The Legal News.

VOL. V. MARCH 25, 1882. No. 12.

PROPOSED LEGISLATION.

Seldom has a Session of Parliament been more fruitful of strange propositions than this one. The other day we had a bill making it a Penitentiary offence to go by mistake on board a Merchant ship in the Provinces of Quebec, Nova Scotia or New Brunswick, with jurisdiction confided to a single stipendiary magistrate. Now we have the charlatanism of Mr. Charlton. Adultery is unquestionably a great moral offence, and may at times be evidence of profound turpitude; but it is extremely dangerous to make it a crime. Firstly, it is very difficult to establish the guilty knowledge which must be an ingredient; secondly, the conduct of the injured husband or wife has much to do with the guilt of the adulterer. The difficulty of dealing with adultery in the manner proposed is made apparent by the provision to leave the prosecution in the hands of the injured husband or wife. The proposition to make illicit sexual intercourse criminal is, to say the least of it, premature, until the legislature has defined "seduction.' Mr. Charlton appears to have as little knowledge of the B. N. A. Act as he seems to have of general policy. Several of the sections of his Act deal with the civil remedies for seduction.

The incest bill, we trust, is unnecessary.

Mr. Cameron has a bill for allowing persons accused of crime to be witnesses for and against themselves. The form of Mr. Cameron's legislation is about as curious as his suggestions are dangerous. The story of "the House that Jack Built," seems to have been his model of style. But Mr. McCarthy soars far above the floundering efforts of the member for Huron. He desires that any person accused of a crime may be brought as a witness on his own behalf, and the husband for the wife, or the wife for the husband, but such witness shall not be brought for the prosecution. Then follows a most peculiar provision: "Provided, that so far as the cross-examination relates to the credit of the accused, the Court may limit such cross-examination to such extent as it thinks proper, although the proposed cross-examination might be permissible in the case of any other witness." In other words the *more* the witness is open to suspicion, the *less* is he or she to be subject to cross-examination! The experiments hitherto made in this direction have not tended to show that the "wisdom of our ancestors" was at fault on the point. The untrustworthy character of evidence against the testator's interest becomes more patent, the wider the opportunity of exhibiting the weakness extends. In civil cases we seem to have gone far enough in allowing the opposite party to wring what he can out of his adversary. In criminal cases the provision of the law which abolishes the disqualification of interest is wholly bad It is a source of perjury, and this is so completely the case that courts and juries attach little or no weight to the disculpatory evidence of accomplices, at all events to the evidence of those who are convicted. Of course exceptional cases do occur where it might be convenient to hear what the party has to say, but the attempt to make general laws to meet exceptional cases is the suggestion of ignorance and self-conceit. All these difficulties have been known for ages.

The papers tell us of another proposition, intended to subject Trustees and Directors to greater responsibility that the law now imposes on them. They are to file twice a year a list of the securities they hold in some public office, under a penalty, it is to be presumed. It may also be presumed there is to be a schedule to which the Trustee is to conform. Parliament has shown such dexterity in framing schedules of this sort for the returns of Bank Managers and Directors that we shall be curious to see the schedule for the returns of Trustees. Did it ever occur to stupid legislators that in rendering an unpaid and already very onerous duty insupportably annoying it will become impossible for testators to get any one to accept the position, except those whose services are procured by an immense legacy, or those who intend to plunder the estate? It is to convert a trust into a distrust, and it may fairly be questioned whether there is any reason for altering thus materially the intentions of testators. There are thousands of such trusts and we do not hear once in a year of a serious complaint, and when such cases do occur, they are quite as often due to the speculations of a dishonest ward as to the infidelity of the Trustee.

The dangers of popular government have often been exposed. The ballot act and the abnormal laws against bribery and corruption attest the reality of certain perils. The danger of inconsiderate legislation introduced by incompetent people has been less considered. It is not, however, to be underrated. Naturally a very small proportion of the members of a representative body can conceive the scheme of organic laws, and fewer still can give a possible form to the conception. R.

