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LA

REVUE CRITIQUE

DE

Législation et de Jurisprudence

DU

CANADA.

PUBLIÉE PAR

MM. Wm. H. Kerr, E. A. Jetté,
D. Girouard, John A. Perkins,
H. F. Rainville.

avec le concours de plusieurs avocats.

De fide et officio judicis non recipitur quæstio, sed de scientiâ sive sit error juris sive facti.—Lord Bacon.

Tome III. - - - - 1873-5.

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REVUE CRITIQUE

DE

Législation et de Jurisprudence.

THE NAVIGATION LAWS OF CANADA.

The subject of maritime law has lately attracted considerable attention before the several Boards of Trade of the Dominion. The creation of a Court of Vice-Admiralty in Montreal was considered necessary to the commercial interest of that district. Complaints were made of the present diversity in the registry laws, and our pilotage system was declared to be based "upon unsound principles" and leading "to serious consequences." Finally, in January last, a memorial was presented by the Dominion Board of Trade to the Canadian Government, who promised to give the matter due consideration. A brief review of the principal features of the laws concerning the responsibility of shipowners will suffice to show that it is highly important to Canada that its navigation laws should be thoroughly remodelled.

I.—RESPONSIBILITY OF SHIPOWNERS.

Under the Common Law of England, in force in most of the British Provinces and in the United States, shipowners, like common carriers by land, are insurers of the persons and goods entrusted to them, and as such are liable for any loss or damage to any extent whatever, unless it is occasioned by the King's enemies or by an act of God, such as storms, tempests, lightning, &c.* They are responsible even for armed robbery, fire or any other accident, unless proved to be an Act of God or exempt by the express terms of the bill of lading or contract.

* Maude & Pollock, p. 48; Chitty, on Carriers, p. 154; Angell, on Carriers, p. 133.

The Roman law is not so severe as the English Common Law. Like the English Common Law, the edict of the Pretor holds the carrier by water liable to any amount whatever—*Nautæ, caupones, stabularii, quod cujusque salvum fore receperint, nisi restituent, in eos judicium dabo*—;* but it did not make the common carrier responsible for acts of *force majeure* or irresistible or superior force, and it accounted robbery, fire and other like accidents among the cases of *force majeure*. "*Ad hoc edicto omnimodo qui recepit tenetur, etiamsi sine culpâ ejus res periit, vel damnum datum est; nisi si quid damno fatali contingit. Inde Labeo scribit, si quid naufragio aut per vim piratarum perierit, non esse iniquum exceptionem ei dari.*† These rules applied to inland as well as to sea going vessels. *Navem accipere debemus, sive marinam, sive fluviatilem; sive in aliquo stagno naviget, sive shedia.* ‡

In the modern countries governed by the Roman Law, such as France, Germany, Spain, Italy, Louisiana, Scotland,§ these principles are generally adhered to. Art. 1148 of the Code Napoleon says: "Il n'y a lieu à aucuns dommages lorsque, par suite d'une force majeure ou d'un cas fortuit, le débiteur a été empêché de donner ou faire ce à quoi il était obligé, ou a fait ce qui lui était interdit." Speaking of carriers by land and by water, art. 1784 says: "Ils sont responsables de la perte et des avaries des choses qui leur sont confiées, à moins qu'ils ne prouvent qu'elles ont été perdues et avariées par cas fortuit ou force majeure."

In Louisiana, owners of steamboats have likewise been held not liable for a loss occasioned by fire, where proper diligence had been used.

In the case of *Hart vs. Jones* (Stuart's R. 589) our Court of Appeals have held that the exception of *force majeure* existed in our jurisprudence. Sewell, C. J.: "By the French law the liability of common carriers has not been carried to the extent of the Common law. It has created a third exception, viz. *force majeure* or irresistible violence." This is also expressly laid

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* Pothier, Pand., lib. 4, tit. 9, éd. Bréard—Neuville, vol. 9, p. 336.

† *Ibid.* p. 351, 352. ‡ *Ibid.* lib. 14, tit. 1, vol. 16, p. 150.

§ Under the Mercantile Law Amendment Act of 1856, s. 17, carriers in Scotland are responsible for losses arising from accidental fire.

down by our Code. Article 1200 says:—"When the certain specific thing which is the object of an obligation perishes, or the delivery of it becomes from any other cause impossible, without any act or fault of the debtor, and before he is in default, the obligation is extinguished." Art. 1202:—"When the performance of an obligation to do, has become impossible without any act or fault of the debtor and before he is in default, the obligation is extinguished and both parties are liberated."

The rule of the English Common Law and even of the Roman law, was considered too extreme and contrary to the progress of navigation; and consequently, at early times, maritime powers enacted laws restricting the liability of shipowners.

One of the most ancient Codes, *Il Consolato del Mare*, narrowed it to the value of the ship and freight. In France, this point was settled by the *Ordonnance de la Marine* of 1681, which has been incorporated into the maritime laws of all the civilized nations of the world. Article 4, Book 2, tit. 8, declares: "Les propriétaires seront responsables des faits du maître; mais ils en demeureront déchargés en abandonnant leur batiment et le fret." This provision has been and is still the law of France. In fact, the principle of the *Ordonnance de la Marine* has thus been laid down by article 216 of the *Code de Commerce*, Book 2, tit. 3, as amended by recent legislation (1841):—"Tout propriétaire de navire est civilement responsable des faits du capitaine.

"Il peut dans tous les cas s'affranchir des obligations ci-dessus par l'abandon du navire et du fret.

"Toutefois la faculté de faire abandon n'est point accordée à celui qui est en même temps capitaine et propriétaire."

By an *arrêt* of the 26th November, 1851, the *Cour de Cassation* of France held that this article was applicable to inland as well as to sea navigation.*

The same rule prevails in Germany and on the continent generally.† Art. 452 of the Prussian Code, says: "The owner is, however, not personally liable for the claims of a third party, but is only answerable to the extent of ship and freight."

In England, the subject of the liability of shipowners has

* Rivière, Répétitions Ecrites sur le Code de Commerce, p. 433.

† See Art. 1339 of the Code of Portugal; Art. 649 of the Russian Code; Art. 321 of the Code of Holland.

from time to time been submitted to the consideration of Parliament. As far back as 1734, by 7 Geo. 2, c. 15, s. 1, the liability of shipowners for any loss sustained, without their fault or privity, through the neglect or misconduct of the master or mariners, was limited to the value of the ship and freight. So, says a writer of that time (1750)*, they know "the extent of what damage a roguish master can do, *which was before unascertained and endless.*" In 1785, by the 26 Geo. 3, c. 86, they were exempted from any loss, arising from fire, or caused to any gold, silver, diamonds, jewels or precious stones, by reason of any robbery or embezzlement, unless the true nature and value of such articles was declared in writing.

These statutes extended to shipowners only and not to masters, though they might happen to be part owners, and they were held to apply to registered sea-going British ships solely, and not to vessels used merely in rivers or inland navigation; doubtless because the nature of the inland navigation of England did not warrant any special exemption or protection.†

But in the Province of Ontario, where vessels navigating the lakes are often more valuable than many sea-going ships and are subject to perils and responsibilities as great as those on the open sea, these decisions were considered inapplicable. In a case of *Torrance v. Smith*, 3 U. C. C. P. 411, the Court of Common Pleas decided that 26 Geo. 3, c. 86, was in force in that Province, under the first Provincial statute (1792) introducing the laws of England into that colony. *Macaulay J.*, for the Court: "This statute applies to ships or vessels engaged in navigation of the great lakes and to ports in Upper Canada and foreign ports in the United States of America; I think it so applicable in spirit, and that the case cited of *Hunter v. McGowan* ought not to be extended and applied to ships or vessels engaged in such navigation." This question, of considerable importance to Ontario and some other Provinces, is again raised in a case, now pending at Kingston, of *Leslie v. The Canadian Navigation Company.*

Several other statutes were subsequently passed in England, further limiting the responsibility of shipowners; but as they

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* Beawes, *Lex Mercatoria*, 5th ed. 1771, p. 49.

† *Hunter v. McGowan*, 1 Bligh, 573; See also *Morewood v. Pollock*, 1 E. & B. 743; *Thorogood v. Marsh*, 1 Gow, 105.

have been enacted after the date of the introduction of the laws of England into Upper Canada and some other Provinces, and, moreover, have been all repealed by, or incorporated in, The Merchant Shipping Act, 1854, 17-18 Vict. c. 104, they are now of no practical interest. The ninth part of that Act lays down the following rules on the subject under consideration:

"Sect. 503. No owner of any *sea-going* ship or share therein shall be liable to make good any loss or damage that may happen without his actual fault or privity of or to any of the following things, (that is to say,)

"(1.) Of or to any goods, merchandise, or other things whatsoever taken in or put on board any such ship, by reason of any fire happening on board such ship,

"(2.) Of or to any gold, silver, diamonds, watches, jewels, or precious stones taken in or but on board any such ship, by reason of any robbery, embezzlement, making away with, or secreting thereof, unless the owner or shipper thereof has, at the time of shipping the same, inserted in his bill of lading or otherwise declared in writing to the master or owner of such ship the true nature and value of such articles,

"To any extent whatever.

"504. No owner of any *sea-going* ship or share therein shall, in cases where all or any of the following events occur without his actual fault or privity, (that is to say,)

"(1.) Where any loss of life or personal injury is caused to any person being carried in such ship;

"(2.) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship;

"(3.) Where any loss of life or personal injury is by reason of the improper navigation of such sea-going ship as aforesaid caused to any person carried in any other ship or boat;

"(4.) Where any loss or damage is by reason of any such improper navigation of such sea-going ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever, on board any other ship or boat;

"Be answerable in damages to an extent beyond the value of his ship and the freight due or to grow due in respect of such ship during the voyage which at the time of the happening of any such events as aforesaid, is in prosecution or contracted for, subject to the following proviso, (that is to say,) that in no case where any such liability as aforesaid is incurred in respect of loss of life or personal injury to any passenger, shall the value of any such ship and the freight thereof be taken to be less than *fifteen pounds per* registered ton.

"505. For the purposes of the ninth part of this Act, the freight shall

be deemed to include the value of the carriage of any goods or merchandise belonging to the owners of the ship, passage money and also the hire due or to grow due under or by virtue of any contract, except only such hire, in the case of a ship hired for time, as may not begin to be earned until the expiration of six months after such loss or damage.

