequently succumbs—how many men of fine ability have been destroyed owing to casting their lot in a country village. Moreover country practice tends to narrow the ideas, to turn the liberal practitioner into a pettifogger, to transform the advocate into a money-lender at exorbitant interest, and to make him a kindler of family feuds. The highest talent will always gravitate to the great cities, leaving as a rule inferior men in the country. Generally, the judges appointed in the country places are inferior even to those named in the chief districts, and with the happy conjunction of Bench and Bar, not composed of excessively good material, rejoicing in as many different interpretations of our codes, it may almost be said, as there are Districts, can it be wondered at that our law with its mixture of English, French and Civil principles, should by its administration be a veritable *olla podrida*, with an unsavory smell, affecting most unpleasantly the nostrils of the public?

As to the Bench generally, the most wide spread dissatisfaction exists throughout the Province. It is perfectly true that the corruption which was brought home to certain judges in the State of New York cannot be reproached to their *confrères* here; but it is not the less true that carelessness, negligence, indifference, and favoritism may with justice be laid to the charge of some of them. Physical defects, absolutely disqualify certain of them from acting as judges, and yet they sit in the most important cases.

To plead a cause in the Court of Queen's Bench, appeal side, is one of the most mortifying trials to which an advocate can be exposed. Some of the judges pay no attention to the argument. Cases pleaded in one, are judged as a rule in the succeeding term, an interval of three months elapsing. In many of the judgments the most amazing ignorance of the facts and law is apparent. In all it is clear that there has been no proper deli-

beration; the Montreal judges being anxious to return to Montreal, when the Court sits in Quebec, and the Quebec judges being animated by the same desire for Quebec, when the Court is holden at Montreal. Two or three days are often consumed by windy harangues on evidence, and the judges seem to imagine that they must each give all the facts, sift the evidence, and lay down the rules of law, where even the facts are patent, and a student of two years' standing is acquainted with the law applicable to them. But this, it must be remembered, is a cloak skilfully put on to deceive the public into the belief that the judges are overwhelmed with work, and that they perform it; whilst the reality is, that in that Court the judges have but little to do, and that little is done in the most slipshod and unprofessional manner.

The hardship to which suitors are exposed by the delay of three months' intervening between the argument and the decision of cases in appeal, is excessive. And there is really no excuse for it save the incapacity of the judges; for with printed factums furnished ere the inscription, containing a full exposé of the facts and the views maintained by each party to the Appeal, nothing should be easier for a judge than to be well up, in both facts and law, when the case is heard. By then listening to the arguments of the Counsel on both sides, it would be easy for them to abbreviate the discussion, and by taking one day's adjournment ere the last day of the term, would enable them easily to dispose on that last mentioned day, of at least eight out of every ten, of the cases argued before them.

And here, *par parenthèse*, it may be remarked that some learned counsel are decidedly tedious in their arguments; they fritter away too much time in speaking, they are afflicted with a plethora of words, they seem to be in love with the sound of their own voices, and delight themselves at the expense of the Bench and the public. Loquacity in a legal argument is a vice; were the time rule to be introduced it would tend very much to the dispatch of business.

The judges of the Superior Court in Montreal cannot be accused of idleness; they are hardworking, and decide to the best of their ability. There is a want of knowledge however of the principles of Commercial Law apparent on the Bench, which causes certain of its members to be avoided in Mercantile cases.

The main cause of the present lamentable state of affairs is

traceable to politics. In North America it would seem as if politics were the cancer of society. By political appointments the dignity of the Bench has been lowered, and the respect of the public for the judges has been impaired. From motives of political expediency, the *esprit de corps* of the Bar has been extinguished, its character has been damaged, and its power for good has been to a great extent destroyed. As consequences, the administration of the Law is unsatisfactory and bad, and society suffers.

It remains to be seen whether the joint action of the Bar, the Bench, and the Government of the Dominion, prompted by pure and patriotic motives, cannot redeem our Province from the imputations which now are justly thrown upon it.

Let the Bar eschew politics in its elections, restrict the right to vote to advocates of at least ten year's standing, elect the best men without distinction of party to its offices, admit no unqualified person to its ranks, punish severely any of its members who violate the principles of the profession, and contend as one man against the miserable practice of making seats on the Bench prizes for political subserviency.

Let the judges remember that courtesy adorns, whilst rudeness disfigures the Bench. A judge who is rude and insolent is no gentleman, and whatever his defects in birth or education may be, an advocate on becoming a judge is bound to act, as much as he can, like a gentleman. Let them remember that they are but public servants, of the highest class it is true, but still not less bound in common honesty to work faithfully for their wages, and let them get rid of the idea that the main object in life of a judge is to receive his salary.

As for the Government of the Dominion, the onus of the present state of affairs rests to a great extent upon their shoulders. To the Minister of Justice we specially look not only for reform in the Bench as it at present exists, but also for the adoption of measures to raise it in the future, to a high state of efficiency. Its curse has been political appointments. Let him choose the best men without distinction of party to fill any vacancies. Let him increase the salaries to members of the Bench, so that judges may cease to feel like criminals, and be able to live respectably. Let him insist upon the retirement of those who are physically incapable of performing their duties. Let him hunt down without any mercy the judge who neglects his duties, or is guilty of any act incompatible with his position.

Sir John A. Macdonald has before him a Herculean labor, verily he has to clean out an Augean stable. Let us hope that he will prove equal to the task, and that in any appointments he may make he will show that as Minister of Justice, his oath forbids his consenting to the prostitution of the judicial office, and that he has at heart the regeneration of the Bench in the Province of Quebec.

WILLIAM H. KERR.

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## OF MORTGAGES PASSED OUT OF THE PRESENCE OF THE CREDITOR.

Merchants of this Province, as well as foreigners, often secured their accounts with their customers by taking mortgages upon their lands, which are merely accepted by the notary on their behalf. It is therefore of great practical importance to inquire into the validity of such mortgages.

There is no doubt that a debtor may go before a notary and there acknowledge himself indebted to his creditor, and that such notarial acknowledgment is valid and binding without the interference of the creditor; but if the promise be made under terms favorable to the debtor, *v. g.*, a term of payment, it is clear that the same requires to be accepted by the creditor, to be perfect and complete; for delay cannot be granted but by the creditor himself.

But a mortgage or hypothec is not merely a promise to pay at some future day; it is at the same time an agreement, which of course must be executed and signed by both parties. This clearly results from the 2020th article of our Code: "Conventional hypothec results from an agreement." Our system of hypothecating being special and not general, the consent of the creditor to take a mortgage upon the special real estate hypothecated, is necessary to constitute a valid title.

It must be admitted that the text-books and the decisions of the courts both in Canada and in France, where the same system of mortgage prevails, do not all support this view. The question has been raised in this Province in the case of *Ryan vs. Halpin* (6 Lower Canada Rep. page 61 *et seq.*) and has been differently decided by our courts. The Superior Court, composed of the Honorable Justices Day, Smith and Vanfelson, held the mortgage

so given out of the presence of the creditor to be null and void; but their judgment was reversed in the Court of Appeals, composed of the Chief Justice La Fontaine and the Honorable Justices Aylwin, Duval and Caron. A considerable number of authorities were cited on both sides, and it cannot be fairly assumed that this single decision, in direct opposition to the opinion of the Honorable Judges in the Court below, can be looked upon as settling the jurisprudence in the matter; and as the Court of Appeals is at present differently composed—the Honorable Justices Badgley, Drummond and Monk having replaced the late Chief Justice and Mr. Justice Aylwin,—and moreover as its ruling is not consistent with the true and well settled principles of law, there is still a great chance of seeing the Court of Appeals revising in this case, as in many former instances, its own decision.

The Court of Appeals seems to have entertained some doubt upon the soundness of its ruling in the case of *Ryan vs. Halpin*, as to the non-acceptance of the deed; for the Honorable Judges relied principally upon the fact that the creditor personally caused the deed to be registered, which, according to their Honors' view, amounted to an acceptance of the mortgage. However, the following authorities maintain that the inscription or registration by the creditor personally, or at his request, does not constitute a legal and valid acceptance or ratification:—Cour de Cassation, arrêt of the 21st February, 1810; Cour Royale de Paris, 23nd April, 1835, Lyon, 9th May, 1837; Cassation, 5th August, 1839.

The necessity of the acceptance, either in the same, or by a separate deed, is clearly laid down by the text-books and the jurisprudence, and by the 1029th article of our Code, declaring that "a party in like manner may stipulate for the benefit of a third person, when such is the condition of a contract which he makes for himself; and he who makes the stipulation cannot revoke it, if the third person have signified his assent to it."

The acceptance by the creditor must be made in an authentic form, and if made by an attorney, the procuration must be special, and also in an authentic form.

"For the purpose of alienation," says article 1703 of our Code, "and hypothecation, and for all acts of ownership other than acts of administration, the mandate must be express."

A mere letter of attorney is not sufficient. Art. 2040 of the

Code says: "Conventional hypothec cannot be granted otherwise than by acts in authentic form." Consequently, all requisite conditions to a mortgage must appear in an authentic form; and hence an attorney cannot give, nor accept a mortgage or hypothec without a power of attorney in an authentic form, that is before a notary in Lower Canada or in the best form known in foreign countries, duly authenticated if executed elsewhere. It is now a settled rule that an attorney appointed by a letter of proxy from the debtor, is not sufficiently authorized, Riom, 31st July, 1851, S. V. 51, 2,698; Cassation, 12th November, 1855, S. V. 56, 1,254; Cassation, 7th February, 1854, S. V. 54, 1,322; Amiens, 9th April, 1856, S. V. 56, 2,333; Toulouse, 1859, S. V. 59, 2,407. The French Code, like our Code and the old French law prevailing in Lower Canada, merely requires the deed of mortgage to be *in an authentic form*; it does not, expressly and *verbatim*, say that the power of attorney to grant the same should be likewise in an authentic form; but as the consent of the debtor to mortgage is a requisite of a hypothec, that consent must appear in an authentic form.

Likewise the consent of the creditor must appear in the same form,—and so it has been lately held and maintained by Courts of Justice and by Jurists in France. So says Zachariae § 266, t. 2, p. 14: "L'hypothéque établie au profit d'un tiers par un acte dans lequel celui-ci n'a pas figuré, doit être aceeptée par acte notarié." See also Grenier, *Hypothèques*, t. 2, No. 388 note; Toullier, Code Civil, t. 7, No. 287, p. 350: Troplong, Des Hypothèques, t. 1, No. 368; arrêt of the Cour de Cassation, 21st February, 1810; Metz, 24th November, 1820; Toulouse, 31st July, 1830; Pothier, Hypothèque, pp. 421, 422; 13 Duranton, p. 67, No. 79; 1 Battur, 292, No. 149, &c.; Riom, arrêt of the 31st July, 1851.

The fact that the deed of mortgage is accepted by the notary on behalf of the creditor, is of no importance. Evidently the notary has no authority for doing so. Many commentators are even of opinion that, when the notary so meddles with the interests of one of the parties, the deed passed before him is null for want of authenticity; and so the Cour de Cassation and other tribunals lately held. Cassation, arrêt of the 3rd August, 1847, J. P., vol. 2, p. 697; Toulouse, arrêt of the 31st July, 1830; Rouen, arrêt of 2nd February, 1829; Troplong, Des. Hyp., vol. 2, p. 637.

D. GIROUARD.

## LA QUESTION DES REGISTRES.

Depuis quelques années, les contestations d'une nature mixte, c'est-à-dire, civiles et religieuses à la fois, sont devenues fréquentes à Montréal. La cause de Guibord a donné occasion aux tribunaux de se prononcer sur les relations de l'Eglise et de l'Etat. Le démembrement canonique de la paroisse de Notre-Dame a aussi fait surgir des questions de la plus haute importance. L'Evêque Catholique-Romain du diocèse réclame le droit, sans suivre aucune des formalités prescrites par la loi, d'ériger des paroisses, de démembrer celles déjà érigées ou de les unir ; il maintient que ces paroisses doivent être reconnues par l'Etat comme ayant le droit de posséder et acquérir des biens, de les administrer comme fabrique. Il prétend en outre que les curés de ces paroisses, ayant le droit de faire des baptêmes, mariages et sépultures, ont comme conséquence immédiate le droit de les constater par des registres de l'état civil ; parce que le baptême et le mariage sont des actes purement religieux sur lesquels l'Etat n'a aucun controle, et qu'il doit reconnaître dans l'intérêt des familles.

Le juge Berthelot, sur la requête de quelques curés de ces paroisses, a accordé des registres ; mais comme son jugement n'est pas motivé, nous ne saurions dire s'il a entendu décider la question telle que nous venons de la poser. D'un autre coté, le juge MacKay a décidé cette question dans la négative, en refusant après plaidoirie contradictoire d'authentiquer des registres pour les curés de ces paroisses canoniques.

Cette contestation, qui dure malheureusement depuis trop longtemps, a récemment été posée devant la Législature Provinciale par M. Trudel, qui demanda :—

" 1o. Si c'est l'intention du Gouvernement d'introduire un bill établissant un nouveau mode de reconnaissance civile des paroisses ?

" 2o. Si c'est l'intention du Gouvernement d'introduire un bill faisant disparaître tout doute concernant le droit qu'ont les curés des paroisses canoniques de tenir des registres de L'état civil ? "

L'Hon. Proc. Général a déclaré qu'en effet, sur la demande de

l'Episcopat, le Gouvernement avait décidé d'introduire un bill établissant un nouveau mode de reconnaissance civile des paroisses, mais que l'archevêque l'avait prié, au nom de ses confrères, de suspendre tonte action sur ce bill pour le moment. Il dit de plus que le gouvernement serait toujours heureux d'accorder les demandes du corps des Evêques qui forme la plus haute autorité ecclésiastique de la Province.

Quant à la seconde question, le gouvernement croyait qu'il était de son devoir d'intervenir immédiatement. Par une décision du juge Berthelot, les curés de cinq des paroisses canoniques de Montréal se trouvaient en possession des registres de l'état civil, tandis que par une décision contradictoire du juge McKay, cinq autres paroisses se trouvaient privées de ces registres. Ces deux jugements soulevaient des doutes qu'il était important pour l'intérêt des familles de faire disparaitre.

La matière en litige va donc être réglée d'une manière définitive par une législation spéciale. Néanmoins, il n'est pas sans intérêt, au point de vue de l'histoire du Droit Canadien, de noter les prétentions respectives des parties dans ce débat célèbre. La plaidoirie de M. Pagnuelo est sans contredit l'argumentation la plus complète qui ait été faite en faveur de la cause de l'Evêque, tandis que le jugement de l'honorable juge McKay résume parfaitement la position assumée par le Séminaire de St. Sulpice, tantôt par l'entremise de la Fabrique et tantôt par celle de quelques citoyens. La rédaction de la *Revue Critique* croit se rendre utile en publiant l'un et l'autre.

LA RÉDACTION.

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Mémoire présenté par M. Pagnuelo à l'Hon. Juge McKay, et contenant le résumé de sa plaidoirie verbale.

*Ex parte*

Les curés des paroisses catholiques romaines de St. Jacques-le-Majeur, St. Patrice, Ste. Brigide, St. Joseph et Ste. Anne, de Montréal,

Requérant l'authenticité pour leurs registres de baptêmes, mariages et sépultures.

*Et*

C. S. Rodier, Alfred Larocque et divers autres,

Intervenants.

I

Les registres authentiques doivent être tenus, sous peine

d'amende, *dans chaque église paroissiale catholique* (C. C. art. 42, 44, 45, 47, 53;) par le curé, prêtre, etc., préposé (*doing the parochial or clerical duty*) *de chaque paroisse catholique romaine*, (C. de Proc. art. 1236, 7, 8, C. C. art. 44.)

Les registres doivent être tenus dans les *lieux où il y a eu des baptêmes, mariages et sépultures* (C. de P. art. 1238), et nommément dans chaque église succursale de Québec et Montréal—(18 Vict. ch. 163—*shall be lawful.*)

Le double régistre doit, avant qu'il en soit fait usage, être présenté au juge pour sa paraphe, *à la diligence de celui qui le tient* (C. C. art. 45).

II.

Qu'est-ce qu'une paroisse catholique romaine ?

"C'est, dit Guyot Répert. Vo. Paroisse, certain territoire dont les habitants sont soumis pour le spirituel à la conduite d'un curé.

"On appelle aussi *paroisse*, l'église paroissiale : et ce mot se prend encore quelquefois pour *tous les habitants d'une paroisse.*

"Les marques qui distingnent les paroisses des autres églises sont les fonts baptismaux, le cimetière, la desserte de l'église par un *curé*, et la perception des dimes. Il y a néanmoins quelques-unes de ces marques qui sont communes à d'autres églises : *mais il n'y a que les paroisses qui soient régies par un curé.*

"Il y a peu d'églises dont on puisse rapporter les titres d'érection en paroisses, *parceque la plupart étaient anciennement des chapelles* (comme St. Jean-Baptiste de Rouville, Chambly, etc.,) qui ne sont devenues paroisses que par le consentement de l'Evêque et des fidèles ; mais la possession immémoriale tient lieu de titres à cet égard.

"Il y a aussi des paroisses qui sont sans territoire, et dont le ressort s'étend seulement sur certaines personnes" (comme *St. Patrice*, et à Québec l'église anglicane où un membre a son banc est aussi son église paroissiale.) (*Canon de* 1863.), voir ci-après.

Qu'est-ce qu'une succursale ?

C'est une église " qui sert d'aide à l'église paroissiale et dans laquelle on célèbre le service paroissial." Guyot, Rep. Vo *succursale*—Dict. du droit canon. Vo do.

Quelquefois on y mariait et enterrait et il y avait des fonts baptismaux.

2 Pialés, p. 337; 2 Coudert, Code ecclesiast p. 51; Jousse, Edit. de 1695. p. 169.

Elles ont souvent une *fabrique*, des *revenus* des *fondations* à administrer.