MURDER AND MANSLAUGHTER

In the case of *Charles Albert Smith*, tried for murder in the March Term of the Court of Queen's Bench at Montreal, the Court had occasion to instruct the jury as to the distinction between murder and manslaughter. The prisoner was charged with murder, but it was apparent that he had no intention of killing the deceased, and the only difficulty was whether he had discharged his revolver with intent to kill one Barnes. Mr. Justice Ramsay, who presided, said :—

"Homicide is the killing of a man. That it may be innocent or culpable is the most obvious distinction. In this case we have not to consider the former. The culpable or criminal killing is in law divided into two offences, murder and manslaughter. This is to some extent an arbitrary distinction; but it is one of great antiquity, and it is founded in reason. The only difference between them is, that in murder there is killing with premeditated malice, and in manslaughter the element of premeditation is wanting. By premeditated malice the law does not mean a long preparation for the crime, such as is indicated by lying in wait, or threats. The existence of malice is judged of in many cases by the act, but sometimes there are other facts bearing so closely on the act of killing that they assist in forming a judgment on the existence or absence of malice, and then it is proper they should be proved. The introduction of this sort of evidence is a matter requiring some little skill and a great deal of caution. On the one hand everything that looks like concealment must be avoided, and on the other care must be taken not to embarrass the attention of the jury by an array of irrelevant facts. This case affords a wider field than usual for this sort of evidence, but I have endeavoured to keep it within proper limits. Evidence of the proceedings of the prisoner the night before the occurrence was admitted, also his demeanour towards Barnes immediately after the arrest; but I prevented the defence from proving an anterior cause of quarrel which could not justify the act.

The facts have been proved before you with remarkable precision, nor can it be fairly said that there has been any display of ill-feeling towards the accused. There are really no contradictions of any moment in the evidence. Your attention was specially directed to what is called a challenge to the prisoner by Barnes to use his pistol. Barnes says he does not recollect this, but Jones says it happened and we may fairly believe it took place. But really it has no bearing on the case, for no words justify an assault, much less a killing, and it does not affect Barnes' credibility. It has also been said that the woman, who was examined, contradicted the testimony of Jones; but when we examine what she says she saw, it confirms in a very remarkable manner the testimony of Jones, who in his turn supports the evidence of Barnes. Now Barnes tells us that after some angry words, heard by McDonald and his companion, who went out fearing a row, prisoner drew his pistol and stepped back, cocking it as if he intended to fire. Thereupon Barnes seized hold of him, but not before. This scuffle caused Jones to turn round, and just then the pistol went off in the prisoner's hand and Hayes was shot dead. It is perfectly evident that it was not the intention of the prisoner to shoot Hayes, but I must tell you that if the prisoner fired the pistol intending to shoot Barnes, and that, accidentally, he shot Hayes it is just as much murder as if he had shot Barnes. The measure of his guilt is the guilty intent towards Barnes. And here comes the whole difficulty of the case. If you believe Barnes, he never touched the prisoner until he drew the revolver and cocked it as if he were going to fire. Barnes then seized the prisoner and the pistol went off. Now if you think prisoner did not relent in the apparent intention to fire, and that he drew the trigger, he was guilty of murder. If again you think that, in spite of appearances, he relented at the last moment, and that the pistol went off accidentally, then he is only guilty of manslaughter. In arriving at a con-

clusion on this point you may consider the transaction of the night before, the violence still manifest immediately after towards Barnes, the fact of his being provided not only with a pistol but a razor, and his violence towards Jones when he disarmed him. You may also consider the fact, somewhat in prisoner's favour, that, in spite of his excitement against Barnes the night before, he did not allude to the cause of his displeasure until Barnes spoke to him on the subject. This may not be much, but it tends in some degree to show that, though violent when excited, he was not so malignant as his act might lead one to think he was. You may also consider his good character. He has produced witnesses, who have known him for the last few months, to establish that he is possessed of qualities which are not to be despised. But if in viewing the whole circumstances you think he executed his apparent intention of firing the pistol at Barnes, then you must not hesitate to qualify the crime as it deserves, or try to escape responsibility by finding for the lesser offence. The question is reduced to one of evidence,—I have done my duty in laying down as clearly as I could the law applicable to the case as I understand it, it is now for you to do your part."

The jury found the prisoner guilty of manslaughter.

STUDY FOR THE LEGAL PROFESSION.