"506. The owner of every sea-going ship or share therein shall be liable in respect of every such loss of life, personal injury, loss of or damage to goods as aforesaid arising on distinct occasions, to the same extent as if no other loss, injury, or damage had arisen.

"516. Nothing in the ninth part of this Act contained shall be construed—

"To lessen or take away any liability to which any master or seaman, being also owner or part owner of the ship to which he belongs, is subject in his capacity of master or seaman; or

"To extend to any *British* ship not being a recognized *British* ship within the meaning of this Act."

This portion of The Merchant Shipping Act applies to *sea-going* ships only. "This," says Chitty on the Law of Carriers, note *e*, p. 174, ed. 1857, "does not apply to the owners of lighters, barges, boats or vessels used in rivers or inland navigation." Maude & Pollock, p. 51, note *f*, also remark that "the protection given, in these cases, by the Merchant Shipping Act, was confined to sea-going ships." It does not even extend to all sea-going vessels, but only to *recognized sea-going British ships within the meaning of the Act.*

No ship can be recognized as a *British Ship*, unless she is registered in the manner mentioned in the Act of 1854 and the Acts amending the same. Sea-going ships must be registered. Ships exceeding fifteen tons burden employed solely in navigation of the rivers and coasts of the United Kingdom, or on the rivers or coasts of some *British* possession, where the managing owners of such ships are resident, may be British ships, if duly registered. Ships exceeding thirty tons or having a whole or fixed deck, employed solely in fishing or trading coastwise on the shores of Newfoundland, Labrador, or in the Gulf of St. Lawrence, or on the coasts of Nova Scotia or New Brunswick, may also be British ships. British ships must belong wholly to British subjects or corporations incorporated under the authority of the Parliament of Great Britain or of her Colonies.*

* See sects. 18 and 19 of the Act of 1864, and sect. 14 of the Act of 1869, 33 Vict. c. 14.

The Merchant Shipping Act Amendment Act, 1862, s. 54, says :

"The owners of *any ship*, whether *British or Foreign*, shall not, in cases where all or any of the following events occur without their actual fault or privity (that is to say) ;

"(1.) Where any loss of life or personal injury is caused to any person being carried in such ship ;

"(2.) Where any damage or loss is caused to any goods, merchandize, or other things whatsoever on board any such ship ;

"(3.) Where any loss of life or personal injury is by reason of the improper navigation of such ship as aforesaid caused to any person carried in any other ship or boat ;

"(4.) Where any loss or damage is by reason of the improper navigation of such ship, as aforesaid, caused to any other ship or boat, or to any goods, merchandize, or other things whatsoever on board any other ship or boat,

"Be answerable in damages in respect of loss of life or personal injury, either alone or altogether with loss or damage to ships, boats, goods, merchandize, or other things, to an aggregate amount exceeding fifteen pounds for each ton of their ship's tonnage ; nor in any respect of loss of, or damage to, ships, goods, merchandize, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage ; such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steam ships the gross tonnage, without deduction on account of engine-room."

This clause replaces article 504 of The Merchant Shipping Act of 1854 and extends to *foreign as well as to inland British ships*. It also comprises all causes of damage to life or property, except those arising from "the actual fault or privity of the ship-owner." Such is still the law in force in Great Britain.

An Act of Congress, c. 43, 9 U. S. Stats. at large, 635, 1851, entitled *An Act to limit the responsibility of shipowners*, has introduced many important provisions in the laws of the United States :

Section 1 enacts :—"That no owner or owners of any ship or vessel shall be subject or liable to answer for or make good to any one or more person or persons, any loss or damage which may happen to any goods or merchandize whatsoever, which shall be shipped, taken in, or put on board any such ship or vessel, by reason or by means of any fire happening to or on board the said ship or vessel, unless such fire is caused by the design or neglect of such owner or owners : *Provided*, that nothing in this Act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of ship-owners.

Sec. 2. "And be it further enacted, That if any shipper or shippers of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds or other precious stones, shall lade the same on board of any ship or vessel, without, at the time of such lading, giving to the master, agent, owner or owners of the ship or vessels receiving the same, a note in writing of the true character and value thereof, and have the same entered on the bill of lading therefor, the master and owner or owners of the said vessel shall not be liable, as carriers thereof, in any form or manner. Nor shall any such master or owners be liable for any such valuable goods beyond the value and according to the character thereof so notified and entered.

Sec. 3. "And be it further enacted, That the liability of the owner or owners of any ship or vessel, for any embezzlement, loss or destruction, by the master, officers, mariners, passengers, or any other person or persons, of any property, goods or merchandize, shipped or put on board of such ship or vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively, in such ship or vessel, and her freight then pending.

Sec. 7. "This Act shall not apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation."

Under this statute, however, it has been held in the United States that a vessel on Lake Erie is not a vessel used in inland navigation, *the lakes not being considered as inland waters.**

From the foregoing synopsis, it is evident that the restriction of the liability of shipowners, provided for by article 503 of The Merchant Shipping Act of 1854 and by section 54 of The Merchant Shipping Act Amendment Act of 1862, exists only in Great Britain and her Colonies, Canada, of course, being included. Everywhere else, the shipowner is responsible to the extent of the value of the ship and freight, subject, however, to the limitations agreed to in the terms of the bill of lading, or contract, and by the common law of nearly all nations with regard to *force majeure*, and gold, silver, money, watches, diamonds, not coming within the meaning of ordinary wearing apparels of the traveller.

Many complaints have been made against these provisions of the law of Great Britain. Mr. Wendt, a gentleman of consider-

* *Moore v. American Transp. Co.*, Supreme Ct., Mich., 1858, 1 Parsons on Maritime Law, note 3, p. 406.

able experience, and a high authority in maritime matters, in his book on "Papers on Maritime Legislation" (1871) says, p. 123–131:

"This clause replaces clause 504 of the Principal Act and has been so interpreted by our Courts as to give rise to the most unjust and unheard of results.

"In the first place, it does not deal equal justice to rich and poor, and secondly, it has introduced into this country a state of things utterly at variance with sound principles of law.

"It is quite clear that when the Merchant Shipping Act of 1854 engaged the attention of the Legislature, the necessity of abrogating the system of unlimited liability was strongly urged upon it. By that system, the whole property of a shipowner, whether on sea or land, was liable to make good any damage, however great, which might be occasioned by any vessel belonging to him, and thus although he might have taken every precaution which the nature of the case would possibly permit.

"Such a state of things, of course, deterred responsible persons from investing their money in shipping property, and, by throwing the carrying trade into the hands of a class who were without adequate means, gave rise to numerous evils which have been often described and need not be here repeated.

"The propriety of admitting the principle of limited liability into maritime matters had already been partly conceded by 7 George II, cap. 15, and by subsequent Acts, and the system now obtained its natural and legitimate extension in the 504th clause of the Act which was the result of mature deliberation, enacting that no owner should be answerable for losses occasioned without his actual fault or privity beyond the value of his ship and the current freight. This new system was qualified, it must be admitted, in cases where liability should be incurred with respect to loss of life or personal injury to any passenger, by the stipulation that the value, in such cases, should not be taken to be less than £15 per registered ton. The reason for this qualification is not apparent, unless it were meant to discourage the taking of passengers at all on board ships of inferior value, in which case it ought to have been made to apply only to liability incurred by the ship on board of which the passengers were; as far as my knowledge goes, however, this stipulation never had any actual influence upon the decisions of our courts.

"Such being the law as laid down by Parliament in 1854, it soon became apparent that the natural increase in the mercantile navies of the world, together with the general introduction of steam as a propelling power, would produce a great increase in the number of collision cases, and when the Board of Trade had become aware of some defects in the Merchant Shipping Act, and was known to be contemplating the introduction of what afterwards became the Amendment Act of 1862, some of the owners interested in the large

steamers, navigating the most frequented parts of the Atlantic, and consequently running the greatest risk of being made liable as above pointed out, really succeeded in prevailing upon the late Government to induce the legislature to limit the liability of shipowners in the way which now constitutes the law of the land.

"A careful perusal of 'Hansard' will show the wonderful argumentation used on both sides of the House, when this question was under consideration, and that on May 26, 1862, the then First Lord of the Treasury (Viscount Palmerston) used the following memorable expressions, viz.:

"'He could not understand the great tenderness which honorable gentlemen seemed to feel for steamships causing damage to other ships which they met. *If he were not officially connected with his Right Hon. friend* (the President of the Board of Trade), but were exercising an independent judgment on his proposal, he should say, that that proposal failed in this, that the true principle which ought to be applied to damage done by steam vessels or any other instrument conducted by man, must be the value of the damage done, not the quality or the value of the instrument carrying it. If there was any fault in the proposal of his Right Hon. friend it was that it went too far in mitigation of the liability of steamships for damage, and he hoped that the House would not do anything so manifestly unjust as still further to limit their responsibility.'

"There cannot be any doubt that a statesman of Lord Palmerstons' character would not have uttered these words of complete and entire disapprobation of a measure introduced and strenuously supported in the House by one of his colleagues, had he not been impressed by the strong conviction that a great wrong was about to be done, and that if, for party reasons, he were obliged to acquiesce in it, he would at least relieve his conscience by a public declaration, that nothing but his official connection could have induced him to do so.

"The Merchant Shipping Act Amendment Act of 1862 having become law, we must now refer to the tenor of subsequent decisions, to see the influence which it has exercised upon the administration of justice in this country.

"In the first place, the opening words of the Limited Liability Clause (Sec. 54. "The owner of any ship, whether British or Foreign, shall not, etc.) have been held by the courts to apply to ships of all nations, in all places, whether within British jurisdiction or without. As the most apt illustration of the result of such decisions, I would refer to a separate memorial which I have laid before the Board of Trade, on the subject of the "Marie de Brabant," a steamer belonging to Belgian owners, which was run down and sunk by the British steamer "Amalia" of Liverpool. The Belgian vessel and cargo were of the value of £38,377 3*s.* 10*d.*, and this amount would have been completely recovered from the wrong-doing "Amalia,"—the value of which vessels was admitted to exceed the loss she had occasioned—

if, by any subsequent accident, she had been obliged to enter any other than a British port, but reaching Liverpool instead, the parties interested in the "Marie de Brabant" were only able to recover £14,600, and, in fact, lost £23,777 3*s.* 10*d.* by being obliged to resort to our courts for their remedy.