2 Pialés, loc. cit.

...."Quoique l'article 21 de l'Edit du mois d'Avril 1695, dit Pialés (loc. cit.) ne parle que des églises *paroissiales*, d'autant plus que ce terme "*puroissiale*" est *générique et peut s'appliquer à toutes les églises dans lesquelles on fait le service paroissial.*"

## III

Mgr. l'Evêque de Montréal a érigé de véritables *paroisses distinctes, avec territoire délimité, curé propre* faisant toutes les fonctions curiales, l'*église paroissiale* dans chacune de ces paroisses étant celle bâtie sur son territoire.

(Voir 1o le décret d'érection, et 2o les requêtes présentées par les *curés des paroisses canoniques* ou catholiques.)

Il est ajouté que ces paroisses distinctes *continueront* à demeurer dans l'enceinte civile de N. D.; que la paroisse N. D. sera la paroisse mère et qu'elle conservera, "*au civil*, son territoire, *ses droits et priviléges paroissiaux.*" Il n'est pas parlé de ses obligations.

On démontrera plus loin que cette disposition est raisonnable et conforme à la loi, puisqu'il s'agit du *civil*, et que l'évêque n'erigeait ces paroisses que pour les fins spirituelles.

Le décret ajoute que pour les baptemes, mariages et sépultures, qui dorénavant *se feront* dans les églises de ces nouvelles paroisses, celles-ci devront être considérées comme *succursales* de N. D.

Que veulent dire ces dernières expressions? Elles signifient que si l'authenticité était refusée aux registres des baptêmes, etc., faits dans les nouvelles paroisses, elle devait ao moins leur être accordée eomme aux registres d'une église succursale, en vertu de l'acte de 1855 (18 Vict. ch. 163.)

En effet, Mgr. de Montréal est sans cesse préoccupé des soins de ne pas priver les paroissiens de l'avantage d'avoir des registres authentiques dans leurs nouvelles paroisses, et dans sa lettre du 28 Septembre 1866, il dit que le juge ne pourra *ainsi en aucune façon* refuser l'authenticité à ces régistres.

Telle est l'explication bien simple de ce passage du décret. L'Evêque a voulu prévenir toute objection au sujet des registres. Si le juge refuse de reconnaître cette Eglise comme église paroissiale catholique, il sera forcé de la reconnaître au moins comme succursale.

Ce sont les curés des paroisses canoniques qui demandent au juge de parapher les régistres qui devront servir à enrégistrer les baptêmes, mariages et sépultures qu'ils feront, en leur *dite qualité de curés.*

Néanmoins leur requête est formulée de manière que si le juge était d'avis qu'ils ne sont pas *curés d'une paroisse* catholique, il pourrait leur accorder les régistres comme prêtres desservants ou faisant les *fonctions curiales* (C. de P. art. 1237, texte anglais) dans une succursale.

Mais le soussigné soumet que ces régistres doivent être accordés aux *curés des paraisses catholiques,* et qu'ils doivent porter cet entête.

IV

*Paroisse Catholique Romaine dans la Province de Quebec.*

Nous avons dit plus haut ce que c'est qu'une paroisse catholique.

Ajoutons qu'elle s'érige par l'Evêque conformément au droit Canon, et qu'il en a toujours été ainsi tant en France qu'en Canada.

Durant de Maillane, Dict. de droit canon, Vo. Paroisse, Edit de 1695, art. 24, et Jousse sur cet article, (non enrégistré en Canada); 2 Coudert, Code Ecclésiastique, p. 9; Ord, de Blois, 1579, art. 22; Edit de Melun, 1580, art. 27.

Aucune loi n'exigeait les lettres Patentes du Roi avant l'Edit de 1749, fait pour le *seul Royaume de France,* et non enrégistré en Canada.

Notre Edit de 1743 ne comprend pas les "érections de chapelle "et autres titrés de bénéfices," qui furent ajoutés plus tard à l'Edit de 1749.

Aussi le Notaire apostolique ne parle pas des Lettres Patentes.

En canada, des paroisses furent érigées depuis 1663, et il n'y eut pas "*de réglement des districts des paroisses de la nouvelle-France,*" avant celui de 1721, fait alors par l'Evêque, l'Intendant et le Proc.-Général.

Depuis cette époque, l'Evêque érigea seul un grand nombre de paroisses nouvelles, dans lesquelles les tribunaux ont reconnu un curé propre, registres authentiques, obligations des paroissiens de payer la dîme, de contribuer à l'érection des églises, presbytères, etc., et corps administratif sous le nom de fabrique.

Voir *Etudes* p. 315 et suivants.

Depuis la conquête, les raports entre le gouvernement protestant de la Grande Bretagne et l'Eglise catholique ne sont pas ceux qui existaient entre le Gouvernemeni Français protecteur de l'Eglise catholique, et celle-ci.

La liberté fut garantie à l'Eglise catholique par les capitulations, le Traité de Paix, l'acte impérial de 1774.

On prétendit, cependant que la couronne anglaise était seule capable d'ériger des paroisses ; l'évêque catholique n'avait rien à y voir ; c'était une des prérogatives de la couronne découlant de la Souveraineté spirituelle du Roy, telle que définie par les Statuts du Parlement.

Les autres prérogatives spirituelles du Roy, que l'on cherchait à étendre à l'église catholique concernaient 1o la nomination de l'Evêque ; 2o l'érection des évêchés ; 3o la nomination aux cures ; et 4o l'érection des cures ou paroisses, (*Rectories.*)

Voir dépêches du duc de Portland, 6 Christie p. 52 ; de Lord Hobbard, 5 Christie p. 395 ; voir le rapport de Sewell, Christie p. 86, voir le rapport du juge Monk, 6 Christie p. 112.

On voit en 1705 Mgr. Denaut effrayé de la persistance des avocats et officiers anglais sur ces points, supplier Sa Majesté de le *reconnaître civilement lui et ses successeurs*, comme évêque catholique romain.

5 Christie p. 395.

Il n'eut pas même de réponse à cette supplique.

Néanmoins l'évêque catholique fut toujours nommé et institué par le pape, de l'agrément du gouverneur quant à la personne choisie, jusque vers 1840 ; depuis lors on a même omis la formalité de l'agrément du gouverneur. Jusqu'en 1848, l'évêque prêta serment de fidélité, mais cessa alors de le faire. Quoiqu'aucune loi, ni lettre patentes, ni commission du roi, n'eûssent reconnu civilement l'Evêque catholique de Québec, personne depuis Craig (1811) n'aurait osé soutenir que l'Evêque Catholique Romain de Québec n'était pas reconnu civilement comme tel.

En 1791 (ch. 6) la loi reconnaissait implicitement l'évêque catholique de Québec et Mr. Sewell pour lui faire la guerre, était obligé d'attaquer cette ord. de nullité ; le juge Monk (6 Christie, p. 112,) le réfutait victorieusement sur ce point en 1810.

Comment l'Evêque finit-il par être reconnu comme tel, sans

que le gouvernement lui eût donné ni lettres patentes, ni commission ? Par la force des choses, par le droit public du pays qui reconnait à chaque culte le droit de se régir et de s'administrer comme il l'entend.

2o Nomination aux cures.

Les gouverneurs n'ont jamais osé nommer aux cures catholiques, ni contester en pratique ce droit aux évêques cathòliques.

3o Erection des Evêchés.

On disait qu'il fallait le consentement du Souverain et ses lettres Patentes. Voir les pamphlets du curé Chaboillez et les rapports ci-dessus cités.

Etudes p. 142 et suivantes.—87 et suiv.

En 1836, le Pape érige l'évêché de Montréal, seul, sans le concours du souverain et nomme Mgr. Lartigue titulaire.

En 1839 Sir Colborne émane des lettres patentes pour incorporer *in corporation sole* Mgr. Lartigue et ses successeurs.

" Whereas Our Beloved and faithful subject the Right Reverend Jean Jacques Lartigue *bishop of the Roman Catholic diocese of Montreal*.....represented.....that the said church *had for all spiritual and ecclesiastical purposes, been erected into a distinct bishopric with ecclesiastical jurisdiction*, &c.

Remarquons que cet évêché était formé par démembrement de celui de Québec.

En 1843, l'Evêché de Québec est érigé en Archevêché par le Pape seul ; lettres patentes du gouverneur en 1845 dans la même forme, et au même effet que celle de Mgr. Lartigue.

Etudes p. 246. Il y avait aussi alors les évêchés catholiques de Kingston et Toronto—(do.)

En 1849 (12 Vict. ch. 136 statut provincial incorporant l'Archevêque de Québec, les Evêques de Montréal, et de Bytown ; ce dernier diocèse fut érigé en 1847.

Disposition semblable quant à tout évêché nouveau *qu'on jugera à propos d'ériger* (Sect. 7.)

4o. En 1869—(32 Vict. ch. 73, Québec) statut expliquant que la sect. 7 de l'acte de 1849, entendait dire : tout nouveau diocèse érigé *canoniquement*.

Voilà pour trois des points principaux autrefois contestés.

Reste le 4e, la paroisse Catholiqne.

En 1827, Dalhousie recommande aux chambres la construction des Eglises dans les cantons pour encourager la colonisation.

" Etudes p. 153.

Rapport du comité de la Chambre en 1827, et son erreur quant à l'édit. de 1749.

" Etudes p. 330.

Loi de 1831. (1 Guill. IV. ch. 51.)

" Etudes " p. 179.

Cette reconnaissance civile, si elle s'appliquait aux fins religieuses, n'avait plus de raison d'être après la loi de 1830, (principalement pour les dissidents) *sur les biens des congrégagations religieuses*, 10 et 11 Geo. IV, ch. 58 "Etudes " p. 169.) et qui reconnaissait comme Corporation pour toutes les fins du culte et de l'instruction toute congrégation ou société de chrétiens.

On a objecté que cette acte ne permet aux catholiques de posséder des biens pour les fins susdites, sans incorporation spéciale, que dans les cas où il n'y a pas encore de paroisses légalement établies.

Je réponds 1o que cette restriction n'existe plus depuis 1839 ; la loi est générale maintenant et ne fait aucune exception de ce genre.—2o. La sect. III de cette acte ne permettait à une congrégation dissidente " d'acquérir qu'*une seule* étendue de terrain dans aucune paroisse ou township."

Cette restriction est aussi disparue. On ne peut donc pas plus invoquer la restriction contre les catholiques que contre les dissidents. L'intention de la législature a donc changé.

N. B.—Cette loi nécessaire pour les dissidents, était inutile pour les catholiques dont la liberté du culte était reconnue et garantie, ce qui entrainait de soi le droit de pesséder des terrains pour le culte.

L'acte de 1831 ne voulait donc pas dire, par *reconnaissance civile, l'existence civile* d'une congrégation catholique comme corporation religieuse pour les fins du culte et de l'instruction, puisque la loi de 1830 reconnaissait cette existence civile et cette corporation "*dans tous les cas où il n'y a pas encore de paroisses légalement établies.*"

En 1839 furent passées deux Ordonnances qu'on trouve aux chap. 18 et 19 des S. R. B. C.

La première concerne l'érection des paroisses par l'évêque et leur reconnaissance civile par le gouverneur ; il traite aussi de la construction des églises ; la 2nde se rapporte aux biens des congrégations religieuses et aux paroisses non reconnues civilement comme paroisses.

On voit dans le chap. 18 que l'évêque érige la paroisse d'après les règles canoniques: le gouverneur confirme cette érection pour les fins civiles. (Sect. 15.)

Quelles sont ces fins civiles ?

1o. Ce n'est pas pour permettre qu'on y impose une taxe pour acheter des terrains, ou bâtir des églises, etc., car la sect. 8 du même ch. 18 dit que cette taxe s'impose dans toute *paroisse et mission.*

2o. Ce n'est pas pour permettre à la congrégation d'acquérir comme corporation religieuse, des biens pour églises, pour presbytères, cimetières et écoles; car le ch. 19, sect. 2, § 1 reconnait ces droits de corporation à toute congrégation de fidèles, et à toute paroisse *qui n'est pas une paroisse* reconnue civilement.

3o. Ce n'est pas pour le paiement de la dime qui est payée pour le soutien du prêtre qui fait les fonctions curiales, et qui a toujours été payable dans les missions comme dans les paroisses.

" Etudes ' p. 357—pour le sentiment de Sir L. H. LaFontaine, l'Hon. J. Duval, A. N. Morin, James Stuart.

Pamphlet de M. LaFontaine sur l'inviolabilité des cures—1837.

4o. Ce n'est pas pour permettre aux prêtres d'administrer les sacrements; on ne discute pas de pareils points. Néanmoins d'après certains de nos adversaires le mariage que ferait le curé de St. Jacques, n'étant pas fait par un prêtre reconnu par la loi civile comme *curé* serait nul, puisqu'il faut que le mariage soit fait par le propre curé des parties.

De même encore ils prétendent que le curé de Notre-Dame, paroisse civile, peut être contraint de faire le mariage des fidèles de St. Jacques, sur lesquels il n'a plus juridiction ecclésiastique, parce qu'il est le seul curé *civil*, ou *reconnu civilement*, des habitants de toute l'ancienne paroisse de N. D.

Il suffit de citer ces absurdités pour faire voir le faux de tout le système de la reconnaissance civile pour les fins religieuses.

5o Il serait déraisonnable que la reconnaissance civile fut requise pour donner l'authenticité aux registres tenus par le curé ou missionnaire ; il serait déraisonable que la loi forçât les habitants à acheter un cimetière, à bâtir un presbytère, une église, à faire vivre un prêtre, et qu'elle refusait l'authenticité aux registres des baptêmes, mariages et sépultures qui se feraient dans cette localité.

Quelles sont donc les fins civiles pour lesquelles la proclamation émane ?

Ce sont les fins municipales, judiciaires, parlementaires, etc.

## V.

*Paroisse municipale.*

L'acte des chemins de 1855 (sect. X § 2) décrète que les habitants d'une *paroisse formeront* une corporation municipale.

Le mot *paroisse* signifiera tout territoire érigé en paroisse, soit par l'autorité civile, soit par l'autorité ecclésiastique, pourvu qu'elle soit toute dans le même comté, et qu'elle contienne 300 âmes, (sect. VII.)

A partir de ce jour, la paroisse Catholique et la paroisse municipale ne fut plus la même chose : il y a quelquefois deux ou trois municipalités dans une paroisse catholique, d'autrefois plus d'nne paroisse Catholique dans la même municipalité.

Le Ch. 24, S. R. B. C. sect. 5 § 2 (1860) ne comprend maintenant sous le mot *paroisse* qu'une paroisse érigée civilement.

Sect. 12. " Les habitants de chaque paroisse *formeront* une corporation, etc.

Du moment done qu'une paroisse est érigée civilement, elle devient municipalité, si elle a 300 âmes.

Le Code municipal a une disposition semblable au statut de 1860, art. 29, et 20 § 4.

Ch. 18, S. R. B. C. Sect. 46, à la fin reconnait un *démembrement* de paroisse pour *les fins civiles ou ecclésiastiques.*

14 & 15 Vict. ch. 136, " Acte pour pourvoir à l'érection des paroisses pour les *fins civiles seulement* dans le comté d'Argenteuil (1851) " il y est déclaré que ces *fins civiles* sont " *les droits municipaux* et autres avantages conférés par la loi aux paroisses érigées en vertu des dispositions des ordonnances et des actes ci-dessus mentionnés."

Or ces droits et *avantages* ne sont ni la dime, ni les registres, ni la construction des églises, ni le droit de corporation religieuse, puisque le statut déclare formellement qu'on ne devra pas l'interpréter comme établissant le dit territoire *paroisse pour les objets ecclésiastiques.*

Une *paroisse catholique romaine* n'est donc pas une paroisse municipale, ni une paroisse anglicane, (S. R. B. C. Ch. 18 sect. 23, ch. 19, sect. 3 § 2.) C'est une congrégation, mission ou paroisse qui est ou n'est pas reconnue civilement (c'est-à-dire pour les fins municipales) érigée par l'Evêque, avec un curé propre, qui porte le nom qu'on lui a donné, qui possède des immeubles par des syndics (*trustees*), et qui existe comme corporation ecclésiastique, en vertu de la loi générale.

*Code des Curés.*—Baudry p. 8, 12, 13, 14.

Le ch. 18, sect. 8, S. R. B. C. appelle *église ou chapelle paroissiale*, l'église ou chapelle *de toute paroisse ou mission*, de sorte que l'église ou la chapelle d'une mission ou d'une paroisse canonique est appelée par le statut *l'église ou chapelle paroissialle* de cette mission ou paroisse: voilà certes le sens des mots *église paroissiale* bien définie par ce statut. Pialès (loc. cit.) dit que les mots "*églises paroissiales*" s'entendent de toutes les églises où l'on fait le service paroissial.

En 1836, procés Nau: il se prétend curé inamovible de la paroisse St. Jean-Baptiste de Rouville: cette paroisse n'existait pas civilement, et même ce n'était qu'une mission; elle ne fut érigée canoniquement qu'en 1846, et civilement en 1859. Néanmoins MM. LaFontaine, Stuart, Duval et Morin, et les juges de la cause, Reid, Pyke & Rolland, ne font aucune difficulté de considérer "les *curés des paroisses, dessertes et circonscriptions réputées de fait paroisses, et établies comme telles par l'autorité ecclésiastique avec ou sans l'intervention de l'autorité civile*," comme de véritable curés.

En 1839, jugement du juge Rolland contre Messire Tessier, curé de St- Mathias, simple paroisse canonique, sur une question de dîme (Tessier *vs.* Tétreau, *Baudry* p. 97;) mais en 1849, avril, jugement en faveur de Messire Brassard, curé canonique de Vaudreuil, par trois juges.

Certificat aux registres des paroisses canoniques, Chambly, Verchères, St. Jacques le Mineur, Rivière des Prairies, depuis 1780, par de Hertel, Rolland, Mondelet, (Chas.) Guy, Day, Vanfelson, Smith, Berthelot, etc.

Jugement du juge Berthelot qui fut rendu sur plaidoirie contradictoire, audition du Proc.-Gén. et production des mémoires; et en-tête des registres pour N. N. de Grâce, St. Henri, Hochelaga, etc.