Our excellent contemporary of Albany is somewhat muddled in his quotations. We are surprised to read (in the last issue of the *Law Journal*) the following, printed within quotation marks, as from the *Legal News*:—"The three "years spent in a law office is very apt to beget "habits of laziness, because the time is so much "longer than is needed to learn what is now re- "quired upon the examinations. On the other "hand, a man who could pass the most severe "examination after a short time of study, might "be entirely without the experience which is "needed and only comes with long office prac- "tice." We would like to see the volume and page of the *Legal News* for this quotation. If we had referred to the subject at all, our observations would not be precisely in this sense. Then, too, our contemporary refers to what "the Canada Legislature" has resolved to do with reference to this question. We are supremely blessed in Canada with no less than eight legislatures. The only body, however, to which the distinctive name of "the Canada Legislature" can, with any approach to accuracy, be applied, happens to have nothing at all to do with the course of study for members of the legal profession. Whether any of the other bodies have undertaken to consider this subject we are not prepared to say, for the perennial clatter of our Parliaments is somewhat confusing and difficult to follow, but we fancy that our contemporary has got matters somewhat mixed, and we leave him to solve the riddle.

COMMUNICATIONS.

DUPUY v. *DUCONDU.*

To the Editor of the LEGAL NEWS:

SIR,—The adverse criticism on the judgment of the Supreme Court in this case, contained in the Legal News of the 18th instant, proceeds on the same mistaken view of the case as did the judgment of the Queen's Bench which was reversed by the Supreme Court.

It can hardly be seriously pretended that because the Crown is bound to no warranty in conceding timber limits, that therefore private parties in whose hands such limits become valuable private property, cannot reconvey them with warrranty.

Without, however, entering upon a discussion of the question of warranty generally in such sales, very few words will suffice to show that the whole point of R's. criticism, viz: that there was no new or sufficient consideration for the warranty contained in the deed directly invoked by appellant, is entirely unfounded.

What were the undoubted facts? The seller had agreed to sell all rights obtained by him from the Crown to some two hundred and fifty miles of timber limits which he professed to hold under certain timber licences enumerated in the agreement.

Subsequently it was discovered that two of these limits, fifty miles in extent, could not be delivered to the purchaser for the very good reason, that at the time when the seller had agreed to sell them and had taken payment therefor, he had abandoned them and held no licences whatever for them, and another party had in consequence stepped in and taken up the limits. Thus the seller had sold and taken payment for what he did not possess and must

have known it, and thus also the deficit was the direct consequence of his own acts. Now there are authorities both in Pothier and our own Code, which apply in such cases. Art. 1487 says: that where a vendor sells a thing that does not belong to him, the buyer may recover damages if he were ignorant of the fact. Art. 1576 says: that the seller of a debt or other right is bound by law to the warranty that it exists and is due to him although the sale be without warranty. Art. 1509 says: "Although it be stipulated that the seller is not obliged to any warranty, he is nevertheless obliged to a warranty against his personal acts. Any agreement to the contrary is null." Thus then, even if it were admitted, which it is not, that the original sale of limits did not carry the warranty usual in sales, still it is clear, beyond question, that it did impose on the seller: 1st, The warranty that he at least held the licences; 2nd, The warranty against his own personal debts; and 3rd, The obligation to make good all damages suffered by the buyer by his not getting the fifty miles of limits for which the seller had no licences and which were lost by the seller's own act.

When the new deed was executed between the parties, by which it was intended to compensate the buyer for the undoubted claim he had for the damages which he had suffered under the circumstances stated, how can it be said, that there was then no sufficient consideration for the warranty stipulated, even if there was no obligation of warranty under the original sale? The deed admitted in the most express manner the obligation of the seller to make good the fifty miles deficit, and to meet this, the seller conveyed with warranty fifty miles of other limits, of which he could not, and did not, give peaceable possession and enjoyment to the buyer.

The Queen's Bench, losing sight of the above important features of the case, held that there was no ground for this warranty, and in face of the deed turned the appellants out of Court with nothing, as "R." thinks the Supreme Court should have done. The Supreme Court, however, was of opinion that it could not have been the intention to give to appellant a mere illusory indemnity for so undoubted a claim, and in this it will be generally held that it judged rightly.

As to the merits of the Supreme Court, the opinion of "R." is not that of the Montreal Bar at least. It is not many months since a large meeting of this Bar was held to consider Mr. Girouard's Bill to deprive the Court of its general appellate jurisdiction. The proposal to do this was voted down by a majority of about two to one, and in the minority, as far as is known, there was but one man who had ever pleaded a case before that Court, while in the majority were the men who had taken or pleaded in that Court the larger number of all the appeals from this Province.