"The results of this decision must not be lost sight of; the principles of international law which have been adhered to in the most sacred manner by all our most eminent judges are now for the first time abandoned and in their stead we have a sort of *lex fori* or an assertion by our courts that a certain fixed measure of relief is all that we can give, and that foreigners, if they come to our courts either as plaintiffs or defendants, must be satisfied with the same limited liability that would be held to apply in the case of one of our own ships, and this while a British shipowner, if plaintiff in the Foreign court, would obtain full and complete redress. And there may result from such decisions far worse confusion than has been at present foreseen; for, supposing that a Belgian plaintiff, who had been deprived of his natural international rights by the decision of one of our courts, in accordance with this British municipal legislation, were subsequently to discover the wrong-doing British ship in a Belgian port, what should prevent him from detaining her there and obtaining in his own native courts such further redress as he had failed in obtaining here. If such a course is once taken in a Foreign country, and it is not at all improbable that it may be, we shall have some of our ships unable to go to France, some to Belgium, and so on, the result being endless confusion and proportionate injury to our trade.

"And how has this anomalous and unjustifiable legislation become part of our statute-book. A glance at the first drafts of the Amendment Act, as laid before Parliament for discussion, will show that these words *whether British or Foreign* had no place in them; in the debates they were never referred to; the House evidently never once remarked that four words had subsequently slipped in which would be held to bind our courts to disregard the most obvious duties of international comity, or surely some expression of regret would have been called forth in the House by our departure from the principles which have made our nation famous. On the contrary, the alteration made without any authority by the drawer of the bill, during its passage through the House was altogether overlooked, and I will do no more than give the words of a late very eminent judge, the Lord Justice Knight Bruce, who thus expressed himself on the point during the hearing of the "Marie de Brabant" appeal above referred to:

"'I do not know why these very extensive Acts of Parliament should have left such an obvious question open to argument. I cannot quite understand it. The questions are so obvious: you know and a great many people do know that there are other people in the world who have ships besides ourselves. In the second place, legis-

lation in the direction of limited liability has been by the Amendment Act distorted from its original intention and converted into a powerful engine of oppression and injustice. There can be only one opinion as to what the limitation of a ship-owner's liability was originally intended to imply, viz: that any man investing say £100 in the purchase of a 64th share of a ship, should have the certitude that he could not be made to forfeit his share and a further amount besides. In other words, the owners of any ship inflicting damage were to be allowed to say: There is our ship, we give her up to you, and as far as her value goes you may pay yourself for any wrong she has done.

"This is the common sense view of the proposition and this is what other countries have always acted upon. Our courts, however, have not held to this interpretation, but have actually made the owners of a ship, which has been found to blame for a collision, liable to make good £8 per ton on her register, when their vessel itself may have been rendered almost valueless or even totally destroyed by the same casuality. And what can be more monstrous than for the law to say that a vessel which has originally cost her owners £4 per ton (and at this rate very excellent vessels may now be bought in open market) which, after collision with another vessel, may reach a British port in such a state as to be worth only £1 per ton, shall nevertheless be held liable in damages to the extent of £8 per ton or even £15, in case of loss of life, while it is perfectly clear that, if the vessel is a foreigner, more than her *actual market value*, as she reaches port, cannot by any possibility be got out of her, nor ought to be, according to the general law of the sea.

"In fact, the creation of this anomalous legislation virtually establishes a monopoly for large and valuable ships to the undue prejudice of small and old ones; in the same debate, to which I have already referred, the then President of the Board of Trade is reported to have said:

"'There might, indeed, be a little increase of liability under the present scheme, as far as the owners of worthless ships were concerned, but that was quite right, because an old ship or one of small value, might do great damage, and might belong to a wealthy owner or company.'

"But every practical man would have told the Right Hon. gentleman that there are many ships between the new A1 ship and that worthless craft which he confesses might probably suffer somewhat under the effects of the clauses supported by him. And I am at a loss to conceive how it can be thought just and equitable to make a poor man who may have invested all his savings in the purchase of a ship worth £4 a ton, liable to a loss equal to double the amount of his investment, while you, in the same breath, exonerate the rich owner of a very valuable craft from, perhaps, three-fourths of the amount which, under the general maritime law, he might be made

liable for, although the latter really could afford to sacrifice more in proportion than the former, and although it is not pretended that the liability in either case bears any proportion to the amount of injury inflicted. Having now, as I hope, said enough to demonstrate clearly the injustice which is occasioned by the assumption of a fixed arbitrary value for property, which is subject to constant fluctuation, and giving it strongly as my opinion that the late Government, unadvisedly yielding to the influence brought to bear upon it, principally by the Liverpool Chamber of Commerce, gave up, in the 504th clause of the Merchant Shipping Act, a principle against which no reasonable complaint could be urged, I would, in conclusion, point out what is likely to be the result of this unfair tenderness for large valuable steam vessels.

"Every one must have observed that in the majority of the collision cases now occurring, one at least of the vessels is a steamer. It will also not be denied that the general impression with regard to collisions is, that a vessel going at full speed is not so likely to receive serious damage herself as she is to inflict injury upon another. Now, bearing this in mind, and remembering that the value of a first-class steamer will often be £30 per ton, what would be the position of the master of such a vessel, say 1000 tons register, in view of an inevitable collision? By slackening speed he might receive the blow of the approaching ship, and possibly lose his own, or in figures £30,000; if he increases his speed, he will probably save his own ship, though he will certainly sink the other, and if he does, his owner's loss cannot exceed £8000. Surely no words could too strongly condemn legislation which could produce such effects as are here only hinted at."

So far, reference has principally been made to the laws of foreign States, and not to the laws of the Dominion. That the Merchant Shipping Act of 1854 is in force in the whole Dominion there cannot be any doubt.

Section 502 says: "The ninth part of this Act (respecting the liability of shipowners), shall apply to the whole of Her Majesty's Dominions."

Section 2 says: "British possession shall mean any colony, plantation, island, territory, or settlement within Her Majesty's Dominions."

Before the promulgation of the Civil Code of Lower Canada, The Merchant Shipping Act of 1854, section 503, was admitted as being part of the law of that Province. *McDougall v. Allan*, 6 Lower Canada Jur. 233. Articles 1671, 2355, 2359, 2374, 2390, 2404 of the Civil Code refer to the Merchant Shipping Act of 1854 as being in force in the Province of Quebec. Finally, the

Imperial "Merchant Shipping (Colonial) Act of 1869," s. 7, enacts that "in the construction of the Merchant Shipping Act of 1854 and of the Acts amending the same, Canada shall be deemed to be one British possession." But here, as in Great Britain, the Acts of 1854 and 1862 only apply to British and Foreign ships, as far, at least, as the responsibility of shipowners is concerned.

The Merchant Shipping Act Amendment Act of 1862, although not published, is in full force, in the Dominion. Section 1 says: "This Act shall be construed as part of The Merchant Shipping Act, 1854."

It is clear, therefore, that section 503 of The Merchant Shipping Act of 1854, and section 54 of The Amendment Act of 1862, are in full force in every British colony. Since the passing of these Imperial statutory enactments, some important legislative acts were passed by the Parliament of Canada.

The Civil Code of Lower Canada, which came into force in 1866, must be first mentioned, and a synopsis of a few of its leading articles will undoubtedly be found of interest.

Article 1675 says: They (carriers by land and by water) are liable for the loss or damage of things entrusted to them, unless they can prove that such loss or damage was caused by a fortuitous event or irresistible force, or has arisen from a defect in the thing itself.

Article 1676. Notice by carrier of special conditions limiting their liability, is binding only upon persons to whom it is made known, and notwithstanding such notice and the knowledge thereof, carriers are liable whenever it is proved that the damage is caused by their fault or the fault of those for whom they are responsible.

Article 1677: "They are not liable for large sums of money or for bills or other securities, or for gold, or silver, or precious stones, or other articles of an extraordinary value, contained in any package received for transportation, unless it is declared that the package contains such money or other articles.

The foregoing rule nevertheless does not apply to the personal baggage of travellers, when the money or the value of the articles lost is only of a moderate amount and suitable to the circumstances of the traveller.

Article 1815: They are responsible if the things be stolen or damaged by their servants or agents, or by strangers coming and going in the carriage.

But they are not responsible if the theft be committed by force of arms, or the damage be caused by irresistible force; nor are they responsible if it be proved that the loss or damage is caused by a stranger, and has arisen from neglect or carelessness on the part of the person claiming it.

Article 2433: The owner of a *sea-going ship* is not liable for the loss or damage occurring without his actual fault or privity:

1o. Of anything whatsoever on board any such ship, by reason of fire; or

2o. Of any gold, silver, diamonds, watches, jewels, or precious stones on board such ship, by reason of any robbery, embezzlement, making away with, or secreting of the same; unless the owner or shipper thereof has, at the time of shipping the same, inserted in his bill of lading, or otherwise declared in writing, to the master or owner of such ship, the true nature or value of such articles.

Art. 2434: When any damage or loss is caused to anything on board a sea-going ship, without the fault or privity of the owner, he is not answerable in damages to an extent beyond the value of the ship and the freight due, or to grow due, during the voyage; provided that such value shall not be taken to be less than fifteen pounds sterling per registered ton, and that the owner shall be liable for every such loss and damage, arising on distinct occasions, to the some extent as if no other loss or damage had arisen.

Article 2436: The articles contained in Articles 2433 and 2434 do not apply to any master or seaman, being also owner or part owner of the ship to which he belongs, to take away or lessen the liability to which he is subject in his capacity of master or seaman.

These last articles were evidently intended to reproduce sections 503–506 of the Merchant Shipping Act of 1854, with the only difference that they apply to all sea-going vessels, whether British, Canadian or Foreign. In fact, the *Codificateurs*, in their *7th Report*, p. 236, observe that articles 2433, 2434, 2435, 2436 "are taken from the Imperial statute known as 'The Merchant Shipping Act, 1854;'" and they add, "that as they are established by positive enactment, no other authority is necessary to justify them, but it may be observed that they are in general conformity with provisions to be found both in the ancient and modern maritime codes of France." Neither of these remarks is correct. Article 2434 is clearly null and void, as being in conflict with sect. 504 of the Act of 1854, which requires the value of the ship and freight to be of £15, only in case of loss of life or personal injury and not in case of damage to property, as provided for by the Code. It is, moreover, in direct violation of section 54 of the Amendment Act of 1862, which limits the responsibility of owners of any ship, *whether foreign, sea going or inland registered British ship*, to *eight* pounds per registered ton, in cases of damage to property (without actual fault or privity), and fifteen pounds per ton in cases of loss of life or personal injury.