Certificats des Protonotaries, quant à l'usage—aveu du *Code des Curés*, p. 107-8.

Sur l'ancien droit, voir l'ord. de 1667, titre 20 art. 8, 13.—Décl. de 1739, art. XIV citée par les codificateurs comme explicative de l'ord. de 1667.

Arrêt du 5 Août 1715. Edits et Ord. vol. 2, p. 167—S. R. B. C. 6—ch. 20, sect. 1ère et 15.

OBJECTIONS.

1*ère Objection.*

C'est vrai, dit-on: la loi reconnait comme corporation pour les fins spirituelles, toute congrégation, mission ou paroisse qui n'est pas une paroisse reconnue civilement; mais il faut pour cela que cette paroisse ne soit pas dans les limites d'une paroisse reconnue civilement.

Je réponds que là où la loi ne distingue pas, il n'y a pas lieu de distinguer. Si le statut de 1831 a pu faire cette distinction, (ce qui est encore douteux) les paroles dont on s'autorisait pour soutenir ce sentiment, ne se rencontrent plus dans la loi; on ne les a pas fait disparaitre sans dessein.

D'ailleurs le principe en vertu duquel cette loi générale a été passée, est un principe de droit public bien connu. Il est exprimé en toutes lettres dans la 14 et 15 Vict. ch. 175. "Attendu que l'admission de l'égalité, aux yeux de la loi, de toutes les dénominations religieuses est un principe reconnu de la législation coloniale; et attendu que dans *l'état et la condition de cette province, à laquelle il est particulièrement applicable, il est à désirer que ce principe reçoive la sanction directe de l'assemblée législative, qui reconnait et déclare qu'il est le principe fondamental de notre politique civile.* (Statut de 1851.)

En 1856 la législature passa une loi (19 et 20 Vict. ch. 141) au sujet de l'église anglicane, pour lui reconnaître le pouvoir de régler (regulate) ses affaires dans les matières qui concernent la discipline, et qui sont nécessaires au bon ordre et gouvernement de cette église, afin qu'il lui soit permis d'exercer les mêmes droits de régie (*self government*) *dont jouissent les autres communautés religieuses.*

Or, en vertu de cette loi générale reconnaissant à l'église anglicane des pouvoirs *communs à toutes les communautés religieuses,* le synode démembra la paroisse anglicane de Québec, érigée par lettres patentes, en cinq paroisses, avec territoire délimité, curé propre, etc., église-mère, églises-filles, etc., exactement comme à Montréal.

Des esprits méticuleux eurent des inquiétudes sur la validité de ce démembrement, et s'adressèrent à la Législature. Or celle-ci déclara (29 et 30 Vict. ch. 148).

Que le Synode avait eu " plein pouvoir et autorité de faire et adopter le dit canon, qui a eu pleine force et effet depuis son adoption par le dit synode, et continuera à avoir pleine force et

effet jusqu'à ce qu'il soit rappelé ou amendé par le synode dn dit diocèse."

C'est peut-être la meilleure réponse à cette prétendue objection.

Pourquoi l'Evêque serait-il libre de diviser et subdiviser son diocèse en paroisses ici, et ne le pourrait-il pas un peu plus loin.

Du moment que ces divisions n'affectent pas les divisions municipales et autres du même genre, sa liberté doit être égale partout dans l'étendue de son diocèse.

Quoi ! le Pape peut en vertu de la *même loi générale*, diviser le diocèse de Québec en dix ou vingt diocèses différents, qui ont de suite l'existence corporative, et l'Evêque ne pourra pas diviser ses paroisses aussi librement !

*2nde Objection.*

" La paroisse N.-D. conserve au civil son territoire, ses droits et priviléges paroissiaux."

Sans doute. C'est ainsi que la fabrique de N.-D. reste propriétaire de son cimetière, qui se trouve dans la paroisse de N.D. de Grâce ; que la dette de la fabrique reste la même ; que l'Eglise-mère N.D. aura les mêmes droits de faire bâtir des Eglises et presbytères par le Séminaire de S.S., droits que M. Rousselot craint de voir perdre par le démembrement.

Le curé de N.D. continue à tenir des registres, mais seulement pour les baptêmes, mariages et sépultures qu'il fera pour ses paroissiens, c'est-à-dire pour ceux sur lesquels il y a juridiction ecclésiastique, et non pas pour les paroissiens de St. Jacques ou St. Patrice.

*3ème Objection.*

" Il a fallu régulariser toutes les paroisses qui n'avaient pas été érigées civilement ; cela s'est fait par différents statuts, en 1860, 1861, etc. Donc on reconnaissait la nécessité d'une reconnaissance civile."

La réponse est facile : il suffirait de citer le passage suivant de Foucart (Droit administ. p. 520) pour satisfaire les plus exigeants.

" Lorsqu'un principe nouveau vient remplacer dans le droit public, un principe qui a été appliqué pendant plusieurs siècles, les esprits imbus des idées anciennes ne comprennent pas immédiatement toute la portée du système nouveau, et mêlent dans l'application les conséquences de théories contradictoires. C'est

ce qui est arrivé, à l'égard du principe de la liberté de conscience et des cultes. Longtemps les publicistes, les jurisconsultes et le législateur lui-même sont tombés dans cette confusion, que le temps n'a pas encore complètement fait cesser."

On sait en outre que nos législateurs oublient quelquefois d'une année à l'autre les lois qu'ils passent: que souvent des députés se mêlent de traiter des sujets qu'ils ne connaissent pas: que même sur les questions les mieux connues, celles de la procédure, par exemple, on trouve des statuts qui dénotent une ignorance déplorable de nos codes. Que penser des statuts sur des sujets encore obscurs, pour lesquels on a fait des lois d'expédience au jour le jour!

D'abord les reconnaissances civiles qui ont eu lieu par statuts avaient pour but d'ériger ces territoires en municipalité.

L'acte de 1861 a sa raison d'être dans le fait suivant: l'acte de 1855 érigeait en municipalité toute paroisse érigée soit par l'autorité ecclésiastique, soit par l'autorité civile. Or, on sait que bien des paroisses n'avaient jamais eu de reconnaissance civile, ni même d'érection canonique régulière, (St. Jean-Baptiste de Rouville, par exemple jusqu'en 1848). C'est pourquoi on déclare que toute paroisse dans laquelle on a tenu des registres pendant dix ans *comme paroise* sera considérée une paroisse régulière, malgré l'absence du *décret canonique ou civil.*

Si l'on n'avait eu en vue que l'absence du décret civil, cette loi était inutile, puisque les statuts de 1855 érigeait en municipalité toute paroisse soit canonique soit civile.

4e *Objection.*

"Il y a appel à Rome du décret d'érection des paroisses à Montreal."

Réponse.—Le fait n'est pas prouvé.

Le fut-il, que l'appel ne serait pas suspensif.

1o. Les requérants se présentent comme *curés de paroisses canoniques:* donc le décret s'est exécuté.

2o. Le droit canon ne considère pas comme suspensifs les appels de décrets d'érection de paroisses, ni d'aucun décret qui ne fait qu'exécuter les prescriptions du Concile de Trente.

*Stremler,* Traité des peines eccléss., de l'appel et des cong. Rom. p. 389, No. 4, 7, 12.

MACKAY, J.

Having seen and examined the petition, dated 31st October, 1872, of the Rev. A. Mercier, *Curé* of the Canonical Parish of St. Jacques le Majeur de Montreal, asking me to *parapher* and attest Registers to serve for the registration of acts of Baptisms, Marriages and Burials in the said Parish for Nov. and Dec., 1872; seen also the *Décrêt Episcopal* of 25th September, 1866, referred to in said petition (admitted by all parties to be authentic); having heard all the parties, *nommément*, the petitioner; also Monseigneur the Roman Catholic Bishop of Montreal, and Alfred LaRocque, Esq., a parishioner of said Parish of St. Jacques, and Damase Masson, Esq., parishioner of the Parish of Notre Dame of Montreal, and Charles W. Schneider and three other parishioners of said Parish of St. Jacques, also parishioners civil and proprietors in the Parish (civil) of Notre Dame of Montreal; the undersigned, Judge of the Superior Court, observes that a *démembrement* has been made from the Parish of Notre Dame de Montreal, and an erection canonical of a distinct parish, called St. Jacques le Majeur, in the *enceinte civile* of the Parish of Notre Dame, the Church of St. Jacques being appointed Parish Church of said Parish Canonical of St. Jacques le Majeur; that the Superior of the Seminary of St. Sulpice and the *Curé* of said Parish of Notre Dame de Montreal, and the Marguilliers de la Fabrique de Notre Dame de Montreal, opposed said *démembrement*.

This *démembrement* seems to have not been preceded by petition of inhabitants (freeholders), such as referred to in cap. 18, Cons Stat. L. C., nor does it appear that any notice by or from the Bishop's Commissary was posted up at the door of the Church whatever, as by Sect. 9, of Cap. 18, Cons. St. of L. C., before the said Commissary (deputy of the Bishop) proceeded to his operations referred to in his *procès-verbal* of 20th Sept., 1866, and preceding the said *Décrêt Canonique*.

The undersigned observes also that, by the said *Décrêt*, it is ordered that the Church of Notre Dame shall be the Mother Church, and also that it shall preserve " au civil son territoire, ses droits et privilèges paroissiens comme si le présent démembrement n'avait pas eu lieu; vu qu'il n'a pour but que le bien spirituel des âmes."

This reservation in favour of Notre Dame is large. We know exactly what before the Bishop's *Décrêt*, the rights *au civil*

of Notre Dame. It was a Parish canonically and civilly erected. Its rights were not unaccompanied by burdens, and we know what these were in respect of Registers.

It is said that by said *Décrêt* said Parish of St. Jacques le Majeur shall be considered, for baptisms, marriages, burials and other offices, *succursale de Notre Dame.*

I am asked to allow and attest registers for said Parish Church of St. Jacques for the registration of births, marriages and burials in it.

Under what circumstances and in favor of what churches, my office may be invoked for such purpose is a matter of regulation by the Law Civil. The law on the subject involves regulations as to evidence in the courts of law, the effects of these being merely temporal. Extracts from such registers properly certified, the registers kept by the person authorized by the law, make proof of themselves. Registers may be kept in parishes merely canonical; but authenticity is property only of civil registers. (See Stuart's Rep.) At different times, parishes merely canonical have resorted to the Legislature to obtain civil effects for registers of theirs. Parishes canonically erected have existed for years without civil erection, and some have resorted to Parliament to get recognition civil and to be recognized for civil purposes, without confirmation by the regular commissioners for the erection of civil parishes.

Registers have been, and are being now, kept by the proper *Curé* for the Civil Parish of Notre Dame de Montreal and its whole limits.

Can I, as the law stands, name another to keep registers within that territory?

The *Décrêt Canonique* before me reserves and allows to the Parish Church of Notre Dame its territory and rights, *au civil, as if démembrement had never been from made it.*

It has been insisted upon that the Church of St. Jacques is entitled to registers from the mere fact of being a Church of a Roman Catholic canonical parish. If not entitled so, is it entitled as *succursale* to Notre Dame Parish Church?

D. Masson opposes the granting of registers whatever to St. Jacques, while Schneider and al. say; "If registers are to be al-"lowed, it must only be for St. Jacques as *succursale* to Notre "Dame;" but the registers are not asked in that way.

Reversing the questions in order, I will take up first the one of whether or not, as a *succursale*, St. Jacques Church is entitled to registers.

Is that Church a *succursale?* Is it such as contemplated by the 18th Victoria?

What is a *succursale* Church? *Guyot* (Répertoire) tells us.

As I understand it, a *succursale* to Notre Dame de Montréal would be a church in the Parish of Notre Dame; but the Church of St. Jacques is a *démembrement* from the Parish of Notre Dame, and is itself Parish Church of a new parish canonical, which PARISH (by the *Décrêt Canonique*) is made *succursale* of Notre Dame.

The 18 Vic. does not allow registers to a *Parish* called *succursale*, but only to *succursales* Church or Churches, in the Parish of Notre Dame, depending upon the Parish Church of Notre Dame.

The 18 Vict. has in view *succursales* churches in the Notre Dame de Montreal Parish existing in 1855; it does not seem to have thought of *succursale* parish or parishes, which we never before have heard of in Lower Canada. By priest of *succursales* churches of 18 Vic., never was meant *curé* of parish independent of Notre Dame. Look at who got and how were Registers in 1864 gotten for *succursales* churches in this very Parish of Notre Dame. The *curé* of the Parish of Notre Dame got them "pour servir à l'enrégistrement des Actes des Baptèmes, Mariages et Sépultures qui se feront dans telle église—(for instance, dans l'Eglise St. Patrice) dans la dite Paroisse."

In a *succursale* Church proper, the service is by the *Curé* of the Mother Parish, or priest appointed by him; the Church is really a dependency of the Mother Church. But the *Décrêt* before me deprives partly the *Curé* of Notre Dame of his *cure*; for the new parish is to be *desservie* by its particular *Curé* named by the Bishop; (for instance, in the case of St. Jacques, Mr. Mercier is named to be *Curé* of St. Jacques.)

I pass now to the other point. As I have said before, it is claimed by the Petitioner that the Church of St. Jacques is entitled to registers from the mere fact of being Parish Church of a Roman Catholic canonical parish.

The ecclesiastical authority to canonically erect parishes cannot be questioned, but certain forms must be observed; else such erection canonical certainly can have no civil effects. Civil recognition can be obtained only as *per* consolidated St. L. C. Cap. 18, or a particular act of Parliament.

The Civil Government alone has the power to give, by its approbation, civil effects to canonical erections. The form is well known; a proclamation by the Governor confirming a report of the commissioners named by the civil authority. The Civil Courts do not take notice of a mere canonical erection of parishes. Nobody will deny that the civil authority may impose what conditions and forms it pleases as conditions precedent, without fulfilling which no parish will be recognized *au civil*, and that this may be and co-exist with perfect freedom of religion and exercise of religion.

There are various kinds of parishes,—Chap. 19, of Cons. St. of L. C., shows it.—See its Sec. 2. There are parishes *not* "recognized by the civil law," and others that are. It is perfectly plain what are "recognized by the civil law," those of Chap. 18, Cons. St. L. C., Sections 10 to 15 inclusive.

When constituted (after canonical erection,) parish civil, "in the manner by law provided," but not before, will a mere canonical parish be recognized by the civil law and law courts.

When, in the Civil Courts, we talk of a parish, we mean parish that civilly we are bound to recognize. The Civil Courts recognize no parishes but civilly erected ones. This has been our invariable habit, and it was not necessary in the Municipal Code to define parish as "any territory erected into parish by the civil authority." The definition was inserted *ex majore cautela*. By "each Roman Catholic Parish Church," in the Code Civil, Art. 42, can be meant only such churches as are civilly recognized. So by "each Parish Church," &c., in Cap. 20, of Cons. Stat. of L. C., is meant each such church as we recognize civilly, in other words Parish Church such as of cap. 18, Cons. Stat. of L. C., Sec. 15. When civilians are writing a Statute we presume them, knowing the Law Civil, to use words to accord with the legislation of the Law Civil. Registers-keeper is an officer of the Civil authority. I can't see appointment of such officer in a parish not to be noticed civilly, according to the *décrêt*; not to be noticed civilly till so and so has been done, according to the Civil Law.

But we must not lose sight of the question before us, which is not so much the general one, whether all parishes erected merely canonically have right to registers such as asked; but whether, in this particular case, the Parish of St. Jacques, as erected canonically, lying within the *enceinte* of Notre Dame

Parish and erected with the qualifications I have before referred to and the reservations in favor of the original Parish of Notre Dame that are stated in the *Décrêt Canonique*, is entitled to separate and independent Parish Registers. The *Décrêt* states that it has "*pour but que le bien spirituel des âmes.*"

All the rights *au civil*, that the Parish of Notre Dame had, it shall preserve "as if *démembrement* had not been," says the *Décrêt*. It follows that it is to preserve its registers, and that *au civil* these shall be kept, as before the *décrêt*, by the *curé*, civil officer, for that purpose. As I interpret the law, and the *décrêt canonique* itself, I cannot name M. Mercier as *curé* of St. Jacques, to keep registers within the territory of the Parish of Notre Dame, civilly erected.

M. Mercier has failed to show a right, or title in any way, to claim from me that I should *parapher* or attest register, or registers, for St. Jacques parish or church. He is not entitled to registers as *curé* of a parish merely canonical, made by a *démembrement* from Notre Dame, such as operated by the *décrêt canonique* of 1866. He is not so entitled as *curé* of St. Jacques parish, though it be said to be *succursale* to Notre Dame. Real *succursales* have existed in this Parish of Notre Dame, and had their registers, and upon the same conditions as formerly, such churches can command them again, but only upon demand of the *curé* of the parish.

M. Mercier's petition is rejected, but I will say without costs.

## THE "UNION ST. JACQUES" CASE.

At last, in the case of *L'Union St. Jacques* and *Bélisle*, decided on the 19th day of September last, the power of Courts of Justice to pronounce upon constitutional questions has been acknowledged by the Court of Appeals of the Province of Quebec. In the previous cases of *Dixon* and *Coote*, the Judges expressed more or less doubt as to their jurisdiction in these matters; but we are pleased to notice that the majority of the Court has since come to the opposite conclusion. The importance of this decision, which fully supports the views often advocated in *La Revue Critique*, has induced *La Rédaction* to publish in full the opinions of the judges. It is true that the Provincial Government has appealed from this judgment to the Privy Council, in England; nevertheless, we do not believe that this appeal is serious so far as the jurisdiction of courts of justice is concerned.

LA RÉDACTION.

CARON J., dissenting:

L'acte d'incorporation dont il s'agit est un acte extraordinaire dans lequel ont été insérées les clauses et conditions demandées par ceux qui demandaient l'incorporation, laquelle ésait régulière et que la législature du jour avait bien droit d'accorder.

Les clauses et conditions ainsi accordées et imposées, nul doute que la Législature, qui le faisait, pouvait les changer et modifier à la demande des parties intéressées.