The general feeling of this Bar undoubtedly is, that it is well that there is a Supreme Court where such mistakes as that made in the case under discussion, can be remedied and justice done, without the enormous expense of an appeal to the Privy Council.

Montreal, March 22nd, 1882. N.W.T.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, March 16th, 1881.

Before RAMSAY, J.

REGINA v. BULMER.

Autrefois acquit.

In charging the jury empanneled to try the plea of *autrefois acquit*, the following observations were made by

RAMSAY, J.—The prisoner is indicted for shooting with intent feloniously to kill and murder one Benjamin Plow. Being arraigned he pleaded, besides the plea of not guilty, a special plea of *autrefois acquit*. The facts are these:—He was put on his trial at the last term of this Court under an accusation containing six counts, all referring to the same fact of shooting, as has been proved by the evidence of the Crown prosecutor at the last term, and as indeed it appears from the reading of the indictment. It is not pretended, and in common honesty it could not be for an instant pretended, that in reality the six counts for the first indictment referred to six different shootings, and that the present indictment referred to a seventh. I say this in a pointed manner, because a recent decision in England, in the form it has come to us, may have given rise to superficial views as to the real state of the law with regard to plurality of

accusations in the same bill. As a mere abstract proposition of law, there never has been or could be any reasonable doubt that several offences, of the same gravity at all events, that is all misdemeanours, or all felonies, could be laid in the same indictment. The common demand of the prisoner that the Crown shall select on which it proceeds, when the counts are too divergent, and the judgments of the Courts requiring the Crown to select, fully establish this. That it never was supposed to be the law that several felonies could be tried on one indictment is made still more clear by the existence of a statute which permits three embezzlements or fraudulent applications or dispositions to be tried on one indictment provided they occur within the space of six months, (32 and 33 Vic., cap. 21, sec. 73). There is also a provision for the trial of three larcenies committed within the space of six months (32 and 33 Vic., cap. 21, sec. 5.) If the common law permitted that any number of felonies or misdemeanours could be tried in one indictment against the prisoner's will, these indictments would be absurd, or they would be limitations of the former law,—a conclusion too preposterous to be entertained. I wish it fully to be understood that I am not desirous of throwing any doubt on the decision of the case of *Orton & The Queen*. The decision in that case is probably quite sustainable, without upsetting the whole traditions of criminal practice, at all events as they have existed in this country, and setting at naught the statutes above cited, which are borrowed from the English criminal acts.

The learned counsel for the Crown has very clearly analysed the whole question before us to-day. He has submitted three propositions:

1st. He says that the prisoner was never in peril on the indictment now before you, but that he was tried before on an indictment unsustainable in law, which, before any judgment was rendered upon it, was reserved for the decision of the Court for Crown cases reserved, and there was set aside as bad in law.

2nd. He says the two accusations are not identical; and

3rd. He says that there was no verdict on any count but the bad one, and that therefore he has not been tried upon them.

On the first of these points I entirely concur with the learned counsel for the Crown, and I think that if the bad count had stood alone in the first indictment the prisoner might have been tried again on the bill before you; but it does not, and therefore the answer does not meet the present case.

From my previous remarks as to the identity of the facts, I need hardly say I consider the second point quite untenable.

On the third point, I think that the presumption of law must be, that the special plea of guilty upon one count means *not* guilty on the others, on the well-known principle of law *inclusio unius, exclusio alterius*. To suppose anything else would be to presume that the Court acted wrongly, which is opposed to another well-known saying of the common law. It has been argued that in certain cases judges and courts have said that the record should show the precise verdict disposing of each count. This is quite true, but I feel satisfied we should be departing from the intention of the learned persons whose words are thus quoted if we were to hold that they meant that where the record was silent as under the circumstances before us, the presumption was to be against the prisoner.

I must therefore charge you as matter of law, that if you believe the prisoner now in the dock is the same William Bulmer who was tried on the 26th and 27th September last (about which there is no room for doubt), he is entitled to a verdict at your hands on his special plea of *autrefois acquit*.

The verdict was in favor of the prisoner.

SUPERIOR COURT.

MONTREAL, March 15, 1882.

Before MACKAY, J.

THE GUARANTEE INS. CO. OF N. A. v. BETHUNE.

Procedure—Inscription for proof—C. C. P. 238.

The case was inscribed for *enquête* and merits for the 15th of March. The March Term of the Court of Queen's Bench, Appeal Side, opened on the same day.

