Technical and Bibliographic Notes / Notes techniques et bibliographiques

Canadiana.org has attempted to obtain the best copy available for scanning. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of scanning are checked below.

Canadiana.org a numérisé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de numérisation sont indiqués ci-dessous.

- ☐ Coloured covers / Couverture de couleur
- ☐ Covers damaged / Couverture endommagée
- ☐ Covers restored and/or laminated / Couverture restaurée et/ou pelliculée
- ☐ Cover title missing / Le titre de couverture manque
- ☐ Coloured maps / Cartes géographiques en couleur
- ☐ Coloured ink (i.e. other than blue or black) / Encre de couleur (i.e. autre que bleue ou noire)
- ☐ Coloured plates and/or illustrations / Planches et/ou illustrations en couleur
- ☐ Bound with other material / Relié avec d'autres documents
- ☐ Only edition available / Seule édition disponible
- ☐ Tight binding may cause shadows or distortion along interior margin / La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure.

- ☐ Coloured pages / Pages de couleur
- ☐ Pages damaged / Pages endommagées
- ☐ Pages restored and/or laminated / Pages restaurées et/ou pelliculées
- ☑ Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- ☐ Pages detached / Pages détachées
- ☑ Showthrough / Transparence
- ☑ Quality of print varies / Qualité inégale de l'impression
- ☐ Includes supplementary materials / Comprend du matériel supplémentaire
- ☐ Blank leaves added during restorations may appear within the text. Whenever possible, these have been omitted from scanning / Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été numérisées.

☒ Additional comments / Commentaires supplémentaires:

Comprend du texte en anglais.
Pagination continue.

REVUE CRITIQUE

DE

Législation et de Jurisprudence.

LA LOI DU MARIAGE.

Les lois civiles ont consacré quatre modes différents de contracter mariage. Dans quelques pays, comme la France, l'Espagne, l'Italie, la Hollande, la Belgique, les Pays-Bas, le mariage est exclusivement un contrat du droit civil. Dans d'autres, au contraire, c'est un acte essentiellement religieux produisant les effets civils que la loi lui donne; tels sont la Prusse, la Sardaigne, la Suède, la Norwège, l'Allemagne protestante, la Russie, le Portugal, le Chili, le Pérou, le Buénos-Ayres, le Brézil et les colonies anglaises. Ailleurs, en Angleterre, en Ecosse et aux Etats-Unis, les lois autorisent le mariage religieux ou le mariage civil au choix des parties. Enfin, il existe à Naples et en Sicile un quatrième mode de se marier, qui outre la célébration religieuse, impose la condition d'en faire dresser acte sur les registres de l'état civil, tenus par un officier purement civil.

Tous ces systèmes, à part celui du mariage religieux ou civil absolu date du dix neuvième siécle; on peut-même dire que la sécularisation du mariage des Chrétiens appartient à notre époque. Ce n'est pour ainsi dire qu'hier que l'Angleterre permettait de s'unir devant le *registrar* et que l'Autriche, l'Italie et l'Espagne introduisaient le mariage à la mairie. Le Code Civil du Bas-Canada a échappé à l'innovation, et aujourd'hui comme dans la nouvelle France, et comme dans l'ancienne France, durant les siécles passés, le consentement au mariage, non seulement dans la province de Québec mais dans toute la Puissance, se donne au pied des autels.

A une époque où le principe de la séparation de l'Eglise et de l'Etat tend de plus en plus à pénétrer dans les lois civiles comme

dans les lois politiques, un jurisconsulte Européen* s'étonne de retrouver en Canada ce qu'il appelle l'ancien régime. Son étonnement serait encore plus grand s'il savait qu'il n'y a pas dans notre pays de religion d'Etat et que la liberté des cultes est un principe fondamental de la constitution Canadienne. Mais c'est précisément parce que tous les cultes y sont autorisés, toutes les religions protégées, que la loi civile y respecte la croyance d'un chacun et de tous, et leur ordonne de contracter mariage d'après les formalités et les rites de leur Eglise. La loi Canadienne ne demande à personne d'abdiquer sa croyance ; au contraire elle lui fait un devoir de lui rendre hommage. Chacun invoque Dieu suivant sa foi et à sa façon, mais tous font bénir leur mariage aux autels de leur culte. Le catholique répond à l'appel de son curé, le protestant à celui de son ministre, le juif celui du rabbin. Et ne serait-ce pas porter attentat à la liberté religieuse que de prohiber l'union de deux catholiques, de deux anglicans, de deux grecs, en face de leur église. C'est en vain que les partisans du mariage civil répondent que l'obligation de se présenter d'abord à l'officier civil n'empêche pas le sacrement ou la bénédiction cléricale. La partie, par exemple, à qui son conjoint refuse, après le mariage civil, de se rendre à l'église, n'est-elle pas légalement forcée de violenter sa conscience et de vivre dans ce que sa foi lui dit être un concubinage. Enfin la question a paru d'une si grande simplicité au législateur Canadien qu'il n'a pas même songé à la soulever. Il a sagement pensé qu'on ne pouvait poser les bases d'une union durable, sans appeler la religion à son secours. Comme l'observait justement le Dr. Lushington devant la Commission Anglaise de Divorce de 1850, c'est parceque le mariage a été élevé par l'Eglise Catholique à la dignité de sacrement qu'il fut déclaré indissoluble par la loi civile de toutes les nations chrétiennes. Aussi il ne faut pas s'étonner de voir que le divorce a presque toujours été la conséquence immédiate de la sécularisation du mariage. L'exemple de la France et de l'Angleterre est là pour le prouver. La trop grande facilité que l'on a de contracter mariage aux Etats-Unis, où il n'est pas même entouré de la solemnité des actes les plus ordinaires de la vie civile, est sans contredit la principale cause du peu de cas que l'on en fait et du nombre extraordinaire de divorces qui s'y obtiennent sur les motifs les plus légers. Cette terre de

* 2 Revue de Droit International, 343.

toutes les libertés, seule, peut réclamer l'honneur d'avoir ouvert son sein au Mormonisme et inventé les licences de divorce en si grande faveur à Chicago et dans les Etats de l'Ouest en général.

L'on dit que le mariage civil est une nécessité de la civilisation moderne, un besoin social de l'époque. Mais comment se fait-il que dans les pays où il a été introduit, il soit si peu populaire? Combien de mariages en France, en Italie, en Espagne, en Autriche, en Angleterre, aux Etats-Unis mêmes, ont lieu devant l'officier civil seulement? Le mariage religieux est tellement entré dans les mœurs et la croyance du monde chrétien que, non obstantles systèmes nouveaux des législateurs-philosophes, on ne se croit pas marié si l'on n'a pas fait intervenir le prêtre ou le ministre.

Les Canadiens n'ont donc qu' à se féliciter en voyant que les Codificateurs ont conservé à la loi du mariage le caractère auguste que Dieu lui même lui donna en établissant l'union de nos premiers parents, et que nous a transmis la tradition des peuples anciens et modernes, payens et chrétiens.

Enfin le mariage religieux, célébré par le propre curé ou ministre des parties, est le plus sûr moyen d'empêcher les mariages clandestins des enfans de famille, mineurs ou non. La prestation du serment, par exemple, qui pourrait être exigée d'eux peut-elle être une garantie qu'il n'existe pas d'empêchements? Sera t-elle un motif assez puissant, exercera-t-elle une pression assez violente sur leur esprit, pour les détourner de leur projet. Non; le mariage sera célébré et consommé malgré l'empêchement; et alors il ne restera plus aux parents qu'à rendre leur malheur public, en s'adressant aux tribunaux, ou à supporter avec humiliation un mariage qui hélas! trop souvent ne tarde pas à devenir insupportable aux époux mêmes.

Le serment donc, même autorisé par la loi, n'offrirait aucune protection. Il en est de même de la production d'un extrait de baptême: pour arriver au but, on ne reculera même pas devant le faux; car en ces choses on a toujours confiance dans l'impunité, et d'ailleurs on ne raisonne pas. Le consentement des parents ne conduirait pas à un meilleur résultat, puisqu'il est facile de prévoir que les parties se présenteraient comme n'ayant ni père ni mère, ou se feraient accompagner de parents supposés. Que doit donc exiger la loi pour la célébration des mariages, pour empêcher les abus déplorables que nous venons de signaler? La réponse à cette question est simple et courte; le mariage, pour

être valablement contracté, doit être célébré par le propre prêtre ou ministre des parties, celui qui les connait, eux et leurs familles, ou avec son autorisation écrite.

I

LA LOI DU MARIAGE SOUS LA DOMINATION FRANÇAISE.

Ces considérations préliminaires nous mènent tout naturellement à l'examen de cette question : " En Bas-Canada, le mariage doit-il être célébré par le curé ou ministre propre des parties ? "

Des ministres de la croyance presbytérienne soutiement qu'ils ne sont que des *officiers civils, des fonctionnaires publics ; et que comme tels officiers publics, habiles à tenir des régistres, ils ont le droit de marier qui que ce soit.*

Un léger coup d'œil sur les lois qui ont régi le Bas-Canada en matière de mariage, nous manifestera l'état de la législation actuelle et la position des diverses congrégations religieuses, tant vis-à vis d'elles que de leurs membres, respectivement.

Sous la domination française, il est hors de doute que le mariage de deux catholiques, capables de le contracter, devait être célébré avec les formalités suivantes :

1o. Le mariage devait être précédé de bans, ou d'une dispense de bans accordée par l'évêque des parties.

2o. Le mariage devait être célébré en face de l'Eglise par le curé propre des parties.

3o. Lorsque les parties étaient de différentes paroisses, il fallait la publication des bans dans chacune des paroisses, et le concours de chaque curé au mariage ; et dans le cas de dispense de bans, si les parties résidaient dans des diocèses différents, il fallait qu'elle fût accordée par les évêques des deux diocèses.

Ces conditions étaient-elles imposées à peine de nullité ?

L'affirmative n'était pas douteuse à l'égard de la nécessité de la célébration en face de l'Eglise par le propre curé des parties. L'ordonnance de Blois, art. 40, dit : "*Nos sujets ne pourront* "*valablement contracter mariage*, sans trois proclamations pré- "cédentes de bans, etc., après lesquels bans seront épousés pub- "liquement ;" et la déclaration de 1639, "*en l'interprétant*," déclare que " le curé recevra le consentement des parties, et les " conjoindra en mariage, suivant la forme pratiquée en l'Eglise ; " fait défenses à tous prêtres de célébrer aucun mariage qu'entre " les vrais et ordinaires paroissiens, sans la permission par écrit " des curés des parties, ou de l'évêque diocésain," (art. 1er), et

ordonne que "les majeurs contractent leurs mariages publique-"ment, en face de l'Eglise, avec les solennités prescrites par "l'ordonnance de Blois." La déclaration de 1639 n'est donc venue qu'expliquer les formalités de la célébration ; elle ne parle pas de la peine du défaut de ces formalités, parce qu'étant une loi *interprétative*, elle doit être considérée comme formant partie de l'ordonnance de Blois, qui établit cette peine.—*Nos sujets ne pourront valablement contracter mariage.*—Tel est le sentiment des commentateurs qu'une jurisprudence constante a confirmé. Pothier, nos. 346, 349; arrêt du 19 août 1659, 2 juillet 1660, 18 décembre 1606, 5 mai 1691, Journal des Audiences; 23 juillet 1733, cité par Rousseau de la Combe, vo. mariage; 29 mars 1695, 17 février 1724, 2 août 1729, 22 juillet 1733. 29 mars 1739, Guyot, vo. mariage; 1er février et 18 décembre 1755, cités par Merlin, vo. mariage. Voir aussi l'édit de décembre 1606 et *Beamish* v. *Beamish*, 8 Jurist, N. S. p. 779, Chambre des Lords, 1861. C'est en effet dans ce sens que, dans cette cause, le Lord Juge Willes interprêta les anciennes ordonnances françaises.

En présence des termes précis de l'ordonnance de Blois : "Nos sujets ne pourront valablement contracter mariage sans précédentes proclamations de bans," il semblerait que le défaut de publication et de dispense de bans emporte la nullité du mariage; cependant les auteurs et la jurisprudence tiennent le contraire, lorsque le mariage est parfait et irréprochable sous tous les autres rapports, (arrêt 15 mars 1691, Journal des Audiences; 19 août et 1 février 1659, Rousseau de la Combe, vo. mariage. Néanmoins, Pothier no 59, ajoute que "lorsqu'un mariage est accusé de "clandestinité, si la publicité n'est pas bien prouvée, le défaut de "publications de bans est d'un grand poids pour le faire déclarer "clandestin et le faire en conséquence priver des effets civils."

Telle était l'ancienne jurisprudence française sur le mariage, et qu'elle soit fondée sur les canons, et en particulier sur le Concile de Trente, ou non, il n'en est pas moins vrai qu'elle formait la loi en force dans l'ancienne France et dans la colonie de la Nouvelle France. Que l'on consulte tous les commentateurs, et l'on verra que ces règles, que nous avons reproduites de Pothier, formaient le droit commun français, comme aussi le texte formel de plusieurs ordonnances des rois, et entr'autres des capitulaires de Charlemagne, de l'ordonnance de Blois 1579, l'édit d'Henry IV de décembre 1606, la déclaration du roi Louis XIII, 26

novembre 1639. La présence du propre curé en sa qualité officielle et réligieuse de célébrant, était tellement prescrite qu'il ne suffisait pas de se prendre pour mari et femme en sa présence; il fallait le concours de ce dernier et la célébration. C'est la disposition formelle de la déclaration de 1639, qui ordonne que "le curé recevra le consentement des parties, et les conjoindra en mariage, suivant la forme pratiquée en l'Eglise." Les recueils de jurisprudence sont d'ailleurs remplis d'arrêts qui ont déclaré nuls des mariages contractés *en violation de cette loi*, et illégitimes, les enfants qui en étaient nés. D'Héricourt en mentionne deux, un de 1676 et l'autre de 1713, Guyot, vo. *mariages clandestins*, en cite cinq: 5 septembre 1650, 20 septembre 1688, 10 juin 1692, 24 juillet 1704 et 26 mai 1705, et Rousseau de la Combe en rapporte un autre du 12 août 1690; voir aussi *Beamish* v. *Beamish*, 8 Jur. N. S. 770.

II.

EFFETS DE LA CESSION DU PAYS SUR LA LOI DU MARIAGE.— L'ACTE DE QUÉBEC.

Telle était la loi du mariage en force en Bas-Canada sous la domination française.

Voyons quelles modifications elle a subies par la cession du pays à la Grande Bretagne.

Sans nous arrêter aux articles de la capitulation de Montréal, dont la teneur et le sens ont été développés avec autant de science que de talent par l'honorable Jnge-en-Chef LaFontaine dans le fameuse cause de *Wilcox* vs. *Wilcox*, rapportée au 2e volume du Juriste, sans invoquer les droits garantis par le traité de Paris, nous passons de suite à l'acte impérial de 1774, *l'Acte de Québec*, qui définit les droits des canadiens sous le gouvernement anglais. La section 5e de cet acte (S. R. C. page XI) statue: "Et pour "la plus entière sûreté et tranquillité des esprits des habitants "de la dite province, il est par ces présentes déclaré que les "sujets de Sa Majesté professant la religion de l'Eglise de Rome, "dans la dite province de Québec, peuvent *avoir, conserver et "jouir du libre exercice de la religion de l'Eglise de Rome*, sou- "mise à la suprématie du Roi, déclarée et établie par un acte "fait dans la première année du règne de la Reine Elizabeth, "sur tous les domaines et pays qui appartenaient alors, ou qui "appartiendraient par la suite, à la couronne impériale de ce "Royaume; et *que le clergé de la dite Eglise peut tenir, recevoir*

" *et jouir de ses dus et droits accoutumés, eu égard seulement aux* " *personnes qui professeront la dite religion.*"

Or, c'est certainement un des priviléges inhérents à l'exercice de la religion catholique que les mariages soient célébrés conformément aux règles que les canons et les conciles ont établies, et qui ont passé presque mot-à-mot dans la jurisprudence française. Par cette clause, la célébration des mariages, conformément à ces règles, est donc une loi écrite du Parlement Impérial. En présence surtout de la dernière partie de la 5e clause qui maintient le clergé dans la *jouissance de tous ses dus et droits accoutumés, eu égard seulement aux personnes qui professeront la dite religion*, comment pourra-t-on soutenir que la cession a eu l'effet de priver le clergé catholique *des droits et dus accoutumés* dans les dispenses des bans, empêchements et célébrations des mariages? Il est maintenu dans "ses dus et droits eu égard aux catholiques:" ces derniers ne pourront donc pas après la cession plus qu'avant, s'exempter de les lui rendre sous un prétexte ou un autre, à moins de sortir préalablement du sein de l'Eglise. C'est donc devant leur curé qu'ils peuvent valablement contracter mariage.

La section 8e du même acte de 1774 est plus formelle. "Tous " les sujets canadiens de Sa Majesté" y est-il dit, "en la dite " province de Québec (*les ordres religieux et communautés ex-* " *ceptés*), pourront aussi posséder leurs biens et propriétés, et " jouir de tous les usages et coutumes qui les concernent, et *de* " *tous leurs autres droits de citoyens d'une manière aussi ample,* " *aussi étendue et aussi avantageuse*, que si les dites proclama- " tions, commissions, ordonnances, et autres actes et instruments, " n'avaient point été faites" (c'est-à-dire qu'avant la cession); " et dans toutes affaires en litige qui concerneront leurs propriété- " tés et leurs droits de citoyens, ils auront recours aux lois du " Canada, comme les maximes sur lesquelles elles doivent être " décidées; et tous procès qui seront à l'avenir dans aucune des " cours de justice, y seront jugés eu égard à telles propriétés et " à tels droits, par les dites lois et coutumes du Canada, jusqu'à " ce qu'elles soient changées ou altérées, etc."

En un mot, les Canadiens pourront *jouir de tous leurs usages et coutumes et de tous leurs droits de citoyens*, tels qu'établis par l'ancienne jurisprudence française, et à l'avenir on devra juger d'après *ces usages et coutumes*. Mais est-il un droit de citoyen plus sacré que celui qui résulte du mariage, puisque c'est

là même que l'on trouve le principe de la légitimité, le droit qui donne un titre aux successions, à la parenté etc? Les procès devront être jugés d'après les *anciens usages et coutumes* du Canada; par conséquent les demandes en nullité de mariage seront soumises aux règles de l'ancienne jurisprudence, même du Concile de Trente, puisqu'il y avait été publié. Le mariage ne pourra donc être valablement contracté qu'en étant célébré en face de l'Eglise, par le propre curé des parties, après publication des bans, ou dispense de leur évêque. Deux catholiques ne peuvent donc valablement se marier en vertu de ce qu'on est convenu d'appeler *a mariage license;* et en supposant qu'ils auraient une dispense de leur propre évêque, ils ne pourraient donc pas non plus faire célébrer leur mariage dans une maison privée, par un ministre protestant, de quelque dénomination qu'il soit, pas plus par un ministre anglican que par un ministre presbytérien. Ajoutons de suite que depuis la cession jusqu'à la promulgation du code, l'ancienne législation sur le mariage des Catholiques n'a aucunement été changée.

III.

EFFETS DE LA CESSION (suite)—POUVOIRS DES MINISTRES ANGLICANS.

On objecte que par le droit commun anglais, les ministres de l'Eglise Etablie d'Angleterre, (Established Church of England) ont le privilége de marier deux catholiques comme toutes autres personnes qui appartiennent à cette église ou à des congrégations dissidentes, et qu'enfin ce droit commun fait partie du droit public de l'Angleterre qui domine sur toutes les possessions britanniques. Que tel soit le droit commun anglais, qu'il fasse même partie du droit public, c'est ce qu'il n'est pas nécessaire d'examiner ici. L'Acte Impérial, à l'égard des Canadiens, serait en effet une dérogation à la règle du droit commun. On a sans doute remarqué que la section 8ème plus haut citée, dit que *tous les sujets Canadiens pourront jouir de tous leurs usages et coutumes et de tous leurs autres droits de citoyens*, voulant par là même faire, à l'égard des émigrants britanniques, une exception dans certains cas, et plus particulièrement dans les questions de mariage. Il est impossible de ne pas voir que ces expressions "sujets Canadiens" s'appliquaient aux habitants français, surtout si l'on considère qu'à cette époque éloignée (1774), on comptait à peine quelques familles anglaises en Canada; et en se

reportant à la clause 5e aussi plus haut citée, qui accorde le libre exercice de la religion catholique, "pour la plus entière "sureté et tranquillité des esprits des habitants de la dite pro- "vince," on se convaincra de suite que la législature statuait pour les colons français, qui étaient alors reconnus et appelés de droit "Canadiens."

Nous ne voulons pas dire que cette clause ne frappe point les résidents britanniques. Sans doute qu'elle les assujettit aux mêmes lois générales, en autant qu'elles ne sont pas incompatibles avec les droits que leur assure leur qualité de sujets anglais, surtout le droit d'exercer librement leur religion et partant de contracter mariage suivant les formalités qu'elle prescrit; car en matière de religion et de célébration de mariage, c'est une maxime que les sujets britanniques, établis dans les colonies, ne sont pas affectés par les lois des habitants du pays. *Lautour* v. *Teesdale*, 8 Taunton, 830.

IV.

EFFETS DE LA CESSION, (suite.)—DROIT COMMUN ANGLAIS.—MINISTRES PROTESTANTS DISSIDENTS.

Il n'y aucun doute que, par le droit commun anglais, les ministres dissidents ne peuvent marier des catholiques ou des anglicans, même des membres de leur église. Avant la Réforme, il paraîtrait que les prêtres dans les ordres sacrés de l'Eglise Catholique avaient seuls le droit de célébrer les mariages, et qu'après la Réforme, ce pouvoir fut de plein droit étendu aux ministres ordonnés de l'Eglise d'Angleterre. C'est la doctrine qui, en 1844, a été maintenue, dans la célèbre cause de la *Reine* vs. *Millis* (10, Clark et Finnelly, 534.), par la Chambre des Lords, sur un appel de l'Irlande. Les faits de cette cause sont que l'accusé Millis, étant membre de l'Eglise anglicane, avait été marié, en Irlande, à une femme qui n'était ni de la même Eglise, ni dissidente, par un ministre presbytérien, suivant les usages et les rites de l'Eglise presbytérienne. Ce mariage fut suivi de la cohabitation pendant deux ans comme mari et femme. Plus tard, du vivant de cette femme, Millis passa en Angleterre, où il se remaria en bonne forme. Il fut indicté en Irlande pour bigamie. On prit l'opinion des juges de droit commun, qui tous se prononcèrent pour la nullité du premier mariage, comme n'ayant pas été célébré par un ministre constitué dans les ordres; car suivant le langage du Lord Chancellier, "holy orders, according

" to the law of England, are orders conferred by Episcopal ordina-
" tion. This was the law of the Catholic Church in England, and
" the same law continued after the reformation of the law of the
" Episcopal Reformed Church." Aussi, quoique sur un partage égal d'opinions, l'accusé fut libéré; et depuis, la doctrine soutenue par les juges de droit commun, au nombre desquels était l'immortel juge-en-chef Tindal, et par Lord Lyndurst, Cottenham et Abinger à la Chambre des Lords, a été suivie par la Cour de l'Echiquier dans la cause de *Catherwood* vs. *Caslon*, (13, M. et W. 261, 8 Jurist. N. S. 1076), et a été formellement confimée par la Chambre des Lords, le 21 février 1861, dans la fameuse cause de *Beamish* vs. *Beamish*, où il s'agissait de la validité du mariage d'un ministre anglican célébré en Irlande par lui même: (8 Jur. N. S. 770.)* " It must be taken as established law," disait alors le lord juge Willes, pour la Chambre. " since the decision in *Reg.*
" vs. *Millis*, that there never could have been a valid marriage in
" England before the Reformation, without the presence of a
" priest episcopally ordained; or afterwards, without the presence
" of a priest or a deacon...Had the case been res nova, we might
" have thought that the law of Edmund, the rubric, and the
" other indications that by the law of England a priest was to be
" present at a marriage, were but reflections of the general law of
" the Church, by which, from the earliest times, the intervention
" of a priest had been inculcated, and from time to time enforced
" by penalties, though never, before the Council of Trent, by
" nullifying the marriage at which no priest assisted. That view
" was presented and considered in *Reg.* v. *Millis*, and it raised
" a question worthy of all the zeal, learning, and genius which
" it called forth; but that view was not adopted in the result,
" and it is not competent for us to restore it. It is to be assumed,
" for the purpose of to-day, that England, from time immemorial,
" divided from the Church, held the presence of a priest to be
" essential; and whatever hardship such a law may, in the course
" of years, have wrought to dissenting bodies, and also to British
" subjects in the colonies and in foreign countries, where no priest
" could be procured, if the law was ever rightly held to apply under

* Pour ceux qui ne sont pas familiers avec les institutions judiciaires de l'Angleterre, il est bon de remarquer que la Chambre des Lords n'est pas composée ici de tous les Lords, formant partie du Parlement anglais, mais seulement de ceux qui ont été juges, et que l'on connait mieux sous le nom de " Law Lords "

" such circumstances, as to which we say nothing, those hardships
" (now mitigated by numerous statutes passed before and since
" the decision in *Reg* v. *Millis*) were very unlikely to have been
" foreseen at the time when the law assumed to exist must have been
" established. It cannot with justice be said that at that time
" it was either an unintelligible or irrational law, or that the
" objects which it had in view—namely, the prevention of un-
" lawful marriages, and the preservation of evidence of those which
" should take place, besides the addition of a religious sanction
" to the duties which spring from the relation of man and wife—
" are either obscure, or even less important at the present mo-
" ment than they were ten centuries ago. The law assumed to
" exist appears to us, for the reasons which we have stated, to
" require, that, equally in the case of the clergy as of the laity,
" marriage in this country must, in the absence of express
" statute, take place in the presence and with the assent of a clerk
" in holy orders, who must be a third person, and whose duty it is
" to prevent or put off the marriage if there be opposed a just
" impediment; and who, in case he allows of its proceeding, is
" then, in the primary sense of the word, to marry the parties
" by receiving their mutual consent to become man and wife. If
" just exception be made to the length at which we have stated our
" unanimous opinion, and the reasons upon which it is founded,
" our excuse must be looked for in the unaccustomed nature of
" the case, and the grave importance of the general subject; nor
" are we ashamed to own that our minds fluctuated during the
" discussion, and that we deliberated with more than ordinary
" anxiety and caution before we felt constrained to be of opinion,
" that the act of competent persons, who, in fact, contracted with
" one another to become man and wife, by a ceremony as binding
" upon them in conscience (with reverence be it spoken) as if
" an archbishop had pronounced the blessing, was, for reasons
" which still affect the security of titles and the peace of families,
" unavailing in point of law. We—that is to say, my Bro-
" thers Byles and Hill and myself, being the only judges who
" were present during the whole of the argument—thus answer
" the question in the negative."

La Commission Anglaise de 1850 sur le Divorce, disait dans son rapport: " In Roman Catholic times marriage was regarded as a sacrament by the canon law, and being a sacrament it was deemed indissoluble. But when the Reformation came, the

Courts denounced, amongst other opinions of the Romish Church, the doctrine of a sacrament in mariage, retaining the idea of its being of Divine institution in its general origin, but considering it in the light of a civil contract, which for its full completion had always required, in England at least, some religious ceremony." Cette opinion est signé par Lord Campbell, Dr. Lushington, Lord Beaumont, Lord Redesdale, le très Hon. S. H. Walpole, Sir W. P. Wood et E. P. Bouverie.

Ce n'est que par des statuts récents que, pour emprunter le langage énergique d'un jurisconsulte américain d'une grande reputation, Dr. Isaac F. Redfield, * " the British Parlia-

* Pour que le public juge mieux de la valeur de nos citations, il est bon de connaitre qu'en France, les opinions des hommes de loi, juges ou non, font autorité, eu égard, bien entendu, à leur réputation basée sur leur intégrité et leur savoir; et il n'est pas même rare de voir Vattel, Pothier, Guyot, Merlin, Pardessus, Troplong, Marcadé et tant d'autres, aussi bien cités à Londres et à Washington qu'à Paris et dans toute l'Europe en général, où souvent le poids de leur nom l'emporte sur les décisions et détermine la jurisprudence. En Angleterre, les jugements des juges *in banco* sont ce que l'on est convenu d'appeler *les autorités;* et les auteurs de *traités* ne sont généralement que des compilateurs de ces précédents. Voilà pourquoi, on y attache tant d'importance aux rapports des causes. La raison en est évidente; les juges anglais, qui sont vraiment les jurisconsultes de la Grande-Bretagne, n'écrivent pas, mais seulement décident; et les auteurs de *traités* ne font que compiler ces décisions, sans les commenter. En toute justice, il faut admettre qu'il est raisonnable que les précédents des juges anglais fassent autorité; car ils révèlent généralement une science profonde. De là, la haute réputation de la magistrature anglaise, de Lord Mansfield, Lord Ellenborough, Lord Eldon, Lord Denman, Lord Brougham, Lord Tenterden, Lord Tindall, etc., etc. Aux Etats-Unis comme dans les autres colonies anglaises ayant leur propre législature, on est forcé de considérer si la règle anglaise doit y être appliquée avant de l'y reconnaitre; on y raisonne donc la jurisprudence; on la discute; et voilà sons doute la raison pour laquelle les commentaires Américains sont aujourd'hui peut-être supérieurs aux commentaires Anglais; voilà pourquoi, les ouvrages de Kent, Story, Dr. Parsons et les traités spéciaux de Wheaton, Redfield, Angell, Bishop, etc., font loi pareillement à Westminister Hall et devant les cours Américaines. Qu'il nous soit permis d'observer que nous préferons le système français et américain, qui oblige, pour ainsi dire, les auteurs et commentateurs à se rendre compte des décisions des cours de justice, en remontant aux principes et rejetant respectueusement celles qui leur paraissent contraires aux règles du droit,—système qui a donné à la France et aux Etats Unis une opinion publique en matière de droit et de jurisprudence.

" ment has degraded the solemnization of that sacred relation
" to the level of a mere civil contract, allowing its solemnization
" before the civil magistrate, and practically abandoned the former
" claim of its indissolubility. We have no purpose, or desire, to
" discuss the nature of the bond, or relation, created by marriage;
" our space would not allow of doing that here, understandingly.
" We may be pardoned for intimating the painful regret we have
" felt, in common with many others, at the apparent levity with
" which the sacredness of the fundamental relation of society is
" handled, and discussed, by too many of the American legisla-
" tures, courts, and text writers." (Édition de Story, Conflict of Laws, par Redfield, 1865, § 122 a; voir aussi *Lussex* vs. *Peerage*, 11 Cl. et Fin. 152, Dr. Brown Ir. Eccl. Law, 266; *Moorhouse* v. *Lord*, 9 Jur. N. S. 677; *Reg.* v. *Orgill*, 7 Car et P. 80; *Du Moulin*, v. *Druit*, 13 Ir. Com. Law, R. 212, Jacop's *Addenda* to Roper on Husband and Wife, vol. 2, p. p. 445–475.)

Le principe consacré dans les causes de *la Reine* vs. *Millis*, *Dalrymple* v. *Dalrymple*, *Beamish* v. *Beamish* a été néanmoins fort contesté durant les dernières années. Les Etats-Unis tendent à le rejeter, quoique pourtant la question y soit encore ouverte. (Parsons on Contracts, vol. 2, pp. 74 et suivantes, éd. 1866; Bishop on Marriage, vol. 1, §279; *Jewell's Lessee* v. *Jewell*, 1 How. 219, 234; *Londonderry* v. *Chester*, 2 N.H. 268; Memoir of Chief Justice Parsons, by his son Dr. Parsons, page 239); The Law of Marriage and Divorce, by W. B. Lawrence. Mais ce qui étonnera, c'est qu'en Canada les tribunaux des deux sections de la Province n'aient pas cru devoir l'appliquer aux mariages contractés dans des régions où la présence d'un prêtre n'est pas possible, par exemple parmi les sauvages. *Connolly* vs. *Woolrich*, 11 L. C. Jurist, 197; *Breakey* vs. *Breakey* 2 U. C. Queen's Bench R. 349). On a pensé que la loi commune de l'Angleterre qui était suivie avant les *Marriage Acts*, qui seule a force dans les colonies, ne requiert pas l'intervention d'une personne dans les ordres pour la validité du mariage, parce que, dit-on, la loi canonique, avant le Concile de Trente, n'exigeait pas cette condition.

Il est bon d'observer que néanmoins la cause de *Connolly* v. *Woolrich* a été arrangée à l'amiable par les parties, après que l'appel au Conseil Privé fut autorisé et en partie instruit.

V

MINISTRES DISSIDENTS, (suite.) STATUTS PROVINCIAUX.

Néanmoins, la régle maintenue dans les causes de la *Reine* vs. *Millis* et de *Beamish* v. *Bcamish*, soit qu'elle exprime la loi commune anglaise, soit qu'elle s'accorde avec la loi commune de ce pays, le Concile de Trente y ayant été publié, s'est tellement emparée des esprits et est si intimement entrée dans nos mœurs, que nous la trouvons exprimée presqu'en toutes lettres dans nos Statuts Refondus du Bas-Canada, c. 20, s. 12, comme reproduisant les dispositions de la 7me George IV, c. 2. Aussi à diverses époques, nous voyons toutes les Eglises du pays, à part l'Eglise de Rome et celle d'Angleterre, qui seules font des ordinations reconnues par la loi civile, s'adresser à la Législature pour être autorisées à celébrer les mariages et à en tenir registres. A une date aussi reculée que 1804, nous voyons le Parlement, " afin de prévenir et éviter tous doutes et questions touchant les " effets civils de ces mariages"—légaliser tous les mariages célébrés dans la Province depuis le 13 septembre, 1759, par aucun ministre protestant dissident, ou par un juge de paix, nonobstant tout loi, usage et coutume à ce contraire. (44 G. III, c. 11, s. 1.) Le législateur a eu même le soin d'ajouter qu'il n'entendait pas par là ratifier les mariages qui seraient ainsi contractés à l'avenir. (sect. 2.)

Nos Statuts Provinciaux sont remplis d'actes autorisant les diverses congrégations protestantes à célébrer les mariages et à en tenir registres ; L'Eglise d'Ecosse fut autorisée à célébrer les mariages et à en tenir registres par la 7e Geo. IV, c. 2; les Baptistes, par la 3e Guil. IV, c. 19; les Congrégationalistes, 4 Guil. IV, c. 19; les Méthodistes, 9 Guil. IV, c. 50; les Presbytériens, 1 Guil. IV, c 56; l'Eglise d'Ecosse dissidente, 3 Guil. IV, c. 27; Méthodistes Wesleyens, 9 Guil. IV, c. 76, etc., etc.

Il est évident que la Législature n'aurait pas reçu les requêtes de ces diverses congrégations protestantes dissidentes, et passé des lois spéciales, dans le seul but de leur conférer un pouvoir dont ells jouiraient en vertu du droit commun. C'est toujours, comme le déclare l'Acte d'Interprétation, pour combler une lacune, un défaut, que le législateur intervient (S. R. C. c. 5, s. 6, p. 25).

VI.

POUVOIRS DES MINISTRES DISSIDENTS EN VERTU DES STATUTS PROVINCIAUX.

Maintenant que les ministres dissidents sont autorisés à célébrer les mariages, voyons quels mariages ils peuvent célébrer? Ont-ils le pouvoir de marier toutes personnes indistinctement, par exemple, deux anglicans ou deux catholiques? Nous n'hésitons pas à répondre que non. Pour jouir de ce privilége, le législateur aurait dû déclarer qu'il leur accordait tous les pouvoirs qui appartenaient aux ministres catholiques ou anglicans; et non seulement c'est ce qu'il n'a pas fait, mais encore il a pris le soin d'exprimer d'une manière assez claire qu'il n' entendait que donner le pouvoir de marier les membres de leurs congrégations respectives. Tous ces statuts sont conçus dans les mêmes termes, pour ainsi dire, mot à mot. Presque tous, après avoir exposé dans la préambule qu'il est équitable d'accorder les priviléges demandés, "pour l'avantage et la satisfaction de leurs différentes "congrégations," ou d'après le texte anglais, "for the relief and satisfaction of their several congregations, throughout the Province," porte ce qui suit: "Qu'il soit statué qu'il sera loisible "au dit George W. Perkins, (cette citation est extraite de l'acte "d'incorporation de l'Eglise presbytérienne), ou à tout ministre, "*pour le temps d'alors de la dite congrégation*, d'obtenir, avoir "et tenir des registres, dument authentiqués suivant la loi, des "mariages, baptêmes et sépultures *qui pourront être faits ou* "*avoir lieu sous le ministère de tel ministre—as may be per-*"*formed or take place uuder the ministry of such minister or* "*clergyman.*"

Soutiendra-t-on un instant qu'en vertu de cette clause ou d'une autre semblable, la disposition de l'ancienne jurisprudence française sur le mariage des catholiques, ou du droit commun anglais sur celui des anglicans, a été abrogée. Un texte de loi aussi formel peut-il être mis au néant autrement que par une législation spéciale et expresse? L'Acte est demandé par une congrégation dissidente; il est donc passé pour venir à son aide et non pour venir à l'aide des catholiques ou des anglicans, ou autres dissidents autorisés à tenir registres, puisque ces derniers ne souffrent pas et ne peuvent souffrir; c'est donc pour les membres seuls de cette nouvelle congrégation que le privilége a pu être

accordé par la législature ; et cette dernière n'a donc fait qu'exprimer un motif, appuyé sur le simple bon sens, en déclarant dans le préambule de la plupart de ces actes, qu'il était juste que de tels priviléges, sujets à certaines règles et règlements, fussent étendus dans toutes les parties de la province aux ministres susdits, "*pour l'avantage et la satisfaction de leurs différentes congréga-*" *tions, for the relief and satisfaction of their several congregations* "*throughout the Province.*"

L'acte ou les actes en question déclarent en second lieu que le privilège est donné au dit—*or any minister, for the time being of the said congregation.* Le droit est donc soumis à la condition de l'existence de la congrégation, à sa durée ; au lieu que le pouvoir des ministres de l'Eglise de Rome ou d'Angleterre, découlant de leur ordination épiscopale, est attaché non pas à la congrégation qu'ils desservent, mais à leur personne, et ne s'éteint qu'avec la vie.