Ainsi, sans l'acte Impérial sur lequel se fonde l'intimée, et sur lequel est appuyé le jugement dont est appel, la Législature qui avait passé cet acte d'incorporation pouvait bien lui faire les changements que notre Législature Locale y a faits et dont se plaint l'intimée, les droits acquis sur lesquels elle se fonde n'auraient pas empêché l'exercice de ce droit de faire les changements.

Cela étant, se présente la question de savoir si l'Acte Impérial contient quelque disposition qui ôte à notre Législature Locale le droit de faire les dits changements.

Je suis d'avis que non. En passant l'acte dont se plaint l'intimée, l'on a pas touché aux lois de banqueroute sous l'empire desquelles, la société en question n'est jamais tombée Il parait

absurde de prétendre qu'une société, fondée dans le but de celle-ci, soit de nature à se trouver en banqueroute ou en faillite. Non, cette société de bienfaisance, fondée dans le but de pouvoir aux besoins des pauvres membres qui en font partie, s'est aperçue, après quelques années d'expérience, que les conditions qu'on leur avait imposées sur leur demande étaient trop onéreuses, et détruiraient la société et le but qu'on se proposait en la fondant; et alors les membres ont demandé à la Législature de faire les changements qu'ils ont suggérés, de nature a remédier à l'état de malaise et d'embarras dans lequel elle se trouvait. La Législature locale en accordant ce qui était demandé n'a sûrement pas touché aux lois générales, réglant la faillite, la banqueroute et l'insolvabilité ; c'est un acte particulier qui n'a rien de commun avec les lois générales sur ces différents sujets.

Quand même, il en serait autrement, et que, de fait, l'acte en question aurait trait à cette sorte de loi, rien ne constate que la société qui demandait la passation de cet acte, était vraiment dans un état de faillite et de déconfiture ; ce n'était pas se déclarer dans un tel état que de demander des changements de nature à améliorer sa position.

Chaque jour l'on voit des corporations demander à la Législature des changements, des amendements à leur charte, sans qu'il pût venir en tête à qui que ce soit de prétendre que c'était un signe de faillite ou de déconfiture.

Il en est de même dans le cas actuel. La société a représenté que les obligations qu'elle doit remplir sont onéreuses et peuvent entraver sa prospérité et sa durée ; mais ce n'est pas là alléguer qu'elle soit dans un état de déconfiture.

Je renverserais donc le jugement et renverrais l'action de la demanderesse ?

Lors de la nouvelle audition qu'a eu lieu en cette cause, l'on a suggéré que c'était moins par suite du statut impérial que la Législature locale était sans juridiction sur le sujet dont il s'agit, mais que c'était parceque l'acte d'amendement, fait par la législature locale, contient une déviation aux droits conférés aux membres de la société St. Jacques par leur acte originaire d'incorporation ; qu'en vertu de cet Acte, l'intimé avait des droits acquis auxquels l'acte d'amendement portait atteinte, ce qui le rendait nul en autant que l'intimée était concernée.

Cette prétention me parait outrée ; si elle était admise, les banques et autres sociétés, une fois incorporées, ne pourraient

plus obtenir de changements à leur charte, pour la raison donnée dans le cas actuel, c'est-à savoir que ces changements, tout avantageux qu'ils pourraient être au plus grand nombre des actionnaires, pourraient affecter les droits et les intérêts de quelques uns d'eux, et que partant, dans cette appréhension, la législature ne devrait jamais accorder d'amendements aux actes d'incorporation.

Une autre observation à faire est que si véritablement la société est en faillite ou déconfiture, la loi passée par la législature locale et dont se plaint l'intimée, est tout-à-fait dans l'intérêt de l'Intimée, puisque, en acceptant ces dispositions, l'Intimée pourra recevoir de suite la somme fixée, au lieu de sa rente, tandis que dans ce cas elle courrait le risque de ne pas être payée de cette rente.

Je persévère donc dans l'opinion que le jugement doit être infirmé et l'action de l'Intimée renvoyée avec dépens.

BADGLEY, J., dissenting:

Several years before the Imperial Enactment of 1867, which constituted the present Dominion Government of Canada out of the then four British American Provinces, a Friendly Society had been established at Montreal, in Lower Canada, called the *Union Saint Jacques de Montreal*, by charitably disposed persons, having for its "object the aid of its members in cases of "sickness and the ensuring of like assistance to the widow's and "children of deceased members." Bye-Laws expedient and necessary for the interests and administration of the affairs of the Society were made which fixed the relief to be given and the classes of its benificiaries to receive it, amongst whom were, during their widowhood, the widows of deceased members, of a certain standing in the Society. The funds were derived from the periodical contributions of its members, whilst connected with the Society. The Institution had been in operation for some years when its members applied to the Provincial Legislature of the time, and obtained an Act of Incorporation for the Society, under its original name and formation and for its original purpose and object of a merely eleemosynary Society. The Act of Incorporation merged the original Society into the Incorporated Institution. The diminished resources of the Society preventing the continuance to its beneficiaries of their then allowances, and amongst them those of the four widows borne upon the funds of the establish-

ment, the Society proposed to them to convert their allowances into the fixed sum of $200, to be once paid to each of them, with the right to receive their full allowance if thereafter the assets of the Society should reach ten thousand dollars. The proposition was at once accepted by two of them, and upon the refusal of the others, the Provincial Legislature of Quebec, formerly Lower Canada, upon the application of the Society passed the Provincial Act, 33 Vict. ch. 38, "An Act to relieve the Union St. Jacques, of Montreal," which gave effect to the proposition above mentioned in respect of its beneficiary widows. The widow Bélisle, one of the refusing widows, thereupon instituted an action against the Society for her weekly allowances claimed to be due to her since the first of February, 1870, the date of the passing of the Provincial Act, to the following first of August, for $43.50, to which the Society pleaded the Provincial Act in bar of the action. The Circuit Court overruled the plea upon the grounds, first, that the legislative authority of the Dominion Parliament extended over all matters of insolvency, and second, that the Provincial Legislature had no power to legislate, as by this Act, *by which* the Respondent, *in view of the inability of the Society to meet their engagements was compelled to compound her said claim of seven shillings and sixpence per week, during her widowhood, for the sum of two hundred dollars, once paid.*

Two questions follow upon this contestation; the first, the right of the Provincial Legislature of Quebec, to pass the Act in question, which is alleged to involve the insolvency of the Society, and the second, the jurisdiction of the Circuit Court to annul a Provincial Act, sanctioned by the constituted authority in the Dominion for that effect, and not disallowed in the manner provided by the Dominion Act, the Constitution of the country.

The first question, the extent of the powers intrusted to the Provincial Legislature, necessarily requires reference to the legislative power entrusted exclusively to the Dominion Legislature. Now by the Dominion Act, it is common knowledge, that the several provinces which compose the Dominion Government have each of them local legislatures, and that by the Act, under which these exist as well as that of the Dominion itself, the powers and rights belonging to each have been defined and established, and are in that sense constitutional. It may be observed that the

Dominion Legislative powers, are, to use a common expression, supreme in all matters of a general nature which are specifically confided to the action of the general or Dominion Legislature, subject only in its legislative acts to the Imperial reservations contained in the Imperial Act for the Dominion, and amongst others to the signification of the pleasure of the Sovereign as to its legislative enactments, and their disallowance within two years as expressly provided by the Dominion Act. Beyond this, the legislative powers of the Dominion are supreme throughout the Dominion, and acknowledge no power, judicial or otherwise, to interfere with them when applied to the general matters enumerated as exclusively within the Dominion Legislative purview. Its legislative powers within these limits are exclusive, and govern and extend over the provinces composing the Dominion. These matters are plainly and explicitly indicated as classes of matters of a general nature, and the Dominion Legislative Acts as to these, are only subjected to the provisions of the Dominion Act; amongst others, to their sanction by the Governor-General in the name of the Crown, His Excellency's reservation of acts for the signification of the Royal pleasure thereon, and their Imperial disallowance within two years after their receipt by the Imperial Secretary of State. In like manner, the Dominion Act has provided for the legislative powers of the several provinces, and the same care has been taken to specify their extent and objects, which necessarily are simply local and not within the general Dominion powers. The provincial legislatures within their own boundaries freely exercise the powers entrusted to them under the Dominion Act, which gave them their provincial constitutions, and in which and for which they are as supreme and exclusive as the general Legislature itself, but like the Dominion, the Provincial Legislatures are likewise subject to the reservations in respect to their legislative acts, namely, the assent to them by their local Governor, their reservation for the assent of the Governor-General, instead of the Sovereign, and their disallowance by the Governor-General, not the Sovereign, within one year, not two as provided for the Dominion Acts. Beyond these reservations the legislative acts of the Provincial Legislature within the enumerated local matters for their action, are supreme and coercive upon all within the extent of the Province. These Provincial powers are as exclusive as those of the Dominion. When not disallowed therefore by the Governor-General, Provin-

cial legislation is supreme and binds as law throughout and within the provincial purview.

Our examination of the Dominion Act, and of its intended scope and purpose indicates the necessary Legislative theory upon which its provisions in this respect are founded. The establishment of the general Dominion Government necessarily carried with it, exclusive legislation by the Dominion upon the general classes of matters affecting the Dominion of the four Provinces, whilst the establishment of the several local or provincial legislatures as necessarily drew to each, its legislative power upon local matters within each province. The theory of the general legislative powers of the Dominion is expressly general in the enactment of general laws upon its exclusive subjects enumerated for its action. The 91 Section of the Act provides for the legislative authority of the Parliament of Canada, *to make laws for the peace, order and good government of Canada in all matters not coming within the classes of subjects* assigned exclusively to the provincial legislatures, and for greater certainty that authority is declared to extend to all matters coming within the classes of subjects enumerated in the Dominion Act, namely, amongst others:—The public debt and property, Regulation of Trade and Commerce, Postal Service, Navigation and Shipping, Currency and Coinage, Weights and Measures, Patents, Copyrights, Naturalization, &c., Bankruptcy and Insolvency, the Criminal Laws and Procedure, and any matters coming within any of the enumerated classes of subjects in this Section. The principle of the theory of the Dominion Legislation for general subjects exclusively, stands out in bold relief by merely going over the list of the enumerated general subjects attributed to the general Legislature. The 92 Section enacts that in each province, the Legislature may exclusively make laws in relation to matters coming within the classes of subjects therein enumerated, namely, amongst others, direct taxation within the province, the amendment of the provincial constitution, public lands of the province, reformatory prisons,—7. The establishment, maintenance and management of Hospitals, Asylums, Charities and eleemosynary institutions in and for the Province, other than Marine Hospitals; 11. The Incorporation of Companies with provincial objects; 13. Property and civil rights in the Province; and 16, generally all matters of a merely local or private nature in the province. Looking to the enumerated subjects of legislation ex-

clusively belonging to each legislature, the division between the general and local subjects is apparent and manifest.

Now, with reference to this contested provincial enactment, looking to its object and intent and comparing these with the legislative powers entrusted to the local or provincial legislature of Quebec, it cannot be denied that the Appellant, the Corporation of the Union St. Jacques is of *the eleemosynary character, classed in the 7th sub-section, that it does fall within the terms of the 13th section as to property and civil rights in the province,* and that it is not excluded from the general terms of "*a matter of a merely local or private nature in the province*": as included then manifestly within these local subjects, the Provincial Legislature has passed this Act, simply as a settlement of claims upon the diminished funds of the Society, between the Society and its beneficiaries, with the view to the maintainence and management of the Union as a conttnuing corporation, the Act involving in its provisions private property and civil rights in the province, and a matter of a merely local or private nature, which its provisions have regulated between the parties in the manner proposed and contemplated by its managers, as a settlement enforced under the provisions of the Act. I would merely add that as between the Corporation and the recalcitrant beneficiaries, including the Respondent, considering the Act of Incorporation as nothing more than a legislative contract touching property and rights between them, even as such and to that extent, the Act is manifestly within provincial legislative powers, which do not in the compulsory settlement of the contract difference between the parties, necessarily fall within the exclusive powers of the general legislature, as for bankruptcy and insolvency. The objection raised upon this point is the only one which has a shadow of plausibility about it, and yet it is manifestly untenable and unfounded.

The Provincial Act in itself may also be tested with reference to its subjection of the enumerated exclusive subject of Bankruptcy and Insolvency attributed exclusively to the Dominion Legislature, by the fact that the Dominion has made a general law upon the Statutory subject, the provisions of which apply to this contention. A Statutory Bankrupt and Insolvent legislation had been in force in the two Canadas since the first Insolvent Act of 1864, which was continued with amendments to the time of the making of the Dominion Law for Insolvency in 1869,

which repealed the provincial enactments and substituted a general Dominion Law upon the subject. By the Provincial Act of 1864, the first section specially enacts that "*the Act should apply in Lower Canada to traders only*," "and in Upper Canada to all persons whether traders or not," and this provision was not interfered with in the subsequent statutory amendments of that Provincial Act.

By the Dominion "Act respecting Insolvency" of 1869, the Lower Canada statutory restriction is extended throughout the Dominion of the four Provinces, and it is enacted by the first Section of the Dominion Act of 1869, "This Act shall apply to to traders only." Now it is nothing but just to read the general subject of Bankruptcy and Insolvency by the light of the Dominion Legislation itself, as indicating the intent of that legislature as to the enumerated subjects for its action, and it becomes undeniable therefore, that the Society, the Appellant here comes within the express limitation and restriction of the general law, and being neither in character nor purpose commercial nor a trader, and solely and simply what it has always been, a charitable and eleemosynary institution in and for the Province of Quebec, the Provincial enactment for its relief can, under no circumstances, be brought within the operation of the laws of Bankruptcy and Insolvency attributed to the Dominion Legislature.

It is not my intention to examine the special provisions of the act in question, because, assuming the act to be within the local legislative powers, and as to its subject matter or inducement not conflicting with the general exclusive power of the Dominion as to the general laws of bankruptcy and insolvency, it is necessarily constitutional, and therefore as a necessary result, its provisions must be obeyed and observed even by Courts of justice, as being within the class of matters within the action and powers of the Provincial Legislature. I will merely add that it has received its proper sanction by the provincial Governor, it has not been disallowed by the Governor General, the only constitutional authority capable of setting it aside or invalidating it, and that it stands recorded amongst the provincial statutes of Quebec as an effective provincial statute and law, with legal attributes for its existence within its province, equal to those of any Dominion or Imperial statute in the Dominion or Great Britain. In the face then of these supreme powers within the purview of

its jurisdiction, the Province of Quebec, what legal authority has been given to the provincial Courts of justice or to their judges individually, to deny to the Provincial Legislature the supreme power in its result, to enact and pass this provincial act? It is manifest that the provincial act in question here, like all other legislative acts which come before the constituted judiciary, are only subjects of interpretation, and only as such can be examined and treated by courts of justice, which are stopped at interpretation, because any beyond that as to legislative acts is legislation, which it is idle to say, courts of justice have no authority to exercise. Their mission ends where legislation begins and, therefore, it is of primary importance to keep courts of justice within the bounds limited by law for subjects such as these. The powers of judiciary in such a case can only be interpretative, certainly not disallowing, and as this act was within the local powers and did not conflict with the general powers, and was not disallowed by the Dominion Executive, the only competent or qualified authority for that purpose, the judgment of the C. C. is nothing less than an unauthorized judicial repeal of the legislative act. It is objected that it is an interference with the law of contracts between the society and the beneficiary, but even in that case the judiciary have no repealing power; they may interpret, but cannot ignore or set aside a legally constituted law, in such case the judiciary are powerless. It may not have been a right thing to do, it may even have been unprecedented; of this I am not called upon to express my opinion, but the Provincial Legislature notwithstanding had the power to do it, and acted upon their powers. The parties interested had their recourse, they should have applied in time to the Dominion Executive to exercise its power of disallowance; there is no other legal mode of evading an existing act, and if that course is not applied for or not adopted, the Act, of necessity, stands supreme as a law. Assuming then, that the Act is, in all respects, valid and constitutional, the rules for the guidance of the judiciary, as applicable in Great Britain in respect of legislative Acts, also govern here. Dwarris, at page 647, says "the general and received doctrine certainly is, that an Act of Parliament, of which the terms are explicit and the meaning plain, cannot be questioned, or its authority contradicted in any court of justice." Even in the United Statos, where the Constitution has given to the judicature the power and right of examining their legislative

Acts, that power is restricted to the discovery of violations of the constitution or of its provisions, but at the same time they all admit, as a settled principle, that the legislature is the supreme power in the State, and if the Act be within the constitution, in other words, within the powers attributed to the exercise of the action of the Legislature, it is paramount to all judicial authority, and per force must be obeyed by courts of justice, who are only the ministers and expounders and not the makers of existing laws. It is within the principle of the supreme power of the legislature that what are denominated private acts of parliament, introduced and passed for the settlement of particular matters or estates, are not only considered but at the same time upheld as common assurances amongst those interested in their provisions, but do not go beyond to strangers or parties not interested in them, the rule being founded in wisdom and justice, because as it is laid down "every person is considered as assenting to a public act, yet he is not so far a party as to give up his interest." It is true this act may be called a private act, although it is designated as a public act, by the Legislature, yet it may be observed that however supreme the power of the Legislature may be in such cases of binding private rights by acts of parliament, caution should be duly exercised in reference to them. Still, whether public or private, the act is existing law, and in a case of an act of the Legislature of Ontario, such a private act as this was upheld by the Court of Appeals for that Province. There, it was an act by which an important condition of a duly executed and recognized will was set aside and controled by an act of that legislature, which like this, was assented to and stood allowed. I refer to the case of the will of the late Hon. Mr. Goodhue. Chief-Justice Draper and five other Judges of the Court concurred in opinion as to the legislative validity of the act, although they differed as to the expression and interpretation of the terms enacted in it. I cannot do better than repeat some of the citations made in that case as to the assumption by courts of justice to override a legislative act. In Logan vs. Burslem, 4 Moo, P. C. C. S. 296, Lord Campbell says: "As to what has been said as to a law not binding if it be contrary to reason, that can receive no countenance from any court of justice whatever. A court of justice cannot set itself above the legislature. It must suppose that what the legislature has enacted is reasonable, and all therefore that we can do is to

try to find out what the legislature intended. If a literal translation or construction of the words would lead to an injustice or absurdity, another construction possibly might be put on them, but still it is a question of construction—there is no power of dispensation from the words used by the legislature." Mr. Sedgwick, in his Treatise upon Statutory and Constitutional Law, argues unanswerably that the judiciary have no right whatever to set aside, or arrest or nullify a law passed in relation to a subject within the scope of legislative authority, on the ground, that it conflicts with their notions of natural right, abstract justice or sound morality, p. 187. And Chancellor Kent, 1 Com. 408, writes, " where it is said that a statute is contrary to natural equity or reason, or repugnant, or impossible to be performed, the cases are understood to mean that the Court is to give them a reasonable construction. They will not, out of respect and duty to the law giver, presume that every unjust or absurd consequence was within the contemplation of the law, but if it should happen to be too palpable to meet with but one construction, there is no doubt in the English law of the binding efficacy of the statute." To the opinions of these able men might be added those of other eminent jurists, Sir W. Blackstone, for example, amongst the number who fully corroborate what is above stated. Now, if unreasonable acts of Parliament are not thus by authorities cited, allowed to be set aside by courts of justice, because, as old Chief Justice Hale, cited by Dwarris, says " it was *magis congruum* that Acts of Parliament should be corrected by the same pen that drew them, than be dashed to pieces by the opinion of a few judges ; " or, as observed by Lord Chancellor Ellesmere, " that when the three estates have spent " their labour in making a law, three judges on the bench shall " destroy and frustrate their pains, advancing the reason of a " particular court above the judgment of all the realm," it is manifest that an act within the precise power of the Provincial Legislature to enact, cannot be ignored by our courts of justice.