The first Canadian statute bearing upon the subject is 27–28 Vict., c. 13, passed in 1864 by the Parliament of the heretofore Province of Canada.

Section 12 is the exact reproduction, nearly word for word, of the Imperial Amendment Act of 1862, with the exception that the liability extends to £8, or $38.92, both in cases of damage to property and personal injury or loss of life. The statute of 1864 has been repealed by the 31st Vict., c. 58, passed in 1868 by the Parliament of the Dominion. Section 12 says:

"12. The owners of any ship, whether Canadian, British or Foreign, shall not, in cases where all or any of the following events occur, without their actual fault or privity, that is to say:

(1.) Where any loss of life or personal injury is caused to any person being carried in such ship;

(2.) Where any damage or loss is caused to any goods, merchandize, or other things whatsoever on board any such ship;

(3.) Where any loss of life or personal injury is by reason of the improper navigation of such ship as inforesaid caused to any person in any other ship or boat;

(4.) Where any loss or damage is by reason of the improper navigation of such ship as afresaid caused to any other ship or boat, or to any goods, merchandize or other things whatsoever on board any other ship or boat;

Be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandize or other things, nor in respect of loss or damage to ships, goods, merchandize or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding thirty-eight dollars and ninety-two cents for each ton of the ship's tonnage, such tonnage to be registered tonnage in the case of sailing ships; and in the case of steamships the gross tonnage without deduction on account of engine room:

(*a*) In the case of any British or Canadian ship, such tonnage shall be the registered or gross tonnage, according to the British or Canadian law, and in the case of a foreign ship which has been or can be measured according to British or Canadian law, the tonnage as ascertained by such measurement shall, for the purposes of this section, be deemed to be the tonnage of such ship;

(*b*) In the case of any foreign ship which has not been and cannot be measured according to British or Canadian law, the Secretary of the Minister of Marine and Fisheries shall, on receiving from or by direction of the court hearing the case, such evidence concerning the dimensions of the ship as it may be found practicable to furnish, give a certificate under his hand, stating what would in his opinion have been the tonnage of such ship if she had been duly measured accord-

ing to Canadian law, and the tonnage so stated in such certificate shall, for the purposes of this section, be deemed to be the tonnage of such ship.

"13. Insurances effected against any or all of the events enumerated in the section last preceding, and occurring without such actual fault or privity as therein mentioned, shall not be invalid by reason of the nature of the risk.

For the reasons already urged with respect to the Civil Code of Lower Canada, this statutory enactment is plainly unconstitutional, null and void, as far as "British and Foreign" ships are concerned. Article 547 of the Merchant Shipping Act of 1854 declares: "The legislative authority of any *British* Possession shall have power, by any Act or Ordinance, *confirmed by Her Majesty in Council*, to repeal, wholly or in part, any provisions of this Act relating to ships registered in such possessions." The Canadian statute provides not only for *ships registered in Canada*, but also for *British and Foreign ships*, and it is sufficient to observe that it has been passed without any reserve for Her Majesty's sanction, and, in fact, is in our statute-book without such sanction.

The Parliament of Canada, like Provincial Legislalatures, has no power to repeal or amend Imperial statutes in force in Canada. It has been repeatedly so held by high legal authorities both in the Dominion* and in England, and such is, moreover, the express provision of several Imperial statutes.

In his charge to the Grand Jury in *R. v. Eyre*, in 1868, it was said by Blackburn, J.: "In the Navigation Laws there are express enactments that the colonists should not make laws to allow foreigners to trade with the colonies, and there they exercise the control which they had a right to exercise; and when that is done, no doubt the colonial legislature cannot make a law which would be binding in contradiction to the Imperial legislature." †

The statute 3 & 4 Will. 4, c. 59, s. 56, enacts that all laws in any of the British possessions in America repugnant to any Act of Parliament made or thereafter to be made, "so far as such Acts shall relate and mention the said possessions," are, and shall be null and void.—See statute 7 and 8 Will. 3, c. 22, s. 9.

* The Union St. Jacques case, 2 *Revue Critique*, 449; see also authorities cited at pp. 49–63, vol. 1, pp. 180–203, 263, 263–273.

† 20 State Tr. 324.

By the British North America Act, 1867, s. 129, it is enacted that "all laws in force in Canada . . . . shall continue . . . . as if the Union had not been made; subject nevertheless (*except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland*) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Parliament, or of that legislature under this Act."

It seems conclusive, in the first place, that in Canada the responsibility of shipowners varies according to the common law prevailing in the Province where it is incurred. In all cases arising within the Province of Quebec and brought before its own tribunals, recourse must be had to the principles of the Civil Law embodied in her Civil Code, whereas in Ontario and the other Provinces, (and also in the Province of Quebec when the remedy is sought before the Court of Vice-Admiralty,) the English Law is the law of the land. In the second place, all the provinces are subject to the provisions of section 503 of The Merchant Shipping Act of 1854, and section 54 of The Amendment Act, 1862. Section 503 applies only to registered sea-going British ships, section 54 to Foreign and British ships of every description. The Parliament of Canada, which under the Constitution of 1867, has jurisdiction in matters of navigation, shipping and commerce, may extend the limitation contained in section 503 to any vessel not being a *registered British ship* within the meaning of the Act of 1854; but it cannot, as was done in 1868, repeal wholly or in part section 54 of the Act of 1862.

II.—THE PILOTAGE ACT.

The recent decision of the Privy Council, in England, in the case of *Redpath* and *Allan*, has alarmed some common carriers by water. It should not, however, be a matter of surprise, as it is based upon an express enactment of our maritime law; Article 2432 of the Civil Code of Lower Canada says: "The owner or master is not liable for loss or damage occasioned by the fault or incapacity of any qualified pilot, acting in charge of the ship within any district where the employment of such pilot is compulsory by law." By the 31st Vict. c. 18, s. 14, 1868, this exemption has been extended to the whole Dominion.

This rule is not peculiar to Canada. It has been borrowed from the English statutory law. It was first enacted by the 6 Geo. 4, c. 125, s. 55, and was re-enacted by section 388 of The Merchant Shipping Act, 1854; but it applies to the United Kingdom only—Sect. 330. It may be said, *en passant*, that it was construed in England to apply to the fault or incapacity of the pilot merely, and not to the negligence of both the pilot and crew, and it was undoubtedly on that ground that the appeal in *Redpath v. Allan* was advised.*

Compulsory pilotage has thus been recently established by the 27–28 Vict. c. 58, 1864, in the following cases and places: Section 9 says:—"The master or person in charge of each vessel exceeding one hundred and twenty-five tons, coming from a port out of this Province (heretofore Province of Canada), and leaving the port of Quebec for Montreal shall take on board a Branch Pilot for and above the Harbour of Quebec, to conduct such vessel, under a penalty equal in amount to the pilotage of the vessel, which penalty shall go to the Decayed Pilot Fund."

Section 10 has a similar provision with respect to vessels clearing the Port of Montreal for a port out of the said (heretofore) Province of Canada.

The injustice of the distinction made in favor of sea-going vessels running in the Province of Quebec is glaring. Inland vessels are not bound to compulsory pilotage, whereas oceanic ships are. Suppose that the steamer "Quebec" should sink the "Scandinavian" by the *fault or privity* of a Branch Pilot happening to have charge of the same, or by mere accident, the Richelieu Company would be liable to the amount of $38.92 per ton of her registered tonnage. If the opposite supposition be made, the Allan line would be entirely exonerated, because it is forced to employ a licensed pilot. These possible consequences of the law under consideration need no comment. Even if it did treat equally all shipowners, no satisfactory reason can be given for its adoption, nor continuance. Where is the difference between the pilot, the master, or mate of a sea-going ship? All must be taken from a licensed class, and in all cases the selection is similar. It is not therefore strange to find that the rule in question is in existence only in Canada and the United Kingdom.

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* *Hammond v. Rogers*, P. C. 7 Moore, 160; *Dowdeswell*, p 443; *Maude & Pollock*, p. 223.

In the United States, there is no enactment on the subject, and the question does not seem to be yet fully determined by the jurisprudence of the Courts.*

In France and on the continent generally, the shipowner is responsible for the acts of a licensed and compulsory pilot, not under special legislation but under judicial authority.†

The law of England in this respect has lately been criticized by many, and especially with considerable force of argument, by Mr. Wendt, the same learned writer on *Maritime Law*, already quoted at some length. His remarks on this interesting point will no doubt be read with interest. He says, pp. 83 *et seq :*

"In the discussion of this part of the Act, I would at once state that I consider it imperative to do away with compulsory pilotage in its present form altogether as a blot upon our Statute Book, and if it is conceded, as I hope it will be, that the abuses which have grown up with the system are such as to admit of no other remedy, it will be clear that this part of the Act must be entirely remodelled. . . .

"I can never acknowledge that a pilot ought to be, or was originally intended to be more than a help to the officers of the ship in avoiding the intricacies or dangers of local navigation. Of course, it cannot be denied that a master of a vessel visiting a port for the first time cannot be so well acquainted with shoals, sands, or beacons as one who makes his livelihood by conducting vessels at all times in that particular district, on the other hand, how can such pilot, taking charge of a vessel for the first time, be as well acquainted as her own master with the sailing, steaming, or steering qualities, from a defective appreciation of which as many accidents arise as from any other circumstances. There is, it seems to me, no reason whatever why a master of a vessel who has undertaken to perform a voyage, say from Sydney to London, should be relieved of responsibility to any point short of either of these places; by all means allow him to make use at any point of such skilled assistance as may present itself; but if, with the knowledge that such assistance will doubtless be at his command, he does not feel equal to the responsibility of the voyage, it is his fault if he undertake it, and our hardy mariners would look upon it as an insult if it were seriously suggested that they could not find their way anywhere. . . . . .

"This, however, is not the worst part of the difficulty as will be clear when the mode of procedure is considered, which is as follows: My ship having, while at anchor, as described in the foregoing illustrations, been run down and sunk by a steamer, my first care is to

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* 1 Parsons on Maritime Law, 486.