La plupart de ces actes ne confèrent même pas, en termes exprés, le pouvoir de célébrer les mariages, mais permettent de tenir registres de *tous tels mariages qui pourront être faits sous le ministère de tel ministre—as may be performed or take place under the ministry of such ministers or clergymen.* On peut peut-être répondre à bon droit que le pouvoir de tenir régistres emporte celui de célébrer mariages ; mais quels mariages ? Ceux qui auront lieu "sous le ministère de tel ministre—under the ministry of such minister." Et quel est le ministère de tel ministre ? Est-ce de diriger l'eglise anglicane ou l'eglise catholique, ou même toutes les églises dissidentes ? Evidemment non ; son action ne s'étend pas au delà de la congrégation qui lui a été confiée, ou qui l'a choisi. Son ministère est donc de ne marier que les membres de son église.

Enfin, on ne saurait prétendre sérieusement que les ministres des églises dissidentes ont, en vertu de ces statuts spéciaux, plus de pouvoirs que les ministres de l'église épiscopale ; et par conséquent, quand bien même ils auraient le pouvoir de marier des parties en dehors de leurs congrégations respectives, par exemple, deux anglicans, ils ne pourraient valablement, en face de l'acte de Québec de 1774 et de l'ancienne jurisprudence française, marier deux catholiques—pouvoir qui est nié aux anglicans, comme nous l'avons vu.

VII.

POUVOIRS DES PRÊTRES CATHOLIQUES A L'ÉGARD DU MARIAGE DES PROTESTANTS (AVANT LE CODE.)

Avant le Code, un prêtre catholique avait-il le droit de célébrer en Bas-Canada le mariage de deux protestants? Sous la domination française, l'affirmative n'était pas douteuse. Sous le gouvernement britannique, des doutes se sont élevés. On soutient que le "Marriage Act" de Lord Hardwicke, en force en Angleterre lors de la cession du Canada, s'oppose à l'intervention d'un prêtre catholique dans les mariages des protestants; on va même jusqu'à dire que la Réforme a eu l'effet de faire passer au clergé anglican les pouvoirs du clergé catholique, à l'exclusion de ce dernier. La jurisprudence anglaise n'a cependant pas confirmé ces vues; et, à une époque aussi reculée que 1816, nous voyons la Cour de l'Echiquier (en Appel) reconnaître la validité du mariage de deux anglicans, célébré dans une colonie anglaise, par un prêtre, suivant le rituel catholique. (*Lautour* vs. *Teesdale*, 8 Taunton, p. 230.)—Dans cette cause, le juge-en-chef Gibbs, pour la Cour, observa ce qui suit: "Both the Defendants are stated to be pro-"testants and British subjects, and the place in which the cere-"mony was performed, was Madras, where they resided as part "of the British settlement there: and the question is, whether "under the laws of marriage, operating on them at Madras, this "can be considered as a legal marriage. In order to decide this "question, it is material to consider who the parties were, and "among whom the ceremony took place. Now, British subjects "settled at Madras, are governed by the laws of this country "which they carry with them, and are unaffected by the laws of "the native. The question therefore is whether by the laws of "this country, to which they alone are subject, and by which "alone their actions are to be governed, this marriage was legal. "In this country we judge of the validity of a marriage by what "is called the Marriage Act, but as that statute does not follow "subjects to foreign settlements, the question remains whether "this would have been a valid marriage here before that act "passed. The important point of the case, viz: What the law "is by which such a question is to be governed, was most ably "and fully discussed in the case of *Dalrymple* vs. *Dalrymple* "which has been so often alluded to; and the judgment of Sir

" William Scott has cleared the present case of all the difficulty " which might, at a former time, have belonged to it. From the " reasonings there made use of, and from the authorities cited " by that learned person, it appears that the canon law is the " general law throughout Europe as to marriages, except where " that has been altered by the municipal law of any particular " place. From that case and from those authorities, it also ap- " pears that before the Marriage Act, marriages in this country " were always governed by the canon law, which the Defendants, " therefore, must be taken to have carried with them to Madras " ..... It follows from what I have stated, that this " was a legal marriage; since it was a marriage between British " subjects, celebrated in a British settlement according to the laws " of this country, as existed before the Marriage Act; and which, " if it had been celebrated here before that statue, would have " been valid."—(Voir aussi *Rex. vs. Brampton*, 10 East, 282; *Dalrymple vs. Dalrymple*; 2 Haggard's R. 54, Engl. Eccl. Rep., 485, et Rolles Abr., tit. Baron & Feme, p. 341; *Yelverton* v. *Langworth*, 10 Jur., N. S., 1209; *Beamish* v. *Beamish*, 8 Jur., N. S., 770.)

Cette jurisprudence s'accorde parfaitement avec la discipline ecclésiastique anglaise. Comme l'observait Sir Herbert Jenner, en 1841, dans la fameuse cause de *Martin vs. Escott*: " The " practice has been and still is to receive into the Church of " England, those who have received ordination at the hands of " foreign bishops, particularly Roman catholic bishops, and this " without conferring fresh orders, a Roman catholic clergyman " being an ordained minister." (pp. 19 et 265; voir aussi *Du-Moulin vs. Druit*, 13 Ir. Com. Law R. 212.)

L'effet de la Réforme a donc été seulement de conférer les privilèges du clergé catholique au clergé anglican; et comme les pouvoirs des prêtres catholiques en matière de mariage n'ont pas été retirés, ni restreints par aucune législation du Canada, tandis que ceux des ministres anglicans l'ont été par l'acte de Québec, comme nous l'avons vu, il s'en suit qu'un prêtre catholique, avant le Code au moins, pouvait marier deux protestants, anglicans ou dissidents, bien qu'un ministre anglican ne pouvait marier que des protestants.

VIII.

DU MARIAGE SOUS LE CODE CIVIL DU BAS-CANADA.

Passons enfin au Code Civil du Bas-Canada en force depuis le 1er août 1866. Disons de suite que les codificateurs n'ont pas eu pour objet d'innover à l'ancien régime; et c'est ce qu'ils constatent en termes formels dans leur rapport 2e, page XI: "Dans la vue, y est-il déclaré, de conserver à chacun la "jouissance de ses usages et pratiques, suivant lesquels la "célébration du mariage est confiée aux ministres du culte "auquel il appartient, sont insérées dans ce titre plusieurs dis- "positions qui, quoique nouvelles quant à la forme, ont cependant "leur source et leur raison d'être dans l'esprit, sinon dans la lettre "de notre législation." Nous avons donc l'assurance des codificateurs de leur intention de maintenir l'ancien état de choses; et non-seulement il est à présumer qu'ils ont atteint ce but, mais encore on doit donner aux articles du Code une interprétation conforme à ce but.

L'article 128 dit: "Le mariage doit être célébré *publique-* "*ment* devant un fonctionnaire *compétent, reconnu par la loi.*" "Le mot *publiquement,*" disent les codificateurs, (ibid. pag. XLIV) "a une certaine élasticité qui l'a fait préférer à tout "autre; étant susceptible d'une extension plus ou moins grande, "il a été employé afin qu'il pût se prêter à l'interprétation dif- "férente que les diverses églises et congrégations religieuses, dans "la province, ont besoin de lui donner d'après leurs coutumes et "usages, et les règles qui leur sont particulières, auxquelles l'on "ne désire aucunement innover. Tout ce qu'on a voulu, c'est "d'empêcher les mariages clandestins. Ainsi seront reputés faits "*publiquement*, ceux qui l'auront été d'une manière ouverte et "dans le lieu où ils se célèbrent ordinairement d'après les usages "de l'Eglise à laquelle les parties appartiennent."

Pour les catholiques donc, le mot *publiquement* signifie *en face de l'Eglise de leur paroisse;* pour les protestants, il signifiera en face de l'Eglise ou dans une maison privée, suivant qu'il y aura licence ou non et que les parties seront de l'Eglise anglicane ou d'une église dissidente; et il est imposible de ne pas reconnaître dans ce premier article du code une détermination bien arrêtée de ne confier la célébration des mariages qu'aux ministres des parties; car il est ridicule de supposer qu'un ministre étranger, un mi-

nistre Presbytérien, par exemple, aurait le droit d'officier dans une église catholique. Aussi le même article (128) ne dit pas que le mariage doit être célébré devant tout prêtre, curé, ministre, mais devant un *fonctionnaire compétent, reconnu par la loi.* Ce fonctionnaire doit non-seulement être *reconnu par la loi*, mais encore il doit être *compétent*; et la loi existante comme aussi plusieurs articles du code nous disent que le fonctionnaire reconnu par la loi, *compétent à célébrer les mariages*, est le curé ou ministre des parties. L'article 129 dit: "Sont compétents à célébrer "les mariages, tous prêtres, curés, ministres, ou autres fonction-"naires, autorisés par la loi à tenir et garder registres de l'état "civil." L'article 44 déclare que "les registres sont tenus par "les curés, vicaires, prêtres ou ministres, déservant *telles églises*, "*congrégations ou sociétés religieuses*," c'est à-dire "*légalement* "*autorisées à tenir tels registres*, (art. 42)." Or, nous avons démontré que les églises dissidentes ne sont autorisées à tenir registres que des mariages de leurs membres respectifs, et que l'église anglicane ne peut tenir registre du mariage de deux catholiques. Le code n'est donc sous ce rapport que déclaratoire de l'ancien droit. Le mariage devra donc être célébré publiquement, par un ministre compétent, c'est-à-dire non-seulement en face de l'église pour les catholiques, mais encore devant le curé ou ministre des parties.

Nous pouvons encore tirer argument de l'article 130: Les "publications, ordonnées par les articles 57 et 58, sont faites par "le prêtre ministre ou autre fonctionnaire *dans l'église à laquelle* "*appartiennent les parties*, an service du matin, etc." "Si les "parties appartiennent à différentes églises, ces publications ont "lieu dans celle de chacune." Si tout prêtre ou ministre a le pouvoir de marier qui que ce soit, il a également le droit de procéder à la publication des bans, puisqu'elle est une formalité relative à la célébration du mariage. Il suffit de supposer le fait de voir un ministre protestant, publiant des bans du haut de la chaire de l'Eglise de Notre-Dame, pour en voir l'impossibilité légale et presque physique.

Enfin, par les mots: prêtre ou ministre de l'église à laquelle appartiennent les parties, il faut entendre non-seulement une église de la croyance des parties, mais encore celle de leur domicile, celle qu'elles fréquentent; et c'est ce qui résulte de l'article 131: "Si le domicile actuel des futurs époux n'est pas établi par une "résidence de six mois au moins, les publications doivent se faire

" en outre au dernier domicile qu'ils ont eu dans le Bas-Canada." C'est donc au propre curé des parties, au ministre les desservant, que le législateur confie la célébration des mariages.

Remarquons qu'en vertu de l'article 130, les mariages mixtes doivent être publiés dans l'église de chacune des parties, à moins que la discipline ecclésiastique ne s'y oppose (art. 129).

Avant de célébrer un mariage, le certificat de publication doit être produit au fonctionnaire public (art. 57.)

Sous le code, la seule présence du curé serait-elle insuffisante comme dans l'ancien droit? Faut-il encore son concours au mariage? A côté de l'article 128, qui déclare non pas que le " mariage est contracté publiquement," mais qu'il doit être " célébré publiquement," il semblerait impossible de ne pas tenir l'affirmative. Cette interprétation paraîtrait parfaitement en harmonie avec les autres articles du code et l'intention des codificateurs de conserver l'ancien régime.

Par *fonctionnaire compétent*, il faut entendre non-seulement le curé ou l'évêque des parties, mais encore leur vicaire. Bien plus, un prêtre qui a une permission écrite de l'évêque ou du curé, n'est pas moins habile à célébrer leur mariage. Il en est de même d'un prêtre habitué, qu'un curé d'une grande paroisse, comme celle de Montréal, prépose pour la célébration des mariages dans la paroisse. Ces règles découlent de la déclaration de 1639 et ne souffrent aucun difficulté.

La question si vivement débattue du démembrement de la paroisse de Montréal a donné naissance à une nouvelle difficulté en matière de célébration des mariages. On a fort discuté, tant dans la presse que dans des mémoires soumis au Souverain Pontife, le pouvoir de Sa Grandeur Monseigneur l'Evêque de Montréal, d'ériger des paroisses purement canoniques; en un mot, on s'est demandé si dans l'état actuel de notre législation, la célébration des mariages pouvait appartenir au curé d'une paroisse érigée canoniquement, mais non civilement? Il est admis que par l'acte de Québec, le Clergé Catholique a été maintenu *dans tous ses dus et droits accoutumés*. Or l'un de ces droits était l'érection des paroisses, et par cette érection, le prêtre la desservant *était le propre curé des parties, compétent à célébrer les mariages*.

Ce n'est qu'en 1791, par la 31e George III, chap. 6, que l'on commença à ériger des paroisses civiles, non pour limiter les privilèges existants, mais pour les étendre et donner aux autorités ec-

clésiastiques les pouvoirs nécessaires pour construire et réparer les églises, presbytères, etc.,—pouvoirs qui étaient exercés sous la domination française par l'intendant du Roi. Dans ce statut comme dans tous les autres qui l'ont suivi, on ne trouve aucune dérogation à l'ancien droit qui permettait à l'évêque d'ériger des paroisses canoniques, jouissant de tous les droits civils que le droit commun leur reconnait, et entr'autres, celui de tenir registres des mariages etc. Peut on alors refuser à l'évêque le droit d'établir de semblables paroisses ?

Puisque d'après le droit commun, le simple curé a le droit de déléguer ses pouvoirs à un prêtre habitué, en vertu d'une procuration générale, ce même droit n'autorise-t-il pas l'évêque à donner une commission semblable à un de ses prêtres, pour célébrer les mariages dans une église publique qu'il nomme ?

Le code, art. 42, lequel est inséparable de l'article 128, puisque le prêtre compétent est celui qui est autorisé à tenir registres, requiert-il l'érection civile de la paroisse ? Il déclare tout simplement que "les actes de l'état civil sont inscrits sur deux registres de la même teneur, *qui sont tenus pour chaque église paroissiale catholique*, pour chaque église protestante, congrégation ou autre société religieuse, légalement autorisée à tenir tels registres." Or, les prêtres des églises catholiques sont autorisés à tenir registres, non pas par les statuts constituant ces églises en corps politiques et civils, mais par le droit commun.

Enfin, les codificateurs, en déclarant que le mariage est valablement célébré, pourvu qu'il le soit suivant les rites de chaque église, ne semble-t-il pas avoir suffisamment indiqué que dans ces matières l'autorité ecclésiastique est juge suprême ?

Il est vrai que les dispositions des statuts refondus du Bas-Canada, ch. 18, semblent présenter une difficulté ; il y est déclaré que la proclamation du Gouverneur établit la parosse "pour toutes fins civiles." Mais ces fins ne sont elles pas seulement celles que l'acte a pour objet, et non toutes les fins civiles sans exception—celles qui résultent, par exemple, de la simple érection canonique ? Comment ne pas reconnaître à cette érection purement canonique tous les effets qu'elle produisait autrefois, indépendemment de toute législation spéciale ? Il suffit d'ajouter que ce regrettable conflit ecclésiastique a été terminé d'une manière favorable a'Mgr. Bourget par une loi de la Législature de Québec.

Sous le code comme dans l'ancien droit, les publications peuvent être omises, "si les parties ont obtenu des autorités compétentes

et produisent une dispense ou licence, permettant l'omission des publications de bans." (Art 59.) L'article 134 déclare qu'elles sont ces autorités compétentes. Ce sont celles "en possession "jusqu'à présent du droit d'accorder des licences ou dispenses pour mariage." Comme nous l'avons vu, jusqu'à la promulgation du code, l'évêque catholique des parties avait seul le droit de dispenser des bans de mariage des catholiques; les licences ne regardent que les protestants.

Il en est de même quant au droit de dispenser des empêchements de mariage résultant de la parenté, de l'affinité, etc., "lequel," aux termes de l'article 127 plus haut cité, "appartiendra tel que ci-devant, à ceux qui en ont joui par le passé."

IX.

DES NULLITÉS DE MARIAGE SOUS LE CODE.

Telles sont les conditions que le code a imposées au mariage; elle ne nécessitent aucun commentaire; elles sont indubitablement celles de l'ancienne loi.

Il est cependant douteux que les prêtres catholiques et les ministres anglicans conservent leur ancienne juridiction. Il est bien vrai qu'aux yeux du code, tout prêtre ou ministre, légalement autorisé à tenir registres, est compétent à célébrer les mariages; nul doute encore que par le droit commun, ce prêtre ou ministre anglican a le pouvoir de tenir régistres des mariages de tous protestants; nous avons bien aussi la déclaration des codificateurs que leur intention a été de conserver les anciennes règles. Mais si l'on en juge par les articles sur la publication des bans, les dispenses ou licences, il semblerait que le code a voulu limiter la juridiction de tout prêtre ou ministre aux personnes de leur église respective. Ce changement à l'ancien droit serait un progrès dans la législation du mariage, une nouvelle garantie pour les familles protestantes contre les mariages clandestins.

Les règles sur la cérémonie du mariage sont-elles encore requises à peine de nullité? Là existe une regrettable différence entre le nouveau et l'ancien régime. Le mariage des mineurs, celui contracté sans consentement libre, ou par erreur, est seulement annullable (art. 148, 151). Celui des parents au degré prohibé, est absolument nul (art. 14 et 152). Tout mariage qui n'a pas été contracté "publiquement et qui n'a pas été célébré devant le fonctionaire compétent," peut être attaqué par les époux

eux-mêmes, et par tous ceux qui y ont un intérêt né et actuel, "sauf au tribunal à juger suivant les circonstances."

Il faut bien remarquer que la discrétion que cet article laisse au tribunal, n'est pas indiquée entre [ ], c'est-à-dire, comme de droit nouveau.

Il est difficile de trouver la source où les codificateurs ont puisé cette règle; leur Rapport n'en dit pas un mot; il se borne à mentionner en marge le chiffre de l'article. Cependant s'il faut s'en rapporter à l'autorité qui se trouve seule au bas de l'article, il paraîtrait que nos législateurs en ont pris, sinon le texte, au moins le sens, dans le *Contrat de Mariage* de Pothier Nos. 361, 362, 451. Au No. 361, Pothier commence par déclarer que "la "peine des parties qui ont fait célébrer leur mariage par un "prêtre incompétent, est la nullité de leur mariage." Au No. 362, "il ajoute: "La nullité des mariages célébrés par un prêtre in- "compétent n'est pas de la classe qu'on appelle *relative;* elle est "de la classe de celles qu'on appelle *nullités absolues.*" Au No. 451 enfin, il établit la ligne de conduite que doit suivre la couronne pour prévenir les abus de ces mariages; et il rapporte un arrêt du 16 Février 1673, qui, à la requête du Promoteur de l'officialité de la Rochelle et non des parties, dont le mariage avait été célébré par un prêtre étranger dans une chapelle privée, leur enjoint de se retirer devant l'Evêque, pour, après avoir reçu une pénitence, y être procédé de nouveau à la célébration de leur mariage, avec défense de se fréquenter. Les codificateurs auraient-ils voulu faire revivre cette ancienne jurisprudence, peut-être plus en rapport avec les mœurs de cet heureux temps qu'avec les nôtres. Nous ne nous objectons pas à ce que les cours de justice imposent des pénitences à ces plaideurs scandaleux; mais il est fort douteux que nos juges exercent dans ce sens la discrétion que leur laisse l'article 156.

Il faut pourtant être juste. Dans l'état social et religieux où se trouve le pays, il était peut-être difficile d'introduire dans le Code les peines prononcées par l'ancien droit contre les mariages irréguliers et informes; les croyances religieuses de certaines congrégations s'y opposaient; et c'est sans doute par un sentiment de respect bien légitime pour ces croyances, que les codificateurs n'ont pas prononcé la nullité absolue des mariages célébrés en violation des formalités prescrites, et qu'ils ont permis au tribunal de décider suivant les circonstances. Supposons que la doctrine des Presbytériens ne s'oppose pas à la célébration de leur

mariage par un ministre d'une autre congrégation; il serait injuste de déclarer ce mariage nul; et tels sont les inconvénients que le législateur semble avoir voulu prévenir, en déclarant que les mariages, célébrés contrairement aux règles générales, ne sont pas nuls de plein droit, mais qu'ils sont jugés suivant les circonstances de chaque cas, c'est à-dire, suivant les règles de l'église des parties. En présence de la déclaration des codificateurs que leur volonté a été de maintenir les usages et coutumes de chaque congrégation religieuse, que tout ce qu'ils ont voulu ça été d'empêcher les mariages clandestins, l'on ne peut raisonnablement donner une autre interprétation à l'article 156. Que servirait au législateur de prescrire des règles pour la célébration des mariages, si on pouvait les violer impunément? Peut-on soutenir qu'en face de tous ces articles, qui confient exclusivement au ministre des parties le soin de l'exécution d'un acte aussi important que le mariage, celui de deux catholiques, par exemple, célébré par une ministre protestant en vertu d'une licence, peut être valide? L'autorité de Pothier Nos. 361, 362, 451, que les codificateurs invoquent à tort comme justifiant leur législation, doit néanmoins lui servir de règle d'interprétation. Elle est un avertissement pour le tribunal que, pour les catholiques, il n'a pas de discrétion à exercer, et qu'il doit maintenir les principes. Il peut pourtant se rencontrer des espèces où il serait plus équitable d'ordonner une nouvelle célébration. Il serait peut-être parfois trop rigoureux de déclarer simplement nul un mariage célébré de bonne foi, en face de l'église paroissiale ou même dans une chapelle privée, par un prêtre qui n'est pas le curé des parties, lors que ce mariage a été précédé de bans, suivi d'une longue cohabitation, et qu'il n'est attaqué que par les parents des parties et sur des motifs légers. Dans un tel cas, il y aurait lieu de mettre en pratique le principe consacré par l'arrêt rapporté au No. 451 de Pothier et aussi par plusieurs précédents anglais, cités par le Juge Wilies dans la cause de *Beamish* vs. *Beamish*, et d'ordonner la réhabitation, c'est-à-dire, une nouvelle célébration. Enfin, il ne peut y avoir de doute que le code n'a pas validé les mariages des catholiques célébrés par des ministres protestants. C'est aux tribunaux qu'il a confié le soin d'exécuter ses volontés, qui sont d'empêcher les mariages clandestins. Il est à espérer qu'ils n'abuseront pas du pouvoir que leur attribue l'art. 156, et que dans les décisions des divers cas que se présenteront devant eux, ils se rappelleront cet article fondamental du code, qui dé-

clare que, " lorsqu'une loi présente du doute ou de l'ambiguité, " elle doit être interprêtée de manière à lui faire remplir l'inten- " tion du législateur et atteindre l'objet pour lequel elle a été " passée." (art. 12.)

Le défaut de publication ou de dispense de bans ou de licence, ne rend pas le mariage nul ; il ne donne ouverture qu'à une amende de $500 (art. 157 et 158). Les cofiçateurs observent à propos de ces articles que " leurs dispositions ont paru à la majorité des " commissaires utiles pour obtenir des fonctionnaires l'exécution " des importants devoirs que leur impose la loi " (page I.) Mais si les publications de bans ont pour objet de fournir à ceux qui ont droit de s'opposer au mariage, l'occasion de le faire, si tout ce qu'ont voulu les commissaires, a été d'empêcher les mariages clandestins (Rapport 2, p. p. xiiv, xivi), pourquoi n'ont-ils pas conservé la règle qui, suivant l'ancienne droit, frappait de nullité les mariages célébrés sans bans, ni dispense, dans un but de clandestinité, c'est-à-dire, sans l'intention de les faire suivre d'une cohabitation publique comme mari et femme. Loin d'assurer de la part des fonctionnaires l'exécution de leurs importants devoirs, l'article 157, en retranchant la formalité des bans comme condition au moins importante, ouvre la porte à bien des abus, à nombre de fraudes.

XI.

DES MARIAGES MIXTES.

D'après ces données, il est facile de reconnaître les règles qui devront gouverner les mariages mixtes. Dans ce cas, comme l'un des membres appartient soit à l'église anglicane, soit à une église dissidente, suivant le cas, et l'autre à l'Eglise catholique, le mariage peut être célébré par le prêtre ou le ministre de l'une ou l'autre des parties ; car comme ce dernier a juridiction sur le membre de sa congrégation, et que cette juridiction est indivisible en matière de mariage, *par droit de suite pour ainsi dire*, il a juridiction sur la partie étrangère. Néanmoins, après comme avant le Code, les ministres dissidents n'ont d'autorité que sur les membres de leur église ; ils n'ont jamais pu célébrer que les mariages mixtes de ces membres.

Ainsi un ministre dissident ne peut valablement marier un catholique avec une anglicane ; et de même encore un ministre presbytérien, par exemple, ne peut marier un luthérien avec une anglicane, ou une méthodiste. Ces propositions ne nécessitent

aucun commentaire ; elles forment le droit commun de l'Angleterre et ne sont d'ailleurs que la conséquence logique des principes que nous avons posés plus haut.

Pothier, au No. 250, nous apprend à ce sujet que la plus ancienne loi qui ait prononcé la nullité des mariages des catholiques avec les hérétiques en général, de quelque secte qu'ils fussent, fut le 72e canon du concile de Constantinople en 692 ; mais que l'Eglisa Latine refusa d'y adhérer, nonobstant les ordres et les menaces de l'empereur Justinien II. Puis il ajoute : " Ce canon " 72, qui déclarait nuls les mariages des fidèles avec les hérétiques, " et qui en cela était contraire à sa discipline, n'a pu y être reçu.

" Depuis on a coutume de regarder les mariages des fidèles " avec les hérétiques comme dangereux, et en cela mauvais, même " comme défendus ; mais je ne connais aucune loi séculière en " France, ni aucun canon, qui les ait déclares nuls avant l'Edit " de Louis XIV, au mois de novembre 1680." Cet édit n'a jamais été en force parmi nous, faute d'enrégistrement au Conseil Supérieur de Québec.

Le code ne dit pas un seul mot des mariages mixtes. Néanmoins comme la jurisdiction des prêtres ou ministres dans les ordres sacrés semble être limitée aux membres de leur église respective, ne faudrait il pas décider de même à l'égard de leur juridiction sur les mariages mixtes ?

En Angleterre et en Irlande, les mariages mixtes ne peuvent être célébrés par un prêtre catholique ; et dans ces circonstances, on y a pour habitude de se marier devant un ministre de l'Eglise d'Angleterre, ou devant l'officier civil, le *superintendent registrar*, pour rencontrer les exigences des actes du Parlement, et ensuite devant le prêtre de l'Eglise de Rome pour satisfaire la conscience de la partie catholique. En Irlande, la prohibition, faite aux prêtres par la 19e Geo. 2, c. 13, s. 1ere, de célébrer le mariage d'un ou de deux protestants, qui n'ont pas embrassé la foi catholique une année avant la célébration. a de nos jours cruellement frappée une dame de distinction et d'une grande vertu ; nous faisons allusion à l'infortunée Mlle Langworth (catholique), dont le mariage, contracté avec le notoire major Yelverton (anglican) d'abord en Ecosse par paroles de présent, mais non suivi de la cohabitation, puis renouvelé en Irlande devant un prêtre catholique, pour donner suite au mariage écossais, fut déclaré nul, parce que la preuve du mariage en Ecosse fut considérée insuffisante et aussi parce que le mariage en Irlande avait été célébré

en violation du statut de George II. Cette cause célèbre, qui fut décidée par la Chambre des Lords le 31 décembre 1864, est rapportée au 10e volume du Juriste Anglais, page 1215.

Pour des raisons que nous avons déjà signalées, ces prohibitions établies par une législation spéciale ne s'appliquent qu'au pays qui l'a passée, et non aux colonies, où le droit canon est la loi commune; et le Conseil Privé, qui, le 10 juillet 1867, déclara valide le mariage de M. Scott, de St. Eustache, avec Dlle Paquet, célébré par un prêtre catholique, n'a fait que suivre la jurisprudence constante et uniforme des tribunaux anglais. M. Scott était presbytérien et Mlle. Paquet appartenait à l'église catholique. (9 L. C. J. 289.) On ne songea même pas à attaquer le mariage sous ce rapport.

XI.

DU MARIAGE DES PRÊTRES ET RELIGIEUX. DE LA MORT CIVILE.

On demandera peut être ici si le mariage des prêtres et des religieux morts civilement, contracté après abjuration, est valide? Cette question demanderait de longs développements, dans lesquels nous n'avons ni le temps ni la volonté d'entrer. Néanmoins, quelques instants d'étude suffiront pour nous engager à considérer ces mariages comme absolument nuls. Nous avons vu que les lois françaises sur le mariage n'ont pas été changées, mais qu'au contraire, elles ont été maintenues par le Parlement Impérial. Or, rien ne plus clair dans l'ancien droit français comme dans le droit anglais avant la Réforme, que l'empêchement dirimant résultant des vœux solennels et des ordres sacrés. Cet empêchement est aussi absolu que celui qui résulte du défaut de raison, de l'impuissance ou d'un mariage existant, parce que pour les religieux, il emporte la mort civile, et que pour les prêtres, il s'attache à la personne même. C'est pourquoi, même en embrassant le protestantisme, le religieux ou prêtre n'est pas dégagé de son incapacité, ce qui ne se produirait pas si l'empêchement était purement relatif. Les précédents ne manquent pas dans l'ancienne jurisprudence française, où de tels mariages furent déclarés nuls et abusifs. Pothier, au no. 117 de son "Traité du Contrat de mariage," en cite un du parlement de Paris de 1640, et Guyot, vo-*Empêchemens de mariage*, en mentionne au autre du 17 juillet 1630. "La raison est," dit Pothier, (loc. cit.) "que la discipline de l'Eglise qui défend le "mariage des personnes constituées dans les ordres sacrés, à

" peine de nullité, ayant été reçue et adoptée en France par la " Puissance Séculière, la défense du mariage de ces personnes, à " peine de nullité, est une loi de l'Etat, aussi bien que de l'Eglise, " d'ou il suite que ce prêtre, dans qui la profession du calvinisme " n'avait pas effacé sa qualité de prêtre, étant demeuré sujet aux " lois de l'Eglise, n'avait pu valablement contracter mariage " contre les lois de l'Etat, qui défendent le mariage des prêtres." (Voir aussi no. 26 du même traité.)

On objecte que le droit public moderne de l'Angleterre répudie les empêchemens résultant des vœux solennels et des ordres sacrés.

D'abord, est-il bien vrai que les lois anglaises concernant le mariage des prêtres, fassent partie du droit public et s'étendent aux colonies? On sait qu'avant la Réforme, l'empêchement produit par la profession religieuse, existait en Angleterre comme en France, non pas en vertu de statuts spéciaux, mais par la loi canonique. " With respect," disait le juge Willis, dans la cause de *Beamish* vs. *Beamish*, " to the regular clergy, professed and entered in a house of religion in England, their condition was, probably from a time before the conquest up to the reign of Henry VIII, considered, for all purposes of personal benefit, as that of civil death, and their mariages, contracted after profession, were, according to the better opinion, absolutely void." A l'égard du mariage des prêtres, il était également défendu. On peut juger de l'horreur qu'il inspirait, en lisant les lignes suivantes, extraites d'un document du 10e siècle, publié dans les " Ancient Laws," vol. 2, p. 335: " A priest's wife is nothing but a snare of the Devil, and he who is ensnared thereby on to his end, he will be seized fast by the Devil, and he also must pass afterwards into the hands of fiends, and totally perish."

Ce n'est que par des lois particulières, émanant du Parlement, (par l'acte 2 et 3 Ed. vi, c. 21, et par la 1re Jacques i, ch. 25,) que le droit commun a été changé et qu'il a été permis aux évêques, prêtres, diacres et à tous les autres chrétiens, de se marier à discrétion. Mais ces statuts n'ont pas d'autorité en dehors de la Grande-Bretagne pour qui ils ont été passés. Il est conforme aux principes et à la jurisprudence qu'il nous a fallu si souvent invoquer, de maintenir que le droit commun est celui qui insensiblement est entré dans les mœurs et les lois d'un pays, et que ce droit commun, en l'absence de dispositions spéciales pour les colonies, seul y a force. (Blackstone, vol. 1, pag. 353, note (26), éd. am. 1849; *Lautour* vs. *Teesdale* et uxor, 8 Taunton's R.

830; *Dalrymple* vs. *Dalrymple*, 2 Haggard's C. R. 54; 4 Eng. Eccl. R. 485; *Yelverton* v. *Langworth*; *Beamish* v. *Beamish*. Ainsi donc même par le droit commun anglais en force dans les colonies, le mariage des religieux et des prêtres est prohibé.

Par l'Acte de Québec, notre clergé catholique a été maintenu dans tous ses droits et priviléges; et est-il pour lui un droit plus essentiel que celui d'exiger les vœux solennels de la part de ceux qui veulent en former partie? Depuis un siècle ces vœux sont sans cesse prononcés, les ordres conférés par tout le pays; et quand bien même ils n'y seraient pas autorisés par des lois spéciales, ne pourrait-on pas à bon droit soutenir que les autorités ecclésiastiques jouissent aujourd'hui du droit de recevoir ces vœux et de conférer ces ordres en vertu de cette possession et de cette prescription centenaires? Et puis, si la loi permet ces vœux et ces ordinations, comment peut-elle ne pas en reconnaître les effets civils?

En France, depuis la Révolution, où, comme en Angleterre, les lois ont séparé le contrat civil du sacrement de mariage, où en un mot le mariage a été sécularisé, l'empêchement dirimant résultant de la profession religieuse—répudié sous la République et aux primières années de l'Empire,—a fini par être confirmé par les tribunaux. (Répertoire de Sirey, vo. mariage, No. 39, où l'on trouve une foule de décisions et d'autorités.) Cette jurisprudence est appuyée sur le fameux concordat de Bonaparte qui, comme l'acte de Québec, protège tous les cultes, et permet tout simplement le libre exercice de la religion catholique. "Attendu," dit l'arrêt le plus récent de la Cour de Cassation (23 février 1847) "qu'il "résulte des articles 6 et 26 de la loi organique du concordat du "18 germ. an. 10, que les prêtres catholiques sont soumis aux "canons qui alors étaient reçus en France, et par conséquent, à "ceux qui prohibaient le mariage aux ecclésiastiques engagés dans "les ordres sacrés;—attendu que le code civil et la charte ne "renferment aucune dérogation à cette législation spéciale, l'arrêt "attaqué, en interdisant le mariage dont il s'agit, n'a violé aucune "loi, et s'est conformé, au contraire, à la législation existante;—"Rejette, etc."

Enfin, les codificateurs, s'appuyant tant sur l'autorité de Pothier que sur celle de Blackstone, se sont prononcés en faveur de la discipline de l'Eglise Romaine. L'article 127 dit: "Les autres "empêchements, admis d'après les différentes croyances religieuses, "comme résultant de la parenté ou de l'affinité, *et d'autres causes*,

" restent soumis aux règles suivies jusqu'ici dans les diverses " églises et sociétes religieuses."

L'article 34 est peut-être encore plus précis: " Les incapacités " résultant, quant aux personnes qui professent la religion catho- " lique, de la profession religieuse par l'émission de vœux solennels " et à perpétuité, dans une communauté religieuse, reconnue lors " de la cession du Canada à l'Angleterre, et approuvée depuis, " restent soumises aux lois qui les réglaient à cette époque."

L'article 70 a aussi quelque rapport au sujet: " Dans toute communauté religieuse, où il est permis de faire profession par vœux solennels et perpétuels, il est tenu deux registres, etc."

Remarquons bien qu'aux termes de l'article 34, la profession religieuse ne peut avoir lieu que dans les monastères " reconnus lors de la cession et approuvés depuis," savoir: l'Hôtel-Dieu, l'Hôpital-Général ou les Sœurs Grises, les Ursulines et les Dames de la Congrégation. Il paraîtrait que les Dames de l'Hôtel-Dieu et les Ursulines de Québec seules font des vœux solennels et à perpétuité, et sont, par conséquent, seules frappées de mort civile.

Les Dames du Sacré-Cœur, ayant été établies durant ce siècle, quoiqu'incorporées par la législature (7 Vict. c. 57), ne font donc pas profession religieuse dans le sens de la loi; et nous ne voyons pas sur quoi est appuyé le sentiment de ceux qui enseignent que ces religieuses sont mortes civilement. L'ordre des Jésuites ayant enfin été reconnu par la Législature Provinciale, les vœux qu'ils prononcent emportent la mort civile.

L'article 34 est un amendement suggéré par la législature, qui n'a pas cru que l'article proposé par les Commissaires (art. 20 du 2e rapport liv. 1er.) exprimait la loi existante; cet article admettait la profession religieuse dans tout ordre reconnu et approuvé, où se font des vœux solennels et à perpétuité; et ainsi il s'appliquait non-seulement aux communautés reconnues lors de la cession, mais encore à celles qui furent érigées sous l'autorité du gouvernement actuel. La législature a considéré cette doctrine comme contraire au droit public anglais, qui s'oppose à la création de corps religieux, dont les vœux emportent la mort civile. La clause 5e de l'acte de Québec permet le libre exercice de la religion catholique; elle conserve à son clergé la jouissance de ses dus et droits accoutumés; et les codificateurs sont allés puiser à cette source le principe qu'ils consacraient dans leur Rapport. Les termes clairs et restrictifs du code, sans tout-à-fait

rejeter leur opinion, ont levé tout doute sur la question. Il est difficile de s'expliquer les raisons qui ont donné lieu à la distinction qu'il introduit; car s'il est contre les bonnes mœurs et l'ordre public de créer des ordres qui font profession religieuse, il doit être également déshonnête d'approuver de semblables corps, quoique créés sous l'empire d'un autre gouvernement. Ce ne peut donc être que par respect pour les droits acquis des communautés établies sous l'autorité du Roi Très-Chrétien, que notre Parlement a consenti à faire le sacrifice de sa logique.