When the case was called, the defendant's counsel asked that it be postponed, stating that the plaintiff could not force him to proceed while the Court of Queen's Bench was sitting. He referred to C. C. P. 238, amended by 35 Vict. ch. 6, sect. 8.

The plaintiff's counsel contended that the article cited applied only to inscriptions for proof,

and not for proof and hearing at the same time.

The defendant submitted that if the article applied to cases fixed for proof, it should apply *a fortiori* to cases fixed for proof and hearing.

The COURT ruled that the article was applicable in both cases, and that while the Court of Queen's Bench, appeal side, was sitting, a party could not be forced to proceed either at *enquête au long* or at *enquête* and merits. The application of the defendant was, therefore, granted.

Hatton & Nicolls, for plaintiff.

Barnard, Beauchamp & Creighton, for defendant.

COUR DE CIRCUIT.

MONTREAL, 14 Mars, 1882.

Devant PAPINEAU, J.

THEOPHILE LAVOIE, requérant v. FRS. HAMELIN, défendeur.

Contestation d'élection municipale.

Jugé—Que pour être recu à contester l'élection d'un conseiller, il faut se présenter avant la clôture du premier terme de la cour qui a suivi le jour auquel la nomination contestée a été faite, s'il s'écoule plus de 15 jours entre la dite nomination et la clôture du dit terme.—C. Municipal art. 351.

Dans l'espèce, le requérant contestait l'élection du défendeur élu conseiller municipal pour le quartier Saint-Denis du village Saint-Jean-Baptiste. L'élection avait eu lieu le dixième jour de Janvier dernier, et la requête pour contester avait été présentée le treize de février aussi dernier, *id est, à l'ouverture* du terme de la cour de circuit pour le mois de février.

Le terme de janvier avait commencé le 15: c'est-à-dire deux jours après la nomination contestée.

Les Requérants prétendaient que quinze jours ne s'étant pas écoulés entre *l'ouverture* du terme qui avait suivi la dite nomination et le jour de la même nomination, ils étaient bien fondés à se présenter à l'ouverture du terme de février.

L'Hon. Juge a accepté la prétention de la défense, savoir; Que s'il y avait plus de quinze jours entre la nomination contestée et la *clôture* du terme qui a suivi la dite nomination, la requête devait être présentée durant ce terme-ci. Le terme de janvier s'étant continué jusqu'au 26, et la nomination ayant eu lieu le dix de janvier, le Requérant devait se présenter le 26 janvier, et il n'était pas recevable à le faire le premier jour du terme de février.

En conséquence la requête fut renvoyée avec dépens.

Taillon et Nantel pour Requérant.

Champagne et Cornellier pour défendeur.

SUPERIOR COURT.

MONTREAL, March 15, 1882.

Before TORRANCE, J.

KELLOND v. REED.

Peremption—Useful Proceeding.

Continuing a cause at enquête by consent is a useful proceeding and prevents peremption.

The defendant made a motion for peremption. The last incident in the cause was on the 7th December 1881, when the cause was at *Enquête*, and the entry in the plumitif was that the case was then continued to 9th December, 1881, by consent. The defendant contended that this was not a valid proceeding in the cause, and that therefore peremption was acquired to him. He likened the case to *Cook* v. *Miller*, 4 Révue Légale, 240, at Quebec, where the entry in the plumitif was that the case had been called.

PER CURIAM. The cases are entirely different. Here the cause was adjourned by the agreement of the parties. It was a valid and useful proceeding. In the case of *Cook* v. *Miller*, the cause was called by the prothonotary and nothing done. There was no intervention or proceeding by either party.

Motion dismissed.

Robertson & Fleet for plaintiff.

Maclaren & Leet for defendant.

SUPERIOR COURT.

MONTREAL, March 15, 1882.

Before TORRANCE, J.

SOCIETÉ ANONYME DES GLACES ET PRODUITS CHIMIQUES DE ST. GOBAIN, & CIE. v. GIBERTON, & BELANGER, opposant.

Security for costs.

A non-resident plaintiff contesting the collocation of an opposant is bound to give security for costs.

The plaintiff, a non resident, contested the collocation and privilege of the opposant who was a resident of the Province of Quebec.

Thereupon the opposant asked for security for costs.