There is nothing, therefore, to sustain the opinion that the provincial courts have jurisdiction to override or set aside provincial legislative acts coming within the classes of matters as above enumerated in the 92nd section of the Dominion Act. And here I may be again permitted to say, that as to the object of the Act in question falling within the exclusive power of Dominion legislation as being a matter of bankruptcy and insol-

vency reserved for the Dominion Legislature, Judge Caron has fully answered this objection, and I shall not further remark upon it. Upon the whole I consider that the Statutes of the Quebec Legislature are binding upon all the residents in the province, when made in relation to the matters within the Provincial Legislature, that the Statute in question in this case is valid and binding upon the parties affected thereby and upon this and all Courts of Justice of Quebec, and that the judgment of the Circuit Court to use its own expression, is unconstitutional, and in effect and fact an unauthorized judicial repeal of the Act and an illegal assumption of disallowance only left to the Governor General; and therefore that the judgment appealed from is incorrect and ought to be set aside.

DUVAL, C. J.

In my opinion the question is of very easy solution. It is undoubtedly true that the authority of the Imperial Parliament is supreme, and in the exercise of that authority the Imperial Parliament cannot be controlled by the judinial power. Such is the recognized doctrine in England, contested by no one; and I must say it is a surprise to me to hear a great deal of learning expended for the purpose of establishing principles which were elementary, and which no lawyer in his senses would think of questioniong. The authority of the Imperial Parliament is undoubtedly supreme. It must be obeyed without questioning the authority of any of its enactments. But our Local Legislature is not supreme. I have heard with surprise the words "omnipotent and supreme," applied to our local legislature. It is neither the one, nor the other. And when the Imperial Parliament said to the Local Legislature:—Thus far may you go and no farther, and the Local Legislature transgresses that limit, whom were the Courts to obey? I answer that it is the Imperial authority which must pass unquestioned, and the Courts are bound to disregard anything at variance with that authority. In doing so, the Courts do not disallow the Act of the Local Legislature; they simply say that they cannot obey it, any more than if the Corporation of Montreal or Quebec had undertaken to pass rules on the subject. The powers of our Local Legislature are defined in express terms, and the subject of insolvency is not within their functions. If the *Union St. Jacques* was insolvent, on what principle could the Local Legislature interfere? If it

was not insolvent, the rights of the plaintiff had been unjustifiably interfered with. What would be said of an Act of the Legislsture of Quebec, enacting that a man who had sold his house for £1,500 should take £1,250? This would be so glaring a case as to call for no argument. The Courts would have no hesitation in interfering. The authority of Blackstone had been cited in support of the position that there is no authority in the Courts to correct a wrong done by Parliament. I admit that. But when had the Imperial Parliament in modern times interfered with private contracts? From what had been said, it was evident that the Legislature of Quebec had exceeded the powers assigned to it. Could this Court interfere? I hold that the judges were bound to look to the Act of the Imperial Parliament, and to obey it. Take another instance- Criminal law was one of the subjects taken out of the power of the Local Legislature. If, then, the Local Legislature assume to legislate on the subject, would any judge sentence a man to the penitentiary under Act of the Local Parliament? Where then was the limit to be placed, or the line of distinction to be drawn? Either the Court had no power to interfere, or it had. It must either satisfy itself that the Act was legal, or it must blindly obey, and say that it is not answerable for the consequences. The majority of dhe Court had for these reosons come to the conclusion to confirm the judgment which had very properly been rendered by Mr. Justice Torrance.

DRUMMOND, J.

The question is whether the Courts of this country have power to refuse obedience to the Local Legislatures. The English authorities cited are not applicable, because they apply to the Imperial Parliament; but here we are under a Federal system, and the judgment of the majority of the Court has the effect not to destroy, but to maintain the power of the Imperial Legislature. The judgment of Mr. Justice Torrance expresses my view of the whole question in clear and express terms. There could be no doubt whatever in my opinion that the Courts not only have a right, but are bound to refuse obedience to the commands of the Local Legislature, when such commands are contrary to an Imperial law. The only quession in the case which admitted of any difficulty was, whether the Act of the Quebec Legislature had interfered with matters of insolvency. On this point I am

with the plaintiff. The British Parliament has laid down the limits within which the Local Legislatures have authority to act, and beyond these limits they cannot go. If they legislate beyond their powers, their enactments are no more binding than the rules and regulations of any other unauthorized body. The simple sanction of the Governor-General could not give validity to an act beyond the powers of the Local Legislature.

MONK, J.

I agree with my colleagues the Chief Justice and Mr. Justice Drummond in this case.

At the time of the argument, I was inclined to the opinion expressed by Judges Caron and Badgley, but upon careful condideration, I think we have the right, and that in fact, it is our duty, to disregard a law of the local Parliament if it be in conflict with the Imperial Act which confers a Constitution upon the Dominion. It is satisfactory to me to know that my brother Caron is also of that opinion, though he differs from the Court upon the ground that there is no conflict in this case. Several learned Judges of the Dominion and many text-writers, whose decisions and authority are applicable to this case, uphold that view, and I therefore readily yield to what appears to be the more approved doctrine.

It is said that our decision will lead to consequences of the gravest character. If this be so, the fault is not ours; we have the Imperial Act, which undoubtedly we are bound to obey and to enforce. If we find a local law in conflict with its provisions, we have no more right to give that effect, than we should a Bye-law of the Corporation contrary to a local law.

But assuming this doctrine as to the powers and duties of this Court to be sound, does this Act transgress the Dominion Act? Does then exist the conflict contended for by the Respondent?

It is argued and with considerable force, I think, that only general legislation on Insolvency was reserved to the Dominion or Federal Parliament and that this Act not possessing that character, it does not come within the prohibition. The law, however, does not, expressly or by clear implication, make that distinction, and, in that case, this Court would not probably feel justified in doing so. The local Act says in plain English that the *Union St. Jacques*, being Insolvent, unable to meet its liabilities and engagements and not being able to induce the Res-

pondent and other ladies to accept a composition, the power of the local Parliament is invoked to legalize a reduction of the claims, in other words, to compel the interested parties to accept a forced composition. All this is said and enacted, in less precise, in milder words, yet, this is a concise statement of the case. The whole act means insolvency and forced composition; nothing more and nothing less.

If this be true, then the letter of the Imperial Act is plainly violated and, although I have some doubts as to whether that statute meant to prohibit the local Parliament from legislating on Insolvency in matters of the nature brought before us, yet there is a judgment of the Court below, and my doubts are not strong enough to induce me to disturb it more especially under the circumstances of this case.

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## WILLS AND INTESTACY.

Our correspondent at St. John, N.B., has sent us the following answer to the Hon. J. H. Gray's last article on this subject.

ST. JOHN, 18th July, 1872.

I have just seen the April number of *La Revue Critique*, containing Mr. Gray's answer to my observations upon his article on "Wills and Intestacy," and I take the earliest opportunity of stating that I think his reference to the Provincial Act, 21 Vict., c. 26, which he quotes on page 152, does not in any way support his position.

I was quite aware of that Act when I wrote my communication, but did not refer to it, because I never supposed that it could be contended that the effect of it was to make any other change in the law of inheritance than to deprive the heir-at-law of the double portion of the real estate, which, till then, he had been entitled to, leaving the other branch of the law, namely, the distribution among the next of kin, where the intestate left no children, just at it was under the Act 26, Geo. 3, c. 3.

Mr. Gray seems to rely upon the omission of the words "*heir-at-law*" in the Act 21, Vict. c. 26, as supporting his view; but I cannot see any force in that argument, because now, there is no "heir at law" in the sense in which that term was previously used, the preference given to the eldest son by the common law, and by one Act 26, Geo. 3, in a limited degree, having been

abolished by the Act 21 Vict., c. 26, which divides the real estate among all the children equally, any reference then to the heir at law in this Act, would be, to say the least, meaningless.

As a judicial construction had been given to the words "next of kindred," when applied to the distribution of real estate, by the case of *Doe v. Crane*, decided in 1846, it must be presumed that when in the year 1858, the Legislature used the same words in the Act 21 Vict., c. 26, in reference to the same subject matters, they intended them to have the same meaning which had already been judicially assigned to them, and that if they had intended to alter that interpretation, and to give to those words the meaning contended for by Mr. Gray, they would certainly have used some language to shew that such was their intention. In the absence of the slightest indication of such an intended change, the only construction that can properly be given to the Act 21 Vict., c. 26, is, that the Legislature only intended to alter so much of the previous law, as gave the heir-at-law a double portion of the real estate, and that they did not intend to make, and have not made any change in the other part of the Act, relating to the next of kin, and which, consequently, remains as it was established by the case of *Doe v. Crane*.

The idea put forward by Mr. Gray as to the construction of this Act, is I believe, a novelty in this Province, unheard of hitherto, by either the Bench or the Bar, and I venture to affirm that his construction cannot possibly be sustained.

## LE CONSEIL PRIVÉ.

Le Comité judiciaire du Conseil Privé est un tribunal devant lequel un nombre assez considérable de nos concitoyens vont demander justice et sur la composition et les habitudes duquel il règne en général d'assez vagues notions.

Voici ce qu'en disait récemment le *London Times:*

### THE JUDICIAL COMMITTEE.

The evidence taken before the Select Committee of the House of Lords on the working of the appellate jurisdiction exercised by that House and by the Privy Council, has recently been issued. Mr. Henry Reeve, the Registrar of the Privy Council, gave an account of the constitution and practice of the Judicial committee. It appears that the Lord President of the Council, a political functionary, has to settle (with the aid of information furnished by the Registrar) what members of the Judicial Committee shall be summoned to sit in any case that is coming on. The present Lord President, the Marquis of Ripon, intimated to the Registrar that in "purely legal cases" the Lord Chancellor is the fittest person to direct what members it is proper to summon, and, consequently, Mr. Reeve has communicated more with the Lord Chancellor and less with the Lord President than he had been in the habit of doing before. But he observes that many Lord Presidents have taken a very active part, and themselves decided on the composition of the Committee to sit upon a particular case. He mentions that the recent appointment of paid members has certainly not superseded the other members. In the *Gorham* case the whole of the Judicial Committee were summoned. The Lord President thought the *Bennett* case a matter of considerable public interest to the Church; the Registrrar mentioned to him the course pursued in the Gorham case, and again a step was taken which the Registrar describes as "not very common;" a letter was written to every member of the Judicial Committee asking whether he would attend. In reference to intervening ecclesiastical causes, the *Westerton* case, the *Purchas* case, the *Voysey* case, and the case connected with *Essays and Reviews*, the Registrar says,—"We summoned a very considerable number of the members; in all those cases I took precise directions either from the Lord President or the Lord Chancellor." The Marquis of Salisbury suggested that the practice of summoning the Court is "characterized by a certain amount of vagueness." The Lord President reminded the Registrar that no reference was made to him in the Purchas case; and the Registrar answered that in that case he took the directions of the Lord Chancellor. Mr. Reeve stated

further in answer to questions put to him, that it happened once—viz., in the *Purchas* case, that a moiety of the Court consisted of privy councillors not being lawyers. The case was heard by only four members, and two of them were prelates. Lord Westbury, in the course of the examination of Mr. Reeve, inquired whether what had occurred was not this:—That there having been some complaint or some murmur, with regard to summoning individual Judges, the conclusion arrived at in the *Bennett* case was that, instead of picking out Judges, it would be better to send a general circular to all the members of the Judicial Committee; and the Registrar answered that it was so. It has never been settled whether a member of the Judicial Committee not summoned or invited may attend. Another question arose:—In the Orders made in 1627, "to be observed in assemblies of the Council," it is directed that a decision is to be "by the most voices," but that "no publication is afterwards to be made by any man how the particular voices and opinions went." The Star Chamber was then exercising jurisdiction; but it is considered that the practice and traditions of the Privy Council have not been affected by the abolition of the powers exercised by the Star Chamber, which was a Committee of the Privy Council. The rule was observed for two centuries, and was departed from in the *Gorham* case. The practise has always been that when the Judicial Committee have deliberated in private, some member is asked to draw up the judgment of the Committee, or of the majority; that document is generally sent to the Registrar of the Council, printed confidentially at the Cabinet Press, and circulated among the members of the Committee who heard the case. These make notes upon it, and suggest any alteration they think desirable, until at last it is got into a form which embodies the opinion of their Lordships or of the majority of them. It purports to be the opinion of "the Committee," and no mention is made of differences of opinion. The Registrar considers that "the Crown would be extremely embarrassed if, on applying to a Committee of its Privy Council for advice, it were told that three members of the Committee were of one opinion and two of another; the Crown requires a decisive opinion upon which to act." Lord Chelmsford came to the help of the witness by observing, in the form of putting a question, that the Crown does not necessarily understand that the recommendation is the unanimous opinion of the Committee. Lord Westbury, in another question, made the not unreasonable suggestion that it seems right that the truth should be stated to the Crown. The public and the profession also might as well be allowed to have the means of weighing the value of the decision. It appears, however, that shortly after the creation of the Judicial Committee this question of the publication or concealment of votes arose; the first time there was a difference of opinion, some of their Lordships were anxious to express their opinions. The Court consisted at that time of Lord Brougham, Mr. Baron Parke, and other Judges. The ancient

rule of 1627 was brought before them by Mr. Greville, then Clerk of the Council, and after careful consideration, they arrived at the conclusion that it was desirable to adhere to the old rule, and to confirm it by their own practice. But it has not been strictly adhered to. In the *Gorham* case, Vice-Chancellor Knight-Bruce, in the secret deliberations of the Committee, read a paper extremely adverse to the conclusion of the majority, and earnestly requested his colleagues to allow it to be stated that he did not concur in the judgment; and the Committee thought it right to defer to his wishes, and to announce, "Vice-Chancellor Knight-Bruce wishes it to be stated that he does not concur in this judgment." In a subsequent case, that of the *Essays and Reviews*, the Lord Chancellor, after delivering the judgment, added, "The Archbishop of Canterbury and the Archbishop of York wish it to be understood that they do not concur in the latter part of this judgment," with reference to a particular article. Mr. Reeve observes that this is the utmost that has been done, and no reason for dissenting has ever yet been stated; but it is difficult to see the wisdom of this restriction, peculiar to this court. It may be observed that when the Judicial Committee was established in 1833, no Bishops were members of it; one of the first ecclesiastical cases heard before it was that of "Estcourt *vs.* Mastin," which determined the very important question of the validity of lay baptism, and no Prelates were present. In 1840, the Church Discipline Act was passed, and it is only by virtue of that Act that Bishops are members of the Judicial Committee. An appeal under that statute cannot be heard without them. *Gorham's* case was not under that Act; it was a case of what is called *duplex querela*. But the then Lord President, Lord Landsdowne, was of opinion that it was exceedingly desirable that the Prelates who were Privy Councillors should attend, and letters were written to them conveying Her Majesty's express commands to them to attend; but they had no vote. Any Privy Councillor may be summoned to attend at the sittings of the Judicial Committee; and many do attend. Indian Judges, appointed assessors attend; the Colonial Secretary has attended, and sometimes the Home Secretary. He has not a vote, but he may express his opinion. That is what the Bishops did in the *Gorham* case; they all expressed their opinions. But what they said was not made known to the public.