Doit-on conclure de l'article 34 que l'empêchement de mariage, résultant de le profession religieuse, n'a lieu que pour les communautés reconnues lors de la cession, approuvées depuis et prononcés des vœux perpétuels? Il faut avouer qu'il existe une contradiction remarquable entre cet article et l'article 127. D'un côté, nous avons la déclaration expresse du législateur qu'il n'y a que les incapacités, résultant de la profession religieuse dans de telles communautés, qui continuent à exister (art. 34); et d'un autre côté, par l'article 127, "les autres empêchements, "admis d'après les différentes croyances religieuses, comme résul- "tant de la parenté ou de l'affinité et d'autre causes, restent "soumis aux règles suivies jusqu'ici dans les diverses églises et "sociétés religieuses." Les expressions "et autres causes," que les Commissaires Caron et Morin recommandèrent dans leur rapport supplémentaire, au lieu des mots, "et autres degrés," que contenait l'article proposé, "pour lever tous doutes sur l'intention de laisser le sujet dans l'état où il est aujourd'hui," ont-elles l'effet de frapper d'inhabileté à contracter mariage, les religieux des communautés établies sous l'autorité de notre constitution? L'article 34 est un amendement de la législature, tandis que l'article 127 est l'œuvre des commissaires: et il suffit de mentionner ce fait pour s'apercevoir qu'on a retranché et modifié d'un côté, sans s'occuper de concilier les autres parties de l'ouvrage avec ces modifications. Quelle sera la conséquence de ce regrettable état de notre législation? Ne semble-t-il pas exact de soumettre la teneur de l'article 127 aux termes restrictifs de l'article 34 et de décider qu'il n'y a que les communautés, faisant profession religieuse emportant la mort civile, c'est-à-dire, celles existant lors de la cession, qui produisent l'empêchement dirimant de mariage dont nous parlons? Peut-on arriver à une autre conclusion, si l'on consulte le droit français, ou le droit commun anglais, comme raison écrite, règle interprétative?

L'ancienne jurisprudence française et anglaise ne nous montre-t-elle pas l'incapacité du religieux, comme n'étant que la conséquence de son état de mort civile? Nous ne voulons que faire part de nos impressions sur cette question, sans avoir la prétention de la résoudre.

XII.

DU MARIAGE DU BEAU-FRERE ET DE LA BELLE SŒUR, ETC.—DROIT DE DISPENSE DU PAPE ABOLI.

L'interprétation de l'article 127 donne encore naissance à une autre difficulté qu'il est encore plus important de signaler; elle se rapporte au droit de dispense de l'affinité qui existe entre un beau-frère et une belle-sœur, un neveu et la veuve de son oncle, droit qui a toujours été reconnu comme appartenant au Pape seul. Pothier, No. 270, cite plusieurs exemples de ces dispenses et divers arrêts des Parlements, qui les confirmèrent.

Les articles 125 et 126 déclarent ce qui suit: "En ligne collatérale, le mariage est *prohibé* entre le frère et la sœur légitimes "ou naturels, *et entre les alliés au même dégré*, aussi légitimes "ou naturels.—Le mariage est aussi prohibé entre l'oncle et la "nièce, la tante et le neveu," le tout à peine de nullité (art. 14.)

Les codificateurs déclarent avoir amendé l'art. 127 "pour lever tous doutes sur l'intention de laisser le sujet dans l'état ou il était avant le code." Alors pourquoi la prohibition des articles 125 et 126? Car sans elle la validité du mariage des parties que nous avons nommées, serait abandonnée à la discrétion des tribunaux. Mais, dira-t on, l'art. 127 est venu apporter un juste tempérament à ces clauses prohibitives. Il est important ici de placer de nouveau le texte entier sous les yeux du lecteur:

"Les *autres* empêchements, admis d'après les différentes "croyances religieuses, comme résultant de la parenté, de l'affi-"nité et d'autres causes, restent soumis aux règles suivies jus-"qu'ici dans les diverses églises et sociétés religieuses.

"Il est de *même* quant au droit de dispenser de *ces empêche-"ments*, le quel appartiendra tel que ci-devant à ceux qui en ont "joui par le passé."

Ces termes, les AUTRES *empêchements*, etc., ne sont ils pas exclusifs des empêchements établis par les articles précédant immédiatement? Ne veulent-ils pas dire que sous tous les rapports, excepté dans les cas déjà spécialement prévus, les anciennes règles gouverneront? Ne faut-il pas inférer le même sens de

ces autres expressions: *Il en est de même*, quant au droit de dispenser de *ces empêchements?* etc. Malgré ces dispositions, l'Honorable juge Loranger soutient que le Pape a encore le pouvoir de dispenser de l'affinité au premier et au deuxième dégré, parce que, dit-il, il existait dans l'ancien droit français qui, comme les articles 125 et 126, prohibait ces mariages. Nous ne pouvons nous ranger à son sentiment.

Ici peut néamoins se présenter une question. L'article 127, qui a aboli le pouvoir du Pape d'accorder dispense de ces mariages, est-il constitutionnel? Ce pouvoir en effet découle non seulement de la clause 8e de l'Acte de Québec, qui veut que les Canadiens jouissent de leurs usages et coutumes jusqu'à ce qu'ils soient changés par la Législature Provinciale, mais encore de la clause 5e qui accorde le libre exercice de la religion catholique et maintient son clergé dans ses dûs et droit accoutumés, sans déclarer que le Parlement Colonial pourra innover à cette disposition. L'article 127 est il une violation de l'Acte Impérial? C'est en effet un principe incontestable du droit public anglais que les actes du Parlement de la Grande Bretagne ne peuvent être rappelés, ni altérés par les législatures des colonies. De même qu'il a fallu l'autorité du Parlement Anglais pour substituer à l'Acte d'Union le nouveau système fédéral qui nous régit actuellement, de même aussi ne fallait-il pas l'intervention expresse de ce même parlement pour modifier les droits des catholiques acquis en vertu de l'Acte de Québec, section 5e? Peut-on nier que le rappel du droit de dispense en question ne soit un attentat au libre exercice de l'Eglise de Rome, un déni des droits accoutumés de son clergé, auxquels ne peut toucher une législature coloniale, sans un pouvoir exprès. Ce pouvoir a été donné au Parlement actuel du Canada; mais ne peut-on mettre en doute que la Législature de la ci-devant Province du Canada ou de Québec l'ait jamais possédé?

XIII.

DU MARIAGE CONTRACTÉ A L'ÉTRANGER EN FRAUDE EN NOS LOIS.

Les lois concernant le mariage, étant des statuts personnels, suivent la personne; et elles ne cessent de l'obliger que lorsqu'elle a de bonne foi acquis un nouveau domicile dans un pays étranger (C. C. art. 6.) Suivant cette règle établie par la

jurisprudence presqu'universelle des nations, le mariage célébré aux Etats-Unis par des personnes domiciliées dans le Bas-Canada, en fraude des lois du Bas-Canada, mais suivant celles des Etats Unis, est-il valide en Bas-Canada? La Cour d'Appel, malgré toutes ses réserves, semble avoir décidé cette question dans l'affirmative, dans la célèbre cause de *Languedoc* vs. *Laviolette*, et malgré notre respect pour les décisions de la première cour du pays, nous ne pouvons admettre la doctrine qu'elle a sanctionnée dans cette espèce. Nous préférons les motifs du dissentiment de l'hon. juge Aylwin, comme exprimant les vrais principes qui gouvernent la matière: "On ne doit certainement pas, disait le "savant juge, envisager ces mariages ici comme en Angleterre, "mais les juger suivant les lois du Bas-Canada, qui diffèrent des "lois de l'Angleterre.....Comment cette cause doit-elle être de- "cidée sous les lois du Bas-Canada? Les Appelants étaient "tenus de célébrer leur mariage devant leur propre curé..... "Je ne puis comprendre qu'une mineure allant aux Etats-Unis, "et y séjournant une demi-heure, puisse par là se soustraire aux "lois de ce pays et s'allier à un homme sans aveu, et le faire "entrer ainsi dans une famille, qui jamais n'aurait voulu l'ad- "mettre." On peut dire de suite, sans crainte de se tromper, que cette opinion est conforme aux sentiments des premiers juris-consultes de tous les pays; nous pouvons même affirmer que le Barreau Canadien n'a jamais considéré la décision de la Cour d'Appel comme une autorité sur la question; et si jamais elle se présente devant le même tribunal, il ne faudra pas s'étonner de la voir décidée dans le sens de son Honneur M. le juge Aylwin. Hâtons-nous d'ajouter que le Code a consacré ce sentiment par l'article 135: "Le mariage célébré hors du Bas-Canada entre "deux personnes sujettes à ses lois, ou dont l'une seulement y "est soumise, est valable, s'il est célébré dans les formes usitées "au lieu de la célébration, pourvu que les parties n'y soient pas "allées dans le dessein de faire fraude à la loi." Il est inutile d'observer que la cause de *Languedoc* vs. *Laviolette* n'est pas citée comme autorité au bas de l'article. (Voir aussi l'article 6, par. 6.)

Le Haut-Canada étant considéré comme pays étranger au Bas-Canada, quant à ses lois et à sa jurisprudence locale, la même règle s'applique.

Nous ne pouvons clore sur ce sujet, sans signaler la cause récente de *Brook* vs. *Brook* (7 Jur. N. S. 422), où le mariage de

Brook avec la sœur de sa première femme, tous deux domiciliés en Angleterre, valide en Danemark où il fut célébré, fut déclaré nul en Angleterre.

XIV.

DU DIVORCE D'UN MARIAGE CANADIEN A L'ÉTRANGER.

En face du texte de l'art. 135, que doit-on penser de la dissolution des mariages Canadiens en pays étranger? Cette question a aussi une grande importance pratique. S'il n'est pas rare de voir un mineur, ou un beau-frère et une belle-sœur, prendre le chemin des Etats-Unis, on y rencontre aussi sur cette terre de la liberté, des canadiens uniquement occupés du divorce de leur mariage, contrairement à la loi du Canada, qui déclare tout mariage indissoluble. Il n'y a aucun doute que les principes, que nous avons signalés, frappent de nullité ces dissolutions de mariage, comme étant non-seulement en fraude de nos lois, mais encore contraires à nos règles de morale et d'ordre public. Les recueils de jurisprudence ne sont pas sans nous offrir des précédents. A une époque aussi peu éloignée que 1845, et dans un pays comme la France, où la législation a sécularisé le mariage et proclamé la liberté religieuse dans le sens large du mot, nous en trouvons un de la Cour de Cassation:

"Attendu, dit l'arrêt, que s'il est permis aux citoyens fran-
"çais de se faire naturaliser en pays étrangers, et même d'y
"amener leurs femmes françaises pour les y soumettre aux
"lois des pays qu'ils adoptent, cette règle qui tient à l'indis-
"solubilité du mariage, reçoit exception lorsque le mari ne fait
"usage de l'autorité matrimoniale que pour voir rompre les liens
"conjugaux, et dépouiller sa femme de ses droits, en la privant
"de l'appui et de la protection qu'il lui avait promis, et qu'il
"lui devait d'après les lois françaises.

"Attendu que la Cour Royale a reconnu et déclaré, en fait,
"que Desprades avait employé des manœuvres frauduleuses pour
"se dégager des liens dans lesquels le retenaient les lois fran-
"çaises, et porter atteinte aux droits de sa femme et de ses en-
"fants.

. . . . . .

"Attendu que le français, en se faisant naturaliser en pays
"étranger, et en adoptant des lois nouvelles, ne peut cependant
"se soustraire aux engagements qu'il a précédemment contractés
"en France, et mépriser les droits acquis aux tiers, etc."—(Sirey

1846, partie 1re, page 99; voir aussi Arrêts de Paris du 30 août 1824, (S. 256, 2, 203), et 28 mars 1843, (S. 43, 2, 562.)

En Angleterre, une doctrine semblable parait prévaloir. On rapporte que Lord Brougham, sur l'autorité de la célèbre cause de Lolley, aurait dit: "If it has not validly and by the highest "authorities in Westminster Hall been holden that a foreign "divorce cannot dissolve an English marriage, then nothing "whatever has been established." *McCarthy* vs. *De Caix*, 2 Russ. et Mylne 614; *Lolley's Case*, 1 Russ. & Ryan's Cr. Cas, 236; *Conway* vs. *Lyndsay*, 1 Dow, R. 124; *in re* Wilson, Jurist, 1861–1865, vo. *marriage*, Part iv., p. 85; *Pitt* vs. *Pitt*, 10 Jur. N. S. 735.

Il est remarquable que tous ces précédents, dont plusieurs sont de la Chambre des Lords, sont tous unanimes dans le même sens; et les rapports des cours de justice ne nous offrent pas une seule décision contraire.

En Ecosse et aux Etats-Unis, où le divorce existe depuis longtemps, la règle opposée a été admise.

"But this rule," observe Redfield sur Story (Conflict of Laws, § 230 b,) "must receive this qualification, that it be not extended beyond transactions occurring while the parties had a fixed and permanent domicil within that forum.....For although it has been claimed as the rule of the Scottish Courts, and the courts of some of the American States have acted upon statutes conferring jurisdiction, to grant divorces for causes accruing without the jurisdiction, there is no general principle of universal law which could fairly be claimed to justify such a practice. And the Judges of Scotland have indeed entered a most vehement protest against any such construction of their law, the tendency of which was to make that country the arena for a most discreditable traffic in divorces, for causes accruing throughout all those states and countries where the facilities for such divorce were more restricted.

§ 230 c. "It would seem that no argument could be requisite to convince every one of the unreasonableness of such a construction. The causes of divorce allowed in any country are an offence against the peace and the policy of the state where committed, and to be estimated by the laws of that state only. It would be an intolerable perversion, that an act, which by the law of the state where committed was no cause of divorce, should by the removal of the parties to another state where the law was

different, become sufficient to produce a dissolution of the married relation. Upon that principle, incompatibility of temper, or slight irregularities of conduct, of which the municipal law takes no cognizance in the place where they occur, would, by the transfer of the domicil of the parties to a place where greater relaxation of the marriage tie obtains, as, to some of the American or European continental states, become just cause of divorce *a vinculo;* or, what is the same thing in principle, by a change of the law of the state, where the parties are all along domiciled, that which was innocent at the time it occurred, might be made the occasion of the severest penalty and forfeiture, in the dissolution of a relation the most sacred and the most valuable of all earthly bonds."

Cependant, nous connaissons un cas où un tribunal d'un des Etats de l'Ouest accorda une sentence de divorce, non seulement pour sévices et causes qui avaient eu lieu à Montréal, mais sur la simple production d'une copie de la preuve qui y avait été faite sur une action en séparation de corps. Nous pourrions donner le nom de cette femme heureuse qui aussitôt après convola avec un jeune homme de Montréal qui n'avait cessé de l'entourer de ses bonnes attentions durant l'instance en séparation.

Il faut pourtant être juste. Nous sommes heureux de pouvoir répéter avec un jurisconsulte américain distingué: "that this painful disregard of the most vital principles of international jurisprudence has not yet been adopted or countenanced in those States whose decisions are regarded as authority both at home and abroad." (Voir les précédents cités dans Story, Conf. of Laws, éd. 1865, §230 d; Wheaton, International Law, §151, éd. 1866.) Il n'y a que quelques jours encore la presse américaine nous apprenait qu'un juge avait refusé un divorce à un Canadien qui paraissait s'être présenté en fraude de nos lois.

Comment nos cours de justice considèreront-elles ces divorces? Porteront-elles la rigueur aussi loin qu'en France et en Angleterre, et décideront-elles que, dans aucune circonstance, le mariage contracté en Bas-Canada, ne peut être dissout par une sentence de divorce rendue en pays étranger? Ou bien, seront-elles d'opinion, comme en Ecosse et aux Etats-Unis, que le divorce de deux canadiens de bonne foi domiciliés à l'étranger, obtenu pour des causes y naissant, est effectif et valable partout?

Il est bien vrai que l'article 6 du code déclare que "l'habitant "du Bas-Canada, tant qu'il y conserve son domicile, est régi;

" même lorsqu'il en est absent, par les lois qui règlent l'état et " la capacité des personnes; mais qu'elles ne s'appliquent pas à " celui qui n'y est pas domicilié, lequel y reste soumis à la loi " de son pays, quant à son état et sa capacité."

Par cet article, le Canadien, naturalisé ou non, pourvu qu'il soit domicilié dans un autre pays, peut bien contracter mariage suivant les lois de ce pays, quelque contradictoires qu'elles soient avec celles du Bas-Canada; il peut même faire tout ce que la loi étrangère lui permet, eu égard à son " état et sa capacité " dans le pays étranger; mais il ne peut changer vis-à-vis du Canada la nature des contrats qu'il y a délibérément et librement faits; il n'y peut surtout rien faire qui aurait l'effet de valider un acte que répudient la morale et l'ordre public de ce pays, aussi bien que la loi de Dieu telle que nous la comprenons. La Législature Canadienne, en maintenant l'indissolubilité du mariage, a consacré la doctrine chrétienne, qui considère le divorce comme contraire aux Saintes Ecritures; et pour nous servir du langage d'un des juges les plus éminents de l'Angleterre sur une question analogue, Lord St. Leonard, " we do not admit any foreign law to be in force here, when it is opposed to God's law, according to our view of that law." (*Brook* vs. *Brook*, 7 Jur. N. S. 422.) La jurisprudence uniforme et constante de l'Angleterre jusqu'à ce jour, au moins jusqu'à l'époque où l'Angleterre abandonna le dogme de l'indissolubilité du mariage, suffirait pour enlever tout doute, si la saine raison ne pouvait seule convaincre. Enfin, l'autorité des tribunaux de la France, qui elle aussi accepta un jour le divorce comme un enfant né de la Révolution qu'il fallait alors adopter, mais qu'elle ne tarda pas à désavouer (1816) malgré les remontrances et les cris de la philosophie, l'autorité, disons nous, des cours et des jurisconsultes de la France nous commande de décider avec eux, que le pays, qui admet l'indissolubilité du mariage, ne peut reconnaitre aucune force étrangère capable de le dissoudre. " Quod Deus conjunxit, homo non separet."

Avant de clore sur ce sujet, il n'est pas hors d'intérêt de faire connaître le raisonnement des juristes anglais, que résume Story, *Conflict of Laws*, §225, dans les termes suivants: " The law of the place where the marriage is celebrated, furnishes a just rule for the interpretation of its obligations and rights, as it does in the case of other contracts, which are held obligatory according to the *lex loci contractûs*. It is not just that one party should

be able at his option to dissolve a contract by a law different from that under which it was formed, and by which the other party understood it to be governed. If any other rule than the *lex loci contractûs* is adopted, the law of marriage, on which the happiness of society so mainly depends, must be completely loose and unsettled; and the marriage state, whose indissolubility is so much favored by Christianity, and by the best interests of society, will become subject to the mere will, and almost to the caprice of the parties as to its duration. The courts of the nations whose laws are most lax upon this subject will be constantly resorted to for the purpose of procuring divorces; and thus, not only frauds will be encouraged, but the common cause of morality and religion be seriously injured, and conjugal virtue and parental affection become corrupted and debased. Thus, a dissatisfied party might resort to one foreign country, where incompatibility of temper is a ground of divorce; or to another, which admits of divorce upon even more frivolous pretences, or upon the mere consent of both, or even one of the parties." Voir aussi "English Law Magazine," vol. 6, p. 32.

Ainsi donc, le divorce d'un mariage Canadien, obtenu à l'étranger, ne produit aucun effet en Bas-Canada, quand bien même les parties y auraient leur domicile; à plus forte raison si toutes deux, ou l'une d'elles seulement, n'étaient pas *bonâ fide* domiciliées dans la juridiction de la Cour de Divorce, ou encore si les sévices n'y avaient pas été commis. (Voir Story, Conf. of Laws, par Redfield, 1865, § 230 a *et seq.*)

XV.

DU DIVORCE PAR LE PARLEMENT.

Il ne nous reste plus qu'à dire un mot du divorce obtenu en Parlement, pour cause d'adultère de la femme et non pour celui du mari. On semble admettre qu'il n'est pas raisonnable de voter un bill de divorce entre deux catholiques, comme étant contraire aux règles de l'eglise de Rome, que conservent dans toute leur intégrité le Traité de Paris et l'Acte Impérial de 1774. Mais il nous semble qu'on doit aller plus loin. Le Parlement Fédéral a, il est vrai, la force physique de dissoudre les mariages des protestants et même ceux des catholiques. Mais l'exercice de ce pouvoir humain, le recours à cette force n'est-elle pas une violence sur les droits acquis des époux, une

violation des principes d'ordre social, un attentat à la loi de Dieu? Nous ne pouvons nous rendre compte de la doctrine, qui prévaut trop généralemeut de nos jours dans les églises et les pays protestants, que le divorce peut-être accordé pour certaines causes. Quel est, en effet, le contrat des conjoints aux yeux mêmes des protestants? Nous le trouvons ainsi couché dans les *Prayer Books* protestants: "You," dit le ministre s'adressant au marié, "take this woman, whom you hold by the hand, to be your lawful and married wife; and you promise and covenant in the presence of God and these witnesses, that you will be unto her a loving and faithful husband, *until you shall be separated by death*?" et le marié répond: "Yes, I do." Le ministre, s'adressant alors à la mariée, s'exprime comme suit: "You take this man, whom you hold by the hand, to be your lawful and married husband; and you promise and covenant, in the presence of God and these witnesses, that you will be unto him a loving, faithful and obedient wife, *until you shall be separated by death*?" auxquelles paroles la mariée répond: "Yes, I do." Alors le ministre ajoute: "I pronounce you husband and wife, according to the ordinance of God: *whom therefore God hath joined together, let no man put asunder.*" Voilà le contrat de mariage des protestants; et nous ne pouvons comprendre qu'aucune force humaine puisse légitimement en changer la nature et le déclarer dissout pour aucune autre cause que la mort, qui est celle que les parties avaient seule en vue.

On peut objecter que c'est une partie du contrat que la femme demeure *faithful*. Mais le mari n'a-t-il pas pris le même engagement envers sa femme? En vertu de quelle règle, par conséquent, la Législature peut-elle donner au mari le bénéfice de la violation de cet engagement de la part de la femme, et le refuser à cette dernière, lorsqu'il a été méprisé par le mari? Enfin, peut-on trouver, dans la convention des parties, un seul mot qui veuille dire, même implicitement, que la violation d'une partie de la convention, ou même de toute la convention, puisse emporter l'annullation de tout le contrat? Non; la convention ne contient rien de cela; et nous sommes encore à nous demander sur quel principe de droit est basé le pouvoir qu'assume le Parlement, en dissolvant des mariages que les époux avaient déclarés indissolubles, tant vis-à-vis d'elles-mêmes et de leurs enfants que vis-à-vis de Dieu. Encore une fois, ce pouvoir législatif nous semble être un empiétement sur les droits acquis des parties,

qui est toujours considére comme irrationnel, injuste et illégitime. *Nova constitutio futuris formam debet imponere, non præteritis.* (Voir Merlin, Répertoire, vo. Effet Rétroactif; Dwarris on Statutes, Part 2e. p. 680.) Nous devons ajouter que tel est, d'ailleurs, le sentiment de plusieurs protestants.

XVI.

DES LICENCES DE MARIAGE—LEURS EFFETS.

Avant de terminer cette étude, il n'est pas sans intérêt de dire quelques mots de ce qu'on est conveuu d'appeler *a mariage license.*

La licence n'est pas seulement une dispense de la publication des bans; c'est encore un ordre, un décrêt à tout ministre protestant de marier les parties qui y sont désignées, sans bans, à l'endroit et à l'heure qu'il leur plaira, pourvu qu'il n'y ait pas d'empêchement. Jusqu'à ces dernières années, elle émanait uniquement du Bureau des Prérogatives, *Prerogative Office*, au nom du Gouverneur-Général du Canada, et elle était expédiée par des agents, répandus dans toutes les parties du pays, qui signaient comme *Deputy-Governors.* Dans la pratique, ces licences étaient signées en blanc par le *député gouverneur*, et remises à une foule de gens qui les remplissaient et les vendaient. En voici la formule textuelle: "To any protestant minister of the Gospel. Whereas there is a mutual purpose of marriage between——for which they have desired my license and given bond, upon condition that there is no lawful set or impediment, pre-contract, affinity or consanguinity, to hinder their being joined in the holy bans of matrimony; these are therefore to authorize and empower you to join the said——in the holy bans of matrimony, and them to pronounce man and wife."

Avant le code, il n'y avait aucune loi dans le pays qui autorisait l'émission de ces licences; néanmoins, le droit n'en a jamais été nié à la Couronne, dont il est, paraît-il, une des prérogatives; et c'est parce qu'il est un droit de prérogative royale qu'il existe dans ce pays, sans y avoir été introduit par une législation spéciale.

A l'origine, cette faculté appartenait au Pape seul et à ses évêques; mais après la Réforme, elle fut transmise à l'Archevêque de Canterbury, puis à tous les évêques; et enfin lorsqu'à la suite de certaines dissentions entre les Episcopaux et

les partisans du Calvinisme, Sa Majesté se proclama chef suprême de l'Eglise, jouissant du droit de primatie en Angleterre, ce privilége passa à la Couronne, à l'exclusion de tous les archevêques et évêques, qui dès lors n'ont pu même donner des dispenses de bans. (Burn, Eccl. Law, vol. 2, p. 461 et suivantes.) Depuis la cession, le gouverneur, comme Ordinaire protestant de la colonie, n'a cessé d'exercer ce droit qui est d'ailleurs formellement reconnu par le code. L'article 127 déclare que le "droit de dispense des empêchements appartiendra tel que ci-devant à ceux qui en ont joui par le passé"; et l'article 134 dit qu'il "est loisible aux autorités en possession jusqu'à présent du droit d'accorder *des licences* ou dispenses pour mariage, d'exempter des dites publications." (Voir aussi art. 59 et 157; Stokes, Col. Law, 149. Clarke, Col. Law, 32, dit: "The governor is also Ordinary, and as such has the power of granting licenses for marriages."

Ca éte l'opinion de certains ministres que la présentation d'une licence accordée en vertu du droit commun, les excuse de s'enquérir s'il y a réellement empêchement au mariage, si les parties sont parentes au dégré prohibé, ou mineures. De telles prétentions sont absurdes. Quoi! par ce qu'il aura plu au député-gouverneur pour Montréal de permettre en blanc la célébration d'un mariage, et au marchand de ces licences de le remplir, le ministre sera justifié de violer la loi? Voilà la conséquence logique et toute naturelle de la proposition que l'on émet. Non; la licence de mariage n'autorise pas à passer outre la loi; si l'une des parties est mineure, le ministre doit s'abstenir; pareillement, si elle est frappée d'autres empêchements non anéantis par le permis; en un mot, le fonctionnaire devra faire tout ce qui lui est dicté par le code. Cette licence, de fait, n'a pour les protestants que les effets de la dispense de l'évêque pour les catholiques; elle fait cesser certains empêchements purement relatifs, tels que la parenté au 4e dégré; elle dispense encore de certaines formalités, telles que les bans. Mais si la loi défend à un ministre de marier telle et telle personne, il ne pourra valablement le faire, nonobstant la licence. Nous avons vu que la loi défend aux ministres protestants de marier deux catholiques; en conséquence, le mariage de ces derniers par un ministre protestant, même fait en vertu d'une licence de mariage, doit être déclaré nul, la licence, dans un tel cas, devant être considérée comme non avenue et nulle. Il y a là, dit-on, un déni du droit

de prérogative de la Couronne. Mais Sa Majesté, en sanctionnant l'Acte Impérial qui a conservé aux Canadiens leur religion et leurs lois, est censée avoir renoncé à cette prérogative à leur égard. Comme nous l'avons clairement établi, les catholiques doivent prendre dispense de leur propre évêque ; ils ne peuvent donc pas demander une licence qui ne peut leur servir.

Il y a plus ; la licence ne permet même pas à un ministre dissident de marier des protestants qui ne sont pas de sa congrégation, parce qu'une loi spéciale le lui défend.

Il n'est pas sans à propos d'observer ici que le Synode Anglican du Diocèse de Montréal a répudié la doctrine que " licence oblige," en déclarant " that a license does not authorize a clergyman to marry a minor, and will not screen him from the consequences of his act, without, in addition, the expressly conveyed authority of the parents, etc." Pourquoi le ministre manque-t-il ici du pouvoir nécessaire ? Pourquoi la licence est-elle alors impuissante ? Si ce n'est parce qu'un texte de loi défend le mariage des mineurs, sans le consentement des parents ? Ne doit-il pas en être de même à propos des autres prohibitions de cette même loi ?

Comme l'indique la formule de la licence, elle n'est accordée qu'en donnant caution : et ce cautionnement, signé par les parties et la caution, en faveur de Notre-Dame Souveraine la Reine, pour £200, est donné en considération de l'octroi de la licence et est sujet à la condition suivante : " Now if it shall not hereafter appear that they or either of them, the said——have any lawful act or impediment, pre-contract, affinity or consanguinity, to hinder their being joined in the holy bans of matrimony, and afterwards their living together as man and wife, then this obligation to be void, otherwise to be and remain in full force and virtue."

On demande quel peut-être la valeur légale de ce " bond " ou cautionnement de pure discipline ecclésiastique ; car il n'est requis que par un ancien canon de l'Eglise Anglicane qui n'a aucune force dans les colonies : " And no license shall be granted but upon good caution and security taken." (canon 101.) Il n'y a aucune loi dans le pays qui autorise l'exécution d'un tel acte, et aucun précédent n'indique comment il y serait reçu par les cours de justice. Nous ne voyons pas non plus en vertu de quelle règle le montant de ce cautionnement est fixé à la somme de £200 courant ? Cette somme est-elle requise par un canon de

l'Eglise d'Angleterre du Canada, ou même par des canons ou des lois anglaises, postérieurs à la cession? C'est ce que nous ne connaissons pas; mais fussent-ils même en existence, ces canons et ces lois n'auraient aucune force parmi nous, parce que les règlements étrangers des diverses églises du pays n'ont pas d'empire en Canada, et que la législation du Royaume-Uni n'y fait pas autorité, à moins d'une déclaration expresse. La validité du cautionnement dépendrait donc de la teneur du canon 101, qui lors de la cession était en force en Angleterre. En supposant quelque valeur légale à ce cautionnement, il est raisonnable de croire qu'il serait réduit au montant des dommages auxquels l'octroi de la licence donnerait lieu. Le code (art. 156 et 157) en assujettissant le fonctionnaire public en défaut, à une pénalité n'excédant pas $500, a-t-il voulu déterminer ces dommages, ou plutôt remplacer l'action pour dommages par l'action pour pénalité? Il n'en dit rien; et dans le doute, il faut penser que le fonctionnaire en défaut est sujet aux deux actions—surtout si l'on considère que la pénalité appartient moitié à la Couronne, et moitié au poursuivant, qui peut ne pas être la partie lésée.

Mais, ce cautionnement peut-il même dans certains cas former la base d'une poursuite judiciaire? L'émission de cette licence de mariage est-elle une considération valable? L'existence des empêchements prescrits par la loi est elle également une condition légale? Vis-à-vis des catholiques, nul doute que le cautionnement est absolument nul, comme contraire aux lois sur le mariage des catholiques. Et quant aux protestants, pourquoi en serait-il autrement? De deux choses l'une; ou les lois n'ont pas été violées, ou elles l'ont été. Si le mariage est valide, le cautionnement est non avenu; s'il est contraire aux lois, comment une cour de justice pourrait-elle reconnaître l'acte qui a donné lieu à cette illégalité? Ainsi donc ce cautionnement nous semble entaché de nullité, comme ayant lieu sans considération et contre les lois du mariage, qui sont toujours des lois de morale et d'ordre public.

Jusqu'à l'Acte Fédéral de 1867, les licences étaient accordées par le gouverneur de la Province, en vertu de la prérogative royale dont nous avons tracé l'origine, et cette pratique n'a pu souffrir de difficulté. Depuis 1867, le gouvernement du Canada s'est arrogé l'exercice exclusif de cette prérogative, pour la raison que les questions de mariage et de divorce sont du domaine exclusif du parlement fédéral et aussi sans aucun doute que le

Gouverneur Général est l'Ordinaire protestant de la Puissance. Mais on perdait de vue que les licences de mariage ont rapport à la célébration du mariage, qui, par le même Acte de 1867, est exclusivement de la juridiction des législatures provinciales et que les lieutenants gouverneurs sont aussi Ordinaires, puisqu'ils ont dans leur province tous les pouvoirs des anciens gouverneurs du Canada, B. N. A. Act, 1867, s. 65. Aussi les gouvernements locaux n'ont pas tardé à revendiquer ce privilège qui leur appartient de droit; de là la passation en 1871, du chapitre 3 des statuts de la Province de Québec qui a fait l'objet d'une étude particulière de la part d'un des collaborateurs de la *Revue*, vol. 2, p. 38. Sans doute cette loi n'a pas révoqué le droit du gouvernement d'Ottawa, s'il existe; mais dans tous les cas elle est de nature à le faire tomber en défaveur et en désuétude. La licence du gouverneur-général émanée en vertu du droit commun, n'offre aucune protection à l'officiant, comme nous l'avons vu; ce dernier est toujours passible des pénalités imposées par la loi. Au contraire, le ministre muni d'une licence du Lieutenant-Gouverneur, émanée en vertu du statut de Québec, est exonéré de tout blâme, quelqu'empêchement qui puisse exister, à moins qu'il n'y ait mauvaise foi de sa part. La justice de cette règle n'est guère contestable, puisque les églises protestantes n'ont aucun contrôle sur les dispenses des bans. Mais la législature locale a-t-elle, en vertu de la Constitution, le pouvoir de législater de la sorte et par là même de toucher indirectement aux lois sur les empêchements de mariage? Peut elle ordonner, par exemple, qu'un ministre qui marie un mineur ne sera plus assujetti aux amendes et aux poursuites du droit commun? A tout événement, il est regrettable que la législature, en introduisant ce nouveau système, n'ait pas donné au public des garanties contre les fraudes ou même la simple négligence de l'officier des licences de mariage. Elle aurait dû donner contre lui l'action pénale et celle en dommages et intérêts décernées par notre Code contre le ministre même de bonne foi. A l'avenir, il parait que les parties lésées devront s'adresser à son Excellence *by petition of right*.

Ajoutons que la validité du mariage n'est aucunement touchée par cette législation; elle reste soumise aux articles du Code.

Le *Montreal Herald* (12 mars, 1874) vient de publier un article sur les licences de mariage qu'il n'est pas sans intérêt de roproduire ici:

"MARRIAGE LICENSES.—It has long been a complaint that Protest-

ants, who desire to marry without the proclamation of banns, have to pay a fee for the license which permits them to do so, while no such tax is levied upon their Catholic fellow citizens,* since they never have occasion to procure the authorization of the State. We see that this cause of complaint is being put an end to in Ontario. Mr. Mowatt has introduced a bill which entirely does away with licenses in that form. Under this new law the State will gain nothing from the disposition of persons intending marriage to dispense with the proclamation of banns, since it is intended to issue what are to be called "certificates" at the bare cost of the amounts of which the issuers of licences at present receive. If it is found that the business can be done cheaper, it is to be so done. So far so well; but there are other alterations in the law which do not strike us as having much connection with the cure of the existing grievance, though they may be very proper, considered on their own merits. For one thing, the clergyman who celebrates a marriage is to be relieved from the responsibility he now lies under, to assure him in case he shall incidentally marry minors.

"The certificate is to cover the whole question of the rights of the party to marry, except, and the exception is important, the clergyman shall be aware of the causes which should prevent it. We say that the exception is important, because we have known more than one instance in which no man possessed of the slightest modicum of common sense, could doubt for one moment that the girl before him was a minor—could hardly doubt that she was acting in a clandestine manner. Now, in a case where the minority is so apparent, we can hardly suppose that the certificate can be held to save the responsibility of the celebrant, if his knowledge of the irregularity is still to subject him to the consequences of his act. It would probably be well that this point should be so plainly stated in the law as to indicate clearly to clergymen, that they are not entirely to shut their eyes to patent facts, because a slip of official paper is presented to them. At the same time, we are quite disposed to the opinion, that the clergyman is not the person on whom the damages ought to fall in cases of deception, where either of the parties, though really minors, may be taken by reasonable persons to have attained their majority. The obligation on this head being removed from the official upon whom it has hitherto rested, however, it becomes of some consequence that the issuer of the certificates which are to warrant the celebration of marriage, should be made to understand the serious character of his duties. Is he to be placed in the same position in which the clergyman has hitherto stood in relation to this matter? Our impression is that hitherto the discretion which the issuers of marriage licenses have been supposed to exercise, has been, in fact of a very perfunctory character, and we should like to see some better

* C'est une erreur. Les Catholiques paient pour leurs dispenses de mariage.

guarantees than have heretofore been prescribed by the set of rules which he is to follow, before he grants to young persons the power of coming under bonds which may sometimes make them miserable for life, or else the issuer ought to be made to feel a responsibility something like that which has hitherto weighed upon the clergy. Another provision of the amended law is intended to do away with two of the three proclamations of banns. We confess that we cannot see the reason of this change, if the proclamation of banns is to be looked upon as valuable at all. It evidently has none of the value which it had once, when mankind resided all their lives in the villages where they were born, and when an announcement of an intended wedding in church, was a notification to everybody who was at all likely to be concerned. But then, if this form of announcement has ceased to be useful, why preserve it at all? We are disposed to think that the true answer to that question would suggest another question—whether, in fact, it is not a matter of great importance to society, that a more efficient method should prevail than either banns as now proclaimed, or certificates like those which Mr. Mowatt proposes to issue, in order to prevent irregular, or in the case of young persons hasty marriages, without the knowledge of natural guardians. If people of mature age choose to marry it is the business of none but themselves, and all that society has a right to do is to see that neither deceives the other, and to take care, so far as possible, that their new status should be known. But the history of too many divorce suits will undoubtedly show that the facility of contracting this important engagement, without advice or consideration, is the direct cause of its being so often prematurely dissolved."

CONCLUSION.

En résumé, tant sous le Code qu'avant, le mariage des catholiques, capables de le contracter, doit être célébré: 1o. en face de l'église; 2o. par le propre curé des parties; 3o. après publication ou dispense de bans; 4o. enfin, il ne doit exister aucun empêchement non dispensé par leur evêque.

Le mariage des protestants doit aussi être célébré par leur propre ministre; il doit être célébré publiquemeut, suivant les usages de chaque congrégation, après publication de bans. Une licence de mariage dispense des bans.

Le mariage mixte a lieu conformément à ces règles, suivant qu'il est célébré par le prêtre ou ministre de l'une ou l'autre des parties.

Le mariage des personnes dans les ordres sacrés ou des religieux morts civilement est ausi nul.

Celui entre beau frère. et belle-sœur est également prohibé. Le Pape ne peut même pas en dispenser.

Il en est de même du mariage célébré à l'étranger en fraude de nois lois.

Le divorce obtenu à l'étranger est aussi nul en Bas-Canada.

Une licence de mariage n'est valable qu'entre les mains des protestants.