PER CURIAM. The main objection made by plaintiff to this demand is that he is not a plaintiff as regards the opposant, but on the defence. This is true from one point of view, but from another point, the plaintiff seeks to enforce his rights. The pretention of the plaintiff has been maintained in an elaborate judgment by Mr. Justice Ramsay in *Webster* v. *Philbrick & Wilkie*, 15 L. C. Jur. 242. I have already ordered security such as is now asked for in *Baltzar* v. *Grewing*, 13 L. C Jur. 297, following *Benning* v. *Rubber Co.*, 2 L. C. Jur. 287; *Church* v. *Bostwick & Wheeler*, cited in a note to *Mahoney et al.* v. *Tompkins & Geddes et al:* 9 L. C. R. 72, which is also in point. I think on principle, that the security should be given here by plaintiff. I think the equities are the same way. Merlin: Repertoire: vo. Caution judicatum solvi, p. 449, says: "On doit à cet égard, considérer comme défendeur l'étranger qui se pourvoit en nullité d'une saisie pratiquée contre lui en France, parcequ'en effet c'est le saisissant qui est demandeur originaire. * * * Par la raison contraire, si c'est un étranger qui est le saisissant, la partie saisie peut exiger de lui qu'il donne caution pour les dépens et dommages-intérêts auxquels il pourra être condamné, en cas que la saisie vienne à être déclarée irrégulière ou mal fondée.

Motion granted.

Abbott, Tait & Abbott for plaintiffs.
Madore for opposant.

SUPERIOR COURT.

MONTREAL, March 13, 1882.

Before JETTÉ, J.

LEGRIS v. DUCKETT.

Property qualification—Member of Provincial Legislature.

Property possessed by the wife séparée de biens of a member of the Legislative Assembly of Quebec cannot be taken into account in an inquiry into the qualification of such member.

The action was to recover the penalty enacted for sitting in the Legislative Assembly, Quebec, without legal qualification.

The Court maintained the *réponse en droit* filed by the plaintiff to part of the plea. The judgment, which is as follows, fully explains the decision:—

"La cour après avoir entendu les parties par leurs avocats sur la réponse en droit plaidée par le demandeur à cette partie de l'exception péremptoire du défendeur contenue dans le paragraphe commençant par ces mots, etc.

"Considérant qu' aux termes des Arts. 124 et 125 de la loi électorale de la province, le député à l'assemblée legislative doit être propriétaire possesseur de biens fonds d'une valeur de $2,000 au dessus de toutes charges, rentes et dettes hypothécaires, et ce à son propre usage et avantage;

"Considérant que d'après le sens légal et juridique du mot propriétaire, la possession que peut avoir le mari des biens appartenant à sa femme séparée de lui quant aux biens, ne peut être considérée comme conférant au mari la propriété ni même une possession suffisante des dits biens pour répondre aux exigences de la loi à cet égard;

"Considérant que l'interprétation donnée au mot propriétaire dans l'article 2 de la dite loi électorale n'est applicable qu' à l'élection et non à l'élu ou à l'éligible;

"Considérant en conséquence que la partie de la défense du défendeur invoquant la possession des biens fonds de son épouse séparée de lui quant aux biens pour se qualifier comme député, est mal fondée en droit;

"Maintient la réponse en droit du demandeur à cette partie de la défense du défendeur," etc.

Longpré & David for plaintiff.
T. & C. C. DeLorimier for defendant.

TRIBUNAL DE COMMERCE DE LA SEINE.

PARIS, 29 Déc. 1881.

Devant CRUCHY, POUSSIELGUE et DERVILLÉ, JJ.

DE MAUBEUGE *et al. v.* LA COMPAGNIE DU TÉLÉGRAPHE DE PARIS À NEW YORK.

Traités et conventions entre deux Compagnies de Télégraphe, pour unir leurs intérêts.

1o. *L'unanimité des actionnaires est non requise pour confirmer telles conventions; la majorité des membres présents à une assemblée suffit.*

2o. *Un actionnaire n'a pas le droit de se plaindre que les traités de fusion sont interdits par l'octroi fait par les Gouvernements, d'attérir les cables sur leur territoire.*

3o. *Le vote ratifiant les dites conventions n'a pas besoin d'atteindre le nombre voulu pour modifier les statuts sociaux.*

Jugement:

Après en avoir délibéré conformément à la loi:

Sur la fin de non recevoir tirée de l'article soixante des statuts;

Attendu que la question aujourd'hui soulevée par les demandeurs a été exposée par eux, à l'assemblée générale des actionnaires, qu'elle y a été discutée, et la dite assemblée a par son vote fait connaître ses intentions relativement aux objections formulés contre les traités passés avec les compagnies anglaises, que le vœu de l'article soixante à reçu implicitement satisfaction, qu'il n'y a donc pas lieu de s'arrêter à la fin de non recevoir opposée.