† Rennes, 3rd August, 1832, S. V. 32, 2 547; D. P. 33 2 19; Bédarride, Dr. Comm. 345.

ascertain that all the requirements of the Act of Parliament, as far as they apply to my vessel, were complied with. The result of my investigation being satisfactory, after making an application to the owners of the steamer for compensation, which is at once declined, I put my case in the hands of a proctor, who proceeds in the High Court of Admiralty to prosecute my claim. On behalf of the steamer the only plea is that she was in charge of a duly licensed pilot, employed by compulsion of law, and that therefore, under the 388th section, her owners are exempt from liability, and this plea succeeds unless it can be proved by me that the accident was not solely due to the fault or incapacity of the pilot, but that the crew of the steamer were partly to blame by not having properly carried out the pilot's orders.

"But the evidence by which alone I can hope to prove such an allegation must be taken from the crew of such steamer, or from the uncorroborated statement of the pilot himself, and, even if it were to the interest of all the witnesses to be truthful, it may be imagined how difficult it would be to obtain sufficient proof from those quarters. But it is directly to the interest of all to suppress the truth in such a case; the crew of course will do all they can to clear themselves from blame, particularly where by so doing they clear their owners from responsibility; while the pilot having to look to the owners for further employment, and being, in very many instances at least, engaged from year's end to year's end by the same firm, must be. to say the least, very sorely perplexed if he tries to do what is right. In the first place, his evidence will almost certainly be uncorroborated; in the second place, he knows that if he succeeds in throwing the blame upon the crew of the steamer, he will be inflicting upon the owners what may possibly be an enormous loss, and will certainly expect to forfeit their patronage; and, lastly, his own liability in the case of a decision adverse to himself cannot be more than £100, and is in most cases *nil*, for if he has any means at all, he will almost certainly be a member of a Club which will undertake to defend him if any proceedings at common law should really be taken against him. If, however, the owners of the steamer agree to indemnify him against any loss, all inducement for him to speak the truth is at an end, except as between his conscience and himself; while for the owners of the steamer a maximum sum of £100 is in one scale and an unknown liability of many thousands may be in the other, and it is not too much to conclude therefore that such a bargain, however corrupt it may be thought, is not unlikely to have ere this exercised an influence on the decision of the court where such cases come for hearing."

CONCLUSION.

The importance of uniformity of maritime law in the Dominion cannot be questioned. It is, in fact, generally admitted that a vessel, leaving one of our ports for any other in the Pro-

vinces, should be subject to the same general rules. In the Province of Quebec, the responsibility of shipowners is governed by a code of laws, which prevails amongst nearly all civilized nations, as being based upon reason and justice, and most beneficial to both navigation and public interest. Its principles, in a great measure, have been adopted by the United States, a nation with whom, under the Treaty of Washington, our maritime intercourse is to be so considerably increased. It appears, therefore, that the adoption by the Parliament of Canada of its leading articles, and of one or two changes and additions, which have become necessary in consequence of the immense traffic between the Provinces and also between Canada and the United States, would be welcomed by the entire community. Finally, the repeal of The Merchant Shipping Acts, as far as Canada is concerned, and the creation of a Court of Admiralty in Montreal and Toronto, by the Imperial Parliament, or at least as provided for by section 547 of the Act of 1854, would permit our Federal Parliament to exercise the powers, conferred upon it by the Constitution of 1867, of regulating the commerce, navigation and shipping of this country, and to achieve the great national work of uniformity in the maritime laws of Canada.*

D. GIROUARD.

Montreal, 8th February, 1873.

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* Since this paper has gone to press, intelligence has been received that the case of *Leslie* v. *The Canadian Navigation Co.*, above referred to at page 4, has been decided in favor of the defendants.—Burrows, J:

"Respecting ships trading upon the great lakes, the statute (26 Geo. 3, c. 86) is clearly in force. This has been established by the case of *Torrance vs. Smith*, and the reasons given by Sir James Macauley for his judgment in that case appear to me to apply with equal force to the navigation of Lake Ontario and the River Saint Lawrence.

"This great river is one hundred miles wide at its mouth. That part of it which runs between Kingston and the sea is six hundred miles long. It is no where less than two miles wide, except at one point, namely, the city of Quebec, where it is nearly a mile wide. Its surface between Kingston and the sea measures 8,600 square miles, and is considerably greater than the surface of Lake Ontario. Ships of more than a thousand tons burthen, built at Kingston, have carried the British flag all over the world. The River St. Lawrence has borne the ships of war and commerce of many countries. It is the limit or boundary between Canada and the United States. It is, like the sea,

FOREIGN MARRIAGES.

A legal writer of distinction lays down the axiom that "marriage is not merely a contract but an international institution of Christendom"; and solely as an international institution I now propose to discuss it. Important as the laws relating to marriage are under our municipal systems, they become of still greater importance when considered as affected by the conflict of laws of various states. At a time like the present, when the means of emigration are open to all, and in a new country like Canada, made up, as it is, and peopled by immigrants from a variety of nations, many of them having systems of laws varying widely from our own, it become a question of great practical importance to fix the status and rights of persons married in foreign countries who may have made their homes here. Though few cases of difficulty have so far been adjudicated in our Courts yet, it is more than probable that very many will arise in the future. And here it is well to bear in mind that every part of the British Empire, not comprised in the Province of Quebec, is to us, in this connection, a foreign country; and as difficult questions may arise with respect to persons having married in Ontario or in England or Scotland, and afterwards domiciled in this Province, as if they had married in Germany or Russia.

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the highway of nations, and carries a commerce which forms no inconsiderable part of the trade of Great Britain. The statue of 26 Geo. III, chapter 86, appears to me to be in force on the River St. Lawrence as much as on the sea and on the Great Lakes.

"It was contended that passengers' luggage not being specially mentioned in the statute is not included with these articles, in respect of which shipowners are protected from loss by fire. The words of the Act, "any goods or merchandize whatsoever which shall be shipped, taken in, or put on board any ship or vessel," seem amply sufficient to include moveable property of all kinds. There is no difference between luggage and merchandize, except that merchandize is goods for sale and luggage is goods not for sale, but for personal convenience. For these reasons, I consider that the defendants are entitled to judgment upon the demurrer."

LEGALITY OF THE MARRIAGE.

It may be said to be almost universally agreed that the validity of a marriage is to be decided by the law of the place where it was celebrated, and a marriage valid by that law will be held valid and binding everywhere, unless there be something in it repugnant to the local law. The forms used in the ceremony, the consents required, and requirements as to age of the *lex loci celebrationis*, are held to govern. France is notably an exception to this rule, for in that country, by the Code Civil, all the consents and requirements are as necessary as if the marriage was celebrated in France. Cases may also arise where it would be impossible to comply with the *lex loci* either because such marriages were forbidden, or because no provision was made for their celebration. An instance of this kind occurred at Rome, where no priest was allowed to marry Protestants, and as a matter of course where the law of the place could not be complied with. In this case it was held by Lord Eldon, on its being sworn that two Protestants could not there be married by the *lex loci*, as no priest would be permitted to marry them, that the marriage was valid.* Instances of persons married by missionaries in heathen countries have also taken place where the local law could not be complied with, yet these marriages have been considered valid and binding, and the issue of the parties as legitimate.

As forming an exception also to the rule that the foreign law governs the validity of the marriage tie, we may consider the effect of a Turkish, Mormon, or polygamous marriage, how we would treat the second marriage, the first wife surviving, and how far we would recognize the status of the parties. In this country we could not recognize the status of a Turkish or Mormon marriage, as marriage is understood by us, it being not only contrary to, but positively prohibited by, law. Marriage as understood in all Christian countries, is the union of two persons for life, to the exclusion of all others. Polygamous unions, though called by the name of marriage, are something very different from what we understand that status to be, nor can we admit that the status of women under the rule of polygamy in any way resembles that of the Christian "wife."

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* Westlake Priv. Int. Law.

Lord Brougham in the celebrated case of *Warrender v. Warrender* (2 Cl. & Finn. 531,) thus refers to this question: "If indeed there go two things under one and the same name in different countries,—if that which is called marriage is of a different nature in each—there may be some room for holding that we are to consider the thing to which the parties have bound themselves according to its legal acceptation in the country in which the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe that we regard it as a wholly different thing, a different status from Turkish or other marriages among infidel nations, because we clearly should never recognize the plurality of wives and consequent validity of second marriages, standing the first, which second marriages the law of those countries authorize and validate."

A recent case bearing on this subject is that of *Hyde v. Hyde* and *Woodmansee*,* wherein the dissolution of a Mormon marriage contracted at Salt Lake City, Utah, was sought in England, in 1866, on the ground of the adultery of the wife. The petition for dissolution was presented upon the following facts, which were proved.

The petitioner was an Englishman by birth. At the age of sixteen he joined a congregation of Mormons in London and was afterwards ordained a priest of that faith. He became acquainted and engaged to the respondent, then Miss Hawkins, she and all her family being Mormons. Miss Hawkins and her mother left England and proceeded in 1850 to Salt Lake City where they were joined in 1853 by the Petitioner. The marriage took place in the same year and was performed by Brigham Young, the President of the Mormon Church, according to the ceremonies of that faith. The Petitioner and Respondent lived together until 1856 when the Petitioner went to the Sandwich Islands, leaving the Respondent in Utah, where he not only renounced the Mormon faith but preached against it. He was excommunicated in Utah and his wife declared free to marry again. The Petitioner urged his wife to join him but she refused either to change her faith or to leave the Mormon territory, He returned to his former domicile in England in 1857 and in 1859

* 1 L. R. Probate and Divorce, 130.

or 1860 the Respondent contracted another marriage with the Co-Respondent. There were issue of both marriges.

Neither the Respondent nor the Co-Respondent appeared. It was held, "that a marriage contracted in a country where polygamy is lawful, between a man and a woman who profess a faith which allows polygamy is not a marriage as is understood in Christendom; and although it is a valid marriage by the *lex loci*, and at the time it was contracted both the man and woman were single and competent to contract marriage, the English Matrimonial Court will not recognize it as a valid marriage in a suit instituted by one of the parties against the other for the purpose of enforcing matrimonial duties or obtaining relief for a breach of matrimonial obligations."

The judge ordinary in delivering the judgment rejecting the prayer of the petition for divorce remarked that "This Court does not profess to decide upon the rights of succession or legitimacy which might be proper to the issue of polygamous unions, nor upon the rights or obligations in relations with third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication or the relief of the matrimonial law of England."