Quant aux catholiques qui abjurent, il est évident que le mariage qu'ils contractent immédiatement après, suivant le rituel de leur nouvelle profession religieuse, est valide. On trouvera des détails intéressants sur cette matière dans la cause de *Swift* vs. *Kelly*, 3 Knapp, 257, où elle fut considérée tant sous le droit anglais que sous le droit canonique. (Voir aussi *Yelverton & Langworth*, 10 Jur. N. S. 1215, per Lord Wensleydale ; *Reg.* vs. *Orgill*, 9 C. et P. 80.) Nos tribunaux semblent tenir que l'abjuration ne peut être tacite et qu'elle n'a d'effet que du jour qu'elle a été signifiée au curé du converti. (*Gravelle* vs. *Bruneau*, 6 Jurist, 27 ; *les Syndics de Lachine* vs. *Fallon* 5, id. 258. Cette règle semble être bien fondée en principe, puisque le curé a, par l'Acte de Québec, des droits acquis qui ne peuvent cesser que par une révocation expresse et connue de lui. Il est dans l'intérêt de la société que les règles de l'abjuration soient définies par une loi spéciale de la législature. Par cette loi, on devrait comme dans plusieurs pays, prohiber le mariage du nouveau converti, à moins d'avoir fait profession de sa nouvelle foi d'une manière publique, au moins un mois avant.

Le Code et en général les lois de toutes les Provinces sont silencieux sur le mariage de ceux qui n'ont pas de religion. Ils ont supposé avec raison que dans un pays religieux comme le Canada, le cas ne pouvait se présenter. D'ailleurs, la Législature d'une nation chrétienne ne peut raisonnablement s'occuper des infidèles et encore moins des athées et des impies. Ainsi donc, les non croyants en Dieu, ni en Jésus-Christ, s'il s'en trouve parmi nous, doivent faire choix d'une congrégation religieuse, autorisée à tenir registres, afin de contracter un mariage valide. Pour se marier en Bas-Canada, il faut être ou au moins paraître chrétien.

Les Juifs et les Unitariens, qui sont autorisés par des statuts spéciaux à tenir registres des mariages des membres de leurs congrégations respectives, ne peuvent cependant procéder à la célébration de leurs mariages, sans passer par toutes les formalités prescrites par le Code, ou au moins sans obtenir une licence de mariage. Mais ici se présente une difficulté. Une licence de

mariage peut-elle être addressée à un autre qu'à un ministre de l'Evangile, *any protestant minister of the Gospel?* Peut-elle autoriser des ministres infidèles, des non-croyants en Dieu ou en la Trinité? Les règles du droit commun anglais ne sont-elles pas opposées à un tel usage de la licence, évidemment contraire à la doctrine chrétienne telle qu'on la comprend en Angleterre? Les Juifs et les Unitariens, ou toutes autres congrégations ou sociétés ne croyant pas en la Trinité, sont-ils tenus d'observer toutes les formalités du Code, sans pouvoir se prévaloir du privilége de la licence? En un mot, une licence de mariage, émanant de la Couronne Anglaise, est-elle effective entre les mains de personnes ne croyant pas en la divinité de Notre-Seigneur, qui est le dogme fondamental de la religion de la Couronne? Voilà autant de questions que nous ne voulons que poser, sans vouloir exprimer d'opinion.

Nous ne pouvons terminer cette étude sans résumer nos reproches aux articles du code. Il est bien important que, sur une matière qui intéresse si hautement la société et l'ordre public, la loi soit claire et ne prête pas à des interprétations diverses. Nous voudrions donc lire l'article 128 comme suit: "Le marriage, pour être valide, doit être célébré publiquement devant un fonctionnaire compétent reconnu par la loi, suivant les usages et les règles de l'eglise des parties." Nous désirerions aussi voir plusieurs articles plus ou moins vagues, confus ou contradictoires, définis et expliqués, tels que les articles 34, 127, etc.

L'article 127 devrait être formulé comme suit:

"Tous empêchements, admis d'après les différentes croyances religieuses, comme résultant de la parenté, de l'affinité, des ordres sacrés, de la profession religieuse, et d'autres causes, restent soumis aux règles suivies jusqu'ici dans les diverses églises et sociétés religieuses.

"Il en est de même quant au droit de dispenser de ces empêchements, même de ceux établis par les articles 125 et 126, lequel appartiendra tel que ci-devant à ceux qui en ont joui par le passé."

Il est surtout regrettable que le code ait innové à l'ancienne jurisprudence quant au droit du Pape de dispenser de l'affinité au degré prohibé, comme entre beau-frère et belle-sœur—changement qui pourrait avoir des résultats désastreux; car personne n'ignore que de tels mariages ont été et sont encore contractés en vertu de dispenses du Pape.

L'amendement que nous suggérons à l'article 127 semblerait mettre fin à ce spectacle immoral et dangereux d'un homme innocent devant Dieu et la société, mais coupable devant l'Etat.

Et pourquoi encore, a-t-on changé ces dispositions de la loi qui frappaient de nullité les mariages célébrés sans les formes prescrites? Dans ce pays où le lien conjugal est indissoluble, il est surtout nécessaire qu'il ne puisse être contracté qu'après mûres délibérations; il importe que les parents et amis des parties intéressées puissent raisonner avec elles; et la stricte observance des conditions et des formalités du mariage est la plus sûre garantie pour elles-mêmes et leurs familles. En Angleterre et aux Etats-Unis où, à chaque printemps de la vie, on peut convoler à de nouvelles noces, où en un mot le divorce est admis, on comprend que les lois sur le mariage n'ont pas besoin d'une grande rigueur; mais lorsque comme en Bas-Canada, l'indissolubilité de l'union conjugale est proclamée, on ne saurait prendre trop de précaution pour assurer le bonheur de cette union, et par là même celui de la société. Il serait donc à désirer que l'article 156 fut conçu comme suit:

"Tout mariage qui n'a pas été contracté publiquement, ou qui n'a pas été célébré devant le fonctionnaire compétent, peut être attaqué par les époux eux mêmes et par tous ceux qui ont un intérêt né et actuel, sauf au tribunal à juger suivant les règles, usages et coutumes de l'église des parties."

Ce que nous demandons c'est le maintien intégral des anciennes règles, l'exacte application de ce grand principe de notre droit public, qui veut que l'on accorde à chaque culte tous les droits légitimes qu'il exerce. Nous n'aurions pas ainsi le spectacle scandaleux d'un conflit entre l'Eglise et l'Etat. Le pouvoir séculier n'ayant, en matière de célébration de mariage, d'autres lois que celles de l'église respective des parties, sera toujours d'accord avec les usages et coutumes de l'Eglise Catholique et de toutes les congrégations protestantes du pays. Voilà, ce nous semble, la vraie liberté religieuse,—celle qui tend à admettre devant les tribunaux les règles de la cérémonie religieuse du mariage, suivant lesquelles le mariage sera un sacrement pour les catholiques, une cérémonie religieuse pour les protestants, emportant les effets civils que l'Etat lui donne.

Espérons que le Gouvernement Fédéral qui, par l'Acte de la Confédération, est saisi des questions de mariage à l'exclusion du Parlement Local, donnera quelqu'attention au sujet délicat que

nous avons essayé de toucher, et qu'il se rendra cher aux familles du pays, en ajoutant au Code quelques dispositions qui rassureraient les esprits sur quelques points controversés et sur lesquels le doute est permis. Enfin, si la demande de la correspondance des Gouvernements Locaux sur les lois actuelles du mariage, qui fut faite de temps à autre devant les Communes, doit être regardée comme le prélude d'une loi générale pour toutes les Provinces, ces dernières ont lieu de s'attendre que nos législateurs ne se laisseront pas entraîner par les exemples indignes de trop de législatures des deux continents et, entr'autres, des Etats-Unis. Elles ont droit d'espérer qu'ils se rappelleront que le Code Civil du Bas-Canada leur offre, tout préparée, une loi applicable à toutes les colonies anglaises, puisque le Code n'est que la reproduction, pour ainsi-dire mot-à-mot, des vrais principes du droit commun anglais, de l'ancien droit français et, à quelque chose près, du droit canonique—principes, qui ont honoré pendant tant de siècles deux des plus grandes nations du monde, et qui, respectant tous les cultes et les croyances particulières de leurs enfants du Canada, y feront leur gloire comme leur prospérité sociale.

D. GIROUARD.

Montréal, 21 mars 1874.

THE LIBERTY OF THE BAR.

CLARENDON is at much pains to show that the rebellion against Charles I. was not brought about by the levying of ship money, but by the decision of the Exchequer Chamber in favour of the alleged right of the King to levy the tax. The people for various reasons submitted to the tax as an imposition by the State; 'but when they heard this demanded in a Court of Law as a right, and found it, by sworn judges of the law, adjudged so, upon such grounds and reasons as every bystander was able to swear was not law, and so had lost the pleasure and delight of being kind and dutiful to the King, and instead of giving, were required to pay, and by a logic that left no man anything which he might call his own; they no more looked upon it as the case of one man, but the case of the kingdom, nor as an imposition laid upon them by the King, but the judges, by which they thought themselves bound in conscience to the public justice not to submit to.' In like manner we think that no careful student of the French Revolution can fail to see that it was mainly due —not to the monopolies of the nobles and the consequent imposition—but to the impossibility of the people obtaining justice. The Courts of Justice were tainted by a corrupt influence. There may have been some magistrates who did not bow their knees to the Baal of Aristocracy and Property; but the people naturally and inevitably distrusted the impartial as well as the partial administrators of the law. Nor is it unduly straining the argument to say that the American Civil War was principally the result of a just or unjust distrust of the Supreme Court. The immediate cause of secession was the election of a President who represented the party resolved to destroy the institution of negro slavery by defining its limits and not allowing its extension to the territories of the Union; but the passions of the contending sections had been inflamed to the pitch of civil strife by the decision of Chief Justice Taney on the Fugitive Slave Law. Those who read history for instruction and not merely for amusement, see that civil discord is not so often caused by bad laws as by the unjust administration of the law, or by a want of confidence in the impartiality of the judges. The apophthegm that

a judge, like Cæsar's wife, should not only be pure, but above suspicion, is trite and true. Only those communities of which the interpreters and administrators of the law are trustworthy and trusted, can be assured of civil peace and national progress.

The immunity of England from revolution since 1688 is remarkable. Our laws were not perfect, and our legislative history is for the most part a record of change and reform. But all this time there has been no question about the fair administration of the law. The wise clause in the Act of Settlement which deprived the Crown of the right to remove judges at pleasure, and enacted that 'judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established,' rendered the judges independent, and from that date there has been no suspicion of their being influenced by the Sovereign. Moreover, our plan of nomination and selection has answered admirably. The appointment of the judges is virtually vested in responsible ministers of the Crown, but not less virtually are the candidates publicly nominated—we might almost say elected—for no minister ventures to give a judgeship to a barrister who has not, by the discretion of solicitors and the approval of litigants, attained to high standing in his profession. Combined with the independence and proved ability of the judges there has been the unrestrained liberty of the advocate; and the freedom of the advocate is as necessary for the due administration of justice as is the independence of the judge. For these and other reasons—we must not forget the benefit of justice being administered before the whole nation by the agency of the press—not only has there been an impartial administration of justice, but, what is of equal consequence, there has been perfect faith in the integrity of the Courts of Law. It has happily become a habit with all classes of Englishmen to treat our judges with a marked and becoming deference. We trust that this noble and most beneficial faith may never be shaken, either with reason, or from base calumny.

Holding these views, we were profoundly impressed by the eloquent exordium of the summing up of the Lord Chief Justice of England in *Reg.* v. *Castro*. It was a stern and dignified rebuke; but there is no member of the profession, and, we may add, no gentleman not in the profession, who will think Dr. Kenealy does not deserve the reprimand. We cannot express the surprise, pain, and indignation which we have felt at the conduct of the learned counsel. We thought it our duty to abstain from

comment; but it is now our duty, as a representative of the profession, to declare our emphatic agreement with the rebuke of the learned judge.

The two offences of Dr. Kenealy were his slanderous imputations and statements about the witnesses for the prosecution, and his treatment of the judges. As to the latter the offence is aggravated by the fact that the offender was specially bound to treat the judges with respect. What would have been said if a witness, perhaps a very ignorant person, had dared to insult the Bench? The public would have been vexed and surprised if the offender had not been punished. But here we have a person, a barrister, a Queen's Counsel, who ought to set an example of good behaviour in a Court of Justice, being guilty of conduct towards the judges that is happily altogether without precedent. The Lord Chief Justice says, 'We were met by contumely and disrespect, by insult, by covert allusions to Scroggs and Jeffries —judges of infamous repute—as if in days when such a spirit as theirs animated the administration of justice the learned counsel would not have been quickly laid by the heels and put aside.' The absurdity of the allusion to Scroggs and Jeffries does not in any degree excuse the slanderous insult. Why did Dr. Kenealy so flagrantly misconduct himself? The Lord Chief Justice says it would appear to be 'through a desire to produce an effect upon the outside world, and to lead them to suppose that the counsel on his side of the case are treated unfairly.' How do we know that the foul aspersions of Dr. Kenealy did not instigate the ignorant mob to attack Mr. Hawkins? Dr. Kenealy appeared to boast of his courage in attacking the judges. Unless there is moral restraint, what courage is needed for a wrongful act that can be done with impunity? Dr. Kenealy knew very well that he could not be punished. The Benchers of the Inns have no authority to interfere with the demeanour of counsel in Court. The judges, Dr. Kenealy knew, would not be provoked into depriving the defendant of the services of his counsel. Dr. Kenealy did not display courage. It was not courageous, but cowardly, to insult the judges, who were forced to submit to the insult. He who bullies an unarmed and bound captive, might as well boast of being brave.

Dr. Kenealy seems to have been annoyed because the learned judges again and again interfered with his address. Why did the judges interfere? The Lord Chief Justice assigns a sufficient reason:—

"Our position was rendered painful also from the fact that "we had again and again to interfere with the address of the "learned counsel in order to correct misstatements and misrepre- "sentations which could not be allowed to pass without such inter- "ference on our part. When witnesses are misrepresented, when "evidence is misstated, when facts are perverted—and that not "for the purpose of argument in the cause, but in order to lay "the foundation of foul imputations and unjust accusations "against parties and witnesses—when one unceasing torrent of "invective and foul slander is sent forth wherewith to blacken "the character of men whose reputations have been hitherto "without reproach, then it is impossible for judges to remain "silent."

As we have remarked, the liberty of the bar is essential to the proper administration of justice. A fettered advocate can no more do his duty to a client than a dependent judge can be trusted to be just to a litigant. We are not supporting the extravagant and false doctrine that an advocate is to do anything for his client. The true doctrine is that of the Lord Chief Justice, that an advocate must seek to win *per fas*, and not *per nefas*. But it is unnecessary to leave to the discretion and honour of the advocate what is *fas* and what is *nefas* in the particular case. Directly an attempt is made to limit the discretion of an advocate there is sure to be a hindrance to the cause of justice. A counsel is not infallible. Suppose he were held legally responsible for what he does in Court—that is, suppose he were liable to an action for defamation of character—how could he then do his best for his client? How could he be expected to break down the credibility of a witness, according to his instructions, when an error in those instructions, or a slip of the tongue in the heat of advocacy, would render him liable to the trouble and costs of an action, and perhaps to the payment of heavy damages?

This liberty of the bar is a tremendous trust, and hitherto it has been rarely abused. But if such conduct as Dr. Kenealy's were common, nay, if it were to be repeated a few times, what would happen? Does any one imagine the public would submit to such a cruel and wicked injustice? Would the bar be allowed to blacken the characters of men and women, of the living and the dead? There would be a demand for the suppression of the advocate that no Government or Parliament could resist. Thus,

in interfering with the address of Dr. Kenealy, the judges did not interfere with the liberty of the bar. They interfered with a gross abuse, which, if permitted, would be fatal to the cherished liberty which is necessary for the advocate because it is necessary for his client, which is allowed to the bar for the public good, and which, we repeat, is essential to the due administration of justice. We have no fear that Dr. Kenealy's example will be followed, and we rejoice that the Lord Chief Justice of England has vindicated the honour of the bar, defended the liberty of advocacy, and upheld the sacred dignity of the bench. —*The* (London) *Law Journal*, February 7, 1874.

THE LORD CHIEF JUSTICE ON DR. KENEALY.

The following is the exordium of the Lord Chief Justice's charge to the jury in the case of the *Queen* v. *Castro:*—I congratulate you, gentlemen, with all my heart, on having at length arrived at the last stage of this very protracted and in many respects very painful inquiry. I wish I could hold out to you any reasonable hope that the last stage of the case would also be a short one. When, however, I look at the extent of time over which the inquiry ranges, at the host of witnesses whose testimony we shall have to consider, at the multitude of documents and letters which we also shall have more or less to go through, and the complicated nature of the facts involved in the inquiry, I fear, gentlemen, I shall have to draw somewhat upon your time and patience, with a view to placing the facts before you in their various lights and bearings. But, gentlemen, you have shown such unwearied attention to the case, such inexhaustible patience, such a desire to get all the facts in order to understand it, that I am sure you will bear with me while I make those observations upon it which appear to me to be necessary to enable you to arrive at a satisfactory decision. Gentlemen, I have said that this is in many respects a painful case, and assuredly it has been—and this I say not only in reference to many of the issues involved, but by reason of the course which has been pursued in the conduct of the defence. It is most distressing for a judge presiding at a trial to find himself in frequent conflict with one of the counsel in the cause, and that unfortunately has been the case over and over again in the course of this trial. It is a very pain-

ful fact so far as the judge is concerned, because he cannot help being conscious that in the minds of the bystanders, who only see the case on the surface, it may have the effect of creating a suspicion that partiality and prejudice operate upon the mind of the judge. When point after point, either of attack or defence, is taken of the most frivolous and untenable nature, the judge has no alternative but to overrule such points; and if similar instances are multiplied, either through ignorance of the law, or, as would appear to be the case here, through a desire to produce an effect upon the outside world, and to lead them to suppose that the counsel on his side of the case are treated unfairly, the judge has of course no alternative. He must do his duty, whatever may be the meaning or the character of tho points so taken. And the eternal recurrence to this line of conduct must of itself and of necessity produce an unpleasant impression on the mind. But, gentlemen, this is a very minor part of the matter. Our position was rendered painful also from the fact that we had again and again to interfere with the address of the learned counsel in order to correct misstatements and misrepresentations which could not be allowed to pass without such interference on our part. When witnessess are misrepresented, when evidence is misstated, when facts are perverted—and that not for the purpose of argument in the cause, but in order to lay the foundation of foul imputations and unjust accusations against parties and witnesses—when one unceasing torrent of invective and foul slander is sent forth wherewith to blacken the character of men whose reputations have been hitherto without reproach, then it is impossible for judges to remain silent. It is not enough to say that the learned counsel should be allowed to go on with his address to the end, and that the judge should wait until it is his turn to speak, and then to set right matters which have been misrepresented and distorted. And especially is it not so in a case like this, where weeks and months might elapse before the judge would have an opportunity of expressing his opinion, for in the meanwhile what might happen? A temporary impression —perhaps that is all that it was hoped to achieve—might have gone forth fatal to the honour and the character of the person assailed; wounds might have been inflicted which possibly never could have been healed. Therefore it was that we felt it to be our duty to interpose and check the torrent of undisguised and unlimited abuse in which the learned counsel for the defendant

thought proper to indulge. And in what way, gentlemen, were our remonstrances met? In an ordinary case, if in the heat of argument, in the fervour of oratory, in the zeal with which the counsel engages in a case, in the examination or cross-examination of a witness, the strict bounds of propriety may sometimes, and not unnaturally be overstepped—but this I say for the honour of the bar of England, that happens very rarely indeed—a word —nay, a hint—from the judge is sufficient to restrain the overflowing zeal within its proper and legitimate limits. But we were met by contumely and disrespect, by insult, by covert allusions to Scroggs and Jeffries—judges of infamous repute—as if in days when such a spirit as theirs animated the administration of justice, the learned counsel would not have been quickly laid by the heels and put aside. We were met by suggestions that we were interfering with the liberties and privileges of the bar. Gentlemen, I will undertake to say that no three judges ever sat on this bench or any other to whom the liberties of the bar were more dear or more sacred than they are to my learned colleagues and myself. We know full well that the freedom of the bar is essential to the administration of justice. We know that it would be an ill day indeed for the country if the freedom of the bar were ever interfered with. It may be, and it was here, abused; but this is a rare, a singular exception, which perhaps only proves the rule. We did not interfere with the privileges of the bar; we interfered to check the license of unscrupulous abuse, to restrain that which, instead of being fair legitimate argument, amounted to misstatement, misrepresentation, and slander. The bar of England—as high minded, noble spirited, and generous a body of men as are to be found in the world—have never claimed slander as one of their privileges, or considered its restraint as an invasion of their rights:—

'Slander
Whose edge is sharper than the sword; whose tongue
Out-venoms all the worms of Nile; whose breath
Rides on the posting winds, and doth belie
All corners of the world; kings, queens, and states,
Maids, matrons—nay, the secrets of the grave,
This vip'rous slander enters.'

The bar of England will never claim that as a weapon to be used in the advocacy which they so nobly carry on and exercise. But here, gentlemen, unhappily, the living and the dead have been equally aspersed. There never was in the history of jurispru-

dence a case in which such an amount of imputation and invective has been used before, and I sincerely hope there never will be another. Although the prosecution has been instituted by Her Majesty's Government and carried on on behalf of the Crown, you have been told that every one connected with it, from the highest to the lowest, counsel, solicitors, clerks, detectives—everybody is engaged in a foul conspiracy—has resorted to the most abominable means in order to corrupt witnesses, against whom I should imagine that nothing was to be said, except this, that they might have been mistaken in the evidence they gave—have been charged with taking bribes and committing perjury. Imputations of this kind are thrown out right and left. One man is called a villain, against whom there is no more reason for bringing such a charge than against any of us. The authorities of Stonyhurst are accused, upon no ground of any sort or kind, not only with not teaching morality to their students, but with the desire of corrupting their minds. They are said to have adopted a system under which youths are brought up to be men with the minds of women—with a covert hint at abominations half revealed, but from which one recoils and shudders; and all this with no more foundation than if the imputations had been brought against the authorities of Eton, Westminister, or any other of our great public schools. The dead are served in the same way. Lady Doughty is charged with hypocrisy, because, as it is alleged, having discovered that her nephew had attempted the honour of her daughter, and had succeeded in that attempt, she shows him to the door with bland smiles and honeyed words. Captain Birkett, who is gone to his account, who went down in the Bella, is actually charged with having scuttled the ship in which he unfortunately perished. Who could conceive it possible that such vile and slanderous imputations could have been brought forward in a Court of Justice? I have, I must say, felt it the more keenly because the learned counsel in the outset of his address thought proper to parade before you an opinion which I had once expressed myself on an occasion when I believed I was speaking in the name of the Bar of England, and I am happy to say that opinion received their unanimous assent. I attempted on that occasion to draw a distinction between that which was legitimate and that which was forbidden in advocacy, and I illustrated the distinction between the *fas* and *nefas* of advocacy by reference to the difference between the sword of the warrior and the dagger of the assassin.

The learned counsel for the defendant began by citing that illustration and applying it to his learned adversary, charging him with having used the dagger of the assassin in the conduct of this prosecution. I am bound to say that a more unfounded charge than that was never made. But that the learned counsel for the defendant should begin by citing with approbation that expression of my opinion, and then proceed to exhibit all—nay, I will not say all—much more than all, the *nefas* of advocacy which I had therein denounced, I must say did surprise and astonish me beyond measure. It seemed as though the learned counsel paraded that sentiment merely for the purpose of mockery, so utterly and entirely did he disregard it. It has been very painful indeed for me to make these observations, but the occasion calls for it. The liberty of the bar I should have thought, until this time, incapable of abuse; but I have seen and heard it abused. I think the proper corrective for it is censure from the bench—censure which I believe will meet, as it deserves to meet, with the universal concurrence of the bar of England.—*The* (London) *Law Journal*, Feby. 7, 1874.

JUDICIAL CRISIS.

COURT OF APPEALS.

MEETING OF THE MONTREAL BAR.

(Compiled from the Montreal Gazette and Herald.)

The difficulties with respect to the Court of Appeals which have been troubling the Bar of this Province for some years, culminated in a crisis, probably without precedent in judicial history. On the 16th December, 1873, the Bar of Montreal almost unanimously resolved not to present themselves before the Court until it is reconstituted in a manner to justify their confidence and respect. The report of proceedings which we append will explain this remarkable resolution.

Proposed by Strachan Bethune, Q.C., A. Cross, Q.C., Jos. Doutre, Q.C., R. Laflamme, Q.C., W. H. Kerr, Q.C., J. C. S. Wurtele, Q.C., J. L. Morris, W. W. Robertson, L. A. Jetté, L. O. Loranger, J. A. Perkins, D. Girouard, J. M. Loranger, H. F. Rainville, S. Pagnuelo.

Seconded by F. X. Archambault, D. D. Bondy, G. Doutre, F. L. Beïque, A. H. Lunn, D. Browne, C. A. Geoffrion, H. Hatton, Louis Armstrong, A. E. Dumesnil, J. J. McLaren, John P. Kelly, C. P. Davidson, J. E. Robidoux, N. W. Trenholme, C. B. Carter, J. O. Turgeon, and

Resolved,—"That the administration of justice in the Court "of Queen's Bench has been, for some years past, inefficient, un- "satisfactory and destructive of the confidence which should be "reposed in the highest Court of the Province; and that, in the "interests of justice, an immediate enquiry by Royal Commission "into the causes of such a lamentable state of affairs is impera- "tively required."

MR. BETHUNE referred to the fact that that very morning 27 *délibérés* had been discharged in the Court of Appeals, without any explanation, simply because one of the Judges had retired a few weeks ago, and another was sick. This was the culminating act of all that the Bar had suffered for years past from this Court. [Cheers.]

Mr. LACOSTE concurred in the substance of the resolution, but desired to omit the words, "destructive of the confidence which should be reposed in the highest Court of the Province." He thought that this was accusing the Judges of what was not yet proved.

The CHAIRMAN contended that the latter clause necessarily followed the first, and that the resolution was no more than the case demanded, and was indeed carefully worded.

Mr. GIROUARD thought that the subject was so important and delicate that he had reduced to writing what he had to say.

Monsieur le Président et Confrères,—Instruit dès mon entrée au Barreau à vénérer l'autorité judiciaire, c'est avec le plus profound regret et la plus grande répugnance que je me suis décidé à prendre part au mouvement actuel du Barreau de Montréal. Lorsqu'en 1858, j'embrassai la carrière d'avocat, le souvenir des Vallières et des Stuart était encore vivace; la tombe du juge Rolland venait dé se fermer; à cette époque, la Cour du Banc de la Reine était composée de Sir L. H. LaFontaine comme juge-en-chef, et des honorables Aylwin, Meredith, Duval et Caron, comme juges puisnés. Il est inutile d'ajouter que la magistrature de cette province était alors entourée de la considération dont elle jouit à si juste titre dans tous les pays; elle était de la part des avocats l'objet d'un véritable culte. Elever la voix contre l'un des juges eût été un crime, contre tout un banc, une impossibilité. Quels changements depuis et en si peu d'années, même depuis le jour mémorable du *massacre des cents innocents* (Sept. 1870), où l'un des honorables juges disait fièrement en pleine Cour aux avocats étonnés de tant de mauvais jugements qu'il s'occupait fort peu de l'opinion publique.

M. le Président, la mort prématurée du juge-en-chef LaFontaine fut pour ainsi dire le signal de la désorganisation de la Cour d'Appel. L'hon. Juge Meredith présageant le mal que nous déplorons si vivement, se retira silencieusement sur le banc de juge-en-chef de la Cour Supérieure; plus tard, le juge Aylwin adressait sa résignation aux autorités et entrait dans la vie privée.

Le juge-en-chef Duval, alors comme aujourd'hui une intelligence d'élite, succéda à Sir L. H. LaFontaine; et sans les infirmités physiques qui sont venu miner, presque de suite après, sa constitution déjà frèle et infirme et l'ont rendu tout à fait incapable de la haute fonction de juge-en-chef de la province de

Québec, il pourrait par son intégrité, ses talents brillants, faire honneur aux Cours de Cassation Européennes. [Hear, hear.] Faut il tenir le même langage à l'égard des autres nominations? Plus d'un parmi nous se rappelle qu'elles créerent dans l'esprit du Barreau et du public de vives appréhensions.

Vous ne l'ignorez pas, Messieurs, c'est la politique seule,—je me trompe,—c'est l'esprit de parti qui a déterminé la plupart de ces nominations, sinon la totalité. Aussi, n'est-ce que de cette époque que date la décadence de l'autorité judiciaire dans la province de Québec. Puisse l'expériénce des dix dernières années servir de leçon pour l'avenir! Il est heureux cependant d'avoir à constater que chaque jour, au gouvernement comme au Parlement, comme aussi dans les rangs du peuple, on se pénètre de plus en plus de cette importante vérité, que les juges doivent être choisis pour leurs qualités d'impartialité, d'intégrité et de science, et non à cause des services vrais ou fictifs qu'ils ont pu rendre à telle ou telle autre cause politique. [Applause.]

Qu'est devenue, M. le Président, cette nouvelle Cour d'Appel inaugurée sous de si singuliers auspices? Les préventions que l'on avait contr'elle étaient malheureusement fondées. Ce que l'on redoutait, ce que l'on pressentait est devenu depuis longtemps un fait acquis. Ce tribunal, le plus élevé de la province, dont le plus bel apanage doit être le respect et la confiance qu'il impose à la masse, perdit peu à peu de son prestige; il descendit dans l'estime de la population et finit par tomber dans le discrédit le plus absolu. Aujourd'hui, on a si peu de confiance dans ses décisions, qu'à grands frais les parties qui en ont la faculté par la loi en appellent presque toujours au Conseil Privé. [Hear, hear.]

La presse à l'unanimité a demandé le rappel des juges; mais se retranchant derrière cette loi constitutionelle qui ne permet qu'au Parlement de décréter leur démission, ils ont presque tous jusqu'au-jourd'hui bravé l'opinion publique et refusé de resigner. Le refus actuel du Barreau de comparaître devant eux et d'y plaider les causes n'a pas même paru les émouvoir.

L'Honorable juge Caron, éloigné du Banc pendant plusieurs années et en dehors de ce qui s'y passait, retenu par ses devoirs comme l'un des codificateurs, sentit bien la difficulté de la situation, et à la première occasion qui se présenta, il se hâta d'abandonner ses collègues à leur triste sort. Il y a quelques jours aussi, un autre juge fuyait devant l'orage qu'il voyait s'amonce-

ler et prêt à éclater. Il nous reste encore du personnel de la Cour, appartenant au régime que l'on est convenu d'appeler l'ancien régime, l'honorable juge-en-chef, le juge Badgley et le juge Monk.

Le juge Badgley est tellement sourd, et cette surdité a été si souvent la cause de méprises regrettables, même en pleine cour, que sa présence sur le Banc est devenue intolérable. L'honorable juge, dont la science est d'ailleurs aussi vaste que profonde, devrait, en compagnie du juge-en-chef, demander une honorable retraite pour cause d'infirmités physiques. [Cheers.]

Monsieur le Président:—Il me reste une dernière tâche à accomplir, et c'est sans contredit la plus pénible. Le sujet auquel je ne ferai qu'allusion est des plus délicats et de ceux que l'on ne touche que dans des cas d'urgence et quand il n'est pas possible de se taire plus longtemps.

J'ai entendu des avocats faire cette remarque, qu'ils n'osaient dire publiquement toute la vérité, à cause de leurs relations professionnelles, sociales ou de famille, avec quelques juges. D'autres craignent de s'exposer à leur colère et de perdre leurs causes, s'ils continuaient à siéger. C'est à mon avis l'insulte la plus crue, la plus outrageante que l'on puisse adresser au Banc. Comment! un avocat deviendrait l'objet de la vengeance judiciaire, parcequ'il aurait fait son devoir! Non, je ne puis le croire; l'avocat comme le juge ne doit avoir pour but que la justice et les intérêts de la justice. A ceux qui parmi nous sont intéressés à ce débat, soit pour un père, un frère, un oncle, cousin ou ami, je leur dirai de se récuser et de s'abstenir. Quant à nous, autres membres de la profession qui n'avons aucune de ces raisons personnelles, dussions-nous nous attirer les foudres de la Cour d'Appel, nous devons faire notre devoir et dire toute la vérité. Du reste, nous ne ferons que répéter ce qui se crie partout et nous ne serons que l'écho fidèle de ce qui se dit journellement dans les cercles privés comme sur la voie publique, dans les réunions comme dans la presse et au Parlement du pays.

Qui d'entre nous, Messieurs, n'a pas senti agir contre lui une main invisible et faisant presque des miracles, lorsqu'il avait à lutter avec certains adversaires? Je ne vous apprends ici rien de nouveau. Cela a été dit vingt et même cent fois; et pendant le terme actuel, n'est-il pas question qu'un confrère bien connu voulait plaider toutes ses causes, dans la crainte, dit-on, qu'un des juges ne résignât prochainement. Je ne puis prêter ce motif

à notre distingué confrère; mais le bruit qui court ne constate pas moins que les avocats ne se sentent pas sur un pied d'égalité devant la Cour d'Appel. [Applause.]

Je ne nomme personne et je ne fais d'accusation contre qui que ce soit: mais je suis convaincu que nous serions tous heureux de voir une Commission Royale nous faire connaître cet ange tutélaire qui semble protéger et illuminer certaines délibérations judiciaires. La rumeur publique nous le présente tantôt sous la forme d'un endosseur, tantôt sous celle d'un préteur, mais toujours comme un esprit bienfaisant dont la mission est d'établir de chères relations entre le plaideur et le juge. [Laughter.]

Ces rapports étranges, fussent-ils faux, et espérons qu'ils le sont, sont des plus déplorables; ils tendent à enlever au public le dernier sentiment de respect qu'il peut avoir pour l'administration de la justice.

Si l'on veut donc rendre à la magistrature son ancien prestige, il faut de toute nécessité que la lumière se fasse sur ces rumeurs qui occupent toute l'échelle sociale, depuis les villes jusqu'aux campagnes, le citoyen jusqu'à l'administration publique. Si elles sont mal fondées, il faut que le fait soit constaté dans une enquête régulière, afin que nos juges d'appel aient le droit de porter la tête haute et de mériter les honneurs de la patrie en reconnaissance de leurs services et de leurs vertus. Mais si malheuresement elles sont bien fondées, le juge qui se serait aussi gravement rendu coupable, devrait être descendu du Banc qu'il dégrade et souille de ses iniquités.

Le but de la motion présentée par un si grand nombre de membres du Barreau est d'obtenir une commission royale pour s'enquérir sur l'administration de la justice à la Cour d'Appel en général. Dans les remarques qui précédent j'ai cru devoir particulariser les griefs et m'abstreindre à l'ancien régime; car il n'est que juste de faire exception des nouveaux juges qui, comme ceux de la Cour Supérieure, jouissent de l'estime et de la confiance entière du Barreau et du public. [Applause.]

Messieurs, j'ai confiance que vous donnerez à cette motion toute l'attention que l'importance du sujet exige. Le pays souffre depuis dix ans de l'administration de la Cour d'Appel; et en cette occasion mémorable, il y a les yeux ouverts sur nous. Montrons lui donc que si le Banc a dégénéré quelque part, que si le Barreau a même perdu quelque chose de son ancien esprit de corps, il possède encore dans son sein assez de caractère et

d'indépendance pour que notre jeune société puisse avec orgueuil dire de lui ce que toutes les sociétés ont proclamé sur l'ordre des avocats: "Le Barreau est le gardien du Banc." [Prolonged Cheers.]

Mr. CROSS said the manner in which the eloquent address of the speaker who preceded him had been received, showed that this movement on the part of the Bar had something in it. There could be no doubt that the Bar had cause of complaint.

Mr. BETHUNE said that the Court had by no means the confidence of the public, and the case demanded the most rigid enquiry. He himself was personally interested, inasmuch as many of his cases had had to suffer on account of the conduct of the Court.

Mr. WURTELE spoke in a similar sense.

The resolution was adopted unanimously.

Mr. KERR moved that the Secretary be instructed to forward to the Minister of Justice copies of the proceedings of this meeting. Carried.

Mr. RAINVILLE said there was another subject intimately connected with that which had been discussed, namely, the course which the Bar should adopt with respect to the Court of Appeals. He thought it would be derogatory to the Bar to present themselves before a tribunal for the investigation of which a Royal Commission had been requested, and he suggested that the Bar should come to an understanding to abstain from appearing before that Court.

Mr. PERKINS said he had just prepared a motion which had the same object in view.

Mr. RITCHIE was unable to concur in the resolution for this reason: There were three of the gentlemen, as the Court was now constituted, against whom not a word could be said. These composed a majority of the Court, and why should the Bar refuse to plead before them? It was out of the power of the Government to remove a Judge without an impeachment. The Minister of Justice had already appointed an Assistant Judge (Mr. Justice Loranger) to act during the illness of the Chief Justice, and there was nothing to prevent the business from proceeding. It would be out of the power of this meeting to carry out such a resolution, and he thought it would be injudicious to press it.

Mr. L. O. LORANGER said it was quite true the resolutions

did not affect the new Judges; but he thought, nevertheless, it was impossible to appear before the Court until matters were put right.

Mr. BETHUNE, had long felt that a crisis must arrive at some time. The crisis had now arrived, and now was the time to have a thorough reform. He thought the Minister of Justice had made a mistake in trying to patch the Court up. He feared the result would be that the advantage of the crisis would be lost, and all their motions would go for nothing. If the Bar wanted to get the full benefit of the crisis, they must take their stand. (Cheers.) It was for them to say that the time had come for a thorough inquiry, and they must abstain in the meantime from appearing before the Court.

It was moved by Messrs. J. A. PERKINS and L. O. LORANGER, seconded by Messrs. H. F. RAINVILLE and J. J. MCLAREN:

"That in view of the foregoing resolution, the Bar of this "section abstain from pleading before the Court of Queen's Bench "during the present term, and that the Chairman of this meet- "ing do communicate this and the foregoing resolution to the "said honourable Court."

Mr. MCLAREN suggested that before the vote was taken there should be an understanding that the minority should yield to the majority, so that the Bar might act unitedly in the matter, and exhibit an *esprit du corps*.