Une lettre de Londres, d'une date toute récente transmet les informations suivantes, de la part d'un citoyen de Montréal, ancien avocat: "Devant cette Cour, tout se fait et se passe simplement, sans bruit, sans effet, sans éloquence. L'éloquence serait non seulement inutile, mais nuisible. La Cour se tient dans une salle de trente pieds carrés, dont les quatre murs sont couverts de livres. Quoique l'accès en soit libre au public, c'est à peine si l'on y voit trois ou quatre personnes à la fois, durant les plaidoiries. Un petit espace est réservé aux avocats seuls, les solli-

citeurs n'y ayant pas accès. Ces derniers sont assis derrière leurs *Counsel* respectifs, sur des bancs à part et séparés par une cloison de trois à quatre pieds de hauteur. Les juges au nombre de cinq sont assis de chaque coté d'une table verte et de plein pied,—c'est-à-dire sans trône et même sans estrade, comme chez nous. L'extrémité inférieure de cette table oblongue, s'appuie contre un grillage à hauteur de ceinture, qui sépare les avocats des juges et au centre de laquelle vient se placer l'avocat pour plaider, en sorte qu'il n'aurait qu'à étendre le bras pour toucher les juges assis le plus près de lui. On comprend facilement que ces dispositions ne prêtent guères a l'éloquence. On se parle face à face, comme dans un salon. Le fait est que c'est, dans toute la force du terme, une *argumentation*, très souvent interrompue par les questions des juges, où le coloris et l'équivoque n'ont pas de place. Les juges ne s'impatientent pas, ils ne vous pressent pas; mais ils vous questionnent jusqu'à ce qu'ils se soient formé une conviction. Puis entre eux et de la même voix qu'ils parlent aux avocats, ils échangent leurs observations, en sorte que leur *délibéré* se fait pour ainsi dire séance tenante et qu'on peut dire à l'avance quel sera le jugement. Ce terre-à-terre toutefois est aussi ouvert aux ressources sérieuses de l'avocat qu'il l'est peu à l'éloquence. J'ai été rempli d'admiration par la plaidoirie d'un Conseil de la Reine, dans une cause du Canada. Les plaideurs du Canada doublent leurs chances de succès en envoyant leurs avocats assister à la plaidoierie et aux conférences préparatoires avec leur *Counsel*. Je suis d'avis que si vous avez à Londres de bons avocats avec lesquels ceux du Canada ont eu le temps de bien s'entendre et se concerter, il vaut mieux laisser plaider les avocats anglais; car ils connaissent les dispositions des juges, la manière de convaincre chacun d'eux; ils savent quand et jusqu'où parler et quand s'arrêter. L'avocat canadien, étant à leur coude, pour suggérer, corriger, au besoin même prendre la parole, son rôle consisterait à surveiller et faire face à l'imprévu. Si D... gagne sa cause,* il le devra à sa présence ici; car il a été fait une objection qui, s'il n'eut pas été présent, eut été fatale à sa cause; déjà tous les juges étaient contre lui. Il n'a eu qu'à citer un article de notre code et à le commenter (ce que n'eût pu faire son collègue anglais) et il a ramené les juges. Cela seul valait tous les frais de son voyage. De son coté, l'adversaire de D. assure que jamais son avocat n'eut

* Une dépêche nous a appris depuis qu'il l'a gagnée.

fait ce qui a tellement excité mon admiration, s'il n'était pas venu le forcer à étudier sa cause, en travaillant avec lui. Et il parait que lorsque les Conseils de la Reine d'ici étudient une cause, ils en ont vu le fond en peu de temps et n'en perdent aucun détail utile. Il y a ici des causes venant de toutes les parties du monde. Après une cause du Canada, il en vient une autre de Dehli, de Calcutta, de Malte, de Gibraltar, de l'Isle Maurice, de la Guyanne, &c., &c. Il faut un grand fond de connaissances universelles et l'habitude d'étudier vite pour se plier à tant de législations variées. Naturellement il en faut encore supposer d'avantage chez les juges. Mais ici comme chez nous, et partout la partie ardue de l'étude est dévolue à l'avocat. Les juges ne se donnent pas la mission de connaître les causes mieux que les parties intéressées et ils les jugent, sur les prétentions qui leur ont été exposées et non sur des points qu'ils pourraient découvrir eux-mêmes. Ils ont l'expérience de la vie légale et le sens de la justice au plus haut dégré de développement et ils sentent que, juger un plaideur sur un point qui n'a pas été l'objet d'un débat devant eux, ce serait le juger sans l'entendre, c'est-à-dire sans instruire son procès. Pour moi qui n'ai plus de cause à perdre ou à gagner, cela me semble être indiscutablement juste. La haute idée que je me suis formée de la manière d'administrer la justice ici, m'a rendu assez insouciant à l'égard des formes solennelles que prennent mos cours canadiennes. L'on n'est pas formaliste au Conseil Privé. Les juges siégent habillés comme de braves bourgeois, dans la vie ordinaire; c'est-à-dire que la plupart portent des pantalons gris plus ou moins foncé. Sir Robert Collier portait une cravate grise. Tous les juges avaient un surtout (walking coat) noir. Le greffier lui-même avait un pantalon gris. Les *Solicitors* assistent en cravates de couleur. Enfin l'impression que j'ai rapportée du Conseil Privé, c'est que c'est un beau tribunal arbitral, éclairé par les plus hautes lumières de la science générale, appliquée aux conditions les plus variées de l'humanité, inspiré par nul autre sentiment que celui d'être juste et parvenant à ses fins, sans s'embarrasser d'un formalisme qui n'est qu'une concession aux faiblesses des hommes. Mais hélas! C'est une justice qui coûte cher! C'est un luxe qui n'appartient qu'aux riches, ou à ceux qui jouent tout pour tout."

H.

# DIGEST OF RECENT DECISIONS.

## MONTREAL DECISIONS.

### COURT OF QUEEN'S BENCH.

*(Appeal Side.)*

June 20th, 1872.

*Pigeon & Dagenais.*—Held that notes *en brevêt*, signed before two notaries, are not subject to the prescription of five years. Caron, Badgley and Monk, J.J.; Contrà Drummond, J.—M. M. Justices Badgley and Monk considered that they were bound by the decision of this Court in *Séguin de la Salle v. Bergevin*, 1865, although they were much inclined to think that it was wrong.

*Conlan v. Clarke.*—The decision of the Court of Review, recorded at page 473 of the 1st volume of *La Revue Critique*, was reversed in appeal by Drummond, Badgley and Monk, J.J., who held that a wife can sue her husband for *pension alimentaire*, without being *séparée de biens* and without an action *en séparation de corps et de biens*. Caron, J., dissenting.

June 21st.

*The Glen Brick Co. & Welsh and others.*—Judgments reported at page 121 of *La Revue Critique*, vol. 1, confirmed by Caron, Drummond and Monk, J.J. Badgley J. dissenting.

*Kelly & Hamilton.*—Judgment recorded at page 242, of vol. 1st of *La Revue Critique* confirmed. Per Duval, C. J., Caron and Badgley J.J.; Contrà Drummond and Monk, J.J.

*Judah & The Corporation of Montreal.*—Held that corporations, in using the power, conferred to them, of expropriating, are bound to use due diligence, and that, consequently, they are liable for the damages suffered by the expropriated proprietor by reason of unnecessary delays.

September 19th.

*King & Tunstall.*—Badgley, J., for the Court:—As the same points of law and fact are involved in these four cases, and as they will receive the same judgment, one statement and argument applying to the whole will suffice.

General Gabriel Christie had been stationed in Canada for some years towards the end of last century, and had become possessed as owner of the several seigniories and properties, the subject of the appellant's demand against the respondents, holding the same. The General had one legitimate son, hereafter referred to as Gen. Napier Christie Burton, and several daughters, and four natural sons. The daughters married as stated in the records and factums of these cases, and had legitimate children of their marriages. The son, General

Burton, was also married, but had no legitimate offspring. Whilst in England, in 1789, Gen. Christie there and then made his will, which enters prominently into this contention, and in 1799 he died in Montreal without revoking it.

By that will, he devised his property by way of substitution, first to his son, General Christie Burton, and to the heirs male of his body lawfully begotten, and in their default to the testator's natural sons successively and their several heirs male of their body lawfully begotten.

Upon the death of his father, Gen. Christie Burton entered into possession of the property, and continued to hold it until his death in 1835, without lawful male children.

In the interval, the 2nd, 3rd and 4th intermediate *appellés*, the three eldest of the natural sons, having predeceased the *grevé*, William Plenderleath Christie, the fourth in order, the last *appellé*, him surviving, entered into possession of the devised property, and held it until his death in 1845.

Gen. Burton, by his will of 1834, devised all these properties, and the appellant claims under that will.

W. P. Christie by his testamentary dispositions, also bequeathed these properties, and the respondents severally claim through him under his will.

There is a conflict between these testators as to absolute right of property devised by each. As the appellant's demand is petitory, he must prove an absolute, indefeasible title in his devisor, and that title can only be found under Gen. Christie's will, which was adopted, proved and acted upon by Gen. Burton, as his title to the property. Under the original or Christie will, Gen. Burton had by its terms only a limited life estate, being the use, usufruct; but upon his failure to have lawful male heirs, then followed the substitutions provided by Gen. Christie's will, the proprietor of the estate having power to devise them as he pleased. Gen. Burton had no absolute property under the will, and having no legal male children, could not devise what he had no power to alienate or control, under the limitation over to the *appellés* after his use or usufruct had ceased as the *grevé*.

But the limitation over is alleged to be a legal nullity, the testator being alleged under the law of Lower Canada to have no power to devise in favour of his bastard children. This involves, first, the capacity or the extent of the devisor's power to give, and second, the capacity of the devisee to receive.

But it must be observed that the legatee, Gen. Burton, adopted and acted upon the will during his lifetime, and at no time or in any way, by law or otherwise, tested the validity of the alleged objectionable bequests during the 35 years of his tenure of the property, nor during that time is any act of alienation shewn to have been attempted by him.

Now, first, the extent of General Christie's, the original devisor's power to give at the date of his will in 1789, and of his death in 1799, is assumed to be governed by the law in force in Lower Canada at those times, namely :—1. The law and jurisprudence under the custom of Paris, with their limitations and restrictions affecting the devisor as being the existing common law, and 2, the absolute abolition of these limitations by the provision of the Act, 14, Geo. 3, ch. 83, sect. 10.

The 9th section of the Act secures to H. M. Canadian subjects their property and civil rights and their laws, as before the conquest and proclamation of '63, until varied or altered by future Provincial Legislation ; and subject further—1st, in the 9th section to the proviso of the Act as to soccage lands ; and 2nd, in the 10th section to the proviso as to those things referred to in the 8th general section, namely, property, rights and laws, to the general amendment and change, that it should be lawful "for the owners of lands in the Pro-"vince having right to alienate them in their lifetime, to devise or "bequeath them at their death by last will, any law, usage or custom "heretofore or now prevailing in the Province to the contrary not-"withstanding," &c. This provision thereby became our municipal law as much as any other portion of our common law, as much, indeed, as if it were recorded amongst the customary laws of the Province. The provision has always been considered as an enlarging law in the matter of its reference, as regarded the devisory power of the testator, owner of lands, to give by will unrestrictedly and absolutely, in the language and with the intent of the Imperial Legislature, where the law originated and was promulgated, and where the restrictions objected in these cases, under the *Coutume de Paris* system, had no force or effect. The devising power under this amendment of the common law became as legally effective as by any act of alienation, sale or otherwise *entre vifs*, and no correct interpretation of the provisions could have sustained the previous restrictions or limitations of the old law against the testator's free and absolute power to devise as he did. The will of '89 is the law, and even in France, it is distinctly held to be so, as Domat says, "si le testateur n'eut rien ordonné contraire aux lois et aux bonnes mœurs, et à l'honneteté publique."

Now as this a matter of morals, where are its constituents to be found? Bastardy is no disqualification to receive in England where the will was made. It is not so in the United States, and our Code has taken care to provide that other illegitimate children, except incestuous and adulterous ones of the donor, may receive by gift, and therefore by will, like all other persons.

In these cases it is not shown that the *appellés* were either incestuous or adulterous children. The devise here, however, was not a legacy ; the legatees capacity to receive possibly might or could be questioned as at the time of the testator's decease, but here it was a gift of property to take effect by substitution upon the contingency

of a certain event taking place, if at all, after a long interval of years; the capacity to receive and appropriate the gift then only arising, under any circumstances, *when the condition happened or the substitution opened to the appellés.* It must be again observed that Gen. Christie's will has through all these times been unquestioned, and it has been allowed to stand as a valid will, and did so stand at the death of Gen. Burton in 1835, and was not interfered with during the lifetime of W. P. C. the last *appellé*, nor effectively, until the institution of these suits in 1864, more than 29 years after Gen. Burton's death and the opening of the substitution to W. P. Christie.

This introduces the second point, the capacity of the last *appellé*, W. P. Christie, to receive the gift at the death of the *grevé*. There appears to be no conceivable doubt in law that the disposition of Gen. Christie's will, assuming the bastard objection did not exist, is substitutionary, and that the actual capacity of the receiver to take would be governed by the law as it existed at the opening of the substitution.

It has been seen that the enlarged devisory power under the 14 Geo. III was our municipal law at and from that time, however promulgated at the time, because it was an act of supreme legislation affecting the province and its common law; but having become and being such municipal law, it became subject to the power of the provincial legislature to extend its operation and explain its intent as any other existing law, part of our common law, and quite as much and as legally as the articles of the Custom; and its law and the jurisprudence under it have been repealed, revised, enlarged and codified by the code legislation. The provincial legislature established by the act of '91, which was an Imperial act like that of 1774, received plenary authority to make all required laws for the peace, welfare and good government of the province, and in the exercise of its power under its own act, 41 G III c 4, interpreted, enlarged, and added to the common law or provisions of the 10th section of the 14 Geo. III, and declared the perfect freedom of bequeathing and receiving by bequest; that general right to devise carried with it the power to devise to any person generally, and necessarily allowed universal legacies to be made under the generality of the legislative enactment to *any person*, even to bastards or illegitimate children. The objection of personal incapacity as regards legatees was thereby abolished from the time of the 14 Geo. III, under the explanatory declaration of the 41 Geo. III, adding increased strength and vitality to the validity of the right of the substitute, which could have had no possible existence until the opening of the substitution in 1835, the will of General Christie standing all the time valid and unrevoked, so far as W. P. Christie, the last substitute, was concerned; the transaction was then and at that time only perfected as between General Burton, the *grevé*, and himself, under the municipal law as it then existed. The capacity to take under a substitution, to be determined only when the substitution opens for the substitute, is too elementary a

principle to require authority to support it. The substitute need not be either born or conceived at the time of the will, and the capacity can therefore be only when the transfer from the *grevé* seeks the substitute. I am unwilling to go further into these cases, because the petitory appellant's claim is unsupported by title and must fall.

Duval, C. J., Caron, J, and Bossé J. (ad hoc) concurred.

Monk, J., dissenting :—

I have prepared full notes in writing of the grounds of my dissent, and would at present merely refer to the only point which I consider of real importance as I view the case. With respect to the question of prescription and other issues which had been raised by the defendants, it was sufficient to say that the pretensions of the defendants were unfounded. But then came up this question : Was there, at the time Gabriel Christie made his will, or at the time the testater died, a disqualification on the part of William P. Christie to take ? There was no doubt that under our law up to 1774, the devise in favor of a natural son would have been inoperative. It was also evident from the subsequent legislation that even after the Imperial statute of 1774, this disqualification existed to such an extent that a devise then to William Plenderleath Christie would have been an absolute nullity. General Christie made his will in 1789 and died in 1799. The disqualification to take existed up to 1801, when the next legislation took place on the subject.

It has been pretended by the defendants that the act of 1801 was declaratory, and that at all events it was retroactive, and that it conferred on parties situated as William Plenderleath Christie was, power to receive. But it seemed strange that the Colonial Act of 1801 could have the effect of declaring and explaining the law embodied in the Imperial Statute of 1774. I do not think that a Colonial Act could be declaratory of an Imperial Statute. Then, if it were not declaratory, could it be considered retroactive ? I hold in the negative. The legacy to W. P. Christie, therefore, lapsed. Then, the legacy having lapsed, had the Act of 1801 the effect of reviving it ? No doubt, had the will been made after the passing of that Act, the legacy would have been good. But I have been unable to find a single authority which held that when a legatee is disqualified to take at the time the will is made, and at the time of the death of the testator, he can be enabled to take by a subsequent Act. The legacy had become extinct, and could not be revived by a statute which applied only *in futuro*.

*Terrill & Haldane.*—Badgley J. for the Court :—This was a case of technicality, the point involved being a matter of practice. Three years had been allowed to elapse in the suit without any proceeding being taken, and the defendant was entitled to claim the peremption of the case. There had been a motion for this purpose, but, when this motion was served, a regular demand was made in the office of the prothonotary for a rule to examine the opposite party on *faits et*

*articles.* Subsequently, defendant renewed his notice of motion for the 25th instead of the 24th. The Court below granted the *péremption.* But this was incorrect. The peremption had been stopped by the demand made in time for *faits et articles,* which was a useful proceeding in the case. The judgment must, therefore, be reversed.

## COURT OF REVIEW.

April 30th.

*Nichols & Hias.*—Held that the sale of greenbacks to be delivered in future can be proved by admissions on *faits et articles* and without any previous writing. Berthelot and Torrance, J. J. Contrà Mackay J. The case was however dismissed for want of sufficient admissions in the answers *sur faits et articles.*

September 30th.

*Allaire v. Mortimer.*—This cause had been inscribed in the Court below on the 20th February, 1872, for enquête and hearing, on the 27th. The defendant's attorneys thus signed the inscription: "Received copy 20th February, 1872." Held that these words did not amount to a "Received Notice" and that the notice, being one day short, was insufficient. Judgment reversed, each party paying his own costs in revision.

30th September.

*McDonald v Taché.*—A sheriff, acting under special instructions from the counsel of a seizing creditor, and without malice, seized the land of several parties not parties in the case. Oppositions were made and were all maintained with costs. Held that the Sheriff was responsible to the seizing creditor for these costs.

31st October, 1872.

*McGauvran v. Johnson & Cushing* et al., T. S. Decision of the Court below reported at p. of *La Revue* reversed. Held that Cushing, the proprietor, was, under the contract, the owner of the materials paid and lying in and about the premises where the houses were being built; that he was in possession of them, and had paid for them. Mackay & Torrance, J. J., Beaudry, J., dis.

November 30th.

*Cartier & Burland.*—Mackay for the Court.—This is a case of a justice of the Peace condemned in 40s. damages and 40s. costs. He is not satisfied with this, and comes before the Court of Review complaining of the judgment, and saying that no judgment against him should have passed. We are with him in this pretension. The case is a plain one. A complaint was made before defendant, and as a justice of the peace, he issued a warrant for obtaining goods by false pretences. When the charge was examined, it did not amount to obtaining goods by false pretences, but rather extorting money under threat of proceedings at law. Cartier, the party charged, got free from the charge. No malice was found against Burland, and therefore he ought to have been protected in the discharge of his duty. We find him

to have acted within his jurisdiction, and no malice having been proved, he is to be free from damages. The judgment is therefore reversed and the action dismissed.