Attendu que de Maubeuge et de Kucklé soutiennent, premièrement que les conventions incriminées auraient changé l'objet social, et par suite auraient du être acceptées et ratifiées, par l'unanimité des actionnaires.

Deuxièmement, que les traités de fusion seraient interdits à la société par les gouvernements qui lui ont accordé le droit de faire atterrir ses cables sur leur territoire.

Troisièmement que le vote ratifiant les dites conventions n'aurait même pas été émis par la majorité requise pour modifier les statuts sociaux.

Sur le premier moyen:

Attendu que les demandeurs soutiennent que la société aurait été constituée en vue de créer une communication télégraphique entre la France et les Etats-Unis, d'affranchir les dépêches Françaises de l'obligation d'emprunter les cables étrangers et de faire concurrence aux compagnies Anglaises déjà existantes, que les conventions intervenues entre la société Française et les compagnies Anglaises porteraient atteinte à l'indépendance de la compagnie Française et annuleraient ainsi le but que se sont proposés les actionnaires.

Mais attendu que l'article premier porte que la société a pour objet la création de lignes télégraphiques entre la France et l'Amérique d'une part et l'Angleterre et l'Amérique d'autre part, et l'établissement, l'entretien et l'exploitation des câbles sous marins, et des lignes télégraphiques destinés à relier les deux continents qu'il n'appert pas des termes des conventions susvisées, qu'elles portent atteinte à l'objet social, tel qu'il est défini dans les statuts, qu'il n'est pas même démontré qu'elles soient contraires au but que les demandeurs prétendent avoir été la cause déterminante de leur souscription, qu'il n'y a donc pas lieu d'exiger pour leur validité qu'elles soient acceptées par l'unanimité des actionnaires.

Sur le second moyen.

Attendu que la déchéance encourue suivant les demandeurs par la société ne pourrait être prononcée que par les gouvernements intéressés, qu'il n'appartient pas aux actionnaires de l'invoquer contre la société elle-même. Attendu au surplus, que le gouvernement Français a connu les traités intervenus entre les compagnies Françaises et Anglaises, qu'ils s'exécutent à sa connaissance depuis plus d'une année, qu'il les a au moins tacitement approuvés, qu'il en est de même du gouvernement des Etats-Unis, que le moyen invoqué doit donc être repoussé.

Sur le troisième moyen:

Attendu que l'article trente-six des statuts porte que les délibérations relatives à l'augmentation du fond social, aux modifications, ou additions aux statuts à la prorogation ou à la dissolution de la société, ne peuvent être prises que dans une assemblée générale extraordinaire composée d'un certain nombre d'actionnaires, représentant au moins la moitié du capital social.

Attendu que les conventions intervenues avec les compagnies Anglaises ne comportent aucun des effets énumérés dans l'article 36 des statuts, qu'elles ne constituent qu'une modification apportée à l'exploitation des télégraphes Français, qu'elles n'excèdent pas les limites des pouvoirs du conseil d'administration, tels qu'ils sont définis dans l'article vingt-deux des statuts, que si le conseil d'administration a cru devoir les soumettre à la ratification de l'assemblée générale, les votes des actionnaires présents dont le nombre représentait une part égale ou supérieure au quart du capital social, suffit pour valider les dites conventions.

Attendu au surplus qu'il n'est pas établi qu'elles soient contraires à l'intérêt social, qu'à tous égards la demande de De Maubeuge et de Kucklé, en annulation de la délibération du douze janvier 1881, doit être repoussée.

Par ces motifs,

Le Tribunal jugeant en premier ressort, déclare de Maubeuge et de Kucklé mal fondés en leur demande, les en déboute et les condamne par les voies de droit en tous les dépens, et même au coût de l'enrégistrement du présent jugement, les dits dépens taxés en marge de la minute du présent jugement.

Mtre. Boutrone, pour les Demandeurs.

Mtre. Marraud, pour la Défenderesse.