Mr. RITCHIE said for his part he had no objection to yield to the majority.

Mr. KERR thought the resolution a wise one. He felt convinced that no difficulty could arise; the Court of Appeals would surely not sit for an hour in Montreal after it became known that the Bar had almost unanimously passed resolutions demanding that a Royal Commission should issue for the purpose of inquiring into its inefficiency and incapacity. He thought, therefore, the majority of the Court would not force any one to go on. The action of the Bar was against the Court of Appeals as it was and had been constituted, and not against a mere majority.

Mr. J. DOUTRE desired to remark that the lawyers were not simply seeking their own interest by their present action; they generally got their pay however their clients fared. But it was in the interest of suitors and the public that something should be done to remedy the evils complained of.

The resolution was then adopted without opposition.

PROCEEDINGS IN COURT.

The Court of Appeals opened on the 18th December at the usual time. There were present the Hon. Justices Badgley, Monk, Taschereau, Ramsay and Loranger.

The royal commission appointing the Hon. T. J. J. Loranger, of Sorel, an Assistant Judge of the Queen's Bench, during the illness of the Chief Justice, was read by the Clerk.

Mr. J. J. DAY, Q.C., rose, and addressing the Court, said that he had a most painful duty to perform, which had been imposed upon him by his brethren of the Bar, but it was one from which he would not shrink.

The learned gentleman was here interrupted by his Honor Mr. Justice Taschereau, who said that the Bench were aware of the nature of the duty which Mr. Day had risen to perform. As the mouthpiece of the Bar, Mr. Day had come there to present certain resolutions which were in effect an impeachment of the Bench, and rather than sit there and hear the same read he would leave the Bench. Suiting the action to the word, the hon. gentleman rose and retired to the Judges' Chambers.

Considerable excitement was caused in the Court room, which was crowded with members of the Bar and others.

Mr. DAY continued to address himself to the remaining members of the Bench, and to explain that he held in his hand certain resolutions which had been passed at a regular meeting of the Bar, held the previous evening, which he wished to present to their honors, in pursuance of orders given him by said meeting.

BADGLEY, J—We are perfectly aware of the nature of the resolutions which you wish to present. We are a constituted Court, and will not sit to hear anything which is not part of the business of the Court.

Mr. DAY said that the resolutions referred to expressed no word of disrespect to any individual member of the Bench, but merely called attention to a certain state of things, in the remedy of which he thought both Bench and Bar interested.

Mr. Justice RAMSAY here stated that he did not wish to reject the resolution, that he heartily sympathized with the members of the Bar which he had so lately left. With all respect to the press he did not wish to take any action on a matter which they had heard of through it, and which had not been brought before the Court regularly. The learned Judge here asked that the copy of resolutions be handed to him. Having read them he

handed them back saying that he did not think that the course proposed by Mr. Day would do anything towards bringing about the end desired.

Mr. Justice MONK said that the course proposed by the Bar was unnecessary, as they might have sent their resolutions to the members of the Bench confidentially. It was well known that the Bench could take no action in the matter. It would simply serve as a notice to them of certain action of the Montreal Bar.

Mr. DAY again attempted to explain his position, but was again interrupted by Mr. Justice Badgley, who stated that he would not consent to receive such a document.

Mr. DAY, placing the resolutions on the Clerk's desk, "If the Court will not consent to receive these resolutions, I hereby make a tender of them."

Mr. Justice BADGLEY then said that he and his *confreres* were there to hear causes from other parts of the Province as well as Montreal, and if the members of the Bar of this city should refuse to plead before the Court, practitioners from other sections of the Bar might do so, and consequently the Court would be opened each morning during the term.

The Bar, in fact, abstained from appearing before the Court during the term. Its proceedings naturally attracted considerable attention; they were commented upon by the public journals of the Dominion, and it is a fact worthy of remark that the accused Judges could not find one single advocate.

OPINIONS OF THE PRESS,

The Montreal *Gazette* of December 18, said:—

Pending the action which may be taken upon the resolutions of the Montreal Bar concerning the Court of Appeals, it is not desirable, perhaps, to enter with any minuteness into the causes which have led to the adoption of the resolutions in question. The members present at the meeting, with very few exceptions, refrained from mentioning names and particulars; it would be the easier course for us, as journalists, to follow their example. But these resolutions will go abroad. The action of the Bar will be read and commented upon, not only in the other Provinces of the Dominion, but even in foreign cities and communities; and as the bare statement of the action of the Bar unaccompanied by explanations is calculated to convey in some respects an exagger-

rated impression of the state of things in Montreal, we feel bound not to dismiss the subject, however painful, without some further consideration.

Mr. Girouard was the principal speaker on Tuesday who reviewed the rise and progress of the difficulty; he had taken the trouble, in view of the importance of the subject, to reduce his remarks to writing, and as they summed up concisely the relations between Bench and Bar, we considered it advisable to publish them in full. It is possible that many of those present were unable to concur entirely in these remarks; yet the importance of united action on the part of the profession in a juncture of this nature was felt so strongly that there was no dissent expressed by any one present. It may be assumed, therefore, that in their general scope and bearing Mr. Girouard's remarks were founded in justice. We have reason to believe from other sources that such is the case, and we hope that wherever the action of our Bar is made known, it will be viewed subject to the limitations of that speech. It must not, and we sincerely hope that it will not, be assumed that because the profession have withdrawn from the Court of Appeals, therefore, that Court is composed of men, corrupt, ignorant or utterly reckless in the performance of their duties. It is because we fear such a notion may gain credit abroad that we feel impelled to return to the subject, and to speak more plainly than we should otherwise be disposed to speak in a matter so extremely delicate and personal in its bearings The Court of Appeals is composed of gentlemen well skilled in their profession, in many respects personally estimable, and there is not one of them who does not enjoy the consideration of a great many friends; there is not one, we feel confident, against whom any deeply seated enmity is cherished by the professional gentlemen practising before them. Having said this much in a general way, let us glance at the *personnel* of the Court. There are five judges, of whom one, Mr. Justice Taschereau, replaced Mr. Justice Caron, now Lieutenant-Governor, but a short time ago, and a second, Mr. Justice Ramsay, was appointed very recently on the occasion of Mr. Justice Drummond's retirement from office. Against Mr. Justice Taschereau and Mr. Justice Ramsay we have not heard a syllable spoken in the way of censure or even of depreciation. They have taken their places on our highest provincial tribunal with the fairest promise of an honourable and distinguished future, and with this brief

reference we may dismiss them from the consideration of the present unhappy difficulties. Of the Judges to whom they succeeded it is equally unnecessary to say a word here. There remain three—Chief Justice Duval and Judges Badgley and Monk—to whom, if the complaints of the Bar have any force at all, the censure contained in the resolutions must apply. Chief Justice Duval was appointed to his present position nine or ten years ago, by a government of which the present Minister of Justice was a leading member; in fact, we believe we are strictly correct in saying that the Hon. Mr. Dorion is personally responsible for the nomination. Chief Justice Duval is a gentleman of great experience, active mind, and sound judgment. He is thoroughly versed in practice, and his memory is so retentive as to enable him to refer, without effort, to all the precedents within his long experience. We may add to this, that the honesty and impartiality of his opinions are unquestioned, and the soundness and general accuracy of his decisions such as to leave small ground of criticism. But in a Bench of five Judges it is of superlative importance that the Chief Justice should be a man of energy and dispatch, and able to endure the strain of a pressure of business. In these respects Chief Justice Duval is deficient. His physical state was weak even at the date of his appointment, and with the lapse of years his infirmities have increased. He no longer possesses the energy to cope with the increasing work of the Court, and the result has been that the list of cases for argument has never been absolutely cleared since his appointment. His occasional absences through illness might not have proved very serious if the Court sat monthly, as we have often suggested that it should; but the absence of the Chief Justice from one of four quarterly terms is a very serious matter. For the delays encountered and the arrears observed in the Court of Appeals during the past five or six years, the Chief Justice principally must be held responsible, for it is certain that he has never manifested the slightest disposition to prolong the sittings or to facilitate the clearing away of arrears. The Court, under his presidency, has opened very late in the morning, but like Charles Lamb at the India House, it has made up for it by adjourning very early in the afternoon. The Chief Justice withal is brusque in his manner, and entirely lacking in that dignified courtesy which smooths the course of business.

Next to the Chief Justice sits Mr. Justice Badgley. We can

hardly at this time do justice to the very high qualities of this eminent judge. To a learning vast and profound, the learned Judge unites an unwearied industry, and a clearness of legal perception rarely equalled upon the Bench. Judge Badgley has long been a bright and shining light of our Canadian Judiciary. His decisions have not only been received with respect in this country, but have almost uniformly stood the test of appeal to England, where his opinions have again and again been adopted by their Lordships of the Privy Council. Judge Badgley, we feel satisfied, can with no sort of fairness be charged with the delays complained of in the Court of Appeals, for we have certain knowledge that in many instances when judgments were deferred he was ready with his opinion in every case which had been argued. It is true, however, that while his physical and mental powers are unimpaired, and his capacity for work is undiminished, Judge Badgley has been troubled for some time by a difficulty of hearing—an infirmity, it may be, superinduced by intense mental application. It is a difficulty which is not constant, but variable in degree; it is susceptible, we believe, of being relieved and overcome by artificial aids, just as failing sight is assisted by the use of spectacles; and the learned Judge, moreover, is a member of a Court which has to deal chiefly with records and printed arguments. In England similar cases have frequently occurred, and it has usually been a matter for the Judge's conscience, whether the difficulty is such as to interfere with the faithful and efficient discharge of duty. Judge Badgley has no doubt been moved to retain his position by the consciousness of unimpaired vigour and an ardent love of work. Should he see fit to seek now in the evening of life the rest and leisure to which long and eminent services have so fully entitled him, no one could charge him with having prematurely deserted the field of duty, or failed to bear his full share in the heat and burden of the day. The Bench would lose a distinguished ornament, but his friends, jealous lest his laurels should suffer by the encroachment of advanced years or infirmity, could hardly fail to applaud his resolution.

There remains to be mentioned Mr. Justice Monk. No one doubts the great abilities of this eminent Judge; but if we speak with the same frankness with which we have referred to his colleagues, we must say that the charges of partiality and secret influence referred to by Mr. Girouard, are, by the profession,

considered to point chiefly to Judge Monk. This is a branch of the charges so peculiarly professional, so difficult of proof, so liable to be biassed by unjust suspicion, that we shall not say any more about it at present. There have long been in circulation hints that this lawyer had such a Judge's private ear, and that that lawyer enjoyed equal favour with another Judge; that the Montreal Judges favoured certain lawyers in the Montreal District, and that the Quebec Judges were partial to lawyers in the Quebec District. How far this is true we do not pretend to say. Actual corruption we hardly think is charged; but it is obvious that even short of that, much impropriety might exist. We shall add but one word, as our limits are already exceeded. When the great obstruction of business in the Court of Appeals is spoken of, it must not be forgotten that with the increasing wealth and populousness of Canada, litigation has also been very greatly augmented, while the Terms have not been increased in number. Had the Court of Appeals been forced to sit monthly instead of quarterly, the difficulty would have been very much diminished."

The *Montreal Herald* of the 23rd, said:—

"The difficulty of dealing with the judiciary has prevented us from saying so much about the subject as its importance deserves. This difficulty arises partly from the independent position which has been given to the Judges. That has been done for wise purposes, and we believe that no competent person wishes to alter the law in that particular; but it has, no doubt, the inconvenience of casting embarrassment in the way of a personal reformation of the Bench, when that becomes necessary. There is but one legal way of attacking Judges, however much the public may suffer from them—that is by an address from both Houses of Parliament to the Governor-General, asking for the dismissal of the person complained of. But, of course, no such address can be voted until charges are preferred in the two Houses, and apart from the natural dislike to make accusations against men placed in the position of Judges, those who are used to public affairs know well how often it is found impossible to make proof of fact. which they personally know to be true. A very serious responsibility is incurred by him who makes allegations which, if they be proved, must lead to the ruin of the persons against whom they are directed; but which, if proof fail, must affix a foul stigma upon their author. And proof often does fail, not because it does

not exist, but because those who furnish information confidentially, are unwilling to put their statements in the shape of evidence. The condition of the question of the Lower Canadian judiciary, is at this moment created precisely by these considerations. Every man who has any considerable acquaintance with the Courts knows the profound distrust of the Court of Appeals which is felt by the profession, and, after what was said at a recent meeting of the Bar, we need not affect to disguise the truth, that the distrust extends much farther than causes dependent on personal infirmities. We are sorry to say that we cannot, like a contemporary, limit the general apprehension of partiality to the decisions of a single Judge. There is a widespread impression that, consciously or unconsciously, two of the Judges, at least, of the Court of Appeals are influenced by friendships, or by other motives, which distort the conclusions which they would otherwise arrive at. But with all this, no specific charge is made—nothing is done which will permit Parliament even to begin the process required by law, as an essential to the dismissal of members of the Bench. It may be said, not unreasonably, that in the absence of such process, attacks or insinuations at meetings of the Bar, or in newspapers, are unfair to the incriminated Judges, especially because these gentlemen cannot be in a position to reply to them. We acknowledge the justice of this remark, and its application even to this article. But what then is to be done? The Bar have sought to solve the question in their own way—a way undoubtedly irregular, and one we fear of bad precedent, but which they have doubtless attempted in order to do something to bring about a reform, whose necessity is everywhere admitted. At Quebec we see that Mr. Attorney-General Irvine has indicated an intention to do, through a Committee of the Local Legislature, something which is apparently closely akin to that which the Bar of Montreal is desirous of effecting, by means of a Royal Commission. We fear that the objections are almost as great in one case as in the other. Our constitutional experience under Confederation is still very immature, and we do not, therefore, even guess upon which of the powers granted to the Provincial Legislatures, Mr. Irvine bases his pretension to charge the Parliament of Quebec with an inquiry into the conduct of the Judiciary. Yet we should be heartily glad if either by that method or the one proposed by the Bar, we could see our way out of the *impasse* in which the

people of this Province now find themselves. One suggestion of a practical kind we may, however, make. It is that to substantiate any wrong doing which will justify the action of Parliament, is just as difficult before a Royal Commission, or before a Quebec Committee, as before Committees of the House of Commons and of the Senate. If anything effective is to be done, it must be by persons who are willing to come forward openly with their complaints and evidence, and if there are persons prepared for that ordeal at all, there is no reason why they should not do it in the way contemplated by the law, as well as in any other. This is probably the light in which a responsible Ministry will have to look both at the petition of the Bar of Montreal and at the proceedings before Mr. Irvine's Committee, if he shall succeed in obtaining it. *Cui bono* it may be asked, are witnesses to be called before unconstitutional bodies when they might as well come before that body, which is charged with the cognizance of such affairs. We fear that neither the Royal Commission, nor the Quebec Committee, can, without a departure from important principles, make inquisition into misconduct of Judges. What either of them, perhaps, may do, is to establish in some formal way the universal dissatisfaction with the condition of our judicial system; but that we apprehend, no one disputes. We make these remarks out of no disposition to censure the step taken here or at Quebec. We cannot but think that duty to their clients prompted some such measures as that adopted by the Profession, as it is useless to incur expenses before a tribunal which is completely discredited. But seeing that, we also see the obstacles in the way of a successful issue to their plan of action.

The Montreal *Witness* of the 17th, said:—

This forenoon J. J. Day, Esq., as Chairman of the meeting of the Bar held yesterday, and representing all the lawyers in the city, clad in his legal robes entered the Court room, where judges have been waiting from day to day for pleaders to appear before them, and announced that he had no motion to make, but that it was his painful duty to lay certain resolutions of the Bar of Montreal before the Court. We doubt if there is any precedent in the history of justice to the unanimous action of the Bar yesterday afternoon. The state of things which could prompt such action must be beyond all parallel. When has a Court been so bad before as to have no defenders? It appears that cases involving freedom, character and thousands of money have been

for years committed to the decision of men whose infirmities have rendered them incapable, or whose attachments, needs, and peculiarities of character and constitution have rendered them, in the opinion of the Bar, uncertain to act justly, if not certain to act unjustly, when circumstances favored the wrong side. How different is this state of things from the proud boast which Canadians used to make a dozen years ago, when judges appointed by various former Governments administered an unsullied justice. We leave to the Commission, which is now evidently called for, the fixing of the blame where it belongs; for that the very fact of such a meeting as yesterday casts a dark stain upon the character of the country and proves the existence of great evil, cannot be denied. The complete absence of any political feeling from the meeting yesterday, and the fact that a great number of those who took part in it were the supporters of the *régime* whose appointments it condemned, will, we hope, convince friends of Canada at a distance that it is possible for Canadians to object to an abuse simply because it is an abuse, and not to gratify party spite.

On the 23rd, the same paper contained the following article:—

It has been asserted that the Government had no power to investigate into the fitness or good behaviour of the Judges of Appeal, on the ground that impeachment is the only mode of enquiry which can be constitutionally resorted to. This opinion is erroneous. In fact it would be contrary to law and practice to call Judges to the Bar of the House, without a preliminary enquiry. Todd, Parliamentary Government of England, vol. 2, p. 742, says:

"Bearing in mind the general responsibility of Ministers of the Crown for the due administration of justice throughout the kingdom, and the obligation which they owe to the dispensers of justice to preserve them from injurious attack or calumnious accusations, it is necessary that, before consenting to any motion for a parliamentary enquiry into the conduct of a judge, Ministers should themselves have investigated the matter of complaint, with a view to determine whether they ought to oppose or facilitate the interference of Parliament on the particular occasion."

At the same page, the same authority lays down that the removal of a judge "may be invoked upon articles of charge presented to the House of Commons by a member in his place, recapitulating the cases of misconduct of which the judge com-

plained of has been guilty; or after a preliminary enquiry, by a Royal Commission (at the instance of Government), or at the request of either House of Parliament or by a Select Committee of the House, into the judicial conduct of the individual in question, or upon a petition presented to the House from some person or persons who may have a cause of complaint against a judge; provided that while the interposition of Parliament may be sought by petition for the application of the remedy prescribed by law for a special grievance in any particular instance, no petition should be received by either House that otherwise reflects injuriously upon the character or conduct of the Courts of Justice."

Several cases are to be found in the books where the conduct of Judges has been investigated by a Royal Commission, preparatory to a formal impeachment or proceeding before Parliament. Case of Chief Baron O'Grady, Com. Journal, Vol. 76, p. 432; Vol. 78,p. 135, 467—470; Case of Sir Jonah Barrington, Mirror of Parl't. 1828, p. 1577; Todd, Vol. 2, p. 730, &c.

It is a remarkable fact that in these cases no specific charge was brought before Government, a Royal Commission was issued with the view of enquiring into the state of the courts of Justice in Ireland. The Commissioners brought specific charges under the notice of Government, and it was upon their report that proceedings were adopted in Parliament to remove the Judges These precedents fully support the position assumed by the Bar of Montreal.

The Montreal *Gazette* of the 26th said:

Whatever difference of opinion there may be as to the propriety of the course recently adopted by the Bar of Montreal with respect to the Court of Appeals, there can be none as to the fact that the step taken by the Bar is a very serious one indeed. To those who were acquainted with the suppressed feeling which has existed among the profession on this subject for several years back there was nothing surprising about this ebullition. It was simply putting into formal and somewhat general terms the complaints which have constantly, and with much greater distinctness of outline, been vented in private. The enquiry which now presses is, how shall the action of the Bar be followed up? The Court as a Court has been placed in an extremely awkward position, for all work before it has been stopped. There being no business transacted before the Court last term, the Judges have

gone away without any *délibérés* to occupy them, and when the March term comes round, the difficulty, if nothing be done in the meantime, will be as formidable as ever. The Judges who seem to be specially aimed at by the Bar's proceedings are in a still more awkward predicament. Very serious charges have been mooted against them; references have been broadly made to a mysterious Hand at work to render nugatory the impressions created by pleadings at the Bar. The Juges themselves are in a manner prevented from answering these charges. But the public cannot afford to let them be ignored. If the inuendo is false and unfounded it surely devolves upon the Court assailed to punish such gross contempt and vindicate the honour and purity of the Bench.

But, it will be said, surely the Royal Commission asked for will be granted; surely the unanimous request of the Bar of Montreal, backed up by similar action on the part of the Bar of Quebec, will be promptly acceded to. It is true one would suppose that the Minister of Justice could have no hesitation as to his course. Every one remembers the onslaught which this gentleman made upon the self-same Court last April; how with words which are still red hot he declared that the Judges were not worth their salaries; how he implored the late Minister of Justice to take action, and when Sir John pleaded the want of information as to the conduct of the Judges, how Mr. Dorion invited him to come to Montreal, and from the lips of lawyers on either side of politics, to hear a full corroboration of all his statements. If Sir John would only visit the Court of Appeals, cried Mr. Dorion, he "would see such an exhibition as could not "be paralleled in the world." All these things are not forgotten. If the assertions had any foundation then, *a fortiori* they must be equally true now, when the mutterings of the Bar have burst into open complaint. But apparently the moment Mr. Dorion is placed in a position in which the Bar of his own Province look to him for action, he hesitates. The advice which he was so ready to give to another he will not himself accept. The Montreal organ of the Government, which may be considered to specially represent the views of Mr. Dorion, in its issue of Tuesday last, sought to cast doubt upon the proceeding which has been suggested. The way taken by the Bar, it says, is "undoubtedly irregular," and "one of bad precedent." Nay, more; the same journal sees as great objections to the course indicated

by Attorney-General Irvine as about to be adopted at Quebec—by inquiry through a committee of the Legislature—As to the Royal Commission inquiry proposed by the Bar, "We fear," adds our morning contemporary, "that neither the Royal Com-"mission, nor the Quebec Committee, can, without a departure "from important principles, make inquisition into misconduct of "Judges." Here we take issue with the writer from whom we have quoted. Let us trace for a moment the law applicable to this question.

Before Confederation there could be no doubt as to the legality of the appointment of a Royal Commission under the circumstances. Judges, it is true, could be removed only upon address to the Governor-General passed by both Houses of Parliament. But by a special Act, Consolidated Statutes of Canada, cap. 13, sect. 1, it was provided that "whenever the Governor in Council "deems it expedient to cause inquiry to be made into and con-"cerning any matter connected with the good Government of "this Province, or the conduct of any part of the public business "thereof, *or the administration of justice therein*," he may appoint Commissioners to conduct such inquiry, with the power of examining witnesses under oath. Can it be doubted, then, that this section would have covered the case under consideration? What can be more intimately connected with the administration of justice than the ability or the honesty of the Judges who are the administrators of the law?

We have to consider, in the next place, the changes which may have been effected by the Confederation Act. That Act made no change in the mode of appointing or removing judges. The Judges of the Superior Court are still as before appointed by the Governor-General, and are removable by the Governor-General on address of the Senate and House of Commons. See Sections 96 and 99. To the Provincial Legislature, however, was accorded the exclusive right to legislate in regard to "the "administration of justice in the Province, including the consti-"tution, maintenance and organization of Provincial Courts both "of civil and criminal jurisdiction, etc." [Sect. 92.] It would appear from the above that the local legislature possesses the right to inquire into all matters affecting the administration of justice, and to provide any remedy which can be provided by legislation, or otherwise within the scope of its powers—not extending of course to the removal of judges. We think there can

be no doubt, therefore, that the course indciated by Attorney-General Irvine's notice of motion is strictly constitutional and proper. It would also appear that a Royal Commission might be issued by the Lieutenant-Governor of Quebec for the same purpose. For section 65 of the Union Act vests in the Lieutenant-Governor all functions and powers which under any Act of the Legislature of Canada were formerly vested in the Governor-General, "as far as the same are capable of being exercised after "the Union in relation to the Government of Ontario and Quebec "respectively." Either of these modes of inquiry might therefore be adopted. It is not so clear, however, that a Royal Commission can be issued by the Governor General for the same purpose, though the contrary is by no means established, and probably so far as the personal conduct of the judges is concerned, such inquiry would be constitutional.

Let us suppose, then, that inquiry has been instituted either by a Royal Commission or by a committee of the local legislature, what good, it is asked, will be effected by such investigation? The answer, we think, is clear. If such inquiry into the administration of justice in the Province disclosed sufficient grounds to justify the removal of a judge, the local legislature or the Attorney General of the Province, might cause the evidence to be transmitted to the Dominion Government, and it would then be for that Government to decide whether it would take the needful steps for carrying out the removal by introducing resolutions in the House of Commons. If the Government refused to take action, it would still be competent for any member to move the resolutions. It is true that even without such a ground-work, resolutions looking to the removal of a judge might be introduced by the Government or any member of the House. The present Minister of Justice, as we have seen, but a few months ago eagerly pressed such action upon his predecessor. Why does he hesitate now? We shall not attempt to answer the question at present, though an explanation is currently given which we trust has no serious foundation to rest upon. At all events, it is a great hardship that the Judges affected by these discussions should be obliged to rest under such serious imputations for one hour longer than is unavoidable. No one will rejoice more than we to learn that the charges preferred are disproved, but until these charges are either retracted or repelled in some way, it is idle to expect that there can be absolute confidence in the administration of justice by the Court of Appeals.

The Toronto *Mail* of December 20th:

In the processes of Law there has rarely been a more extraordinary spectacle than that which happened the other day in Montreal, when a spokesman of the Bar of the Province, clad in his legal robes, entered the Court of Appeals, where the Judges had been from day to day waiting to listen to pleaders, and announced that, instead of having any motion to make, he had to lay before their Lordships certain resolutions which had just been passed by the Bar of Montreal. It fell to the lot of Mr. J. J. DAY, Q.C., to act as the Bar's representative, and these are the resolutions which, unanimously adopted by himself and his brethren of the long robe, it became his duty to present to the Court:

"That the administration of justice in the Court of Queen's Bench has been for some years past inefficient, unsatisfactory, and destructive of the confidence which should be reposed in the highest Court in the Province; and that, in the interests of justice, an immediate inquiry by Royal Commission into the causes of such a lamentable state of affairs is imperatively required.

"That in view of the foregoing resolution, the Bar of this section abstain from pleading before the Court of Queen's Bench during the present term, and that the Chairman of this meeting do communicate this and the foregoing resolution to the said honourable Court."

Of the five members constituting the Court, Chief Justice DUVAL was absent when Mr. DAY proposed to present the resolutions. Of the remaining four members, Mr. Justice TASCHEREAU was the first to interrupt the Bar's representative. Mr. DAY had not uttered many words when Judge TASCHEREAU observed that he was aware of the nature of the resolutions; that they were in effect an impeachment of the Bench; and that rather than listen to the reading of them, he would leave the Bench, which he did accordingly. Mr. DAY proceeding, Judge BADGLEY remarked that they were a constituted Court, and would not sit to hear anything which was not part of the business of the Court. Mr. Justice RAMSAY, the most newly appointed member of the Bench, said he heartily sympathized with the members of the Bar, which he had so lately left, but he did not think the course proposed would do anything towards bringing about the end desired. Mr. Justice MONK said the Bench could take no action in the matter.

The presiding Judges having refused to receive the resolutions, Mr. DAY placed them on the clerk's desk, observing that by such action he made a tender of them to the Court. A few unimportant motions were subsequently made by members of the Bar from outside of Montreal, but the business of the Court has been virtually suspended by the action of the Montreal Bar.

This is really a matter of no small importance, and it is much to be regretted that such a dead-lock should have occurred. We fancy it would not be a wild guess to say that it is traceable to no less a person than M. DORION, the *batonnier* of the Quebec Bar, and now, by a turn of Fortune's wheel, Minister of Justice and Attorney-General for the Dominion. In view of the numerous complaints of the Quebec Judiciary which have been made in Parliament and out of it for some years back, and from a consideration of the facts so temperately put in a Montreal contemporary—to which, as published elsewhere, we ask the attention of those who are desirous of possessing more than a superficial knowledge of the subject—it would be the height of folly to pretend to believe that there is not ground for the action of the Montreal Bar. We do think, however, that a wiser course might have been taken than that which was resolved upon. The judges themselves, a majority of them admittedly unblameworthy, might have been spared what, whether so intended or not, was not very far removed from an insult. As the *Gazette* puts the matter, the *corpus* of complaint rests upon the physical infirmities of the Chief Justice—who was appointed by Mr. DORION when a member of the SANDFIELD MACDONALD Government—and Mr. Justice BADGLEY, both eminent lawyers and jurists, and Mr. Justice MONK, to whom it would seem, M. GIROUARD, at the Bar meeting referred, when he said: "Who among the gentlemen present had not felt an invisible hand acting against him, irresistible, miraculous, so to speak, when he was contesting with certain adversaries. This was by no means new—it had been spoken of twenty or a hundred times; and during the present term, had it not been reported that a well-known *confrere* wished to plead all his cases for fear that one of the judges would soon resign? He did not impute this motive to his distinguished *confrère*, but the current rumour said no less than that the lawyers did not feel themselves on the same footing of equality before the Court of Appeals. He would name no one, nor would he make accusations against any one; but he was con-

"vinced that the Bar would be glad to see a Royal Commission "issue to let us know something about the guardian angel, which "seemed to protect and enlighten certain judiciary deliberations. "Public rumour represented it sometimes in the form of an "endorser, and as often in that of a money-lender; but always "as a benevolent spirit whose mission was to establish *dear* rela- "tions between the pleader and the judge." There can be no mistaking the purport of such language. To the credit of the Canadian Bench it must be said that this is the one solitary charge contained in the indictment of the Montreal Bar which could in the least detract from its uprightness. It is unfortunate that it should have been made; but we will, at all events for the present, hope that there is an air of exaggeration about it.

The action of the Bar is so entirely in consonance with the views expressed by M. DORION, when he was but a private member of the House of Commons, that it may be fairly assumed, he will, without delay, recommend the issue of a Royal Commission in harmony with the resolutions we have quoted. Convinced that a full and thorough investigation cannot but have a good result, we do not regret that M. DORION is, for the moment, in a position to give effect to what we must believe are his conscientious convictions on a subject of the very highest interest to the people of Quebec.

The *Halifax Reporter* of December 23rd, said:

The Bench and the Bar in Montreal have come into collision, and the Bar is virtually on a strike. Late papers bring particulars of the affair, which was itself telegraphed without comments. From these fuller particulars we learn that though the lawyers think several of the Judges very good men and able jurists, yet that in two or three instances they are incapacitated for the proper discharge of their duties by reason of infirmities. The picture drawn by Mr. Girouard, the chief speaker at the meeting of the Bar Society, is anything but flattering to the condition of the Bench, of that portion which is physically incapable of doing the work of administering justice. He seriously impugnes the competency of these judges. His words are good words for other latitudes than that of Quebec Province in this respect. "It must not," he said "be forgotten that it was politics alone, (but this was a mistake, it was party spirit) which had

prompted the greater part if not the whole of these appointments. Did not the decadence of the judicial authority in the Province of Quebec date from this period? Should not the experience of the last ten years serve them as a lesson for the future? It was a good thing, however, that we could now see day by day in the Government as well as in the Parliament, as also among the people, that the important truth was making itself felt, that Judges ought to be chosen for their impartiality, integrity and knowledge, and not on account of services, real or fictitious, which they may have rendered to any political cause. To-day this tribunal, the highest in this Province, whose most beautiful and imposing attribute should be the respect and confidence of the masses of the people, looses its prestige little by little, is lowered in the estimation of the population, and finishes by falling into the most absolute discredit. To-day there is such little confidence in its decisions that at great expense, those who can afford it almost always appeal to the Privy Council."

From this speech it seems that besides the intellectual incapacity of some, others are deaf and utterly unable to hear causes, and the Chief Justice is "used up" by frequent infirmities.

Under the promptings of this speech, 87 lawyers of Montreal, including all the leading men of the profession, passed a resolution unanimously "that the Administration of Justice in the Court of Queen's Bench has been for some years inefficient, unsatisfactory and destructive of the confidence which should be reposed in the highest Court of the Province, and that, in the interests of Justice, an immediate inquiry, by Royal Commission, into the causes of such a lamentable state of affairs, is comparatively required."

On Wednesday last, Mr. Day, Q.C., rose in Court and offered the resolutions. A scene took place, the account of which will be found in another column.

It is evident, from all these particulars, that the Court of Appeals in Quebec Province is sadly demoralized.

There is a warning for the people of the Dominion generally, in this decadence of the Courts of Justice in Quebec. Every man is interested pecuniarily in the thoroughness of the Judiciary, and every Judge owes it to the public as well as to himself, to retire when incapacitated or obviously unfit for his work from any cause. The Government of the country owes it to the public to appoint none but good men, able and experienced. Mr.

Girouard points out the cause of the evil complained of in Montreal. He shows that the Judiciary has been made subservient to party politics, and that Governments have been weak enough to consent to prostitute the judiciary to party purposes. We care not what Government does it. It is wrong, altogether wrong, and public opinion should be brought to bear, in an enlightened manner, upon the Government, to prevent the Judiciary becoming a resting place for political hacks.

The Judiciary of Nova Scotia have always maintained a high position. They may have defects. But nothing can be charged against them like that charged against the Quebec Judges. We were doubtful of the propriety of appointing Judge McDonald on the ground that he had never distinguished himself at the Bar. But from all we learn and observe we are quite satisfied that the latest addition to the Bench will prove a good and a satisfactory one to all concerned.

At the same time we want to see the people alive to the importance of bringing pressure enough to bear upon the Government to appoint the Judges irrespective of their political leanings. As things have been, every Administrator of Justice has to reach the goal of his ambition by swimming through the muddy waters of politics. His standing may be high at the Bar, but the lawyer who is no politician stands a slim chance of reaching the Bench.

The time is very opportune for the Public in the various ways at its command to press home its wishes on this point upon the present Government. Next session of the Provincial Legislature the County Courts Bill will be passed, and four or five County Judges will be appointed. In the Supreme Court it is not possible for Mr. Justice Dodd to long continue to adorn the Bench with that clear, shrewd common sense so peculiarly his; simply because of his increasing deafness. In the natural course of events other vacancies must occur. Now the people should take up this matter, and insist that appointments to the Judiciary be non-political—be made from the Bar for legal and judicial qualifications and not for political partizanship.

If the public fail of their duty, the experience of Quebec province will be the experience of Nova Scotia, and there will come more and more frequency in the appeals to the Privy Council, entailing great expense and the consumption of time. Indeed we are not sure that from some cause or other, not perceptible to

a lay man, appeal to the Privy Council are now greatly on the increase. We hear more often of notices of appeals now than we used to hear.

The Halifax *Colonist*, Dec. 25th, said:

There is no question that the appointments of the late Government to the Bench were, as a rule, singularly judicious and acceptable to all parties. Sir John was wont to select the best man for the post whatever were his politics. Instances of this fact can be recalled by any one acquainted with the recent history of the Dominion. But there is trouble in Quebec among the lawyers. The bar of Montreal is in a state of insurrection against the Judges of the Court of Appeal. The lawyers have come unanimously to the resolve not to plead before the court as at present constituted. What can be the explanation of this disastrous state of things? It cannot be partizanship, for all parties combine. It is partly, we believe, owing to the physical infirmities of two of the Judges, and the supposed moral delinquencies of a third. There are five Judges of this Court, but two of them—the two appointed recently are not complained of in any way. They are admitted to be able and exemplary men. This cannot be said of the rest.

The *Chronicle* states that the late Government is responsible for the evils complained of. The Chief Justice is the chief stumbling block in the matter; yet Mr. Dorion, the present Minister of Justice, is responsible for the appointment of Chief Justice Duval! This same Dorion has now the opportunity of accepting the resignation of the Chief Justice, and nominating his successor. Judge Badgely is irreproachable in every way—only he is deaf, and deafness in a Judge is as grievous a disqualification as deafness in a Jury. No Government need be ashamed of having appointed him to the Bench. He will no doubt retire on a pension. Judge Monk, it is insinuated, is not above the influence of other than logical and legal arguments in making his decisions; but it remains to be seen what amount of truth, if any, is in the suspicion. Politics has had nothing to do with the appointment of any of these gentlemen; and their varied disqualifications should be judged apart from politics. Even MacKenzie himself will not be able to secure Judges who will never become infirm in body, deaf, or dull-sighted. He will not be able to secure his nominees at all times against some infirmities

of temper. Angelic as he himself and all his colleagues are, they can not expect to find so many impeccable saints in the Dominion of Canada. It is supposed that Dorion will nominate himself to succeed the fallen Duval. Of course in the eyes of Dorion there is no man so fit for the post as Dorion! Thus he will make a good and sudden exit from the troublous field of politics. Only let him beware of ever failing in his powers of seeing, hearing, protracted sitting, and early rising, or else the Montreal bar will rise in insurrection against him.

The *Halifax Chronicle*, December 23rd, said:

The complaints which have from time to time found expression in the press respecting the administration of justice in the Province of Quebec, have at last taken a form which demands and will receive investigation. It has been notorious for years that several of the judges in that Province have been incapable, through their infirmities, of performing their duties in a proper manner; that others have been guilty of gross favoritism and corruption, which has been carried to such a point that certain barristers do just as they like, and others know that it is useless to attempt to conduct a case against the favorites; and that the Bench has been so tainted with corruption that neither the Bar nor public have confidence in its judgments. This state of affairs has arisen chiefly from the fact that the late Government, and their predecessors of the same political party, in making appointments to the Bench, regarded party services as the only necessary qualification. While Sir John A. Macdonald's Government remained in power there was no hope of the disgrace being removed, and the barristers, realizing that fact, did not care to prejudice their clients' interests by arraying themselves in useless opposition to the judges. The change of Government at Ottawa has given the people an assurance that abuses in the administration of public affairs will no longer be covered up, and hence this Quebec prejudiciary scandal is being exposed by the barristers and an earnest demand made for an investigation and a remedy. The present Minister of Justice, Mr. Dorion, is the leader of the Bar of Quebec. He must know well the evils complained of, and the public may be assured that he will deal with them promptly and vigorously.