Another important consideration is the effect of *subsequens matrimonium*, and how far such a marriage would affect the status of the parties, and more particularly the rights of their children born out of wedlock. Questions of the most serious nature have arisen in England upon this point with respect to the inheritance of land. In the celebrated case of *Birtwhistle* v. *Vardill** it was held in the House of Lords, and may now be considered the law of England, that a person, born in Scotland of parents then domiciled there and who were afterwards married there, was not entitled to inherit English land, whereas such a person would have legally inherited Scotch land, for in Scotland he would have been legitimized by such a marriage. We have therefore the strange circumstance of a person being legitimate by the law of one part of the Empire and illegitimate by the law of another. To bring the case nearer home we have but to consider the case of parents of children, born prior to marriage,

* 5 Ba. and Cr. 438.

marrying in the Province of Quebec afterwards removing to Ontario or to any other Province or State where the law of legitimation by subsequent marriage does not exist and there acquiring real estate. In the event of the death of such parents intestate children born prior to their parents' marriage could not inherit, though in the Province of Quebec they would be legitimate, would inherit, and have all rights as if born in wedlock.*

These instances are sufficient to establish the rule that though marriages, which are legal and valid in the place where they are celebrated, are generally held binding and valid in all countries yet there are circumstances into which courts of law will enquire in connection therewith.

PECUNIARY EFFECTS ON PROPERTY.

Having formed a basis upon which it is almost universally agreed to decide the legality of the marriage itself we have next to consider that status with reference to its pecuniary effects on property and the laws which govern the rights of the consorts. I would first refer to the laws which regulate the rights of the consorts as conflicting in consequence of the different domiciles of the parties. No opposition will now be made to the rule that the law of the domicile of the husband, or matrimonial domicile, must in the absence of an express contract govern the rights of the parties in opposition to the law of the place where the marriage was celebrated, or to the law of the wife's domicile. It not unfrequently happens too, that persons marry in neither of their domiciles but resort to another place simply for the purpose of having the ceremony celebrated, and possibly then taking up a domicile new to both. In such cases the law of the new domicile would be the *lex domicilii matrimonii* and it would govern the rights of the consorts. Where a native of a country marries a foreign wife she, as a rule, is naturalized by her marriage with a citizen of that country and obtains all the rights of citizenship regulated by the laws of the matrimonial domicile. By the law of England though an alien woman marrying an Englishman becomes, since the passing of the Act 7 and 8 Vict. c. 66, naturalized, yet an Englishwoman marrying a foreigner though she takes the nationality of her husband still remains a British subject. This is also the law of the United States.

* Civil Code, arts. 237, 238, 239.

A Canadian and an Englishwoman marrying in England and removing to Canada, the domicile of the husband, would submit themselves to the law of the Province in which they settled, and all their rights would be governed by the law of such Province, though any real property which either consort possessed would, upon the authority of most jurists, be regulated by the *lex situs*. Our Courts have also held that an Englishman and Englishwoman marrying in England with the intention of settling in this Province should be governed by our law. These rules certainly seem reasonable and just; for it is but natural to suppose that the parties had the matrimonial domicile in view, and would understand that their rights were to be governed by the laws there existing; and, moreover, they actually submitted themselves to the operation of those laws.

Where the parties have entered into an express contract their rights will be regulated by it, and its provisions will be carried out by all Courts in so far as they are not prohibited by the *lex loci*, for no country can admit any agreement adverse to its own views of morality. The form of the contract and the formalities respecting its execution will be judged by the *lex loci celebrationis* and if sufficient there will be sufficient everywhere, The interpretation and effect, however, must be governed by the law of the matrimonial domicile, or domicile of the husband.

Westlake, on this subject, says that, "formal and external requisites of the marriage (contract) will depend generally on the place of celebration, the interpretation generally, and the legality and operation always on the domicile; if, however, the contract relates to land it must follow the form of the *situs*." This may be taken to be the rule generally recognized. Westlake is inclined to go even further and to agree with Dumoulin and Savigny that no distinction should exist between moveable and immoveable property but says its consequence as to land cannot be admitted in England.

Lord Brougham in the case of *Warrander* v. *Warrander*, before referred to, says with reference to the interpretation of the contract, that "the marriage contract is emphatically one which the parties make with an immediate view to the usual place of their residence.

EFFECT OF CHANGE OF DOMICILE.

We come now to the important consideration of change of domicile. If the parties have removed to another country where different laws exist by what law will the rights and property of the consorts be governed, the law of the original domicile of the husband, that is the matrimonial domicile, or by that of the actual domicile? Presuming community of property to have existed in the place of the matrimonial or original domicile of the marriage will it continue between the parties upon their removal and settlement in a State where community does not exist, or will the rights of the persons be governed by the law of the new or actual domicile?

Upon this point the greatest difference of opinion exist amongst jurists. Dumoulin, Savigny and other distinguished writers on international law contend that the rights of the consorts having once been determined by the law of the matrimonial domicile must continue without change under every and all circumstances; that the rights of the parties are vested rights, which cannot be disturbed. Some of the advocates of this doctrine go upon the theory of the tacit agreement of the husband and wife as to their respective rights as existing at the place of marriage; but upon this they are not of accord, certain of them holding that it is by operation of law and from the actual submission of the parties to that law. This latter is the view taken by Savigny in opposition to Dumoulin. He says, in support of his theory:—"When the marriage was about to be contracted, it was entirely in the wife's option, either to abstain from it altogether, or to add certain conditions regarding patrimonial rights. She has made no such contract, but has accepted the conjugal rights as fixed by the law of the domicile, and naturally has reckoned on its perpetual continuance. The husband now changes the domicile by his own mere will, as he is undoubtedly entitled to do, and quite a different distribution of the conjugal estate is thus introduced for this marriage. If the wife is satisfied with it, our whole controversy is less important, since an alteration of her rights could have been effected by contract. The question, however, is important, if the change is detrimental to the wife, and she is not content with it. Precisely in order to exclude the unjustifiable one-sided power of the husband over the rights of the wife, was the existence of a tacit contract presumed by the

defenders of that opinion. The opposite party have recoiled from this and not altogether without reason. The same end, however, may be attained, even if we renounce the tacit contract. By a contract, tacit as well as express, we understand a declaration of intention to the same effect, which is not conceivable without the distinct consciousness of both parties. If we ask, then, whether in the inception of a marriage there has always been a distinct understanding of both parties, especially of the wife, as to the distribution of the property of the spouses, we must certainly deny this; and hence the general assumption of a tacit contract is unfounded. But we must always admit of a voluntary submission as the foundation of the local law; and this is conceivable even in a negative fashion, as mere absence of contradiction. Now this does not exist at all as to the law of the new domicile in the supposed case of a disagreement between the spouses. We must therefore deny in this case any *alteration of the conjugal rights of property*, for presuming which there is no sufficient reason, even from the stand-point of the opposite party, who regard the positive law, and not the contract, as the criterion of the local law. Thus we arrive in a different way at the same result to which the assumption of a tacit contract would conduct us."

In further support of this view Savigny says:—"If, at a place where the law establishes as the rule universal communion of goods of the most extensive description, a marriage is contracted by a rich man with a poor woman, the estate becomes common by the completion of the marriage. If the man afterwards changes the domicile to a place where the dotal régime prevails, the wife must according to the second opinion, lose in a moment, and against her will, the share of the estate to which she had already acquired right."

There certainly seems to be great justice in this mode of reasoning and the case as presented by this learned civilian is supported by very high authority. The Court of Paris in 1849, and afterwards the Court of Cassation in 1854, decided that *le régime matrimonial* once established ought not to be affected either by a change of national status or of domicile; and it was held that where parties who had married in England, their then domicile, and afterwards removed to France, and the husband having become naturalized, purchased conjointly with his wife immovable property, the property enured solely to the husband, such being the English law, which was the law of the domicile.

Sir R. Phillimore in referring to this case says that "a stronger case of what appears to the writer of these pages to be a sound maxim of the *jus gentium* cannot well be imagined."

Fœlix also supports the view taken by these jurists. He says: —"L'association conjugale, quant aux biens, une fois constituée par l'effet de la loi du domicile du mari au moment du mariage, ne se modifie pas par suite d'un changement de la même loi. C'est ce que la plupart des anciens auteurs ont décidé pour le cas de changement de domicile des époux durant le marriage; aujonrd'hui ce même principe s'appliquera au changement de nationalité."

Boullenois holds strenuously to the opinion that the status of the parties once determined by the *lex domicilii matrimonii* must continue as the following quotation will demonstrate. "Dans ce système je n'ai besoin ni de la convention expresse, ni de la convention présumée; je tiens de la loi mon état, et ma condition de commun, ou de non commun, comme un autre tient d'elle son état de majeur, ou de mineur, et cet état se porte par tout et influe surtout, comme état un état personnel."

Burge also says:—"The change of domicile neither divests them" (the consorts) "of any rights which they had acquired under the law of the matrimonial domicile nor confers on them any rights which they could not acquire under that law."

Pothier says:—"Delà il suit que lorsque des personnes domiciliées sous la coutume de Paris ou sous quelqu'autre coutume semblable, se sont mariées sans faire de contrat de mariage, la communauté légale qui a lieu en ce cas suivant la coutume de Paris, entre ces personnes s'attend à tous les héritages, qu'elles acquerront durant leur mariage, fussent-ils situés dans des provinces dont la loi n'admet pas la communauté lorsqu'elle n'a pas été stipulée." (Traité de la Communauté, Art. prel. 11.)

Our Courts have adopted this principle also by the judgment of the Court of Queens Bench in the case of *Rodgers et al., v. Rodgers* (3 L. C. J. p. 64) wherein it was held that no community of property according to the custom of Paris existed between parties married in England, their then domicile, without any ante-nuptial contract, they having afterwards changed their domicile and settled and died in this Province. This judgment, which is so far as I can find, the only one of this nature delivered by our Courts, fully adopts the views of Savigny, and those who agree with him.

In granting *séparation de biens* to persons married in England or in the Province of Ontario of which there are several instances (*Sweetapple v. Gwilt*, 7 L. C. J., p. 106, *Sadler v. Pœtter*, decided at Quebec and not reported. *Howard v. Compain*, decided at Montreal, not reported, and other cases) our Courts seem to have abandoned the principle laid down in *Rodgers v. Rodgers;* and have dealt with the rights of the parties according to the law of the actual domicile and not in accordance with the *lex domicilii matrimonii*. If we are not to change the rights of persons as established in one instance it certainly seems anomalous that we should do so in a case of precisely similar nature.