*Higgins et vir, vs. The Corporation of the Village of Richmond.*—BEAUDRY, J., dissenting. The action is for the recovery of damages caused by the upsetting of a waggon. It is stated that the road is not level, that a mound exists, which it was the duty of the Corporation to have removed. Had that been done the accident by which the female plaintiff and child were thrown from the vehicle, would not have happened. As I read the evidence, the defendanis are not to blame. The road has existed in its present state for forty or fifty years, and the accident appears to have been caused, not by any obstruction in the road, but by the proximity of the railway, the whistle of which frightened the horse I have therefore to dissent from the judgment of the majority.

MACKAY, J., for the Court.

The suit was brought for $3,500 special damages, alleged to have been suffered by Mrs. Higgins or Steers. Her husband also sued but he has waived claim, and he now stands in the suit, simply for the purpose of authorizing his wife who is *séparée de biens*. The damages are charged as having being caused to Mrs. Steers by an obstacle in the roadway, near the railway station, a mound being permitted to exist, which, it is charged, it was the duty of the corporation to have removed. It was alleged further that the corporation had been warned to abate this mound, but they had neglected to do so. The defendants plead that the road is a good natural road; that no negligence of theirs contributed to the accident; that there was no obstruction except a natural inequality of the road. There was a further plea imputing negligence to the person driving the vehicle. In February, 1872, judgment went against the defendant, finding that this imperfection in the roadway did exist, and awarding the sum of $120 damages. If the Defendants are liable, the condemnation must be considered very moderate, because the woman was seriously injured, and was confined to her house for a long time. The majority of the Court think the judgment is right in holding the defendants liable. We do not say that all municipalities are obliged to reduce all their roads to levels, but we say this is a particular case and the defendants administering in a Village Municipality blameable. Other accidents had taken place at the same spot. There had been numerous upsets there, and notice had been given to the defendants to remove this mound out of the roadway. It is proved that the mound is a very peculiar feature in the roadway and a manifest obstruction. The fright of the horse, caused by the whistle of the train, is said to have been the primary cause of the accident, but we don't find it so. Other accidents happened at the same place without the railway having anything to do with them. There was a slight upset there about a week after the accident to the plaintiff.

Suppose the horse was a little skittish at the whistle of the railway, we don't think that was the primary cause of the accident, or that it can be considered there was fault or contribution by the plaintiff, so that she is to loss her damages. In cases even where there is contribution by the plaintiff to the accident, and the contribution is very small, plaintiff is not to lose his damages. Parsons, on Contracts, p. 703, 4th Ed'n. Under the circumstances, therefore, the judgment ought to be confirmed.

## SUPERIOR COURT.

June 27th, 1872.

*Laroeque* v. *Lajoie, es qual.*—This is an action of revendication by a creditor against an assignee to obtain possession of certain effects. The plea is a demurrer, on the ground that by section 50 of the Insolvent Act of 1869 the remedy provided is by summary petition in vacation or by a rule in term, and not by suit. The plaintiff replies that it could not be intended to take away the common law remedy by suit; but the object of the section referred to is clear; namely, to prevent seizure, attachments and suits by numbers of creditors, at expenses ruinous to the estate, and to substitute therefor the simpler and less expensive process of petition or rule. The plaintiff is, in my opinion, wrong in bringing the action in the present form, and must be non-suited. Demurrer maintained. Mackay J.

*Fraser* v. *Gerrie.*—This is a suit for damages for malicious arrest of plaintiff on a criminal charge at instance of defendant Gerrie, and the action is commenced by a *capias*, allowed by a Judge to issue for $1500. The defendant moves to quash the *capias* on the ground of insufficiency of affidavit, and specially because the declaration—not containing any averment as to the criminal proceedings being determined, and the said proceedings being in fact still pending at the time that the *capias* was issued—is insufficent in law. The plaintiff replies that as defendant was about to leave the country he was forced to take his action *before* the determination of the charge laid by defendant, and now moves to amend his declaration. I think that the *capias* was well issued, without the allegation as to determination of the criminal proceedings. It would be absurd to say that a man falsely accused and arrested, was bound to allow his accuser to leave the country, and to lose his chances of recovering any satisfaction, because the charge was still pending. The plaintiff, feeling sure of his innocence and seeing his accuser about to leave, rightly obtained an attachment against him—and the same is maintained, and defendan's motion is rejected with costs, and the criminal proceedings being now ended, the motion to amend the plaintiff s declaration, by adding to it allegation of the criminal proceedings having been determined and the plaintiff discharged from them, is allowed. Mackay J.

*Quesnel, et al, Insolvents*—Petitioners for discharge.—The petitioners apply for a discharge under the Insolvent Act of 1869, alleging that more than a year has passed, and that having conformed to the requirements of the law, the Judge is bound to grant them a discharge. But I consider that the Judge has a duty to perform, namely to see that the proceedings have been regular, and that the bankruptcy law be not used as a mere whitewashing machine. These parties made a voluntary assignment, and from the date of their cession to the present time not one meeting has been called under the Act. There has been no public examination of the Insolvents, and in fact nothing done; yet the Assignee certifies that the petitioners have complied with all the requirements of the law. Section 109 has not been conformed to. I have examined the parties, as I shall do on all such applications, and I am not satisfied. Petition for discharge rejected for the present. Mackay J.

June 28th.

*Grange* v. *McDonald*.—Suit is brought against nine heirs for a debt due by their father, and the questions at present raised upon law issues are: 1, as to the sufficiency of the allegation of the declaration, it not being asserted that the heirs had accepted the succession; and, 2, as to the correctness of bringing the action against the heirs jointly. Held, that it is the duty of the heirs to show non-acceptance, and therefore that it need not be specially alleged in the declaration; acceptation is the general rule; 2o. that the suit against the heirs jointly is conformable to the practice of the Court. Mackay J.

*Bulmer, et all*, v. *Browne*.—An architect is sued for the sum of $114.10, balance due for bricks supplied by plantiffs to Messrs. Wand, contractors for the brick-work—on the following letter:

"Messrs. Bulmer & Sheppard,

"Mr. Wand has contracted for the brick-work of Mr. Roe's house, and the bricks he will require will be paid for as may be required by you. Yours truly, JOHN JAMES BROWNE.

July 5, 1871."

It is admitted that by Mr. Wand was and is meant the Messrs. Wand. The letter was delivered by one of them to Plaintiffs who afterwards upon the faith of it, delivered all the bricks the Wands asked for, for Roe's house.

The defendant asserts that it is not a letter of guarantee, and that he is not responsible; one of the witnesses swears that the defendant being applied to for payment before the delivery of the bricks was completed, said "Go on, make delivery till the work is done; you hold my letter of guarantee;" there can be no donbt that under the circumstance of this case, said letter must be held to be a guarantee, and the defendant be condemned to pay the amount claimed. Mackay J.

*Bulmer* v. *Browne*.—This is another action between the same parties, for bricks supplied to the same Wands. But here the letter is very different; there is no promise of payment, but an engagement that

certificates will be granted to Bulmer & Sheppard for the bricks which may be delivered, if they obtain the endorsement of the Wands in the said letter. This was not done; there was no notification of acceptance of said letter by B. & S., and certificates were regularly granted to the Wands, and it was not till after one of them had left the country that their endorsement of said letter was made known. The letter of guarantee reads as follows:

"Montreal, May, 29, 1871.

"Messrs Bulmer & Sheppard,

"Messrs. Wand are requiring about 100.000 bricks for the building erecting for Mr. Clendinning. I will grant a certificate to you, in the usual way, as the bricks are delivered, by Messrs Wand endorsing this letter. Yours: JOHN JAMES BROWN."

Action dismissed. Mackay J.

June 28th.

*Ahern v. McDonald.*—Held that a boarding house keeper has no lien on the effects of his boarders for the payment of the board. *Saisie revendication* of boarder maintained with costs. Torrance J.

*Ex parte Flood.*—Held that a conviction charging the defendant with having sold a couple of glasses of beer, without stating the precise measure and specific quantity, is bad. Torrance J.

Sept. 18th.

*Hurteau*, Insolvent, *Stewart*, Assignee; *Boyer* contesting dividend sheet—Hurteau having become bankrupt, Sauvageau was appointed assignee, and sold five lots of land belonging to the insolvent. These lots were bought by Benard and an other person. Boyer was a mortgage creditor, holding a mortgage on these lots, and Montmarquet now represented by Schneider, held another mortgage on part of the property. After Sauvageau sold the lots and received a portion of the price, before a dividend sheet was prepared, he paid Boyer $3,000. Soon afterwards, Sauvageau fled the country, taking with him about $1,300 of the proceeds of the lots. So there is deficiency of $1,300 to be suffered by somebody. Boyer says that he ought not to be made bear the whole of it. Boyer's claim altogether was about $9,000. He had been collocated for $7,300 in part of his claim; Schneider & al being collocated in full for their claim $756. The question was, who should bear the loss of the money stolen. Boyer contended that it was only fair that it should be borne *pro rata* by himself and Schneider, who was the first mortgage creditor. The Court could not accept this doctrine. The first mortgage creditor is entitled to be paid from the proceeds of the thing mortgaged to him. The loss of a portion of the thing does not affect him; so long as any portion remains, he is entitled to be paid from that. If an assignee or public officer after selling lands mortgaged, steal part of the proceeds, but leave some of the remainder, this remainder must go first to pay the earliest mortgage creditor, who may say that loss whatever—whether from fire or larceny—can't hurt him; so long as

it is only partial, and that enough remains to pay him. There is enough in the present case to pay Schneider out of the proceeds of the lands mortgaged to Montmarquet. Schneider's pretension as first mortgagee was perfectly sound. The award of the assignee which sustained it must, therefore, be confirmed, and the contestation of Boyer dismissed. Mackay, J.

September 18th.

*Mitchell* vs. *Butters.*—In this case an order for execution was asked from the Court upon an award made under the Corn Exchange Act. Under the act, the Corn Exchange has power to appoint arbitrators to settle business disputes between its members. Certain formalities are prescribed, and amongst others that the arbitrators must be sworn, and there must be a submission in writing at the commencement of the proceedings. Within five days after, the award itself and all questions connected with it may be reviewed by the Board of Review. The award if confirmed is then to be a finality, and execution may issue upon it. The parties to the present case, having a difference respecting some damaged grain, the question was submitted to arbitration, but the arbitrators were not sworn, and there was no submission in writing. The arbitrators, on the 28th of June, made an award against Butters. On the 3rd of July, the Board of Review were in action on an appeal taken by Butters from the award. On the 8th of July, there seemed to have been an attempt to cure what was defective In the first proceedings. The Board of Review made an award confirming the original award. Mitchell now moved the Court for an *exequatur*, and Butters answered that there never was power sufficient to the arbitrators ; that they were not sworn ; that witnesses were heard before the Board of Review. It appeared that the Board of Review did reopen the case and heard witnesses ; they had right to do so. Butters speculating for an award in his favor objected to nothing till after it was rendered. His Honour, after a careful review of the case, concluded by remarking : "I regret that it is not in the power of the Court to order an *exequatur*. Mitchel claims that *his* award is a special one, under an act of Parliament. If so, the formalities imposed by that act must be complied with, one of these is that there must be a submission in writing. The want of a submission prevents the Court from granting Mitchell's motion. The award is so vague that, on this account also, Mitchell cannot succeed. An award to warrant an execution ought to read as a finality. The Court is disposed to treat arbitrations as favourably as possible, and it is matter of regret that I must reject the application in this case. I reject the motion, but I do so without costs, because Butters contributed to the want of formalities, and never intimated that he would object ; and he should not have resisted the carrying out of the award." Mackay, J.

September 18th.

*Prudhomme, et al. vs. Painchaud.*—Five plaintiffs brought (five) actions against Painchaud and others calling themselves commis-

sioners for the civil erection of parishes in the diocese of Montreal. The cases are all pretty much alike. The Court taking up that against C. T. Painchaud, remarked that it was a *quo warranto* to test the action of C. T. Painchaud, who professed to be one of the commissioners for the civil erection of parishes in the diocese of Montreal. The declaration alleged that there had been commissioners appointed for the erection of parishes, that defendant usurped the authority of a commissioner; and it prayed that defendant be ordered to show his authority, and that it be declared that he had usurped authority. The defendant answered that he was acting under a commission from the Lieutenant Governor of Quebec; that he was not acting as a commissioner except for the purposes of the erection civil of the Parish of Notre Dame de Grâce; that his commission was warranted by Chap. 18, of the C S L C, seeing that the other commissioners had declared themselves interested; that the petitioners were well aware of this and of all the facts, and their proceedings were simply vexations. In answer to this the plaintiff said that five commissioners were already appointed and more than five could not legally exist. With reference to the appointment of the Commissioners, it was to be observed that in July, 1871, when the Lieutenant Governor issued his commission to the defendant and his associates, there was an existing commission to Gravel and others. From the terms of the commission to the defendants it appeared that the original commissioners, having declared themselves incompetent to act in the matter of the erection of the Parish of Notre Dame de Grâce, the Lieutenant Governor named special commissioners in the place of those who had so declared themselves incompetent to act. There were various objections raised, one that a writ of *quo warranto* did not lie in a case like this, but the Court would pass over this point, inasmuch as it held on the merits that the plaintiffs could not succeed. Was the erection of this Parish of Notre Dame de Grâce to be left undone because there were no commissioners to act? The appointment of other commissioners had become necessary. It was injurious to nobody, and was not illegal, as his Honour read the law. The fact that the *Official Gazette* did not announce the defendants' appointment was of no consequence. It was said at the final argument that there was a debt of $400,000 due by the Parish of Montreal, and that this was enough to prevent any civil erection of N. D. de Grâce; but this debt was not alleged in any of the pleadings, nor was there any proof of such debt. The *requête* of the petitioners would be dismissed with costs, the grounds of the judgment being these: That the conclusions of the *requête* could not be granted; that there was nothing about the debt of the Parish in the original *requête;* that none exists; that the defendants were not proved to be interested in the erection of the new parish, and that they had right to do what they had done; that they show sufficient warrant. [Tne same judgment passed in the five cases.] Mackay J.

September 20th.

*Bellemare v. Hudon.*—This was an action to recover $400 penalty for selling goods by auction without a licence. As there were circumstances of mitigation, the defendant having acted without the view of making any gain and merely through friendship to the party, for whom he sold the goods, the defendant was condemned to pay the lowest amount, $200 and costs. Torrance J.

September 20th.

*The Corporation of Montreal v. Contant.*—An *usufruitier* is responsible for the taxes. Beaudry J.

*Atty. Gen. Ouimet v. Gray.*—Hon. Mr. Gray having taken his residence in Ottawa, became thereby disqualified from acting as Dominion arbitrator for the devision of the debt of the old Province of Canada. Not being proved however that he attempted to exercise the duties of arbitrator in Lower Canada, the *requête libellée* was dismissed. Beaudry J.

September 30th.

*O'Brien v. Lajeunesse.*—No *saisie arrêt*, nor *capias*, can issue at the suit of a landlord for future rents against his tenant on the ground of diminution of the *meubles meublants*. Mackay J.

September 30th.

*In Re Wright*, Ins., and *Whyte, Ass., Pet.*, and *Beaudry*, Cont. Party. —Held that the prohibitory clause contained in a lease not to sub-let, nor transfer any portion of his lease, without the written consent of the proprietor, does not apply to a sale in Insolvency under clause 77 of the Insolvent Act of 1869. Berthelot J.

*Stewart v. Ledoux.*—Stewart was assignee to the estate of Léger dit Parisien under the Insolvent Act of 1869. The defendant, a carriage maker, was in possession of a carriage which had been repaired by him. Held that the Insolvent Act did not deprive the defendant from his right of retention or lien for his repairs, $65. *Saisie revendication* dismissed with costs. Mackay J.

December 17th.