Le Journal de Québec of the 20th, said:

La question de l'administration de la justice, dans sa plus haute sphère, la cour d'appel, absorbe une large part de l'attention publique. On sait que les avocats de Montréal ont récemment refusé de comparaître devant la cour d'appel afin d'amener une crise, qu'ils ont adopté des résolutions énergiques, s'adressant également aux deux gouvernements et demandant une commission royale. Ceux de Québec n'ont pas été aussi loin, bien qu'ils aient aussi protesté. Ils n'ont pas parlé de la commission royale, qu'ils regardent probablement comme contraire à l'esprit de la loi relative à l'indépendance des juges. Cette loi indique le remède: une adresse simultanée des deux chambres, dans les cas graves. Cela conduirait à une comité parlementaire conjoint des deux Chambres, comme procédure préliminaire, au lieu de la commission royale avant l'action indiquée du Parlement. Si celui-ci seul peut agir, il est évident que la commission royale serait une intervention pour le moins inconvenante. Mais le remède indiqué est violent et, malgré tant de plaintes portées contre certains juges, aucun représentant du peuple n'a encore tenté de l'appliquer. Cependant l'opinion publique s'affirme chaque jour plus accentuée et menaçante. Cette attitude des avocats est une révolution réelle dans notre histoire judiciaire. On ne l'eût pas même soupçonnée du temps des Stuart, des Vallières, des LaFontaine, etc. Elle porte un rude coup au prestige de la plus haute cour du pays, sinon à la majesté de la loi, dont elle doit être le plus imposant organe.

Nous n'entendons pas, par ces observations, blâmer le barreau, sa démarche étant, dans leur opinion, une nécessité, et la nécessité ne connaissant pas de loi.

Quelques députés ont suggéré, dans la dernière session des Communes, de déterminer l'âge auquel les juges devraient sortir de charge, afin, par là, d'obvier à l'un des plus graves inconvénients dont souffre le public, le grand âge. Une infirmité prolongée et intervenant d'une manière persistante dans l'exercice des devoirs du juge devrait avoir le même effet que la vieillesse. Mais il fut maintenu, par d'autres députés, que la clause 99 de l'acte constitutionnel défend toute législation de cette nature. Elle se lit ainsi:

"Les juges des cours supérieures resteront en charge durant bonne conduite; mais ils peuvent être démis de leurs fonctions par le gouverneur-général sur une adresse du Sénat et de la Chambre des Communes."

Cela semble fermer la porte à tout changement de ce côté, et nous placer dans une position inférieure de beaucoup à celle qu'occupe le parlement d'Angleterre vis-à-vis des juges de la mère-patrie, qui pourrait, lui, appliquer un remède au mal invétéré dont nous nous plaignons, s'il existait.

L'opinion publique est donc encore le grand remède, et, pour parler plus justement, le seul efficace.

Sur cinq des juges de la cour d'appel, l'un est malade, un deuxième est tellement sourd qu'il ne peut rien entendre des plaidoieries qui se font devant lui, et l'intégrité d'un troisième est mise en soupçon. Ce sont ces trois juges que le barreau, tout entier, s'efforce, dans l'intérêt de la justice, de faire entrer dans la vie privée.

Pour les deux premiers, la chose ne parait pas difficile, puisqu'ils sont disposés, nous assure-t-on, à accepter des pensions, aussitôt que le gouvernement fédéral sera prêt à faire les changements que commandent les circonstances; mais, quant au troisième c'est différent, comme le caractère des insinuations faites sur lui. Veut-il insister à rester juge, malgré le sentiment public, ou consentirait-il à accepter, lui aussi, une pension? D'un autre côté, les preuves sont-elles assez faciles contre lui pour engager les Chambres à le mettre en accusation? C'est ce que nous ignorons. Dans tous les cas, plus prompte sera l'action du gouvernement fédéral, pour tout ce qu'il est possible de faire, le mieux ce sera et pour lui et pour le public. Si ce juge restait sur le banc, dans de pareilles conditions, c'est-à-dire lorsque son intégrité et son impartialité seraient en suspicion permanente, ce serait, pour lui, chose odieuse et intolérable."

On the 23rd, the same paper said:

Nous annoncions, hier, la démission de M. le juge en chef Duval, qu'il envoyait par la poste, samedi, à Son Excellence le gouverneur-général. Il est probable que M. le juge Badgley va suivre son exemple. Nous ne savons ce que fera M. le juge Monk; mais il agirait sagement, suivant nous, en faisant comme eux, afin de permettre au gouvernement de compléter, d'un seul coup, le renouvellement de ce haut tribunal judiciaire et de le replacer, dans la confiance publique, au lieu élevé d'où il n'aurait jamais dû descendre. Rien ne sauverait ce juge à l'avenir du soupçon, juste ou injuste, qui pèse sur son caractère.

Sur le banc de la cour supérieure se trouve un autre juge vieux et infirme et frappé de paralysie. Son patriotisme et sa

conscience doivent lui dire que son utilité est finie et qu'il devrait, lui aussi, se retirer dans la vie privée.

L'acte des avocats du barreau de Montréal a été un grand scandale, dont la dignité du banc se ressentira longtemps; mais la situation était devenue telle qu'il a cru, sans doute, que rien qu'une crise pareille ne pouvait la sauver.

The Roman Catholic Bishop of Montreal, Mgr. Bourget, ordered public prayers for the early and satisfactory settlement of the conflict. The following *annonce* was read in all the R. C. Churches of Montreal, and published in *Le Nouveau Monde:*

Annonce à faire, par l'ordre de Mgr. l'Evêque de Montréal, le 4me Dimanche de l'Avent, au prône de toutes les Eglises de la ville et de la banlieue de Montréal, dans lesquelles se fait l'office public, et au chapitre des Communautés Religieuses.

Nos Très-Chers Frères,—Il se passe maintenant, dans notre ville, des événements, que tous les gens sérieux, qui ont à cœur le bien public, ne peuvent s'empêcher de regarder comme très-graves en eux-mêmes et comme pouvant avoir, pour notre siècle des résultats dont il est difficile de calculer les conséquences.

Ces faits sont notoires et connus de tous; et il serait par conséquent plus qu'inutile d'en donner ici des détails. Nous n'avons donc nul besoin de les signaler à votre attention, en cherchant à les juger et apprécier, comme ils doivent l'être, avec la plus juste impartialité. Car chacun pourra facilement y découvrir ce qui pourra en résulter.

Mais comme ces événements se trouvent très-compliqués et peuvent être d'une importance majeure pour tous les citoyens qui y sont concernés, nous allons tous ensemble recourir à la prière qui, dans beaucoup de circonstances, est l'unique remède aux maux qui menacent la société en général en même temps que le bien des particuliers. Car elle seule, dans ces fâcheuses circonstances, peut indiquer la route, qu'il faut suivre, pour ne pas s'écarter des règles de la justice et de la vérité.

Nous allons donc prier, N. T. C. F., le Père des lumières de qui vient tout don parfait, de daigner, dans son infinie bonté, éclairer tous les esprits, pour qu'ils voient le bien qu'il y a à faire et le mal qu'il y a à éviter, et fortifier les volontés, pour que chacun s'exécute généreusement et fasse ce qu'il sait devoir contribuer au plus grand bien.

Nous vous exhortons donc, dans le Seigneur, à implorer le

secours du Dieu tout-puissant, par l'intercession de sa glorieuse Mère, la Vierge Immaculée, et celle de tous les Saints Anges et des Bienheureux qui règnent dans le Ciel, afin d'obtenir que la paix se maintienne dans toutes les classes de notre paisible société.

Cette paix qui surpasse tout sentiment et qui est un avant-goût de la céleste patrie, nous sera accordée dans ces jours de retraite et de salut, si nous nous unissons au chant joyeux des Anges qui, à la crêche du Divin Enfant Jésus, firent retentir les airs de ce cantique mélodieux: Gloire à Dieu au plus haut des Cieux et paix sur la terre aux hommes de bonne volonté!

The (Toronto) *Canada Law Journal*, February, 1874, says:

There is no cause to despair of the future of any country so long as it possesses an upright, learned and industrious Bench of Judges, and a Bar composed of men having the same requisites, and who have, in addition, a distinct appreciation of their position as bound to assist and not mislead the Bench, and tenacious withal of the rights of the clients they represent.

That the Bench and Bar of our sister Province of Quebec is not all that could be desired has been evident for some years past; but there are not wanting members of the Bar in that Province who not only deplore the existing state of things, but are determined if possible to apply a remedy.

We published some time ago an able article from the *Revue Critique* on this subject, written by Mr. W. H. Kerr. The dissatisfaction has now culminated in a series of resolutions which were passed by a large number of the Bar, and presented to the Court of Appeals at a recent sitting.

We desire to say but little on such a painful subject, especially as there is every reason to hope that a better state of things will shortly prevail. The burden of the charges against the Court of Appeals is, the accumulation of arrears of business, resulting in a practical denial of justice, and a want on the part of some of the Judges of attention to arguments presented by Counsel, and a general carelessness in their adjudications; and, with respect to one of their members, a suspicion that he sometimes gives undue and improper weight to the representations of some lawyers who are said to be favoured above their fellows. This, the most serious charge of all, and which is said to point to Mr. Justice Monk, demands instant investigation. We trust it may prove

unfounded. It is also asserted that, in general, the Montreal Judges favour lawyers in the Montreal District, and that the Quebec Judges are partial to the Bar of the District of Quebec. Chief Justice Duval, it is alleged, is not equal to his position owing to ill health, physical weakness, and the want of other attributes essential to the success of the Chief of a Court. Judge Badgley, a most able jurist, and as a man highly respected, is afflicted with deafness to such an extent that his usefulness is much impaired. We believe that no sort of censure was intended by these resolutions to the two Judges recently appointed, Mr. Justice Taschereau and Mr. Justice Ramsay.

The whole matter will doubtless receive the attention of the Government of the Dominion at an early day, and the less said about it in the meantime the better.

SECOND AND THIRD MEETINGS OF THE BAR.

Montreal Gazette, 4th March, 1874, said :—

The fact which we stated yesterday, that one hundred and three cases are inscribed before the Court of Appeals at Montreal alone, and that this vast total is constantly receiving additions, is of itself sufficient to account for the keen interest which is being manifested by the Bar with respect to the appointment of new Judges and the completion of the Court. At present all business is at a stand still, and there is a glorious opportunity for suitors, defeated in the Courts below, to bid defiance to their opponents by taking their cases up to the Queen's Bench in appeal, where almost any amount of delay may be obtained, in consequence of the lock up. The Bar of Montreal met to consider this discreditable condition of things last Tuesday week, but at the entreaty of the Government, a few days' grace was granted. While intense dissatisfaction prevailed that an administration, which was to reform everything, should have brought things to such a pass, it was resolved to do nothing which might tend to embarass the Government in their efforts to solve the difficulty. A week passed away, and the Bar again assembled yesterday to hear what had been done. During the whole week, rumours had been abundant respecting the appointments which were contemplated, but of positive information there was none, and apparently for the very good reason that there was none to give. Within the four and twenty hours previous to the Bar

meeting, the Ministerial organs had given inharmonious sounds on the subject. The *Herald* yesterday morning stated that the leave of absence of Chief Justice Duval had been extended, that leave of absence had also been granted to Mr. Justice Monk, and that Mr. Joseph Doutre would succeed Mr. Justice Badgley, who, it has been known for some time, after a long and distinguished career, has intimated his wish to retire from the Bench. The *Nouveau Monde*, however, had on the previous evening a different version. It stated that Judges Sicotte and Loranger would be appointed Judges *ad hoc* to fill the places of Messrs. Duval and Monk; but that Mr. V. P. W. Dorion would replace Mr. Justice Badgley. We are sorry to have to add that our French contemporary's version was that which was yesterday believed to be the true one. We should have hailed with pleasure Mr. Doutre's accession to the Bench, and we believe that few appointments could have been more acceptable to the majority of the Bar.

The meeting of yesterday, as will be noticed by our report elsewhere, was adjourned, upon the assurance that arrangements for completing the Court would be concluded that very day. To-morrow the members of the Bar will re-assemble to receive the announcement of the appointments. In the meantime we will only say that the delays and the intrigues which have taken place with respect to this matter, have left anything but a favourable impression of the administrative ability of the so called Reform Government. The all but universal impression is that the public interests are being trifled with; and appointments which, according to the oft-repeated professions of the men in office, should be bestowed on the most deserving, are made the occasion of intrigue and wire-pulling. We may add that it would be hard to imagine a more unfortunate arrangement for the Court of Appeals than making temporary appointments of Judges *ad hoc*. What stability of jurisprudence can be expected while the composition of the Bench is constantly undergoing change? Of what avail to argue 103 cases before a Court of which two of the members only sit temporarily, with the prospect of a re-hearing being ordered upon their retirement?

Montreal Herald, 4th March:

The judicial returns for the past year published in the last number of the Quebec *Official Gazette*, an abstract of which ap-

pears in another column, contain some curious information about the administration of justice in this Province. Perhaps the most striking point is the fact that during the past year, the six Superior Court Judges in Montreal, or rather four of them, really did more work than the remaining nineteen Judges in the other parts of the Province; these Montreal Judges having rendered in the Superior Court in Montreal and Terrebonne and in the Court of Review no less than 649 judgments in contested cases, while the remaining nineteen rendered only 432. In addition to this, the Chamber business, Insolvency, Expropriation cases, &c., not included in the foregoing, is much larger in Montreal than elsewhere, and tends to make the disparity much greater, while the number of judgments rendered by the Circuit Court in Montreal is slightly in excess of the rest of the Province. From this it would appear that the total number of judges is either altogether too large, or the number in Montreal is too small. In the Court of Appeals the fact that 354 cases, involving probably millions of dollars, have been hopelessly awaiting adjustment, will be deemed sufficient to justify the very extreme course taken by the Bar in refusing to appear before the Court until it was thoroughly re-organized. Indeed, even if it were properly constituted, it would take the Court over five years to dispose of pending cases, without touching new cases at all, at the rate at which judgments were given last year; for the refusal to plead was only determined upon in December, and any cases then argued would not be decided until March in the present year, so that the number of judgments rendered last year was not diminished on that account. No words can add to the force of these figures themselves, in showing the utterly unsatisfactory state of our administration of justice in the Province, and the necessity of radical measures for putting it on a footing in in which it can command the confidence of the community.

FOURTH MEETING OF THE BAR.

[Compiled from the *Gazette*, *Herald* and *Star*, 6th March.]

The adjourned meeting of the Bar of Montreal, to consider the state of affairs in connection with the Court of Queen's Bench, in Appeal, took place at the usual place at three o'clock yesterday afternoon. The attendance of members of the Bar was very large and influential.

Mr. J. J. DAY, Q.C. was requested to take the Chair.

The CHAIRMAN said it was unnecessary for him to explain the purpose of the meeting; it had already been explained several times, there having been successive adjournments from time to time. Their meeting concerned the constitution of the Court of Appeals. If the Bar might believe the public journals, changes had already taken place, although the Bar had received no official information—for he believed Mr. Archambault was not present to-day (laughter). He learned from the public journals that two leaves of absence to Messrs Duval and Monk—had been granted, and one of the honorable judges had also lately resigned. Of the latter fact they might be confident, for the *Gazette* of that morning, while eulogizing the learned Judge's official career, intimated that he had ceased to be a member of the Bench. Three of the Judges were therefore either temporarily or permanently out of the Court of Appeals. The Court had now to be reconstructed. At Quebec no business had been done so far, as only Judges Taschereau and Ramsay remained in the Court. The question now arose as to the action the Bar were disposed to take. If the facts stated by the public journals were true, nothing that the Bar could do would affect the case. He did not think there was any use in adjourning the meeting again. He felt that every effort should be made to reconstitute the Court of Appeals with all possible speed, but he did not think they should bring such pressure upon the Government as to drive them into nominating A, B, or C, to meet the exigency of the moment. It was better that time should be allowed for due consideration. He might mention that an offer of a seat on the Court of Queen's Bench had been made to a learned Judge of the Superior Court (Stuart), but the offer had been declined. Hence the Government might be in a difficulty at this moment in reconstituting the Court, and it was not for the Bar to do anything that might lead to inconsiderate appointments. He deprecated the introduction of politics into this matter. In the selection of judges the Government should have an eye only to the learning and abilities of the persons appointed. The Chairman concluded by remarking that if any gentleman present, professing to be the organ of the Government, had any information to give, the meeting would be happy to receive it. If not, it was open to any one to propose anything he pleased.

Mr. DEVLIN rose to ask a question, not as the organ of the

Government, but as a member of the Bar. He wished to know the object of the meeting, and what was the business before it. As he understood it, the meeting was originally called for the purpose of expressing dissatisfaction with some of the gentlemen then occupying seats on the Bench, but who have since left it.

The CHAIRMAN—What I stated was not from official sources. It is true that what was the cause of our meeting in the first place is to a certain extent at an end; but the evil still exists because we have no one to take the place of those who have retired. This meeting, therefore may, with propriety, take into consideration the present state of things before the Court of Appeals. The Chairman then read a resolution which he had prepared for the first meeting, but which would not be applicable now. He said it was quite in order, however, for any one present to take any action they pleased.

Mr. A. CROSS, Q.C., said that the appointment of Judges in the Court of Queen's Bench could never be a matter of indifference to the Bar. It seemed to him that the present state of matters was worse than that formerly complained of, because the grievance now was that there was no court at all, so that the reason for calling the first meeting still existed, and with additional force. The question now came up, whether the Bar had waited long enough, and whether the arrangements should have been completed, or whether the Bar should wait for a further opportunity. They could not shut their eyes to the fact that there was but one permanent appointment to be made, that is, in Mr. Justice Badgley's place. He (Mr. Cross) had that day met Mr. V. P. W. Dorion, who said he had nothing to communicate to the Bar, but he said that there was really no truth in all the rumours that were before the public in reference to the appointment of *ad hoc* Judges, except as to the fact of Mr. Justice Stuart's refusal. This had only been sent in on the previous day, so that there had not been much delay yet. The *ad hoc* Judges must be made up from the Superior Court; therefore, it was not likely that any steps would be taken to provide them until Mr. Justice Badgley's place had been filled. The Bar might, it seemed to him, take this opportunity of expressing an opinion as to the principle of the appointments, but he suggested that it would be advisable to adjourn the meeting for a few days longer.

The CHAIRMAN suggested that a new meeting might be called with reference to the special business desired to be brought up.

Mr. KERR, Q.C., said in the notice calling the meeting, the object was stated to be "for the purpose of taking into consideration the state of affairs before the Court of Queen's Bench." Now this notice had been published on the 23rd February last past. The only thing that had been done in the interval was this, that instead of having an unsatisfactory court, the Bar had now no court at all, (applause,) so that things had gone from bad to worse. There was this fact staring them in the face, that the Court was to meet on the 11th March, and this was the 5th, so that he thought they were justified in consulting together and seeing whether they could adopt any means of having a session of the Court of Queen's Bench next term. It seemed to him that if the same time was taken to fill the vacancies in the Court of Queen's Bench that had been taken to procure them, they would not have a term till next June. The Bar ought be certain of something, for the present state of uncertainty was very unpleasant. He thought it advisable to take some steps in view of the difficulties—the insuperable difficulties—experienced by the Government in filling up one place in the Queen's Bench. Under the circumstances, it might be a convenient time for broaching to the members of this Bar something which might aid the Government in their difficulties, and at the same time put this question of appointing Judges on the proper basis. Hitherto complaints had been made by all parties that the appointments of Judges had not been satisfactory, and that the Bench had been brought into disrepute by the mode of appointment. The parties most interested in the appointment of good men to the Bench are the respectable members of the Bar who are to practice before them. And the Bar, moreover, enjoyed peculiar advantages in finding out who are the proper men to be named judges. If you practice fifteen years with a man, you acquire a more intimate knowledge of his abilities than an outsider can have. He therefore begged leave to submit at this time that no judge whatever should be appointed unless his name formed one of a certain number to be sent up by the Bar to the Government, and that the Government should select from the names sent up by the Bar those whom they thought fit and proper, but the Government should have no power to go beyond the names submitted. He had broached this idea two years ago in

the *Revue Critique*, and he knew that the present Minister of Justice approved of the idea, as he told the speaker that he thought that would be the fairest and best way to have good judges on the Bench. He therefore moved, seconded by Mr. Joseph Doutre, the following resolution:

"That the present system of appointing Judges is destructive alike to the Bench and the interests of society; that the Bars of the Province should indicate to the Government the names of those of their members competent to discharge the duties of a Judge, and that from the persons whose names are so indicated, Judges should alone be chosen by the Government."

He threw this out in view of the difficulty which apparently beset the Government of the day in making nominations. He thought if the system suggested could be inaugurated in this country, it would redound to the public good and to the benefit of the Bar, and if it were possible to inaugurate such a system, they would be doing their duty to the profession and to society at large. [Applause.]

Mr. DEVLIN contended that this motion should not have been brought up as a substantive motion, but rather as a notice of motion. He did not agree with Mr. Kerr that the Government had met with insuperable difficulties in the way of making these appointments. It was but right that the case should be stated fairly. Government were not unable to fill the vacancy. The fact was, as the members of the Bar knew, that the resignation of Judge Badgley had only very recently been received; and, as they knew, his place had been offered to a gentleman at Quebec who had seen fit to decline, but his refusal had only yesterday been received. It was plain then that unless they wished to drive the Government at railroad speed, it was impossible for them to consider the appointments. As to the appointments to the temporary vacancies, they rested with the Superior Court according to rule, if not according to law. For the appointments which Government had to make, he thought it should have time for proper consideration. Mr. Kerr's motion could in no way affect these appointments, it was, however, of a most important nature, and he trusted it would be allowed to stand over. He would propose that this meeting do adjourn and stand adjourned till the 11th instant, the day of the meeting here of the Court of Queen's Bench, Appeal side.

Mr. GIROUARD held that to adjourn under the circumstances

would be to render themselves ridiculous in the eyes of the public; he did not censure the Government for taking time to make nominations that would inspire public confidence, and having affirmed that political considerations should have nothing to do with judiciary nominations, asserted that they should also be free from undue clerical influences, and he regretted that apparently the latter had been unfavourable to a *confrere*, who had always been distinguished for his learning, impartiality and integrity.

Mr. J. L. MORRIS said there was no desire on the part of the Bar to hurry the Government, but there was a desire to have a proper Bench, and he would support Mr. Kerr's motion, believing that it would introduce a better system of appointments. He thought, if the meeting agreed with the principle of Mr. Kerr's motion, it would be a mistake to adjourn, because now was the time when the suggestion of names would have effect. After the Court had been re-constituted it would be useless to make suggestions. He thought it would be better that names should be suggested by a Committee composed of the leading members of the Bar, instead of by the whole Bar.

Mr. O'HALLORAN expressed his great astonishment at the proposition of Mr. Kerr. He yielded to no one in his adhesion to progressive ideas and had never expected to have to act as a break on Republican and Democratic propositions, but this proposal was in advance of anything which had previously been brought up under the British Government and constitution. The appointment of Judges was a matter of the Royal prerogative, and to attempt to dictate to it was an infringement which would not be tolerated. To attempt to dictate to the Crown was both foolish and futile, and no Government would be justified in regarding it as such. The Bar should never arrogate to itself the right of dictating to Government as to what circle it should select from, the recipients of its favours. He believed, however, that the Bar had a right to complain that the Government had left the Province so long without a tribunal to dispose of the cases which had for years been awaiting its disposal.

Mr. DOUTRE, Q.C., observed that change of Government operated greater change of opinion than he had imagined. He saw Mr. Kerr advocating a democratic motion, and Mr. O'Halloran, the great champion of democracy, now pleaded for the Royal prerogative. (Laughter.) He, however, had not changed his mind. He had studied the subject in all its aspects, and he

saw no protection for society except carrying out the principle contained in this motion. It was admitted on all hands that there were men on the Bench who would never have received three votes from the Bar. He would prefer, however, to let the motion stand over.

Mr. W. W. ROBERTSON opposed the motion as out of the scope of the Bar.

Mr. CROSS said the proposition of Mr. Kerr was undoubtedly of the very highest importance. There was no good reason, he thought, to be urged against the principle, but the novelty had staggered some persons.

Hon. Mr. LAFRAMBOISE thought the motion would have the effect of taking away the responsibility of the Government to the people for their appointments, and that it was a responsibility which the Government should not be relieved of.

Mr. WOTHERSPOON supported the principle of the motion.

Mr. KERR, in closing the discussion, said he had been met by the objection that it was a matter of prerogative. What of that, if the prerogative was bad and was badly exercised? How many cases were there in which the prerogative had been swept away? Why should not this plan be adopted if the members of the Bar were all convinced, as he believed they were, that the system of nominating Judges in Canada at the pressnt day was bad, and exposed the Minister of Justice to be torn to pieces, as the Hon. Mr. Laframboise had said?

Hon. Mr. LAFRAMBOISE—I didn't say that.

Mr. KERR—You said the Government were receiving letters on the subject from all quarters, which is much the same thing. Men were pushed forward on these occasions, because they had given Ministers assistance in the elections. The suggestion in the motion was no novelty. In England it had been proposed that the selection of Judges should be intrusted to the Lord Chancellor and the Justices. Mr. Doutre had referred to his supposed change of opinion, but this was incorrect. He (Mr Kerr) had advocated this very plan in an article written in 1872, and the present Minister of Justice had commended the suggestion then as the best plan he had seen. (Applause.)

The CHAIRMAN expressed his concurrence in the principle of the motion, that the nomination of Judges should first be suggested by the Bar.

Mr. Devlin's motion for an adjournment until 3 o'clock on the 11th instant, was then unanimously agreed to.

OPINIONS OF THE PRESS.

Under the title " Ne l'embarrassons point," the *Minerve* of 6th March said :

Il y a quelques mois, le barreau se réunissait à Montréal et à Québec pour affaires urgentes. Il s'agissait de s'occuper de la réorganisation des tribunaux et les avocats décidaient de ne plus plaider devant la Cour d'Appel telle qu'elle est constituée.

Mais des amis du gouvernement interviennent et font entendre qu'il va tout réorganiser, qu'il vaut vaut mieux ne pas presser le gouvernement de crainte de déranger ses petits plans.

Alors les avocats qui sous le régime de la corruption, auraient senti leur sang bouillonner, répondent : Soit, attendons, n'embarrassons point le gouvernement.

Comme un homme averti en vaut deux, le gouvernement ne ne fait rien pendant trois mois pour organiser les tribunaux, et le terme de la Cour d'Appel s'ouvre avec une cour composée de deux juges au lieu de cinq. Mais les avocats se réunissent à Québec et à Montréal, des amis de M. Dorion insinuent que le lendemain, la réforme sera faite, que la Cour pourra s'occuper des cent sept causes à Montréal et d'une vingtaine à Québec. Puis on souffle à l'oreille qu'il ne faut pas casser les vitres ; ni presser le gouvernement, car cela pourrait déranger ses petites combinaisons. Alors les gens qui aiment plus le gouvernement que leurs clients de s'écrier encore : N'embarrassons pas le gouvernement. Le lendemian pas de juges, même demande, mêmes réponses et toujours on répète le refrain judiciaire : Ne pressons pas le gouvernement, ne dérangeons pas ses petits plans et ne l'embarrassons pas.

Voilà six jours que cette commédie dure. Jusqu'à quand se repêtera-t-elle ? Quand donc les bouillants champions de la justice, si exigeants autrefois, se fatigueront-ils de quémander des délais, et les autres de l'accorder ?

On veut calmer l'opinion publique avec une demi-mesure en nommant des juges *ad hoc !* Mais est-ce là ce que l'on avait promis, ce que l'on avait fait attendre ?

Mais pourquoi tarder ? Choisissez donc parmi vos amis : à vous entendre ce sont tous de grands hommes de loi, des jurisconsultes éminents. Pourquoi vos expédients, vos demi-mesures en face de cette richesse ?

Pour ne pas déranger ses petits plans, le gouvernement boule-

verse tout. Il enlève M. le Juge Loranger, à Sorel, pendant le terme de la Cour. Tant pis pour les plaideurs !

Si le gouvernement réorganisait les tribunaux on sait ce qui arriverait. Ou M. Dorion donnerait sa démission, pour accepter la place de Juge en Chef qu'il se réserve, ou il renoncerait à cette position pour conduire son parti très-riche en grands hommes, mais qui ne peut pas se passer de lui. M. Dessaulles et M. Laflamme lui-même le regardent en ce moment comme un homme providentiel, ce qui ne manquera pas d'étonner ceux qui connaissent ces libres-penseurs de l'Institut-Canadien.

On comprend l'injustice suprême qu'il y aurait de toucher à ce petit projet. Les rouges étant au pouvoir, il faut que l'intérêt du parti prime tous les autres et ceux dn public et ceux des plaideurs et ceux des veuves les plus chargées d'orphelins. Et l'on souffre tout cela sans mot dire ! Des gens qui criaient jadis si fort ne soufflent plus mot. Cette aplatissement complet, cette servilité sans exemple chez les hommes qui tonnaient si fort contre les abus de l'ancien régime, ne sera pas un des moindres mir. cles opérés par M. Mackenzie.

Chose singulière, les plus ardents jadis, sont les plus complaisants aujourd'hui. Plusieurs de ces intrinsigeants d'autrefois nous font l'effet de tigres transformés en chiens couchants.

Le Nouveau Monde, March 6th :

Il n'y a pas d'autres nouvelles ce matin relativement aux nominations de juges de la Cour du Banc de la Reine. Dans le public, on se répète généralement qu'il vaudrait beaucoup mieux attendre une réorganisation complète au mois de mai, que d'essayer une reconstitution partielle et temporaire sous la pression des circonstances difficiles actuelles. Il est évident qu'une semblable détermination serait bien accueillie en général et qu'elle permettrait au ministre de la Justice d'agir avec toute la maturité de délibérations nécessaire.

Hier, le Barreau de cette ville se réunissait de nouveau sous la présidence de M. Day. Le Président fit observer que le juge Badgley ayant résigné et les juges Monk et Duval ayant reçu un congé, l'objet que le Barreau voulait atteindre lorsqu'il était convoqué pour exprimer son mécontentement au sujet de la composition de la Cour du Banc de la Reine, était atteint et qu'il n'était que juste de donner au ministre le temps nécessaire pour remplir les vacances. Il croit qu'un ajournement serait la seule chose convenable à faire.

Telle n'était point l'opinion de M. Kerr. Il voudrait prendre une décision, et sinon blâmer le ministère, du moins lui dicter impérieusement son devoir. Il proposa la résolution suivante, secondée par M. Jos. Doutre :

Que le système actuel de nommer les juges est également dommageable au Banc et aux intérêts de la société ; que le Barreau de cette province devrait indiquer au gouvernement de la Puissance les noms des avocats compétents à faire des juges, et que le ministre de la Justice soit tenu de choisir parmi ceux qui auraient été designés.

Cette motion, si elle eut été adoptée, aurait été suivie d'une autre désignant ceux que M. Kerr jugeait dignes de monter sur le Banc. Elle était même toute prête.

C'est ainsi que l'on espérait arracher au Barrau une recommandation qui serait regardée dans le public catholique comme un acte de gnerre aux institutions qu'il aime et respecte par dessus tout.

M. Devlin prétendit qu la question méritait considération et qu'il valait mieux ajourner au 11 courant, jour d'ouverture du Terme, et laisser au ministre le temps d'arrêter son choix.

M. Girouard se déclara favorable à la motion, afin, dit-il, de faire échouer "*certaines intrigues cléricales ou autres*" qui empêchent des nominations qu'il parait fort désirer.

Il croit le Barreau très capable de choisir les juges, et que la politique n'entrerait pour rien dans ses préférences.

Il est seulement dommage que M. Girouard ne nous ait pas mis un peu plus dans sa confidence, et qu'il n'ait point fait toucher au Barreau les fils de cette *intrigue cléricale*, nommé les acteurs et celui ou ceux contre qui cette intrigue s'exerce. Il était en trop beau chemin, et il jouait trop bien le rôle de conservateur catholique, pour s'arrêter court et ne lancer que de vagues insinuations.

M. O'Halloron, ancien député de Missisquoi, s'opposa vivement à la motion. M. Doutre vint à la rescousse, et soutint que le moyen suggéré était "*le seul capable de sauver la société !*"

Néanmoins, comme il ne croit pas qu'une recommandation faite en dehors de la sanction légale puisse avoir de résultat, il pense aussi bon de ne point presser la question.

L'Hon. M. Laframboise démolit d'un mot les prétentions de la motion Kerr-Doutre ; c'est que son adoption ferait disparaitre l'une des garanties constitutionelles de l'administration et qu'elle

ferait disparaitre la responsabilité ministérielle pour la nomination des juges. Aujourd'hui les électeurs et les justiciables savent à qui s'en prendre des mauvaises nominations judiciaires. C'est au gouvernement qu'ils adressent les reproches; c'est le gouvernement qu'ils puniront. Mais que pourraiant ils contre le Barreau qui ne relève en aucune manière du public et qui est un corps absolument irresponsable ? Rien évidemment.

Après quelques débats, la motion d'ajournement au 11 mars courant, à trois heures de l'après-midi, fut adoptée sans division, et le Barreau s'rjourna.

Montreal *Witness*, 6th March:

The difficulty in regard to the Court of Appeals continues. No appointments have been made, so far as can be learned, although it was intimated that they would be made known yesterday. It seems the refusal of Mr. Justice Stuart of the Superior Court to take a seat on the Queen's Bench has added to the embarassment of the Government in filling up the vacancies, and the Bar seem willing to give them time to settle the matter. It seems easy enough to denounce incompetent or unfit judges, but not so easy to supply their place. Criticism is facile, reform arduous. So far as can be seen, the difficulty is not so much to find men fit to be judges, but to please certain interests in the appointments. Certain selections the *Nouveau Monde* says would be unfortunate and suicidal, which words, from such a source may be taken to mean that the concurrence of the influence that rules Lower Canada—the Church of Rome, and especially the Programmist party within it, must be a paramount condition in appointments to the Bench. This influence has too much at stake in this Province to brook the elevation of any one who, in questions that might arise between it and any of its followers or others, would be guided by the eternal principles of justice and law in preference to ecclesiastical arbitrariness and dogmatism. Other selections would hardly please the Bar, while yet others would be politically objectionable. To state these difficulties, however, is to solve them. Until it be formally declared that the Church of Rome is the ruler of the Dominion of Canada, the Government of the latter, and above all a government calling itself Liberal and Reform—qualifications which this Church has placed under its severest ban, although for its own purposes sometimes allying itself politically with those professing

them—has no right to admit ecclesiastical considerations or influence in any of its public appointments, especially to the Bench, where such a policy could not fail to have the most baleful consequences. As for the Bar, seeing its members have the deepest interest in securing learned and impartial judges, it is not very likely they would interpose any objection to selections made on the score of personal merit. That political considerations must to some extent weigh in these appointments seems unavoidable in existing circumstances; but where they are allowed to cover incompetency or defects in character, the result will recoil with damaging effect on their makers. No better example in selecting judges could be followed than that of Britain, whose judiciary deservedly occupy a high place in the world's esteem. There it is the aim of every Government to distinguish itself for the talent and high character of its legal appointments, and the result is a galaxy of judges and interpreters of the law unequalled perhaps in any other country. So high is the character of the Bench that even in Ireland we find Roman Catholic judges deciding against the hierarchy of their church when they considered the latter condemned by the law.

The suggestion that judges should be selected from a list prepared by the Bar seems one well deserving of consideration, especially with a Government hampered by outside influence. A converse proposition would be that the Government should communicate to the Bar the names of those it intends to appoint to the Bench to evoke opinion thereupon previous to confirming them. The one seems as practicable as the other.

Whatever method be adopted it will greatly discourage the friends of the present Government if these important appointments should prove unsatisfactory to the Bar and the public.

The Court of Queen's Bench opens on the 11th inst., till which time the Bar meeting has adjourned to see what can be done.

Montreal Gazette, 9th March:

In connection with this subject, the Montreal Bar, or, at all events, a considerable part of it, is apparently in danger of making itself as ridiculous as the Government has already succeeded in showing itself incompetent. The result of the last meeting of the profession was, in effect, a declaration that it was better to abstain from asking the Government to do its duty than to run the risk of bad appointments being made. So far this was, if

not a direct expression of want of confidence in the Government, at all events an unintentional exhibition of distrust; and to this extent we willingly subscribe to the opinion of the Bar. But this is not all. The Bar might have felt justified in going a great deal farther; nay, if actuated by the feelings and traditions of a Bar worthy of the name, it was bound to have gone a great deal farther, and to have protested against this fatal and imbecile trifling with the administration of justice. One of the first obligations of the Crown is to administer speedy justice to its subjects; and not only is it the right of the latter to get it—a right asked and agreed to even in a barbarous age, and witnessed by one of the earliest charters, but it is a right so urgent and unquestionable that to refuse or to withhold it is nothing short of a high crime in a Minister of State, and one that brings not only discredit deservedly on himself, but also ruin unfortunately to others. In truth, what are we to think of Mr. Dorion throughout this miserable business? For months, if not for years, the Court of Appeals, it is said, has been practically useless. It was so, if Mr. Dorion is to be believed, nearly a year ago, when he made his violent attack on Sir John Macdonald for not having it in an efficient state. It has now got to be worse. It has become so uninviting that Judges to whom seats in it are offered refused them. In this state of things what does Mr. Dorion do? He gets the resignation of one member, and gives leave of absence to two others. Why did he not ask for their resignation? In case of their refusal, which would scarcely have been possible, if the Minister had under the circumstances the right to make the request, Mr. Dorion might have had something to show to justify the vacant seats and the suitors' ruin, at least until Parliament should meet, but no. He gives them leave, at least so it is said, and if we assume this wrongly we shall be glad for Mr. Dorion's sake; and then he expects judges of other courts who respect themselves to go and do the dirty work of cleansing the Court of Appeals of almost insuperable arrears besides an immense accumulation of new cases. Of course such judges cannot easily be found. The consequence is that there is no Court of Appeals, for the appointments announced do not complete the Court. It is not abolished by law; but there is a power above the law that dispenses with it. Assuredly there is a heavy responsibility resting somewhere for this state of things. Is it possible to doubt that in so extreme a case the Governor-General is not powerless to

insist that the course of law and justice shall not be stopped? It is a favorite tenet with the Dorion faction that a Governor-General does not go for much at any rate; but we have yet to see that he can go for so little as this: and be expected to stand by and see the law openly defied and set at nought by his Ministers while the Queen's subjects are the innocent and ruined victims, without raising his voice against the iniquity. Of course we do not affect to be ignorant of the unworthy motives imputed to Mr. Dorion by his enemies. We are not among his friends, but we hesitate to believe that personal objects of the nature extensively believed are at the root of this extraordinary state of affairs. No, Mr. Dorion is bad enough and has enough to answer for already without this. He is responsible for the only two appointments that brought discredit on the Bench: there is no danger that he should aggravate the responsibility which he must keenly feel on that head, by perpetrating an act, that would give no strength to the Court of Appeals while it would inflict indelible disgrace on himself.