Opposed to the theory of continuance of the government of the law of the matrimonial domicile, and holding that the law of the actual domicile must govern, but few English authorities are to be found, owing to the fact that the question has scarcely ever come before the Courts in England. I may however refer to the comments of Lord Eldon made with reference to the case of *Foubert v. Turst*, decided in the House of Lords, which are strongly against the idea advocated by Dumoulin and Savigny and in favour of the law of the actual domicile. In this case there was an express contract, and upon that judgment was given, holding that the community of property which existed in France had continued during the residence of the parties in England and that the rights of the parties and the property, which was personal, should be governed by the law of France. Lord Eldon stated that the decision was wholly based upon the contract, and that had there not been an express contract by which the parties had submitted to the *coutume de Paris* the law of England, where the parties were domiciled at the time of the dissolution of the marriage, would have regulated their rights. He opposed the theory of tacit understanding, and would *a fortiori* have opposed its application to immovables.

In Louisiana this question appears to be well understood. There have been numerous decisions on it owing to the existence in that State of the law of community, and its being a new country where many have settled from other States and nations. For the same reasons these questions will undoubtedly frequently arise in this Province as our population is increased by immigration. In Louisiana the law is so well settled that it is embodied in the Civil Code of the country in the following article. "A

marriage contracted out of the State between persons who afterwards come here to live is also subjected to the community of acquets with respect to such property as is acquired after their arrival."

In the case of *Murphy v. Murphy*, (1 Martin Reports, p. 312,) where it was stipulated by express contract that community should exist between the parties according to the *coutume de Paris*, no matter where the parties should reside, the principle was established that the community did not continue between the children born of the marriage and the survivor in South Carolina.

In *Gale v. Davis* (1 Martin Reports p. 312) it was held that where a couple removed from Virginia, the country in which they were married, and where the English Common Law prevails, to Louisiana their property acquired subsequent to removal was governed by the law of the actual domicile.

Mr. Justice Derbigny in delivering judgment in the case of *Gale v. Davis* says:—"That though it was *once* a question it seems now to be a *settled* principle that when a married couple emigrate from the country where the marriage was contracted into another, the laws of which are different the property which they acquire in the place to which they have removed is governed by the laws of that place."

Story asserts that the law as maintained in Louisiana will probably form the basis of American jurisprudence on this subject, and says that the law of the actual domicile must be regarded "as the controlling law in regard to all the rights and duties for the time being springing from the relation." He gives as a practical reason why the doctrine of continued rights of the matrimonial domicile should not be adopted, "that it subjects the citizens or subjects of the same state to as many different laws as the different nationalities of its inhabitants." This is an objection of a very serious and formidable nature in the present age. Formerly when the means of emigration were open to but few and when generation after generation was content to remain in the fatherland, this reason would have had less weight; now however, and especially on this continent, it would be a matter of the greatest difficulty to admit the doctrine of continued rights under every circumstance. It is impossible to over estimate the confusion which would exist in a country the judges of which

would be obliged to administer the laws of almost every State in the world.

Story laws down the following propositions, as those which should be adopted on this point:—

1. "Where there is a marriage between parties in a foreign country and an express contract respecting their rights and property, present and future, that, as a matter of contract will be held equally valid everywhere unless under the circumstances it stands prohibited by the laws of the country where it is sought to be enforced. It will act directly on movable property everywhere. But as to immovable property in a foreign territory it will at most confer only a right of action, to be enforced according to the jurisprudence *rei sitæ*."

2. "Where such an express contract applies in terms or intent only to present property, and there is a change of domicile, the law of the actual domicile will govern the rights of the parties as to future acquisitions."

3. "Where there is no express contract, the law of the matrimonial domicile will govern as to all the rights of the parties to their present property in that place, and as to all personal property everywhere, upon the principle, that movables have no *situs* or, rather that they accompany the person everywhere. As to immovable property the law *rei sitæ* will prevail."

4. "Where there is no change of domicile the same rule will apply to future acquisitions as to present property."

5. "But where there is a change of domicile the law of the actual domicile and not of the matrimonial domicile will govern as to all future acquisitions of movable property; and as to all immovable property, the law *rei sitæ*."

Story goes on to remark that even, "in cases of express contract the exception is to be understood that the laws of the place where the rights are sought to be enforced do not prohibit such arrangements. For if they do, as every nation has a right to prescribe rules for the government of all persons and property within its own territorial limits, its own law in a case of conflict ought to prevail."

These rules seem to embody not only the just and equitable view of the question but a theory which can be worked out by the Courts of all nations with certainty and uniformity. They do not disturb rights acquired under a former regime, but leave

them to be dealt with by that law, only dealing with such rights or property as are acquired in the new domicile.

If we adopt these propositions we free ourselves from the difficulty which would arise from the decisions of our Courts rendered with reference to persons marrying in a foreign country with the intention of removing to this Province. It has been held in such cases that the rights of the parties and their property are governed by the law of this Province. Here then we are obliged to show the intention of the parties at the date of a marriage, a task in all cases difficult and in many quite impossible, opening also a door to such perjury as self interest may dictate. If these principles were adopted it would also be in conformity with the judgment rendered as to persons going to another country being there married and returning to their former domicile. In the case of *Languedoc et al., v. Laviolette* (1 L. C. J., p. 240) where the parties left Lower Canada their domicile and went to the State of New York, and then married and returned to their former domicile it was held that their rights should be governed by our law and not by that of the State of New York, and that community of property existed, there being no express contract to the contrary. A similar case was decided, in Louisiana, *Le Breton v. Nouchet* (3 Martin, p. 60, 66,) where the parties eloped and were married in the Mississippi Territory where no community existed and returned to Louisiana and there resided until the death of the wife when the question arose as to what law should govern. In this case the judgment was that the law of Louisiana should govern. These decisions are sound law and would form a part of the system proposed.

We would also escape from the difficulty urged in opposition to the granting of *séparation de biens* to persons married in England, Ontario or elsewhere where *communauté de biens* does not exist. At present I contend that the judgments referred to are contradictory, and that upon the same principle that our Courts have granted separation of property to persons married under a different regime, and afterwards domiciled in the Province of Quebec, they should also adopt the rule of governing their rights and property acquired after their residence in the province by our law, the law of the actual domicile.

The reasoning of Dumoulin, Savigny and others able writers who have advocated the continuance of the original rights of the

matrimonial domicile is such as not easily to be over come, but I cannot help thinking that there is an equal show of justice in the arguments of the other side, while as a practical working system, the doctrine of Story and the law as it exists in Louisiana is immeasurably superior. Most advocates of the former view wrote under different circumstances and in countries where but little inconvenience could exist from acting up to their views, but those who have written on the subject latterly have been those who have had practical experience and knowledge of the difficulties which surround the old theory.

J. C. HATTON.

LÉGISLATION À QUÉBEC.

Nous signalons à l'attention publique deux statuts de la législature de Québec qui nous semblent mettre en danger dans certains cas les droits de propriété et ouvrir la porte à la fraude. Il n'est guère possible de croire que ces Actes aient subi l'examen des officiers en loi de la Couronne ou du Parlement, ou l'épreuve de la discussion ; car il ne faut s'y arrêter qu'un instant pour en voir les dangers et les défauts.

Le premier est le chapitre 16 de la 33e Victoria (1ère session, 1870) ; il est intitulé. " Acte pour faciliter la reprise des " terres abandonnées en certains cas."

Sect. 1.—" Chaque fois qu'une terre a été vendue en vertu " d'un acte de vente (ou équivalant à vente, sect. 13) et que le " vendeur a droit de demander la résolution de la vente à raison " du non paiement du prix ou pour toute autre cause, et *que* " *l'acquéreur a abandonné la terre et l'a laissé dans cet état* " *d'abandon durant deux années ou plus*, alors le vendeur pourra " procéder d'une manière sommaire, tel que pourvu ci-après, à " reprendre la terre ainsi vendue et à rentrer en possession " d'icelle."

Une procédure sommaire pour reprendre un terrein *réellement* abandonné, ne souffrirait pas d'objections si on l'entourait des garanties nécessaires pour être à l'abri de la fraude et de la surprise. Mais ici, malgré les mots trompeurs du statut, il ne s'agit pas seulement d'un terrain *abandonné*, mais aussi de tout terrein que l'acquéreur a revendu, *s'il n'a pas donné un avis par*

écrit de cette vente à son propre vendeur (sect. 12,) ce qui couver évidemment tous les cas où la propriété a changé de main, car il n'a existé jusqu'aujourd'hui aucune nécessité de faire signifier à son vendeur l'acte par lequel on cède et transporte la propriété à un autre.

Remarquons encore que ce procédé sommaire existe pour demander la résolution de l'acte, non-seulement pour défaut de paiement du prix, mais aussi " chaque fois que le vendeur a droit de " demander la résolution de la vente..... *pour tout autre cause.*" Ces derniers mots sont d'une étendue à effrayer, car ils se rapportent aux cas de *fraude, vol, violence, ou lésion ;* aussi bien qu'aux cas où l'acquéreur s'est obligé de faire quelque chose, comme de bâtir, etc. Peut-on croire que la législature voulait rendre sa mesure aussi générale? La chose répugne, à moins qu'il n'y eut l'intention de favoriser quelques intérêts particuliers. Ce qui nous confirme dans la pensée que le législateur ne voulait pas donner à sa loi une étendue aussi large, c'est la section 7 où il est dit que le défendeur peut prévenir le jugement en consignant le montant dû, " ou en remplissant les *obligations qui y sont stipu-* " *lées*, et dont le défaut d'exécution aura donné droit au ven- " deur de demander la résolution de la vente."

Quoiqu'il en soit, le statut est positif, et le procédé sommaire est accordé chaque fois qu'il y a lieu à la résolution de la vente *pour quelque cause que ce soit.*

Voyons maintenant le procédé sommaire.

On présente une requête au juge, après avis de dix jours à l'acquéreur et au possesseur actuel, ou avis par les journaux si le défendeur est absent. Cette requête est appuyée " *d'un affidavit*, et de la production de la preuve *écrite* de la vente, S'IL L'A EN SA POSSESSION" (sect. 4.)

C'est là tout ce que la loi exige de la part du vendeur : *un affidavit et l'acte de vente, s'il l'a en sa possession ! !*

Voici son pendant :

Sect. 5.—" *Il ne sera pas permis de contester la dite requête,* " *si ce n'est pas des contre affidavits produits dans les trois jours* " *qui suivront la présentation de la dite requête.*"

Sect. 6.—" A l'expiration du dit délai de trois jours, le juge " pourra, *à sa discrétion*, rejeter la requête, ou rendre un juge- " ment *déclarant l'acte de vente nul et autorisant le requérant* " *à prendre possession de la terre, etc.*"

Ainsi le défendeur devra préparer ses plaidoyers et faire son

enquête dans les trois jours qui suivront la présentation de la requête, et le quatrième jour le jugement est rendu. C'est un procédé évidemment sommaire, très sommaire même.