*Barnes* vs. *Mostyn.*—This was a suit for $10,000 damages, brought by an enlisted soldier against his military superior officer, for false arrest and imprisonment, *maliciously, and without just, reasonable or probable cause.* Mackay, J :—

This arrest, says plaintiff's declaration, was close confinement. It was really only confinement to barrack room, not confinement to guard room. Any soldier who shall give in any false statement of clothing, stores, &c., or who shall by any false document be concerned in any embezzlement of stores, or who shall by producing any false accounts misapply the public money for purposes other than those for which it was intended is liable to punishment under Art. of War, 88. Commanding officers are responsible, among other things, for the maintenance of a proper system of economy in their regiments. P. 31, Pipon's Manual of Military Law. The custom of the service has established the right of every officer in command of

troops to assemble, at his will, courts of enquiry for the investigation of any matter connected with the service, on which he may feel a difficulty, from imperfect information or otherwise, in arriving at a conclusion. P. 170, Pipon. The Exchequer Chamber has recognized (says Pipon) the legality of such courts, and see further the Queen's regulations. Section 785 of edition of 1st January, '68. The officers of courts of enquiry are not sworn, nor are the witnesses before them; and a soldier whose conduct is being investigated may decline to take any part in the proceedings, or to make any statements, but he may be present if he please. P. 171, Pipon, and see "Tytler," also Queen's regulations. No soldier is to be kept in confinement for more than 48 hours without having his case disposed of, unless it be preparatory to his being tried by court martial. P. 34 of Pipon's Manual of Military Law of 1863 (citing the Queen's regulations). All offences for which a punishment exceeding seven days confinement to barracks has been awarded are to be entered in the Regimental Defaulters' book. P. 35, Pipon. The defendant ordered a court of enquiry in consequence of the missing of the boots referred to, and the report of the acting quartermaster, and a charge made by him against plaintiff, and plaintiff was put under arrest. The Court of Enquiry set to work, and finally reported that plaintiff's explanations (he having appeared before them) were unsatisfactory, and that the deficiency of boots was plain, &c. The Court was not a judicial body, and ordered nothing against plaintiff. On the 30th May the Court was dissolved, and with it the plaintiff's arrest. The Major General, having had the proceedings of the Court of Enquiry put before him by the defendant, ordered plaintiff's discharge, not seeing enough to warrant a court martial against him. The defendant did not order plaintiff to be sent back to the ranks, if by this be meant his being reduced in rank in the regiment, for he was *not*. Plaintiff has brought up, amongst other witnesses, a former quarter master, Mr. Burden, whose evicence would exonerate plaintiff from liability for the missing boots. Mr. Burden I would not say a word against, nor would I against plaintiff, needlessly. Plaintiff's reputation stood good, and his character good, and it is to be lamented that the question of these missing boots arose. Mr. Burden has interest to prove that the 78 pairs paid for had really been made, and put into store. He has since had to pay for them, through deductions that he has had to suffer from his half pay. The case we have before us does not involve the question of plaintiff's guilt or innocence in respect of the missing boots;—the real question is as to defendant's liability towards plaintiff in the manner and form charged by plaintiff for the causes stated in the plaintiff's declaratian. Captain O'Connor's evidence is important. He says:—There was a discovery first of a deficiency of boots in the Quarter Master's store, and plaintiff could not account for how many pairs he had made. The arrest was after a report by the acting Quarter Master. The Court of enquiry found

the deficiency of boots plain, and that plaintiff's explanations were most unsatisfactory. Plaintiff was *not* reduced to the ranks, though put out the shoemakership. As to his tools and private property plaintiff expressed to Capt. O'Connor satisfaction with an allowance made him (plaintiff) for them. Defendant might well have brought plaintiff to a court martial that May, says O'Connor. Much is made by plaintiff of his not having been showed to General Russell, but Captain O'Connor explains this away, and upon plaintiff's name not having been carried into the defaulters' list, but Captain O'Connor explains that only in cases of crimes or punishments are such entries made in said lists. 30th May only was the Court of enquiry dissolved, and of course the plaintiff's arrest lasted while it lasted. The 48 hours rule relied upon by plaintiff's counsel I do not interpret as he does for this case, seeing that the Court of Enquiry was a proceeding preliminary to having in view a court martial. (See page 34, Pipon.) Defendant then, simply, discharged plaintiff from arrest, says O'Connor. Finally, O'Connor says plaintiff was generally a well-conducted man.

Upon the whole, I have come to the conclusion that plaintiff's case is not made out. I have read of injustice by officers in the army towards subordinates; I have sorrowed over narratives such as Somerville's, and of the Robertson court-martial, and in my present office I would not fail to pronounce for damages against any military officer guilty of mere wanton abuse of power. But we must not allow mere passion to prevail against right. It is most important that the discipline of the army be kept up, and that commanding officers working to that end be not hampered by fears of actions of damages in the civil courts against them. I find the defendant not guilty of the charges laid against him. He had to move as he did, or be guilty of dereliction of duty. I hold that upon any charge against an officer or soldier being brought to the knowledge of a commanding officer he ought to investigate it, and that he may cause a Court of Enquiry to assemble to ascertain the circumstances of the case. The defendant in ordering the Court of Enquiry and arrest of plaintiff did not more than he was bound to, and the arrest was not maintained unduly. The defendant was not removed by malice. It is clear that boots have gone astray. Plaintiff asked and got pay for 78 pairs; yet asked by Lt. Liddell as to how many pairs he had made, he says 31 or 32. The Court of Enquiry and the arrest I cannot find to have been (under the circumstances) without any reasonable cause. Plaintiff has himself to blame in part for them, and it cannot help him that at the Court of Enquiry he says that "when he made the statement to Lt. Liddell he did not recollect." It is certain that he made the statement. We may allow that the plaintiff did not make away with the missing boots, and that he really made all that he got paid for, 78 pairs: yet *non sequitur* that his present action is to be maintained. It is dismissed with costs.

December 17th.

*Ex parte Adolphe Desève*, Insolvent; and *Whyte*, Assignee.—This is a petition by a bankrupt for his discharge after a year. He gave his notice for the 25th of March, which is a holiday—Annunciation Day, and the petition was consequently only presented on the 26th. This is contested, and the court finds that the contestation must be maintained. It has always been held that it is impossible for a private person, like petitioner, to fix a thing to be done on a day non-juridical; sheriff's sales have been opposed with success on this ground. Without noticing the other objections, therefore, the petition for discharge must be rejected on this ground alone. Mackay J.

December 17th.

*Dusseault vs. Radway.*—The action is brought against R. G. Radway for the recovery of $200 penalty for not having registered his partnership in the terms of the consolidated statutes of Lower Canada. The plea is the general issue. The action must fail for a reason not pleaded, but which the court has discovered, namely that the partners in the firm in question all reside abroad, and therefore no registration here was necessary. Action dismissed, but without costs. Mackay J.

*Nolan vs. Crane.*—The declaration charges defendants, as factors of a foreign house—George Cowan & Co., of Chicago, with having sold some flour, of which non delivery and refusal by plaintiff is alleged, and it is further alleged that the plaintiff suffered certain damages—loss of gain which he might have made on the transaction. The plea is that the defendants never were personally liable to the plaintiffs; that no credit was given to the defendants, and that the contract was with George Cowan & Co. The first question is the liability of a factor for a foreign principal. What is this liability? On this point we are to be governed by Arts. C. C. 1715 and 1738. It is impossible for me to get over such positive law as that. It is idle to pretend that the general rule must hold. So that upon the law point, I hold that the plaintiff has a right to succeed. The court estimates the damages at 80c. per barrel on 2,000 barrels, and gives the plaintiff judgment for $1,600 against defendants jointly and severally. Mackay J.

## RECENT DECISIONS IN ONTARIO.

The following recent decisions have been reported in the Province of Ontario upon the scope and construction of some of the criminal Statutes passed in the first session of the first Parliament of the Dominion.

32, 33 *Vict. c.* 21, *s.* 18.—Held that the Police Court of the City of Toronto is a Court of Justice within this section and that the defendant was properly convicted of stealing an *information* laid in that Court: *Reg v. Mason:* 22 *C. P.* 246.

32, 33 *Vict. c.* 22 *s.* 12.—On an indictment for attempt to commit arson, the evidence shewed that a person under the prisoner's direction arrayed a blanket saturated with oil in such a way that if a flame

were communicated to it the building would have caught fire and then, after lighting a match and holding it till it was burning well, put it down to within an inch or two of the blanket when the match went out, the flame not having touched the blanket: Upon these facts it was held that the defendant was properly convicted under this section of an attempt to commit arson: *Reg v. Goodman:* 22 *C. P.* 338.

32, 33 *Vict. c.* 23, *sec.* 8.—Applies to all cases of Perjury, not merely to "Perjuries in Insurance cases" which is the heading under which secs. 4 to 12 are placed in the Act: *Regina v. Currie:* 31 *U. C. R.* 583.

*Held* therefore that a magistrate in the County of Hatton had jurisdiction to take an information and to apprehend and bind over a person charged with perjury committed in the County of Wellington. *Ib.*

*Held* further that a recognizance to appear for trial on such charge at the General Sessions was wrong, as that Court has no jurisdiction in perjury. But a *certiorari* to remove it was refused, as the time for the appearance of the party had elapsed. *Ib.*

32, 33 *Vict. c.* 28.—A conviction which set forth that the person was in the night-time of the 24th February, 1870, a common prostitute, wandering in the public streets of the City of Ottawa and not giving a satisfactory account of herself contrary to this Statute, was held bad for not shewing sufficiently that she was asked, before or at the time of being taken, to give an account of herself, and did not do so satisfactorily: *Reg v. Levecque:* 30 *U. C. R.* 509.

32, 33 *Vict. c.* 29, *s.* 32.—The Court will not arrest judgment after verdict or reverse judgment in error, for any defect patent on the face of this indictment, as by this section the objection must be taken by demurrer, or by motion to quash the indictment: *Reg v. Mason:* 22 *C. P.* 246.

32, 33 *Vict. c.* 29, *sec.* 51.—On an indictment for murder the prisoner cannot be convicted of an assault under this section. This is the rule laid down in Reg v. Bird: 2 Den C. C. 94 and Reg v. Phelps: 2 Moo. C. C. 240: *Reg v. Ganes,* 22 *C. P.* 185.

32, 33 *Vict. c.* 31, *s.* 71.—When, *per incuriam,* a conviction is brought up as *certiorari* to the Superior Court, which is bad on its face (and the defendant has also sued out a *Habeas Corpus*) the Court cannot quash the conviction, but can discharge the defendant (*Semble* per Wilson J., that the conviction being before the Court could be quashed): *Reg v. Levecque:* 30 *U. C. R.* 509.

32, 33 *Vict. c.* 31, *s.* 74.—It is doubtful whether an order of the General Sessions simply ordering costs of an appeal to be paid, without directing to whom they are to be paid is regular under this section: Per *Galt J.* In *re Delaney v. MacNabb:* 21 *C. P.* 563, *s.* 75. The issuing of a warrant of commitment under this section is discretionary and the Court will on this ground refuse a *mandamus* upon the justice of the peace: *Ib.*

But held that a *mandamus* was not the proper way to proceed in such a case where the justice refused to issue his warrant, but that the proceeding should be by way of summary application to the Court under Con. Stat. U. C., c. 126, s. 8, to which the person might to be committed should be a party. *Ib.*

## RECENT DECISIONS IN NEW BRUNSWICK.

### SUPREME COURT.

Easter Term, 1872.

*McGoldrich vs. Eastern Express Company.*—Plaintiff applied to the Defendant's agent at Fredericton to forward goods to London by first steamer from Halifax, stating that he wished $600 insured on the goods. The agent said that he could not get marine insurance effected at Fredericton, but that if the Plaintiff would apply to the agent of the Company in St. John, perhaps he would get the insurance, as he had done on a previous occasion for another person. Plaintiff then sent an invoice of the goods to the Company's agent at St. John, with a letter stating that he (Plaintiff) wished the agent to insure the goods. The next day the goods were delivered to the agent at Fredericton, who signed a receipt for them, stating the conditions on which the Company forwarded goods (insurance not being mentioned). The agent at St. John, denied receiving the Plaintiff's letter, but the jury found that he had received it. The goods were forwarded by the steamer and lost.

Held: That the contract was contained in the receipt signed by the agent at Fredericton, and not in the letter written to the agent at St. John, and that the Defendants were not liable for the loss of the goods.

*Newbury vs. Young.*—The registered owner of a vessel is not liable for goods lost by the fraud or negligence of the master during the voyage, unless the master is employed by or acting for him. Therefore, when Defendant made advances to A. to enable him to build a vessel, and took the registry in his own name to secure his debt, but the vessel was sailed by A. and the Defendant had no interest in her earnings, and did not employ the master. Held: That he was not liable for goods lost on a voyage of the vessel, through the negligence of the master.

*Morrison vs. Kyle, et al.*—In an action on a joint and several promissory note, it is no *legal* defence, that one of the makers signed the note as a surety, and that the other maker had given the Plaintiff a Bill of Sale of property for the purpose of paying the note, which he had appropriated to the payment of another debt.

*Ryan vs. Lockhart, et al.*—A Company incorporated for the purpose of supplying St. John with water, were authorized by statute to enter upon and take lands, and to erect dams and reservoirs, and lay down pipes, on making compensation to the owners of the land. Under this authority they took certain lands of C. and executed a deed, by

which they agreed that if their works should cause the overflowage of any more of C.'s land, they would, as compensation therefor, erect a bridge across the overflowage to enable him to get from one part of his farm to the other, and keep the bridge in repair as long as the overflowage continued. The bridge was erected and kept in repair till the rights and property of the Company subject to all their liabilities, were vested in the Defendants by statute. C. afterwards conveyed the land to the Plaintiff. The Defendants continued the overflowage, but allowed the bridge to get out of repair. Held: 1st. That the agreement to build and keep the bridge in repair was not *ultra vires*. 2nd. That the obligation to repair was an equity attaching to the land in the hands of the Company, and the defendants claiming under the Company, and taking the lands subject to the outstanding liabilities, were bound by the equity. 3rd. That the Plaintiff was entitled to an injunction to restrain the defendants from overflowing the land until the bridge was repaired, and while it was out of repair.

Trinity Term, 1872.

*Doe dem. Johnston v. Jardine.*—This was an action to recover dower, brought under the Act of Assembly 21 Vic. c. 25. It has been generally supposed, for some reason, that the Act was inoperative, and no action under it has been tried until this case. The Court decided that there was no insuperable objection in carrying out the Act, and therefore the action was maintainable; though a new trial was granted because the plaintiff had not followed the directions of the Act in assigning the dower.

*Aiton v. Demill.*—This was a question about the boundary of a crown grant,—whether the lines of the grant could be extended by reference in a subsequent grant. The Court held that so far as related to third parties it could be done, and they would have no right to dispute the extension of the lines of the grant, thought the Crown might not be bound by it. Judgment for plaintiff.

*Doran v. Willard.*—This was action, in part, to recover the value of an unfinished building which the plaintiff had built on land he had agreed to purchase, but afterwards abandoned. The defendant afterwards purchased the land. The building not being affixed to the soil, but resting on blocks, the Court held that it did not pass to the defendant by the deed of the land. The plaintiff recovered a verdict for some other property, not including the value of the building, and he moved for a new trial, which the Court granted, but recommended the plaintiff to abandon his claim to the building, which was of small value.

*The Queen v. Simmons.*—This was a conviction by the defendant, a Justice of the Peace for Sunbury, against one McGowan for selling liquor without license. The conviction was quashed on the ground that the prosecution was carried on by a Division of the Sons of Tem-

perance, of which the Justice was a member, and he was therefore incompetent to try the cause. There were three convictions set aside on this ground.

*The Queen v. Perkins.*—Application to set aside a conviction of one Birch for assault, tried before the Defendaut, a Justice of the Peace for King's County. The Court held that the warrant under which Birch was arrested was legal, but that the conviction adjudging him to be imprisoned in the gaol at Kingston was bad—the gaol of King's County at that time being either in St. John or Westmoreland, at the option of the Sheriff, by Act of Assembly, while the new gaol was building at Hampton.

*Doc. dem. Sullivan & wife v. Curry.*—The lessors of the Plaintiffs claimed the land in dispute, under the will of one H. P. of Gagetown in Queen's County. The Defendant held under a deed from H. P.'s executor, under a license from the Probate Court of Queen's County. The lessor of the Plaintiffs contended that the license was void, because H. P. had left sufficient personal property to pay his debts, and that the executor had improperly expended large sums in costs in the Probate Court, in proceedings which he had no right to take; that he had acted fraudulently towards the estate, and that the Defendant who had been his attorney in the proceedings in the Probate Court, had no right to purchase from the executor. There was a verdict for the defendant; and the Court held that though a large amount of costs appeared to have been unnecessarily incurred in the Probate Court, and the proceedings there were irregular, it did not avoid the defendant's deed; that the parties interested under the will should have appealed from the decree of the Probate Court, and could not object to the regularity of the proceedings in this action. The defendant's verdict was therefore affirmed.

*Falconer v. Western Ex. Railway Co.*—This was an action for killing two cows on the railway track between McAdam Junction and St. Croix. The plaintiff endeavoured to make out that the Company were bound to fence the road, and that in consequence of their neglect the cows were killed; but the jury found that the road ran through wilderness land at the place where the accident happened, and therefore the Company was not bound to fence. Another alleged ground of negligence was that the train was being run with the engine behind at the time, and that this was an unsafe way of running. The defendants proved that they had a man on the forward car to look out for obstructions on the road and to give the alarm; that they were going round a curve at the time, and running very slow; that they used every precaution to avoid the accident, and that the danger was in no way increased by the manner in which the train was run. The Court held that there was no evidence of negligence, and judgment was given against the plaintiff.

*Garrison v. Harding.*—Action for false imprisonment. The defen-

dant was a Justice of the Peace for Carleton County, and issued a warrant against the plaintiff for the alleged offence of firing a pistol on the highway. The plaintiff was driving through Jacksontown, followed by his dog. A larger dog belonging to the defendant attacked the plaintiff's dog, and threw him down twice, whereupon the plaintiff fired a pistol at the defendant's dog, and wounded him. Soon after this, some person made a complaint before the defendant that the defendant that the plaintiff had fired a pistol in the highway. (This seems to be contrary to a law of the Municipality.) The complaint was made under oath, but the plaintiff's Christian name was not stated. The defendant afterwards filled in the Christian name, and issued a warrant against the plaintiff, on which he was arrested. He offered to give bail for his appearance to answer the charge, but objected to do so before the defendant, asking to be allowed to go before another Justice for that purpose. This, the plaintiff swore, the defendant refused to allow, and ordered the constable to take the plaintiff to gaol. The defendant denied this, but the Jury found that he did refuse. A verdict was given for the plaintiff, and the Court refused to set it aside, holding that the warrant was illegal for want of a proper information; that the insertion of the plaintiff's Christian name in the information, after it was sworn to, destroyed it, and did not authorize the warrant which was issued.

*Harris v. Roulston.*—An indenture which does not contain provisions to teach an apprentice to read, write, and cipher, &c., as directed by the Act of Assembly, is void; and the apprentice cannot be imprisoned, as provided by 1 Rev. Statutes 347, for deserting his master's service.

*Ex parte Reynolds.*—The Insolvent Act of 1869, of Canada, does not repeal the Absconding Debtor's Act, in force in New Brunswick at the time of the Union of the Provinces.

*Betts v. Venning.*—During the argument of this cause, which was an action against the Inspector of the Fisheries, for cutting down a mill dam at Shediac to make a fish way, one of the objections was that the Canadian Fishery Act of 1868 was unconstitutional. The Chief Justice said he was glad the question had been raised; that he doubted the right of the Canadian Parliament to pass laws and make regulations respecting the River Fisheries of this Province; he thought they came under the denomination of "*Property and Civil Rights*," which, by the union act, belong exclusively to the Local Legislature, and that the Dominion Government had no right to grant licenses to fish in our rivers, and to prohibit the owner of land fronting on a fresh water stream, from fishing in front of his own land.

LA RÉDACTION.

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## LIST OF DECISIONS GIVEN.