Our article on the Court of Appeals was unavoidably crowded out on Saturday morning, and since it has been in type, an announcement has been made showing an attempt to complete the Court. Mr. Justice Sanborn has accepted a seat in the Court, and Mr. Justice Loranger is appointed temporarily as a Judge *ad hoc*. What we have written elsewhere is in no way affected by these appointments, for it must be remarked that the Court is yet incomplete. There are but four Judges, and it was ruled last Term that parties cannot be forced to proceed with the argument of their cases before four Judges, except by consent, such course having been found very unsatisfactory to Bench and Bar, as well as suitors. And we may say further that no completion of the Court by temporary appointments can be satisfactory to the Bar, especially while the roll of unheard cases is as long as it is at present. The appointment of *ad hoc* Judges is but exposing the Bar to a repetition of the grievance sorely complained of last December, namely, that cases after being argued and taken into consideration, were sent down for re-hearing in consequence of changes in the membership of the Court. And it is specially difficult to discover any reason for *congés* at this moment, seeing that it is notorious the Judges to whom leave of absence has been granted have only been oppressed

during the past six months with the sense of nothing to do, and that one of them had actually resigned, but was induced to withdraw his resignation at the solicitation of the Minister of Justice.

Montreal Gazette, 10th March:

The sittings of the Court of Queen's Bench, at Quebec, which came to an end on Saturday, were something remarkable in the annals of the judiciary. Out of five Judges composing the Court, one had resigned, and the other two had received leave of absence long before the Term commenced. There remained but two—Judges Taschereau and Ramsay—who opened the Court on Monday morning in due form, but, of course, were forced to adjourn immediately owing to there being no quorum. Day after day was this solemn farce continued, the two Judges sitting for a few moments each morning waiting for something to turn up—some *Deus ex machina* to help them out of the difficulty—until Saturday arrived, and with it the end of the March term. Then the two learned Judges left for Montreal. All this time numbers of important cases were standing for hearing, but in consequence of the failure of the Government to make appointments in season, no opportunity was presented for the suitors to approach the seat of justice. At Montreal the Term begins to-morrow, where over a hundred cases are awaiting hearing, and the result threatens to be the same. This is a pretty specimen of Grit administration which, while its attention is monopolized by intrigues and counter-intrigues, allows the public interests to go to the dogs.

Le National, 10th March:

STATISTIQUES JUDICIAIRES.—Il y a quelques jours, un journal de cette ville contenait, à propos de statistiques judiciaires, un article à sensation, propre à produire beaucoup d'effet, sur ceux qui ne connaissent pas parfaitement l'état des choses judiciaires à Montréal.

D'après les derniers rapports, il semblerait en effet que les Juges résidant à Montréal auraient rendu durant la derniére année, en Cour Supérieure et en Révision; 642 jugements dans des causes contestées, tandis que les autres juges n'en auraint rendu que 432.

Le confrère en conclut qu'il n'y a pas assez de juges à Montréal ou qu'il y en a trop ailleurs.

Cette anomalie n'est qu'apparente, et les faits peuvent s'expliquer d'une façon trés naturelle.

Les juges résidant à Montréal, même quand ils siègent seuls à la Cour Supérieure, ont toujours la ressource de consulter leurs collègues qui délibèrent dans la même chambre. En Revision, ils sont obligés de se consulter mutuellement et de s'entendre pour la distribution du travail. Dans un très grand nombre de causes, les juges sont aidés dans les matières commerciales et les affaires de dommages, par d'intelligents jurés devant lesquels la procédure est courte et sommaire. En outre, un grand nombre de contestations ne sont pas sérieuses et n'ont pour objet que de gagner du temps, d'obtenir des délais. Les plaideurt ne s'exposent aux frais qu'entrainent ces contestations simulées que lorsqu'ils sont réduits à la dernière extrémité, et exposés à être mis sous la loi de banqueroute ; aussi cela n'a-t il lieu que dans des causes pour des montants considérables, comme ceux qui sont reclaimés dans les grandes villes.

Dans les districts ruraux les juges ont à faire une rude besogne. Ils ne sont pas aidés par des jurés; en matieres civiles, notre population n'en veut pas. Le juge siégeant est seul, et n'a pas la ressource de consulter des collègues, et il a en outre la perspective de voir ses jugements revisés sans être entendu, comme peuvent l'être les juges des grands villes. Les causes contestées dans les districts ruraux, sont en outre d'une nature beaucoup plus compliquée que celles qui surgissent dans les villes. Dans celles ci, la masse des affaires est d'une nature commerciale, souvent tranchées par des jurés, et surtout décidées par l'étude de la jurisprudence. Dans les districts ruraux, les causes contestées ont en général nn caractère très compliqué; les questions en litige sont généralement des questions de succession, de communauté, de loi municipale, etc.

Nous ne disons rien de trop en affirmant que, en moyenne, avec les désaventages de sa position, de son isolement, le juge d'un district rural doit consacrer à une cause contestée autant d'étude et de travail, que le juge des grandes viles en peut mettre à la décision de trois causes contestées,—avec l'avantage de pouvoir consulter ses collègues, d'avoir accès à de magnifiques bibliothèques, et d'entendre sur les questions les plus difficiles, les membres les plus distingués du Barreau.

Il se peut que la décentralisation judiciaire aiet été poussée trop loin, surtout en maintenant des magistrats stipendiaires dans les districts où il y a des juges résidets. Nous n'examinons pas aujourd'hui cette question. Mais tant que le système actuel sera maintenu, on ne pourra prétendre qu'il y a une grande disproportion dans le travail réparti entre les juges de Montréal et Québec, et ceux des autres districts.

Nous émettons une proposition générale, sans nous arrêter aux exceptions qui doivent exister. Ainsi, nous croyons que M. le Juge Berthelot est chargé du District de Terrebonne en même temps que des affaires de Montréal. Il peut y avoir là un surcroit déraisonable d'ouvrage imposé à un seul juge; mais l'exception n'ôte rien à la valeur de notre assertion que, vû les circonstances, les juges des District ruraux ont à faire une somme de travail au moins égale à celle qui incombe aux juges des grandes villes.

Le Canadien (Quebec), 9th March:

M. Dorion prend son temps; et après s'être tant lamenté en chambre sur la nécessité urgente de réorganiser la Cour d'Appel, il juge maintenant à propos de laisser ce tribunal sans titulaires. En effet, il n'a nommé qu'un seul juge, M. Sanbourn, en sorte qu'il n'y a pas encore de quorum et que la cour ne peut pas siéger à Québec durant le présent terme.

Pour se tirer d'embarras, M. Dorion a voulu que la cour siégeât avec quatre juges seulement. M. le juge Taschereau a positivement refusé de siéger si la cour n'est pas au complet et composée de cinq juges. Il faut donc que le ministre de la justice s'exécute et donne à d'autres la commission qu'il semble convoiter pour lui-même ou pour quelqu'un de ses amis.

Toujours est-il que l'administration de la justice souffre de tous ces retards occasionnés par la petite diplomatie de M. Dorion. Nous étions loin de croire le ministre de la justice capable de faire souffrir toute la Province pour satisfaire ses prédilections politiques, et de jeter par là le discrédit et le ridicule sur l'administration de la justice. Car, à Québec, on commence se à demander: As-tu vu les nouveaux juges?

Montreal Herald, 11th March:

We observe that the Quebec *Canadien* feels extremely lugubrious over the condition of this Court. We shall say at once that

it is not yet constituted as we desire it to be; but we note with a little surprise the lamentations which come from the source we refer to, or from any similar source, since the inefficient condition of the Court, so far as it is due to any human agency, and not to the decay of the faculties of aged men, is assuredly due to the late Ministry. The Macdonald Ministry had known for a couple of years at least, all the weaknesses of the Court, and had either neglected, or had been unable to remedy them. The difficulty in the way of applying a remedy is well known. It consists in the power given by the judicature act to a Judge to retain his functions and his salary long after the public voice has pronounced him inadequate or unfit for the performance of them. Whether it was possible for the Macdonald Ministry to do more than it did to procure the retirement of some of the Judges we do not know; certain it is that they did nothing, and that no new blood was introduced until within a few days before their fall, when Mr. Justice Drummond's resignation made the vacancy which was filled by Mr. Justice Ramsay. It is not many months since the present Ministry took office, and yet with all the distractions of a general election, and other pressing business naturally pertaining to their present position, they have been enabled to constitute the Court in a manner, which, if not perfect, is effective. Only one place on the Bench has been actually vacated; but no time was lost in filling the vacancy, first by the offer of it to Mr. Justice Stewart, and upon his refusal to Mr. Justice Samborn. Mr. Justice Stewart's acceptance, had he accepted, would have been, we believe, highly popular both with the bar and the public. Mr. Justice Sanborn's nomination is, we almost or quite imagine, as well approved by the public as that of Mr. Justice Stewart, though we are bound to say that the new Judge has yet to earn that full confidence of the Bar, which has been already acquired by Judge Stewart. The relative positions of the two gentlemen at Quebec and Sherbrooke are sufficient to account for this diversity of sentiment. At all events, Mr. Justice Sanborn is a man whose integrity, prudence and disposition for honest work no one doubts; and his age, sound health, sound habits, alike give promise that he will not be speedily incapacitated for the complete fulfilment of his duties. Two other temporary vacancies had to be temporarily filled, and one of them has been filled at once, and with a judge to whom the *Canadien* can certainly not object, since he was placed upon the

Bench by the late Ministry. We have, therefore, now as we have said before, an efficient Court of four Judges, all in good health, and therefore, all able to discharge the duties of their high position. They have a heavy work before them; for, as is noticed by some Opposition authorities, and as we have ourselves stated, there is a large arrear of cases on the register of the Court—an arrear which oddly enough is spoken of by these Opposition gentlemen as if it were a reproach to the present Ministry, though every single case of those by which it is made up, was accumulated under the late Ministry, and must, therefore, be one of their faults, if fault it be. There is still one temporary vacancy, which will, we believe, be filled up as soon as satisfactory arrangements can be completed, so as to give suitors the advantage which they are entitled to in a full Court of five Judges. We have said that the Court, even thus constituted, will not be in the form that we desire. We have always objected to the system of assistant Judges, except in cases of necessity, and we are not more in love with those Judges now than we have been at previous times. This objection does not indeed apply so much to the Court of Queen's Bench, where the temporary appointments are made from the ranks of those who are already Judges, as to the Superior Court, which will require two advocates to be taken to supply the places of Mr. Loranger and the other Judge of that Court who will accompany him to the Queen's Bench. We do not hesitate to pronounce such a system vicious in a high degree; but the Court of Queen's Bench had fallen into a very anomalous condition, whose reformation has never been in the immediate power of this or the last Ministry—has never been in their power at all, except through the exercise of harsh, perhaps somewhat uncertain, and certainly lengthy proceedings against particular Judges. Such as the Court is, it has fallen to the present administration as a troublesome legacy from their predecessors, and having as we may say, put the Court on its legs, the men now in office are entitled to at least a few months to try, without resorting to violent measures to bring about such a permanent arrangement, as may not only be justified by the pressure of circumstances, but by the inherent strength and capacity of the tribunal which they will create. We have no doubt that that will be effected within a reasonable time.

Montreal Gazette 11th March:

"Pity the sorrows of an imbecile Government," seems to be the burden of the *Journal de Quebec's* remarks upon the judicial crisis. The Government is adrift upon a sea of troubles and it is hopeless to struggle for the shore. It comes out now that in trying to patch up one Court, the interests of suitors elsewhere have been sacrificed. At Sorel the business of the Court was suddenly interrupted and thrown into confusion by the withdrawal of Judge Loranger, and we presume the case is much the same at Sherbrooke by the withdrawal of Judge Sanborn. Even now the Court lacks a head, and there is not the slightest prospect of progress to-day. This extraordinary state of things it is for the Bar to deal with at their adjourned meeting to-day.

LAST MEETING OF THE BAR.

[Compiled from the *Gazette* and *Herald.*]

Yesterday (March 11,) a largely attended meeting of the Bar was held, J. J. Day, Q.C., in the chair, on being called to occupy that position, although he remarked that it was a heavy burden. The Chairman explained the object of the meeting, which was an adjourned one, to take into consideration the present state of the Court of Appeals.

The motion of Mr. Kerr, Q.C., seconded by Mr. Doutre, Q.C., and put at the previous meeting, was then read as follows:—"That the present system of appointing judges is destructive alike to the Bench and the interests of Society; and that the Bar of the Province should indicate to the Government of the Dominion the names of those of their members competent to discharge the duties of judge; and that from the persons whose names are so indicated, judges should be chosen by the Government."

It being proposed to let the motion lie upon the table,

Mr. KERR thought the proper course was to let a vote be taken on it: there was no use in deferring it to a future occasion, and it had been pretty fully discussed already. For his part he had nothing more to say on the subject.

Mr. CROSS, Q.C., said the members of the Bar of this Province could not act for those of other parts of the Dominion. Then again it may be said that while the Bar is consulted in this matter, why should not the judges, who would perhaps have

a better knowledge of those suitable to occupy the position of a judge. Then again, the public, who were certainly interested, as their case would be tried before the judges so appointed, might ask a voice in the selection. It was impossible that this could be settled by any exclusive body without being properly discussed. The United States had a check upon the appointment of judges in the Senate. He thought the resolution might be held over.

Mr. DEVLIN fully concurred with the remarks of Mr. Cross. He was proceeding to speak against the motion, when

Mr. RITCHIE, Q.C., raised a question of order. The business for which the meeting had been called was to take into consideration the state of the Court of Appeals, and he believed the present discussion was going beyond the scope of the business stated in the requisition. He thought, moreover, that such a representation to the Government as was proposed in the motion would be totally disregarded, as several previous propositions emanating from the same quarter had been.

Mr. KERR said he did not think anything would be got from the Government without asking for it. However, as the meeting eemed unwilling to take the resolution into consideration, and as Mr. Doutre was absent, he would consent to have it withdrawn, which was accordingly done.

The CHAIRMAN—That subject having been disposed of, has any gentleman anything to move with reference to the Court of Appeals, or are you satisfied with all that has been done? [Laughter.]

After a pause,

Mr. DEVLIN—As there appears to be no business before the meeting, I move that it do adjourn.

Mr. LAFLAMME, Q.C.—I second that.

Mr. KERR—I move "that this meeting is perfectly satisfied with the present constitution of the Court of Queen's Bench." [Laughter.]

Mr. DEVLIN—I will second that. [Laughter.]

The CHAIRMAN—Well, gentlemen, have you any remarks to make on that?

Mr. WELCH—I think such a motion as that is ridiculous, and I object to it.

Mr. KERR—Let us have the opinion of the Bar.

Mr. WELCH—I ask if such a motion as that is to be put before the meeting?

Several members—No.——Yes.

Mr. CROSS observed that the present constitution of the Court of Appeals was three permanent Judges and one temporary Judge, and the Court was still incomplete from want of another temporary Judge. This question of Assistant Judges had come up some years ago, and the feeling was that it was a very inconvenient system, unsatisfactory to the public and to the Bar as well. It was not in existence in Great Britain, France, the United States, or any other country he heard of. The Court being constituted in this manner, its constitution could not be considered satisfactory.

Mr. LAFLAMME, Q.C., moved in amendment, seconded by Mr. RITCHIE, Q.C.—"That the Bar of this section hopes that the Government will lose no time in taking into consideration the necessary steps to complete the organization of the Court of Appeals, and that this organization be made in a permanent manner, and not by the appointment of *ad hoc* Judges." He supposed Mr. Kerr's motion was intended to be satirical rather than serious, for there was no doubt that the Bar had expressed its dissatisfaction, and was dissatisfied with the organization of the Court of Appeals. Everybody would admit that this system of judges *ad hoc* was not a proper one. There was no question as to the fact that two judges had obtained leave of absence, and the Government were bound to replace them. Their places could be filled under the law by no one else than judges *ad hoc* from the Superior Court. One permanent appointment had been made in the place of the judge who had resigned, and time might show that this appointment was a wise one. He condemned the system of judges *ad hoc* as a vicious one; it was unsatisfactory alike to the Bar and to the public. But he hoped that pressure would not be used to force the Government into appointments which might prove generally unsatisfactory. He would rather wait three or six months than have appointments which would be generally condemned. Seeing the difficulties under which the Government laboured, he thought it only fair to give the gentlemen at the head of affairs ample time to complete the constitution of the Court.

Mr. RITCHIE, as the seconder of the amendment, was forced to express his surprise that Mr. Kerr should have framed his motion in the terms stated. He had heard of a caucus meeting of the Bar on the previous day, and was under the impression that the result of the deliberations was of a different nature from

that proposed by the motion. No one here said that the leaves of absence had been improperly granted; in one case he knew that there was good reason for it. Under these circumstances, the appointment of Judges *ad hoc* had to be resorted to temporarily; but there was no impropriety in the Bar endeavouring to have the Court constituted permanently as soon as possible.

Mr. KERR thought every one was willing to give the Government three or even six months, in order to have good, permanent appointments. He read the motion which had been passed at the caucus meeting on the previous day, which was to the effect that the meeting did not approve of the system of nominating Judges, and regretted the present constitution of the Court.

Mr. DEVLIN—That is very different from the motion you made to-day. You would not have had a seconder had I not come to your help.

Mr. KERR—I am glad to hear it. That is just what I wanted to get out. [Laughter.]

After some further discussion,

Mr. DEVLIN pointed out that the amendment as it stood might be construed as a condemnation of the *ad hoc* appointment which had already been made.

Mr. LAFLAMME—I have no objection to strike out the latter part of the motion.

This was strenuously opposed, and after a warm discussion of a promiscuous character,

Mr. KERR said—I don't see that Mr. Devlin will have any other recourse than to vote for my motion. [Laughter.]

The discussion proceeded for some time longer, and finally Mr. Laflamme's amendment was altered to read as follows: "That the Bar of this section hopes the Government will lose no time in taking the necessary steps to complete the organization of the Court of Appeals, in a permanent manner."

The amendment was carried amid some confusion, and the meeting adjourned.

Le National, 13th March:

La presse de l'opposition fait grand bruit à propos de la Cour d'Appel du Bas-Canada et de sa désorganisation. Elle a grandement raison; seulement, son indignation devrait être tournée contre les ministres tories qui depuis tant d'années ont toléré cet état de choses. Le ministère MacDonald-Cartier-Langevin, n'a

pas fait le moindre effort pour répondre avec justice aux plaintes nombreuses et constantes portées surtout contre la Cour d'Appel; il a fait systématiquement la sourde oreille.

Le ministère actuel vient d'arriver au pouvoir, à travers deux élections et des difficultés innombrables qui surgissent dans tous les départements, grâce surtout à la négligence des administrations précédentes.

Il n'est pas juste d'exiger des ministres actuels qu'ils règlent à la fois et en un clin d'œil, toutes les difficultés que leurs prédécesseurs tories ont laissé dormir ou ont compliqué pendant vingt ans.

Si le ministère MacDonald eût rempli son devoir, il y a longtemps que la Cour d'Appel serait réorganisée. Il s'agissait d'obtenir la retraite volontaire de certains juges, ou de prendre contre eux des procédés parlementaires très longs et très compliqués. Le ministre actuel de la justice n'a pas hésité à accorder des congés aux juges qui ne voulaient pas résigner de suite, et contre lesquels une procédure parlementaire aurait été à peu près interminable.

Tous ceux qui y entendent quelque chose reconnaitront qu'il a sagement agi dans l'intérêt du Bas Canada, parce que des procédures rigoureuses auraient exigé beaucoup de temps et causé du scandale.

Grâce à l'arrangement actuel, tous les sieges auxquels il est désirable de donner de nouveaux occupants à la Cour d'Appel, seront remplis d'ici à quelques semaines, et la Cour sera complètement réorganisée.

Les hommes pratiques, les membres du Barreau surtout, doivent comprendre les difficultés éprouvées par les ministres. Plusieurs anciens juges ont refusé d'entrer à la Cour d'Appel, probablement à cause de l'accumulation des affaires, qui donnerait pour quelque temps un surcroit d'ouvrage. Nous espérons que le gouvernement aura grand soin de ne pas oublier les scrupules des juges en question, et que jamais on ne leur proposera de nouveau de faire partie de la Cour d'Appel.

Le ministre de la Justice a fait l'impossible pour compléter à temps la Cour d'Appel, n'a pu y réussir malgré tous ses efforts, et au milieu des affaires innombrables qui l'assaillissent. Les affaires les plus pressantes peuvent certainement être plaidées devant la Cour d'Appel telle qu'elle est constituée, et pas un plaideur ne peut avoir une raison sérieuse de se plaindre à cet égard.

Il faut seulement espérer que le gouvernement sera d'ici à quelques semaines, en état de réorganiser la Cour d' Appel d'une manière durable.

Montreal Gazette, 13th March:

The adjourned meeting of the Montreal Bar took place the day before yesterday, and the proceedings appear, to a large extent, to have been of the ironical order. The chairman told the meeting that the occasion of it was "the Court of Appeals," an announcement received with an explosion of laughter. Some observations, not remarkable for their good sense, were made by several gentlemen on the expediency of allowing the attorneys and their clients (including, we presume, those on the criminal side of the court,) to recommend the judges who are to try them. Up to this all that is apparent is that every one was alike dissatisfied, bewildered, and utterly unable or afraid to say anything reasonable that was called for by the occasion. But Mr. Kerr proceeded to hit the nail on the head by moving that "this meeting is perfectly satisfied with the present constitution of the Court of Queen's Bench." The motion was seconded by Mr. Devlin, and received with renewed roars of merriment; and Mr. Laflamme naturally enough "supposed that Mr. Kerr's motion was intended to be satirical." These dignified and useful proceedings terminated by an expression of the hope that Government would lose no time in taking the necessary steps to complete the organization of the Court of Appeals.

The outside public, we admit at once, have ordinarily very little to do with the hilarity of the Bar; but this seems to have been an occasion on which the public were invited to witness it, and it was all dished up in the next morning's papers for their edification. The public therefore are naturally curious to know the causes of all this laughter, where *prima facie*, at all events, the comic element was no more to be looked for than at a meeting of the diocesan Synod. Is it really that the Court of Appeals has become a joke in the estimation of those best qualified to form an opinion? It looks very like it, we must confess, and the confession is made with much more regret than surprise. Nor are we prepared, under the circumstances, to take the profession to task for their hopelessness or their joking. What were they to do? It requires some moral courage to stigmatize an improper appointment to the Bench. It is personal and un

pleasant, but it may be a duty for all that. Where was the man to do it? Who was to say at a public meeting what everybody else does not hesitate to say in public and in private? No one was there disinterested enough and public spirited enough to tell the whole truth—to say, in few words, what every member of the profession knows for himself, that these *ad hoc* appointments are indefensible, and that the only permanent appointment made by the Ministry is a bad one. Undoubtedly that is the opinion of every person in the community acquainted with the subject; yet no one seems to have had the courage to say so.

The thing itself is certain; and the peculiar responsibility of Mr. Dorion for it is no less so. He it was who appointed Mr. Duval. None can better know than himself the physical incapacity of that gifted man. The infirmity of Judge Badgley, infinitely less serious, was felt at once by that gentleman to be such as to call for his resignation, and it was given. Mr. Justice Monk, on account of domestic affliction, is understood to have received a short leave. This was a sufficient reason in his case, the cause and the duration of his leave being alike temporary. But in the case of the Chief Justice, no such pretext existed. It is not want of feeling, it is simple truth and fairness to the public to say that he cannot expect to return to active duty, and his resignation should have been sternly and justly required. The materials for a Court were not wanting a month ago, but it is now so discredited that no competent man would take it. This is the fact. It is very painful to say it, but the profession at large are perfectly aware of it; and considering the position affairs have assumed at last, they were entitled either to say so plainly, or possibly to treat the whole thing as a burlesque, which they seem to have preferred to do.

The (Quebec) *Chronicle*, 13th March:

After a long and tedious delay the Minister of Justice has, to a certain extent, perfected the organization of the Court of Queen's Bench for this Province. It is to be regretted that this result had not been brought about earlier, seeing the great inconvenience suffered by the public as well as the Bar. The March term of this Court for the Quebec district ought to have opened on the first instant, but owing to the dilatoriness and indifference of the Government in appointing Judges to fill up the vacancies, the large list of cases must stand over unheard until next June

The Minister of Justice with whom the nomination of new Judges rests, cannot plead ignorance of the facts, inasmuch as both the Montreal and Quebec Bars held special meetings at which the question was fully discussed, and resolutions adopted recommending immediate action. It is one of the sacred privileges of the British subject to appear before the legal tribunals of his country and demand a fair and impartial hearing of his grievance whatever it may be. This maxim is as old as the hills and so respected in England that, but a few days ago we see one of the most remarkable trials on record concluded after an investigation which occupied one hundred and eighty days. The contrast with the administration of Justice on one side of the Atlantic is worthy of note. Here, suitors with large and important interests at stake appear from day to day before the Courts and through their advocates claim the right of being heard, but they are informed that the Bench is still incomplete, and to obtain Justice they must await the convenience of the Government. This nervous hesitancy on the part of the Minister of Justice to appoint Judges would never have occurred with the late Sir George Cartier. With all his faults, and he was credited with many, one duty was with him paramount to all others, a close attention to the demands of the public; and had an emergency like the present occurred during his term of office he would have been equal to the occasion. The question now presents itself,—Will the Court as at present organized give satisfaction to the general public? Judging from the action taken by the Montreal Bar since the nominations, we would say the selections of the Minister of Justice will not tend to establish that harmony which should exist between Bench and Bar. It cannot be disavowed that certain members of the profession, expecting reward for their professional, and in some instances political services, will feel the disappointment of not being in the list of favoured ones, but in reality this is not the standard complaint against the recent nominations. The Court of Queen's Bench is the highest tribunal in our Province, within whose jurisdiction are entrusted the lives and property of the people, and the Minister of Justice knowing this ought to have exercised such prudence and judgment in the appointments, as would elevate the dignity and honor of that court. Months and weeks of valuable time have been wasted in bartering with the names of the leading Judges of the Superior Court of the Montreal and Quebec Districts; and

although amongst them many competent and learned men could be found, the Minister of Justice, seemingly acting under the influence of some leading political wire puller, has constructed a Court that has completely failed to secure that confidence our highest Court of Justice is entitled to, and deserving of.

Montreal Herald, 14th March:

We see that the resolution of the Bar on this subject has not given satisfaction to one of our Conservative contemporaries. He wanted these gentlemen, it seems, first of all, to erect themselves as a corporation into a Court of Appeals from the Government on the question of judicial appointments, and having done so to declare that the nomination of Mr. Sanborn was a bad one, and "these *ad hoc* nominations were indefensible." Now, we venture to say that neither of these dicta will command themselves to reasonable men. To begin with, it must be remembered that the Government had at its disposal only one seat on the Bench. It has filled that vacancy; and there its power to comply with the wishes of the Bar and the public as to the constitution of the Courts on a permanent basis clearly ends. The gentlemen who want permanent judges, and who assert that the appointment of "these *ad hoc* judges" is indefensible, not merely that the system of *ad hoc* judges is bad—are bound to provide the vacancies into which the permanent judges are to be placed. That disposes of the question as to the *ad hoc* judges. If the Court of Queen's Bench was to be put into a posture for work, an *ad hoc* or rather an assisted judge was absolutely necessary. The gentleman named was suggested as is well known, in reply to an application made to him in the customary way, by Chief Justice Meredith of the Superior Court. The objection, we must add, comes exceedingly late, when we have had to endure *ad hoc* Judges, for so many years, without the slightest breath of complaint from any friends of the late Ministry. This is especially the case, when it may be fairly doubted whether it is not the Judicial system, which was the work of Sir G. E. Cartier, to which we owe the necessity for frequent recurrence to the expedient of temporary judges, not merely judges whose appointment was temporary as to a particular Court, but even as to their Judicial position. In the present case, it is as demonstrable as either of the rules of arithmetic that if there were to be a Court of Appeals, during the present term, it must be constituted by taking

one or more Judges from another Court, or, worse still, an advocate from the bar. Then as to the appointment to the one place which the Government has had at its disposal. It is pronounced *ex cathedra* a bad one. We confess that this is a style of newspaper criticism which does not seem to us to carry much weight. Another journalist might as curtly and authoritatively declare it a good one; but unless it were known that one or both of these writers were brilliant legal luminaries themselves, neither of these dogmatic assertions would avail half as much as a few reasons. We can only ask, how it was that Mr. Sanborn was not discovered to be a bad judge when he was placed on the Bench by Sir John A. Macdonald, amidst many shouts of triumph on the discrimination and the impartiality of the Minister. We may, of course, be told that that was for a local and inferior Court; but we have yet to learn that the law in the Superior Court at Sherbrooke is different from the law in Montreal. It is a question of quantity not quality, and if Judge Sanborn were competent to administer justice in the Townships, the only question is whether he possesses the physical strength to administer more of it in this city and in Quebec. We of course comprehend that there is a feeling at the Bar which is so natural as at least to be excusable, against the appointment, but we do not believe that it extends to the public, who do not see the thing from the same points of view. The fact is that the reception of Mr. Sanborn's appointment is so far very much like that of the appointment of Mr. Justice Richards. At Toronto they did not much like to see a lawyer from Brockville, whose personal appearance and manner was moreover not very prepossessing, placed on the Bench. We have reason to hope that the parallel will continue. Mr. Richards was soon acknowledged by the profession to be one of the best Judges on the Bench, and we think it not unlikely that Mr. Sanborn will earn an equally high reputation. It is to be observed, moreover, that the Government was bound to select from the English side of the Bar; and that they did not offer the seat to Mr. Sanborn till it had been declined by Mr. Justice Stewart. One of the circumstances above mentioned is an answer to a great deal of talk which has prevailed about the means adopted to prevent the elevation to the Bench of a gentleman of French race, whom we desire most heartily to see there. It is to be remembered that there are men in the higher ranks of the profession, who will not leave

their practice for the emoluments of the Bench. We do not know whether this is the case with Mr. Doutre; but we imagine, at all events, that he has nothing to gain by accepting a judge's salary, and we know quite enough of his independent character to be sure that he has never in any way, directly or indirectly, been an applicant. The fact evidently is that the Government has not yet had any vacancy at their disposal which they could offer to him, whatever reasons there might be either for or against that course.

Montreal Gazette, 24th March:

While we have been engaged in discussing the organization, or rather the non-organization, of the Court of Appeals in this district, we have overlooked neglects in other quarters, about which a good deal of feeling naturally prevails. The translation of Mr. Justice Sanborn to the Court of Queen's Bench has left vacant the position he formerly occupied as Judge of the Supreme Court for the District of St. Francis. He was removed from that position on the first day of the last Circuit Term, thus adjourning it for a month. The Terms of the Superior and Circuit Courts both stand fixed for the 7th of April, and both the Bar and litigants are entirely in the dark as to whether an appointment will be made before that time or not, so that the greatest uncertainty prevails, resulting in most annoying and embarrassing inconvenience. The *Enquête* Term of four days begins on the 28th instant, next Saturday, and it is of the utmost importance that there should be a Judge to preside; but so far as can be ascertained, there seems but very little likelihood of the appointment being made by that time. Meanwhile the utmost dissatisfaction prevails, and the Bar is in a condition of hopeless uncertainty as to the future.

It is difficult to understand the reason for these delays. People—friends of Mr. Dorion, who were in the habit of looking forward to his obtaining of office as a sure guarantee for a better condition of things connected with the administration of justice, —are beginning to contrast his delays in office with his apparent energy when on the opposition benches. The contrast is striking, and certainly anything but favorable to the Minister of Justice. There can be no reason, that is no reason based on grounds of public policy, for these wretched delays. But for the strong denunciation by Mr. Dorion and his friends, of the

policy of making appointments to the Bench subservient to party political purposes, we should almost be disposed to think that the Quebec leader has fallen into this bad habit. There are rumors to this effect which we are very unwilling to believe, but belief in which Mr. Dorion is doing his very best to force upon us. We have heard that the translation of Mr. Justice Sanborn to the Queen's Bench was not at all dictated by considerations either for the character of the Bench or the special fitness of the new Judge; that, on the contrary, it was the first step in a scheme which will find its conclusion in the elevation to the Judiciary of a gentleman very closely connected with Mr. Dorion himself, and who, but for the indignant protests of influential friends of the Government, would probably have been on the Bench already. We hope we are wrong in hinting even that this common street rumour may have foundation in fact. While on mere party grounds we could not seriously object to the Administration pursuing the course of suicide upon which by appointments already made of different descriptions, they are entering, we have all too much interest in the character of the Bench, to make us feel otherwise than anxious that the very best men should be appointed to the Judiciary.

Whatever the motive for delay, the delay itself is simply an outrage, annoying to the community, and disgraceful to the Government. Surely, if the Government are determined to make only political appointments to the Bench, they have gentlemen of the legal profession among their own friends who would do no discredit to the position. We are quite aware that these gentlemen may not be pressing their claims to appointment. We are quite aware that Mr. Dorion's embarrassment may arise from the number of legal political bummers who are demanding the rewards of party service, now that their party is in office. But surely a public man who appeared, when the responsibility did not rest with him, as zealous as did Mr. Dorion for the character and efficiency of the Bench of his Province, should be able to place these hangers-on at defiance, and name respectable men to the positions that are vacant. We can assure him that the feeling in the St. Francis District is becoming very strong that he is utterly neglecting the interests of the Bar and litigants alike, by his unaccountable delay in the appointment of a resident Judge.

Montreal *Herald*, March 24th:

THE JUDICIARY OF LOWER CANADA.—We have had many complaints, and have made many, of the personal composition of the Bench of Lower Canada. We believe that all these complaints were to a great extent well founded; but we have also pointed out that part of the cause of the public griefs was to be found in the system which prevails here. Our reference has been generally to a part of the procedure of the Superior Court, which, however, has a very direct bearing upon the whole course of any process which is carried in its latter stages through the appellate jurisdictions—we mean the written *enquête* as something separate from the argument and the future judgment, both by the time at which it occurs and by the Judge before whom it is held. Some cautious steps have lately been taken to remedy this evil, and these have proved so satisfactory both to the profession, to clients and to judges, that we may fairly hope they will be extended until the traditional abuse shall be swept away. We take it, however, that apart from the incidental evils which arise from a case being presented in appeal upon evidence collected at *enquête*, the constitution of an appellate tribunal is very faulty. We shall say nothing, however, now of the court which sits in review upon the decision of the single judge *en premire instance*, but refer at once to the appeal side of the Court of Queen's Bench, and in order to show more distinctly what we mean we may refer to the judiciary system in Upper Canada, which is substantially that which prevails in England. In Upper Canada the judges of the various courts go circuits, and thus bring home justice to the door of every citizen; but there are appeals in different forms, though mainly on points of law to the Courts sitting in *banco*, and, if we understand the matter correctly, legal questions which are disputed at *nisi prius*, may at last come before a court consisting of the judges of all the other courts sitting in error and appeal. But in *banco* the courts always sit at Toronto. The judges, therefore, after their circuits come together to the place where they reside, and there they have opportunities for conference, which may be long and often in proportion to necessity. They are constantly exposed to contact with the ablest men on and off the Bench, both as the audience at argument, and as participators in deliberation. The case is very different in Lower Canada. We have a number of judges of the Superior Court, of equal rank, scattered through the Pro-

vince, each of whom is isolated in his own *chef lieu*, and he has very little opportunity of communication with his brethren, or that portion of the Bar which possesses the largest experience, except when accident makes him a judge *ad hoc* at Quebec or Montreal. Capacity and learning do not depend upon locality, and there is no reason why able men should not be found on the Bench in the rural districts. We believe, indeed, that some of the gentlemen who preside in the country courts, are both able and laborious. As a proof of this, Mr. Justice Loranger is employing his leisure in the composition of a book on the Institutes of our law, which appears to possess very great merit. But still it is reasonable to believe that a man, unless possessed of a strong determination to resist the *genius loci*, is very likely to grow more or less rusty in these widely separated *chefs lieus*. His business, in some of them especially, if we throw out of account his merely ministerial duties, must be very light, and, above all, his own views do not meet the corrective of conference with other minds. That is not the case with any of the judges of the Superior Courts of Ontario. We believe it is unwholesome for Judges anywhere. Then when we come to the Court of Appeals itself, by which our jurisprudence ought to be fixed, we find a cognate cause of inefficiency. It is composed of five Judges, of whom two reside at Quebec and three at Montreal, and some of these gentlemen must travel from one city to the other, and live as strangers in the city to which they go, in order that they should be able to consult with their brethren at a distance. Now, to say nothing about the question of time, the expense and other inconvenience of such journeys, make it impossible to expect that the Court can ever come together except during the short periods of term, when the business of hearing arguments necessarily occupies a great portion of the time at the disposal of the members of the Court, and gives them little opportunity for full conferences. Moreover, the small number of judges in this Court makes *ad hoc* appointments almost a necessity, since sickness and other causes of absence frequently take away single members, and the absence of a single member leaves the Court with only four judges, before whom advocates do not like to appear lest an equal division should necessitate a re-argument. In Ontario the Court of Error and Appeal consists of the nine Judges of the three Superior Courts and of Mr. Justice Draper as President, so that there are ten Judges, and the absence of even two or three

still leaves a very numerous Court available for the transaction of business, and a Court, which, as it embraces all the judicial talent of the three Superior Courts, fixes the jurisprudence of the country in the most satisfactory manner possible. We know that we are treading on somewhat difficult ground; because the love for what is called decentralization is apt to be strong, and each *chef lieu* which has a resident judge of the Superior Court desires to retain him; but we cannot help thinking that a smaller number of Judges than we now have, who would go Circuit, and would reside in the same place when the Circuits were over, so as to facilitate conference among them, if such an arrangement could be made, would conduce very greatly indeed to the public service, and would probably be the only real and comprehensive remedy for the present state of things. The difficulties in the way of this change are great, perhaps are even insuperable; but it seems to be worth while to turn some attention to the discovery of a method that will get rid of the patch work sort of judiciary which we now have, and give us a tribunal which, like the Ontario Court of Error and Appeal, will afford such interpretation of the law as will carry with it the weight of irrecusable, if not infallible, authority. This would induce suitors to accept the decision of the highest Court in Canada as one beyond which it is useless to go. We have said nothing about details. If such a plan were attempted, the mode of arranging the Judges into Courts of Queen's Bench and Common Pleas, or by whatever name it might be called, would naturally come up, if any such division were found to be necessary. We take it for granted, also, that there must be something like the local County Courts of Upper Canada, with ministerial functions, but with a jurisdiction in other respects very much inferior to that of the superior Judges. These ideas are, of course, prospective and speculative; but though younger and more active Judges than we have had would do much to improve things, it is scarcely to be hoped that any can entirely overcome the vices inherent in the existing arrangements.

CONSTITUTIONAL LAW.

JURISDICTION OF CIVIL TRIBUNALS IN GOVERNMENT CASES.

No. 976.—L'HOTEL DIEU vs. LE CONSEIL D'AGRICULTURE.

This case involved three questions of constitutional law of some importance to the various Governments in the Dominion and to the community at large.

1stly. Does the Council of Agriculture of the Province of Quebec form part of the Government of the Province?

2ndly. Is the Government of the said Province amenable to the ordinary tribunals of the Province? and

3rdly. Does the fact that the Council of Agriculture is a corporation, without being subject to be sued by its act of incorporation, make any difference in this respect between this branch of the administration of the province and the other public non-corporate departments?

On behalf of the Hotel Dieu, Mr. PAGNUELO relied upon article 357 of the Civil Code of Lower Canada: "Under such name (corporate name) the corporation is known and designated, *sues and is sued.*"

On behalf of the Council of Agriculture, Mr. GIROUARD submitted the following printed factum:

"I.—The Council of Agriculture has been constituted and organized under a Provincial Statute, passed in 1869, 32 Vict. c. 15, and entitled: '*An Act respecting the Department of Agriculture and Public Works.*' Section 1 declares that the whole subject of agriculture in the Province shall be under the control of the Department of Agriculture and Public Works. Section 17 says that the object and duties of the Council are *to advise on all measures calculated to insure the efficacious management of agricultural societies and to promote agricultural and industrial progress in the Province.* Two members of the Executive —the Commissioner of Agriculture and the Minister of Public Instruction—are also members *ex-officio* of the Council, and the other twenty-one corporators are all appointed during pleasure by the Government; Sec. 19. They are subject to the orders of the Lieutenant-Governor in Council; Sec. 20, and the by-laws,

measures, orders, or resolutions of any nature whatever, enacted by them, must be approved by the same authority; Sec. 39. The Receiver-General is their treasurer; Sec. 22. The property of the corporation may be recovered in its corporate name before the ordinary tribunals, but the initiative belongs to the Commissioner; Secs. 22, 23, 24. The Commissioner also selects the place and furnishes the buildings where the Council holds its sittings; Sec. 25. Its secretary is appointed by the Government, and he *shall become one of the officers of the Department of Agriculture and Public Works;* Sec. 31. This secretary has charge of the correspondence of the Council, but under the direction of the Commissioner; Sec. 32. The expenses of the Board are paid out of the public monies upon the order of the Commissioner; Sec. 33. Special meetings may be called by the Commissioner; Sec. 35. Provincial exhibitions are organized by the members of the Council, but of course with the approbation of the Executive and sometimes with the concurrence of the Federal Government; and provision is made by them for the distribution of public grants to Agricultural Societies; Sec. 36. Finally, the Council always acts jointly with the Executive or the Commissioner of Agriculture. Secs. 36, 38, 39, 79. If all these provisions do not clearly establish that its advisers form a branch of the department of Agriculture and Public Works, and are therefore a part of the Government of the Province, then nothing short of a formal declaration in the statute to that effect will be sufficient. But the Defendants are confident that such formal enactment is no more necessary with regard to the Council of Agriculture than with the other departments of State which form the government of the province, *par la seule force des choses*, and without any express declaration.

"II.—Since the reign of Edward I, the rule that the Sovereign, or its public servants, or the Government or any part thereof—even a foreign sovereign—cannot be sued before the ordinary courts by reason of their public or official acts—has been and is now so well settled that the Defendants hope they will not be called upon to cite any authority. However the following will suffice for the present:

The Duke of Brunswick v. *The King of Hanover*, 6 Beavan 1; 2 H. L. Cas. 1; *de Haber* v. *Queen of Portugal*, *Wadsworth* v. *The Queen of Spain*, 17 Q.B., 171; *Mayor of London* v. *Cox*, 2 L. R., H. L., 239; *Chisholm* v. *State of Georgia*, 2 Dallas, 239, *et seq.*; *Hodgson* v. *Dexter*, 1 Cranch 345.

"III.—The Plaintiffs contend that the Defendants, being a corporation (sect. 21), may be sued like any other corporation. Article 358 of the Civil Code of Lower Canada is quoted; but the Defendants reply that being a purely political and public corporation, they are to be governed not by the municipal or civil law, but by the political and public law of the province; Civil Code, art. 356. Moreover, it is well known that the Crown cannot be affected by the Code, or any other statute, unless especially named. Therefore, its provisions cannot apply to any of the public departments of the Crown without any such express declaration.

"The Defendants respectfully submit that their incorporation does not change their character; it gives them a well defined existence; it constitutes them a fictitious and legal person; but they are still the public servants of Her Majesty, charged with the grave and important duties pertaining to the public government, in conjunction with the other public departments of the Province. Our Court of Appeals have decided that the Collector of Customs is not responsible, even when he overcharges the importer and thus violates the statute, for he is a servant of Her Majesty; and the same ruling applies to the present case, and more so, as the Council is not charged with any violation of law or duties. In both cases, the remedy is not denied, because no defined and existing person, real or fictitious, is known, but because the law has not created any tribunal to take cognizance of the matter.

"The Council of Agriculture is not the only corporation to be found in the government of the country. The Dominion of Canada, the Provinces, the federal and local legislatures, the Governor and Lieutenant-governors, etc., etc., are corporations, having all the powers and attributes of ordinary corporations, and moreover, all the privileges pertaining to the high public bodies entrusted with the government of the country, and more particularly the privilege of not being amenable to the ordinary courts of justice. These political corporations are not so expressly declared by statute, but by implication.

"For several years, from 1839 to 1859, the Board of Works of Canada was a corporation; they were often summoned before this Honorable Court during the course of the construction of the Lachine and Beauharnois Canals; but the statute which created them expressly gave to the citizens the power to sue them like

any ordinary subject, 2 Vict. c. 64, s. 4; 4 & 5 Vict. c. 38, s. 6. In 1859, the Board of Public Arbitration was constituted, and the right of appeal to the Superior Court from their award, was granted. In 1867, this right was repealed by the 31st Vict. c. 12, and the Department of Public Works became entirely independent of the judicial power. The Board of Works has been the only public department in Canada which has, until lately, ever been constituted into a corporation, and it is remarkable that the legislature considered that it was necessary to make express provisions so as to render them amenable to the ordinary tribunals.

"Under the common law, the Governor of a colony is also called a corporation. In Canada, he is declared to be so under statutory enactment, with special and extraordinary powers; Canada, 31 Vict. c. 33, s. 1, 1868; but the power to sue him is not granted by the statute, and it is a well settled rule of the public law of Great Britain that Governors cannot be sued either abroad or at home by reason of their *official* acts. *Macbath* v. *Haldimand*, 1 Dunff. & East, 172; *Harvey* v. *Lord Aylmer*, Stuart's Rep. 542; Forsyth, Const. Law, 86. Haldimand and Aylmer were both governors of this colony. The same rule was laid down by the Privy Council in *Hill* v. *Bigge*, 1 Revue de Législation 76.

"From time immemorial, at least since Edward I, the British Sovereign cannot be sued, and as laid down by all the text-books he is a corporation sole.

"The present constitution of public departments is of recent date, 2 Todd, 422; and this fact accounts for the want of jurisprudence upon the point under consideration. Although there is no precedent in England, the following cases will be found of interest. They establish that property held by corporations taking a far less active share in the public administration of a State than the Council of Argiculture, has been considered to be so held for governmeet purposes. *The Queen* v. *McCann*, 3 L. R. Q. B., 141; *The Queen* v. *St. Martin's Leicester*, 2 L. R. Q. B. 501; *Mersey Docks Cases* 11 H. L. Cases, 464, 508; *Leith Harbour Commissioners* v. *Poor Inspectors*, 1 L. R. H. L. 17; Campbell v. Hornsby, 7 I. R., Ex, 82.

"In the United States, the rule of the common law is also that the federal government, or the states, or foreign powers, cannot be sued by citizens before any of the ordinary courts of justice,

United States v. *Murdock*, 18 An. Louis. 305; *United States* v. *Ringgold*, 8 Peters, 150; *United States* v. *Bank of Metropolis*, 15 Peters, 377; *Chisholm* v. *State of Georgia*, 2 Dallas, 436 to 447. The whole subject is well discussed in the latter case. See also 3 Story, Const. Law, 538–542; 1 Kent, 295–297; Sergeant, Const. Law, 109. It is however said by several American jurists that the United States, and States generally, are in some respects corporations. Abbott, on Corporations, Vis *Public Corporation*, *Private Corporation*, *States*; *Prioleau* v. *The United States*, L. R., 2 Eq. 659. Iredell J., observes in the case of *Chisholm* v. *State of Georgia* (p. 447): "The word "*corporation*, in its largest sense, has a more extensive meaning "than people generally are aware of. Any body politic (sole or "aggregate) whether its power be restricted or transcendent, is, "in this sense, a *corporation*. The King, accordingly, in Eng- "land, is called a corporation. So also is the Parliament itself. "In this sense, not only each State singly, but the United States "may, without impropriety, be termed *corporations*."

"The political institutions of Canada partake of the character of corporations more than those of the Union. The United States, the States individually, the Republics of France, Spain, &c., are the result of the will of the people; but Canada, the Provinces, &c., like ordinary corporations, are mere creatures of the Parliament of Great Britain or of Canada. It is unnecessary to add that the courts cannot have any jurisdiction over these public and political bodies, were they even characterised as corporations by statute.

"In conclusion, the Defendants respectfully call the attention of the Honorable Court to the fact that out of the several corporations created by the same statute concerning the Department of Agriculture and Public Works, two only are not declared to be amenable to the ordinary tribunals of the Province—the Council of Agriculture and the Council of Arts and Manufactures, as now organized under that statute. With regard to the other corporations—the agricultural societies and the horticultural societies, which may be as numerous as there are counties in the Province—the statute enacts that they shall be governed by the rules applying to ordinary corporations, 32 Vict. c. 15, secs. 43, 97. *Qui dicit de uno negat de altero.* Secs 22, 23, and 24 provide for certain suits to be brought by the Commissioner of Agriculture in the name of the Council; but not a word is to be

found in the Act concerning any right of action against them and it seems that this other maxim applies here: *Expressio unius exclusio est alterius.*

"Finally, the Defendants call the attention of the Court to the consequences of the doctrine upheld by the Plaintiffs. If judgment be entered against the Defendants upon the merits, the real estate vested in the Council for government purposes, may be seized and sold, as the Defendants have no control over the funds to their credit, which may, moreover, prove to be quite inadequate; if they can be sued like ordinary civil corporations, they may become subject to a writ of injunction, a mandamus and all sorts of proceedings, right or wrong, which may prevent the holding of provincial exhibitions and may be ruinous to the general welfare of the agricultural and industrial interests of the province. And it is possible, nay more, it would be legal to submit the country to such extraordinary events! The legislature thus intended that the subject should govern the Government!

"Upon the whole, the Defendants contend that no other proceeding can be taken against the Council of Agriculture, but that allowed by the public law of Great Britain to obtain redress for wrongs committed by any other branch of the public government, to wit: *the petition of right.* Perhaps a remedy might be obtained before the official Board of Arbitration, 32 Vict. c. 19, s. 153."

The case was argued before the Superior Court at Montreal, McKay J., in November, 1873; but on the 17th February, 1874, the Plaintiffs discontinued their demand, and the *délibéré* was consequently discharged.

LA RÉDACTION.

GENERAL RULES OF THE ELECTION COURT FOR THE MONTREAL DIVISION, IN THE PROVINCE OF QUEBEC.

Made under and by virtue of the Act of the Dominion of Canada, passed 23rd *May, A.D.* 1873, *being* "*The Controverted Elections Act*, 1873."

I.—The Presentation of an Election Petition shall be made by leaving it at the office of the Clerk of the Election Court, who, or his Deputy, shall (if required) give a receipt, which may be in the following form:

Received, on the day of at the office of the Clerk of the Election Court, a Petition touching the Election of A.B., a member purporting to be signed by (*insert the names of Petitioners.*)

C.D., CLERK.

With the Petition shall also be left a copy thereof for the said Clerk of the Election Court to send to the Returning Officer, pursuant to section 11 of the Act.

II.—An Election Petition shall contain the following statements:

1. It shall state the right of the Petitioner to petition within section 10 of the Act.

2. It shall state the holding and result of the Election, and shall briefly state the facts and grounds relied on to sustain the prayer.

III.—The Petition shall be divided into paragraphs, each of which, as nearly as may be, shall be confined to a distinct portion of the subject, and every paragraph shall be numbered consecutively, and no costs shall be allowed of drawing or copying any Petition not substantially in compliance with this Rule, unless otherwise ordered by the Court, or one of the Election Judges.

IV.—The Petition shall conclude with a prayer, as for instance, that some specified person should be declared duly returned or elected, or that the Election should be declared void, or that a return may be enforced, (*as the case may be*), and shall be signed by all the Petitioners.

V.—The following form, or one to the like effect, shall be sufficient.

IN THE ELECTION COURT.

"The Controverted Elections Act, 1873, "Election of a Member for the House of Commons for (*state the place*) holden on the day of A.D.

Dominion of Canada. } The Petition of A of (*or* of
Province of Quebec, } A of and of B of , *as the*
Montreal Division. } *case may be*) whose names are subscribed.

1. Your Petitioner A is a person (*or if more than one, say, your Petitioners are persons*) who was (*or were*) duly qualified to vote at the above Election, (*or* claims to have had a right to be returned or elected at the above Election, *or* was a candidate at the above Election).

2. And your Petitioners state that the Election was holden on the day of A.D. when A B, C D, and E F were candidates, and the Returning Officer has returned A B as being duly elected.

3. And your Petitioners say that (*here state the facts and grounds on which the Petitioners rely.*)

Wherefore your Petitioners pray that it may be determined that the said A B was not duly elected or returned, and that the Election was void, *or* that the said E F was duly elected and ought to have been returned, or (*as the case may be.*)

(Signed) A.
" B.

VI.—Evidence need not be stated in the Petition, but the Court or one of the Election Judges may order such particulars as may be necessary to prevent surprise and unnecessary expense, and to ensure a fair and effectual trial, and upon such terms as to costs and otherwise as may be ordered.

VII.—When a petitioner claims the seat for an unsuccessful candidate, alleging that he had a majority of lawful votes, the party complaining of and the party defending the Election or Return, shall each, six days before the day appointed for trial, deliver to the Clerk of the Election Court, and also at the respective elected domicile of the Petitioners and Respondent (*as the case may be*), a list of the votes intended to be objected to, and of the heads of objection to each such vote, and the Clerk of the Election Court shall allow inspection and office copies of such lists to all parties concerned; and no evidence shall be given

against the validity of any vote, nor upon any head of objection not specified in the list, except by leave of the Court or one of the Election Judges, upon such terms as to amendment of the list, postponement of the enquiry, and payment of costs, or otherwise, as may be ordered.

VIII.—When the Respondent in a Petition under the Act, complaining of an undue return and claiming the seat for some person, intends to give evidence to prove that the Election of such person was undue, pursuant to the 54th section of the Act, such Respondent shall, six days before the day appointed for trial, deliver to the Clerk of the Election Court, and also at the address, if any, given by the Petitioner, a list of the objections to the Election upon which he intends to rely. And the Clerk of the Election Court shall allow inspection and office copies of such list to all parties concerned; and no evidence shall be given by a Respondent of any objection to the Election not specified in the list, except by leave of the Court, or one of the Judges, upon such terms as to amendment of the list, postponement of the inquiry, and payment of costs, as may be ordered.

IX.—With the Election Petition there shall be fyled in writing an election of domicile by the Petitioner or by his Attorney, if he has one, at some place within a mile of the office of the Clerk where the said Petition shall be deposited. In default of his doing so, the Office of the said Clerk shall be deemed to be the domicile of the said Petitioner for all the purposes of his said Petition.

If the Petition appear by Attorney the latter shall, at the same time, fyle a written appearance.

X.—The Respondent shall, within 5 days from the service of the Petition and Recognizance upon him as herein provided, fyle at the office of the said Clerk a written appearance signed by him or his Attorney, and a written election of domicile shall be made and fyled by the said Respondent or his Attorney, in the same manner as required of the Petitioner, by the last preceding rule: and in default of his so doing, the office of the said Clerk shall be deemed to be his domicile for all the purposes of the Petition.

XI.—The Clerk of the Election Court shall keep a book or books at his office, in which he shall enter the elections of domicile made under the preceding rules, which book shall be open to inspection by any person during office hours, without payment of any fee.

XII.—The Clerk of the Election Court shall, upon the presentation of the Petition, forthwith send a copy of the Petition to the Returning Officer, pursuant to section 11 of the Act, and shall therewith send the name of the Petitioner's Attorney, if any and of the elected domicile, if any, given as prescribed, and the Returning Officer shall forthwith publish those particulars along with the Petition.

The cost of publication of this and any other matter required to be published by the Returning Officer shall be paid by the Petitioner or person moving in the matter, and shall form part of the general costs of the Petition.

XII.—The time for giving notice of the presentation of a Petition, and of the nature of the proposed security, shall be five days, exclusive of the day of presentation, and the said notice shall consist of the service on the Respondent, or on each of the Rerpondents, of the Petition and recognizance and of a certificate of the Clerk, of the day when the said Petition and recognizance were fyled, at his office, and of the date and amount of the deposit, if any made.

XIV.—Where the Respondent has named an agent or given an address, the service of an Election Petition may be by delivery of it to the agent, or by posting it in a registered letter to the address given at such a time that, in the ordinary course of post, it would be delivered within the prescribed time.

In other cases the service must be personal on the Respondent, unless one of the Election Judges, on an application made to him not later than five days after the Petition is presented on affidavit showing what has been done, shall be satisfied that all reasonable effort has been made to effect personal service and cause the matter to come to the knowledge of the Respondent, in which case the said Judge may order that what has been done shall be considered sufficient service, subject to such conditions as he may think reasonable.

XV.—In case of evasion of service, the affixing in a conspicuous place, in the office of the Clerk of the Election Court, a notice of the Petition having been presented, stating the Petitioner, the prayer and the nature of the proposed security, shall be deemed equivalent to personal service, if so ordered by one of the Election Judges.

XVI.—The deposit of money, by way of security for payment of costs, charges and expenses, payable by the Petitioner, shall

be made by payment into the hands of the Clerk of the Election Court, subject to the orders of the Court or of an Election Judge.

XVII.—All claims to money deposited or to be deposited for payment of costs, charges and expenses payable by the Petitioners, shall be disposed of by the Election Court, or one of the Election Judges.

XVIII.—Money so deposited shall, if and when the same is no longer needed for securing payment of such costs, charges and expenses, be returned or otherwise disposed of as justice may require, by rule of the Election Court, or order of one of the Election Judges.

XIX.—Such rule or order may be made after such notice of intention to apply, and proof that all just claims have been satisfied or otherwise sufficiently provided for as the Court or one of the Election Judges may require.

XX.—The rule or order may direct payment either to the party who deposited the same, or to any person entitled to receive the same.

XXI.—Upon such rule or order being made, the amount shall be paid by the Clerk of the Election Court.

XXII.—The Clerk of the Election Court shall keep a book open to inspection of all parties concerned, in which shall be entered, from time to time, the amount and the petition to which it is applicable, which book may be inspected without payment of any fee.

XXIII.—The recognizance as security for costs may be acknowledged before one of the Election Judges, or the Clerk of the Election Court, or a Justice of the Peace.

There may be one recognizance acknowledged by all the sureties, or separate recognizances by one or more (not exceeding four,) as may be convenient.

XXIV.—The recognizance shall contain the name and usual place of abode of each surety, with such sufficient description as shall enable him to be found or ascertained, and may be as follows:

IN THE ELECTION COURT.

Dominion of Canada, } Be it remembered, that on the
Province of Quebec, } day of in the year of our Lord 18
To wit: } before me (*name and description*) came A B of (*name and description as above prescribed*) and acknowledged himself (*or severally acknowledged themselves*) to owe to

our Sovereign Lady the Queen, the sum of one thousand dollars (*or the following sums*) [that is to say] the said C D the sum of $, the said E F the sum of $, the said G H the sum of $, and the said J K the sum of $, to be levied on (his) (*or their respective*) goods and chattels, lands and tenements, to the use of our Sovereign Lady the Queen, her heirs and successors.

The condition of this recognizance is that if (*here insert the names of all the Petitioners, and if more than one add*, or any of them), shall well and truly pay all costs, charges and expenses, in respect of the Election Petition, signed by him (*or them*) relating to the Election of a Member for the House of Commons (*here insert the name of the Electoral Division*) which shall become payable by the said Petitioner (or Petitioners or any of them) under the "Controverted Elections Act, 1873," to any person or persons, then this recognizance to be void, otherwise to stand in full force.

(Signed,) (*Signatures of Securities.*)

Taken and ackowledged by the above named (*names of sureties*) on the day of at before me

C D

A Justice of the Peace (*or as the case may be.*)

XXV.—The recognizance or recognizances shall be left at the office of the Clerk of the Election Court by or on behalf of the Petitioner, in like manner as before prescribed for the hearing of a Petition forthwith after being acknowledged.

XXVI.—The time for giving notice of any objection to a recognizance, under the 12th section of the Act, shall be within five days from the date of service of the notice of the Petition and of the nature of the security, exclusive of the day of service.

XXVII.—An objection to the recognizance must state the ground or grounds thereof, as that the sureties, or any, and which of them, are insufficient, or that a surety is dead, or that he cannot be found, or that a person named in the recognizance has not duly acknowledged the same.

XXVIII—An objection made to the security shall be heard and decided by one of the Election Judges, upon summons taken out by either party, to declare the security sufficient or insufficient.

XXIX.—Such hearing and decision may be either upon affidavit or personal examination of witnesses, or both, as the Judge may think fit.

XXX.—If by order made upon such summons the security be declared sufficient, its sufficiency shall be deemed to be established within the meaning of the 13th section of the said Act, and the Petition shall be at issue.

XXXI.—If by order made on such summons an objection be allowed, and the security be declared insufficient, the Judge shall, in such order, state what amount he deems requisite to make the security sufficient, and the further prescribed time to remove the objection by deposit shall be within five days from the date of the order, not including the day of the date, and such deposit shall be made in the manner already described.

XXXII.—The costs of hearing and deciding the objections made to the security given shall be paid as ordered by the Judge, and in default of such order shall form part of the general costs of the Petition.

XXXIII.—The costs of hearing and deciding an objection upon the grounds of insufficiency of a surety or sureties, shall be paid by the Petitioner, and a clause to that effect shall be inserted in the order declaring its sufficiency or insufficiency, unless at the time of leaving the recognizance with the Clerk of the Election Court, there be also left with him an affidavit of the sufficiency of the surety or sureties, sworn to by each surety before a Justice of the Peace, which affidavit any Justice of the Peace is thereby authorized to take, or before some person authorized to take affidavits, in some one of the Superior Courts, that he is seized or or possesacd of real or personal estate, or both, above what will satisfy his debts, of the clear value of the sum by which he is bound by his recognizance, which affidavit may be as follows:—

IN THE ELECTION COURT.

"THE CONTROVERTED ELECTIONS ACT, 1873."

I, A. B., of (*as in recognizance*) make oath and say, that I am seized or possesssed of real (*or* personal, *or* real and personal) estate above what will satisfy my debts, of the clear value of $

Sworn, &c.

XXXIV.—The Clerk of the Election Court shall make out the Election list. In it he shall insert the names of the Attorneys of the Petitioners and Respondent, and the elected domiciles, if any. The list may be inspected at the office of the Clerk of the Election Court, at any time during office hours, and shall be put up for that purpose upon a notice board appropri-

ated to proceedings under the said Act, and headed "Controverted Elections Act, 1873."

XXXV.—The time and place of the trial of each Election Petition shall be fixed by the Judges of the Election Court, and notice thereof shall be given in writing, in the English and French languages, by the Clerk of the Election Court, by affixing the same in some conspicuous place in his office, sending one copy by the post to the address given by the Petitioner, another to the address given by the Respondent, if any, and a copy by the post to the Sheriff, fifteen days before the day appointed for the trial. The Sheriff shall forthwith publish the same in the Electoral Division.

XXXVI.—The affixing of the notice of trial at the office of the Clerk of the Election Court shall be deemed and taken to be notice in the prescribed manner within the meaning of the Act, and such notice shall not be vitiated by any miscarriage of, or relating to, the copy or copies thereof to be sent as already directed.

XXXVII.—The notice of trial may be in the following form:

IN THE ELECTION COURT.

"THE CONTROVERTED ELECTIONS ACT, 1873."

Election Petition of (*name the Electoral Division*), take notice that the above Petition (*or* Petitions), will be tried at on the day of and on each other subsequent days as may be needful.

Dated the day of

By order,

(Signed) A. B.,

Clerk of the Election Court.

XXXVIII.—Notice of the time and place of the trial of each Election Petition shall be transmitted by the Clerk of the Election Court to the Clerk of the Crown in Chancery for the Dominion of Canada, and the Clerk of the Crown in Chancery shall, on or before the day fixed for the trial, deliver, or cause to be delivered, to the Registrar of the Judge who is to try the Petition, or his Deputy, the Poll Books, for which the Registrar or his Deputy shall give, if required, a receipt; and that the Registrar or his Deputy shall keep in safe custody the said Poll Books until the trial is over, and then return the same to the said Clerk of the Crown in Chancery.

XXXIX.—Any one of the Election Judges may, from time to time, by order made upon the application of a party to the Petition, or by notice in such form as the Judge may direct to be sent to the parties, postpone the commencement of the trial to such day as he may name, and such notice, when received, shall be forthwith made public by the Sheriff or a Bailiff, by reading the same and affixing a copy thereof at the place where the nomination took place.

XL.—In the event of the Judge not having arrived at the time appointed for the trial, or to which the trial is postponed, the commencement of the trial shall, *ipso facto*, stand adjourned to the ensuing day, and so from day to day until the arrival of the Judge.

XLI.—No formal adjournment of the Court for the trial of an Election Petition shall be necessary, but the trial is to be deemed adjourned, and may be continued from day to day until the enquiry is concluded; and in the event of the Judge who begins the trial being disabled by illness or otherwise, it may be continued and concluded by any other of the Election Judges.

XLII.—The application to state a special case may be made by rule in the Election Court when sitting, or by a summons before one of the Election Judges upon hearing the parties.

XLIII.—All affidavits and papers in any matter in the Election Court, or in any Court for the trial of an Election Petition, may be entitled as follows:—

IN THE ELECTION COURT.

"THE CONTROVERTED ELECTIONS ACT, 1873."

Election of a Member for the House of Commons for (*name the Electoral Division.*)

Dominion of Canada.
Province of Quebec,
Montreal Division,
To wit:

XLIV.—An officer shall be appointed by the Judge who presides at the trial, for each trial of an Election Petition, who shall attend at the trial in like manner as to the Prothonotary of the Superior Court at Enquête and hearing.

Such officer may be called the Registrar of that Court. He by himself, or in case of need his sufficient Deputy, shall perform all the functions incident to the officer of a Court of Record, and also such duties as may be prescribed to him.

XLV.—The reasonable costs of any witness shall be ascertained by the Registrar of the Court, and the certificate allowing them shall be under his hand.

XLVI.—The order of a Judge to compel the attendance of a person as a witness may be in the following form:

Court for the trial of an Election Petition for (*complete the title of the Court*), the day of

To A. B. (*describe the person*), you are hereby required at the instance of Petitioner (or Respondent) to attend before the above Court at (*place*) on the day of at the hour of (*or* forthwith, *as the case may be*), to be examined as a witness in the matter of the said Petition, and to attend the said Court until your examination shall have been completed.

As witness my hand,

A. B.,
Judge of the said Court.

XLVII.—In order to the commitment of any person for contempt, the warrant may be as follows:—

At a Court, holden on at for the trial of an Election Petition for the (*here name the Electoral Division*), before the Honorable and one of the Election Judges pursuant to the "Controverted Elections Act, 1873."

Whereas A B has this day been guilty, and is by the said Court adjudged to be guilty, of a contempt thereof, the said Court does, therefore, sentence the said A B for his said contempt to be imprisoned in the Gaol for and to pay to our Lady the Queen a fine of $, and to be further imprisoned in the said Gaol until the said fine be paid. And the Court further orders that the Sheriff of the said District, (*or, as the case may be*), and all Bailiffs and Officers of the Peace of any County or place where the said A B may be found, shall take the said A B into custody, and convey him to the said Gaol, and there deliver him into custody of the Gaoler thereof to undergo his said sentence. And the Court further orders the said Gaoler to receive the said A B into his custody, and him to detain in the said Gaol in pursuance of the said sentence.

Signed the day of A.D.

(*To be signed by the Judge.*)

XLVIII.—Such warrant may be made out and directed to the Sheriff or other person having the execution of process of the Superior Courts, as the case may be, and to all constables and

officers of the Peace of the County or place where the person adjudged guilty of contempt may be found, and such warrant shall be sufficient, without further particularity, and shall and may be executed by the persons to whom it is directed, or any or either of them.

XLIX.—All Interlocutory questions and matters, shall be heard and disposed of before any one of the Election Judges who shall have the same control over the proceedings under the "Controverted Elections Act, 1873," as a Judge at Enquete and hearing in the ordinary proceedings of the Superior Courts, and such questions and matters may be heard and disposed of by any one of the Election Judges.

L.—Notice of an application for leave to withdraw a Petition shall be in writing and signed by the Petitioners or their agent. It shall state the ground on which the application is intended to be supported.

The following form shall be sufficient:—

IN THE ELECTION COURT.

"The Controverted Elections Act, 1873," (*name the Electoral Division*) Petition of (*state Petitioners*) presented day of . The Petitioner proposes to apply to withdraw his Petition upon the following ground (*here state the ground*), and prays that a day may be appointed for hearing his application.

Dated this day of

(Signed,)

LI.—The notice of application for leave to withdraw shall be left at the office of the Clerk of the Election Court.

LII.—A copy of such notice of the intention of the Petitioner to apply for leave to withdraw his Petition shall be given by the Petitioner to the Respondent, and to the Returning Officer, who shall make it public in the Electoral Division to which it relates, and shall be forthwith published by the Petitioner in the *Quebec Official Gazette* in the English and French languages.

The following may be the form of such notice:—

IN THE ELECTION COURT.

"The Controverted Elections Act, 1873." In the Election Petition for in which is Petitioner and Respondent, Notice is hereby given that the above Petitioner has on the day of lodged at the office of the Clerk of the Election Court, notice of an application to withdraw the Petition,

of which notice the following is a copy (*set it out*). And take notice that, by the rule made by the judges, any person who might have been a Petitioner in respect of the said Election may, within five days after publication by the Returning Officer of this notice, give notice in writing of his intention on the hearing to apply for leave to be substituted as a Petitioner.

(Signed,)

LIII.—Any person who might have been a Petitioner in respect of the Election to which the Petition relates, may, within five days after such notice is published by the Returning Officer, give notice in writing, signed by him or on his behalf, to the Clerk of the Election Court, of his intention to apply at the hearing to be substituted for the Petitioner, but the want of such notice shall not defeat such application, if in fact made at the hearing.

LIV.—The time and place for hearing the application shall be fixed by one of the Election Judges, and whether before the Election Court or before a Judge, as he may deem advisable, but shall not be less than a week after the notice of the intention to apply has been given to the Clerk of the Election Court as hereinbefore provided, and notice of the time and place appointed for the hearing shall be given to such person or persons, if any, as shall have given notice to the Clerk of the Election Court of an intention to apply to be substituted as Petitioners, and otherwise in such manner and at such time as the Judge directs.

LV.—The security on behalf of the substituted Petitioner shall be given within two days after the order of substitution, or such other time as the Court or the Judge may order.

LVI.—Notice of abatement of a Petition, by death or surviving Petitioner, under section 44 of the said Act, shall be given by the party or persons interested in the same manner as notice of an application to withdraw a Petition; and the time within which application may be made to the Court or one of the Election Judges, by motion or summons of a Judge, to be substitute as a Petitioner, shall be one calendar month or such further time as, upon consideration of any special circumstances, the Court or Judge may allow.

LVII.—If the Respondent dies, or is summoned to Parliament as a member of the Senate, or if the House of Commons have resolved that his seat is vacant, any person entitled to be a Petitioner under the Act, in respect of the election to which the

Petition relates, may give notice of the fact in the Electoral Division by causing such notice to be published in the *Quebec Official Gazette* in the English and French languages, and by leaving a copy of such notice signed by him or on his behalf with the Returning Officer, and a like copy with the Clerk of the Election Court.

LVIII.—The manner and time of the Respondent, giving notice to the Court that he does not intend to oppose the Petition, shall be by leaving notice thereof, in writing, at the office of the Clerk of the Election Court, signed by the Respondent, six days before the day appointed for trial, exclusive of the day of leaving such notice.

LIX.—Upon such notice being left at the office of the Clerk of the Election Court, he shall forthwith send a copy thereof by the post to the Petitioner or his agent, and to the Returning Officer, who shall cause the same to be published in the Electoral Division.

LX.—The time for applying to be admitted as a Respondent in either of the events mentioned in the 41st section of the Act, shall be within ten days after such notice is given as hereinbefore directed, or such further time as the Court or one of the Election Judges may allow.

LXI.—Costs shall be taxed by the Clerk of the Election Court, upon the rule of Court or Judges order by which the costs are payable, and costs, when taxed, may be recovered by execution issued upon the rule of Court ordering them to be paid; or, if payable by order of a Judge, then by making such order a rule of Court in the ordinary way, and issuing execution upon such rule against the person by whom the costs are ordered to be paid, or in case there be money in Court available for the purpose, then to the extent of such money by order of the Election Court or ne of the Election Judges.

The office fees payable for inspection, office copies, enrolment, and other proceedings under the Act, and these rules, shall be those fixed in the annexed tariffs. The fees shall be payable in money, and shall be accounted for by the Clerk of the Election Court to the Receiver-General of the Dominion of Canada.

LXII.—At the time appointed for the trial of any Election Petition, the Petitioner shall leave with the Registrar, for the use of the Judge at the trial, fairly written on one side of the paper only, a copy of the Petition and of all the proceedings

hereon, which show the several matters to be tried—including the particulars of objections on either side; the correctness of which copy, in so far as the proceedings are filed with the Clerk of the Election Court shall be certified by the said Clerk. The Judge may allow amendent of the said copy, or in default of such copy being delivered, the Judge may refuse to try the Petition or may allow a further time for delivery of the copy, or may adjourn the trial—in every case upon such terms, as to costs and otherwise, as the Judge shall see fit to impose.

LXIII.—Writs of *Subpœna ad testificandum* and *duces tecum* under the seal of the Election Court, for the attendance of witnesses before the Election Court or before the Court for the trial of an Election Petition, may be issued at any time by the Clerk of the Election Court, which writs may be in the following form:

IN THE ELECTION COURT.

SUBPŒNA.

Dominion of Canada, Province of Quebec, To wit: } VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland, QUEEN, Defender of the Faith.

To ———

We command you that, all excuses being laid aside, you and every of you be and appear in your proper persons before our Election Judge, assigned to try the Election Petition for (*name the Electoral Division*) at in the County of on the day of 187 , by o'clock, in the noon of the same day, and so from day to day until the said Election Petition shall be tried, or otherwise disposed of, to testify all and singular you or either of you know in the matter of the said Election Petition, depending in our Election Court at Montreal, wherein is (*or* are) Petitioner, and is (*or* are) Respondent, on the part of the and at the Court for the trial of the said Election Petition for (*name the Electoral Division*) at aforesaid, to be tried by our said Election Judge without a jury; and also that you bring with you and produce at the time and place aforesaid (*describing what is to be produced in the ordinary way,*)

and this you or any of you shall by no means omit, under the penalty upon each of you of one hundred pounds.

Witness the Hon. (*the senior Election Judge*), one of the Judges of our Election Court, at Montreal, the day of 187

(Signed,) A.B.,
Clerk of the Election Court.

LXIV.—After the trial of any Election Petition, the Judge shall return to the Clerk of the Election Court the evidence and proceedings before the said Judge and his finding on the said Petition.

LXV.—No proceeding under "The Controverted Elections Act, 1873," shall be defeated by any mere formal objection.

LXVI.—Any rule made or to be made in pursuance of the Act shall be published by a copy thereof being put up in the office of the Clerk of the Election Court.

LXVII.—The Prothonotary of the Superior Court for the District of Montreal is declared to be the Clerk of the Election Court for the Montreal Division, and shall perform the duties of that office by himself or one of his deputies.

LXVIII.—The Sheriffs, Criers and Bailiffs of the Superior Court, in the different districts of the Montreal Division, are hereby appointed, within their respective districts, officers of the Election Court and of the Court for the trial of Controverted Elections, and to perform therein as such officers the same duties and functions.

LXIX.—The Election Court will sit every first and third Monday of each month, at 10½ o'clock before noon, in the room usually occupied by the first division of the Superior Court, if required, and adjourn to such other day as may be necessary.

CONTROVERTED ELECTIONS OF THE DOMINION.

Tariff of Fees to be paid to the Attornies of the Election Court in Controverted Elections of the Dominion.

It is hereby ordered that the following fees be paid to the Attornies of the Election Court in connection with contestation of Election.

Taking Instructions from Petitioner or Respondent.....	$10.00
Drawing Petition.....	10.00
Each copy.....	2.00
Drawing objections to Bail Bond.....	4.00
Copy thereof.....	2.00
Drawing objections to Petition.....	8.00
Copy thereof.....	2.00
Drawing answer to objections if required.....	6.00
Copy thereof.....	2.00
Drawing list of voters objected to under Rule VII. and copy	6.00
Drawing list of objections under Rule VIII. and copy...	10.00
Drawing any Petition or Motion and copy.....	4.00
Each necessary attendance at Election Clerk's Office....	1.00
Each necessary attendance before the Court.....	2.00
Each day's attendance at trial, including travelling expenses, not exceeding fifteen days.....	14.00
Drawing any notice required.....	1.00
Each copy.....	0.50
Arguing any reserved objection before the Court.....	4.00
Arguing the cause at trial.....	10.00
Bill of Costs, copy and attendance at taxation.....	4.00