Quand on songe que ce jugement est irréformable, excepté sur appel devant trois juges et sur la seule preuve produite devant le premier juge, et lorsqu'on se rappelle qu'il a pour effet d'annuller toutes les hypothèques et tous les droits de propriété que l'acquéreur a pu donner ou transmettre à des tiers, on ne comprend pas une législation semblable.

Ajoutons que ce jugement est exécutoire contre *toutes personnes quelconques*, au moyen d'un " bref de possession pour " expulser telles personnes " sans donner au propriétaire actuel la " chance d'être entendu comme on le fait ordinairement au " moyen d'une action en jugement commun."

Je passe au second statut qui forme le chapitre 7 de la 34 Vict. (2nde session de 1870 ;) il a pour titre :

" Acte concernant la reprise de certaines terres *abandonnées* dans les seigneuries."

C'est, dans l'intérêt du seigneur contre le censitaire, une copie un peu modifiée du statut que nous venons d'analyser ; la procédure est exactement celle du premier statut cité ; elle fut trouvée si parfaite qu'il n'y eut rien à reprendre. Voici dans quel cas le seigneur peut réclamer *sommairement* la terre concédée par ses ayeux. 1o. S'il est dû dix ans d'arrérages, car la prescription de cinq ans établie par l'article 2012 du Code Civil est changée tout doucettement dans la section 12 de ce statut ; elle sera dorénavent de dix ans. 2o. Si la terre a été *abandonnée pendant vingt ans ;* mais le mot *abandonné* s'entend comme dans le statut précédent, c'est-à-dire qu'un censitaire originaire est censé avoir abandonné sa terre, s'il n'a pas *donné avis par écrit* au seigneur de la vente qu'il en a faite ! !

Nous n'insistons pas d'avantage : cependant qu'on nous permette de signaler encore la clause suivante qui parait vouloir sauvegarder les droits des tiers, mais qui au fond ne sauvegarde pas grand chose : " Rien de ce qui est contenu dans le présent acte " ne sera censé préjudicier aux droits des personnes qui ont des " réclamations hypothécaires sur ces terres, mais l'exercise de " ces droits sera sujet au paiement par telles personnes de tous " les arrérages de droits seigneuriaux alors dûs : " S'imagine t-on que le créancier hypothécaire a droit de se faire mettre en possession de la terre ? Puisque le seigneur garde la terre, pour-

quoi le créancier hypothécaire lui paierait-il ses arrérages de droits seigneuriaux ? Il ne pourrait être tenu de le faire que si le seigneur lui remettait la terre à son tour. Mais ce statut ne dit rien de tel, ni la loi commune non plus; on reste donc en présence de cette disposition : le seigneur garde la terre; mais pour le forcer à payer les hypothèques, ne valussent-elles que le quart ou le dixième de la propriété, il faudra lui payer sa dette par dessus le marché. Voilà un seigneur bien favorisé, et un créancier bien maltraité.

Il me semble que semblables lois ne peuvent souffrir la moindre critique, tant elles dénotent l'oubli des principes les plus élémentaires du droit.

Chose étrange! malgré leur importance évidente, elles sont à peine connues, et elles ont été adoptées sans soulever la moindre remarque!

Il suffit de signaler un tel mode de législation pour faire comprendre la nécessité de le réformer. Le premier député venu taille sans merci dans notre code civil et même dans notre code de procédure; loin de gêner ces tentatives le gouvernement semble au contraire les autoriser en proposant, chaque session, des changements nombreux sur ces matières, et en laissant sanctionner des statuts comme ceux qui nous occupent. La législature adopte tous ces projets sans le moindre souci, se reposant sans doute sur une loi passée en 1868, dans laquelle il est déclaré que les Codes ne seront affectés par aucun statut postérieur, excepté les articles nommément amendés par ce statut postérieur; comme si un corps de lois était semblable à un champ de légumes où l'on peut arracher et transplanter sans nuire à l'ordre et à la beauté du champ. Du moment qu'une loi nouvelle contient une disposition contraire à celle des codes, c'est en vain que l'on s'imagine que ces dispositions différentes pourront subsister ensembles; le droit ne peut dire blanc et noir à la fois, et la loi nouvelle anéantira l'ancienne.

Tout le monde légal déplore que l'initiative en ces matières soit laissée pleine et entière à chaque député, et qu'on en fasse un tel abus. Les changements se font souvent avec tant de précipitation que la session suivante, il faut compléter, modifier ou rappeler les amendements de la session précédente. Aucun système de jurisprudence n'est possible avec cet état de choses; aussi la confusion la plus complète règne-t-elle dans plusieurs parties de notre droit; la procédure est maintenant au guet-apens continuel

où la bonne foi est presque toujours la victime de l'arbitraire du juge ou de la subtilité de l'adversaire.

Il nous semble nécessaire de règler d'une manière différente la présentation des projets de loi qui touchent au droit civil, à la procédure civile et au code municipal. Peut-être un comité judiciaire nommé dans chaque Chambre, ou dans les Sections du Barreau, devrait-il être chargé de tout projet de loi sur ces matières : il faudrait l'astreindre à faire un rapport motivé à la Chambre, et ce rapport servirait de bâse à l'action de la législature. Son principal avantage serait d'attirer l'attention sur ces projets de loi, qui maintenant soit adoptés à la vapeur et sans examen.

S. PAGNUELEO.

RECENT DECISIONS.

QUEEN'S BENCH.

Present: The Honorable J. F. Duval, Chief Justice; R. Caron, L. T. Drummond, W. Badgley, S. C. Monk, Puisné Judges.

DECEMBER TERM, 1872.

Commercial Union Insurance Company, Appellants, and Foote, Respondent. — This was an appeal from a judgment rendered on the eighth day of April last, condemning the appellants to pay the respondent $116.40 for advertising in the "Quebec Morning Chronicle."

The appellants have their principal place of business at Montreal; and in 1869 and 1870 they had as their agent, at Quebec, one Benoit Marquette. In December, 1869, Marquette, acting in his said quality caused an advertisement to be published in the respondent's newspaper for and in the interest of the appellants, and it continued to be so published until March, 1870. The time during which the said advertisement was published and the price charged therefor are not in dispute. The point raised by the appellants was that the respondent, as their agent, exceeded his authority in the matter, and that they are not responsible.

The respondent's action was to recover the price of the advertising, which, he alleges, was done by the order of the authorized agent of the appellants and in their interest.

The plea was the general issue.

The evidence established that the publishing in the "Chronicle" was done at the request of Marquette, that it was he who was debited with the amount in the respondent's books; that the account for the printing was sent to him, and of him repeatedly it was endeavored to collect the amount at intervals of three months, running over the period from October, 1870, to July 1871. And it was only after these delays that the bill for printing was forwarded to the appellants and payment requested of them, that the appellants knew nothing about the publishing in the "Chronicle" until August, 1870, when they received a letter from Marquette giving them the information, to which they immediately replied, expressing their disapproval of what he had done.

Reference was to the following authorities.

Our Code art. 1727 states that "*the mandator is bound in "favor of third persons for the debts of his mandatory, done in "execution and within the powers of the mandate and that the "mandator is only answerable for acts which exceed such powers, "if he have ratified them either expressly or tacitly.*" The rule as laid down by writers upon the subject is that the principal is bound by such acts only of the agent as fall within the scope of his power and duties, that the mere existence of the relation of principal and agent, establishes an agency no further than is necessary for the discharge of the duties *ordinarily belonging to it.* It is so stated in Greenleaf on evidence, vol. 2, sec. 65, and Pardessus, speaking of the agency which is to be inferred from the employment, says it is "*celles qu'il est d'usage de confier a ceux qui ont de semblables emploies,* ainsi le facteur preposé en termes généraux à un établissement commerciale est autorisé à tout *ce qui rend néccssaire la direction qui lui est confiée.*" Smith in his Mercantile Law, page 170, writes "the rule is that the extent of the agent's authority is (as between his principal and third parties) to be measured *by the extent of his usual employment.*"

The judgment of the Court below was confirmed by the Chief Justice Caron & Drummond, JJ., Badgley & Monk, dissenting.

It was thus held, as had been decided by the Superior Court,

that the special power to publish advertisements was inherent in the office of an agent appointed to take risks and receive premiums; that such an authority is to be presumed, that advertising was intended to promote the appellant's business and that the proof of custom, usage or sanction of the appellants was not necessary.

Skead, Appellant, Defendant below; McDonell, Respondent, Plaintiff below.—The Superior Court, after hearing this case finally upon the merits, rendered an interlocutory judgment ordering an *expertise*. This was an appeal from that judgment.

The declaration of the respondent alleged that, while he was the lawful holder of certain timber limits in Ontario, by license from the Crown, under chapter twenty-three of the Consolidated Statues of Canada, the appellant illegally trespassed upon such limits, and cut down and carried away timber valued at fourteen hundred dollars. It further alleged that the appellant was then in possession of such timber at Quebec, and asked that he be condemned to deliver it up to the respondent, or in default pay fourteen hundred dollars damages.

The appellant pleaded the general issue, and also specially alleged that all timber cut by him was cut upon his own limits in Ontario, which were adjacent to those held by the respondent.

The parties went to proof, and the respondent having failed to prove that the appellant was ever in possession in Lower Canada, of any timber cut on the respondent's limits, modified the conclusions of his declaration and restricted his action to damages for the alleged trespass. Thus at the time of the hearing, the action was simply an action of damages instituted in the Province of Quebec, for alleged grievances committed upon real estate, wholly situate in the Province of Ontario.

The Superior Court after hearing the argument, being of opinion that the respondent had failed to establish his case, in the exercise of its discretionary powers, ordered the *expertise* complained of;

One of the *considérants* of the judgment which was rendered in the Court below was as follows:

"Doth order, *avant faire droit*, that, by experts to be agreed "upon by the parties, else named by the Court or by a judge "pursuant to law, and after consultation in this behalf with the "Officers of the Crown Timber Office, *the said division line be*

"*duly established and run*, and that it be ascertained by the "said *experts* whether the timber to which the witness William "John McDonell refers in his evidence in this case on the part "of the plaintiff, as having been cut by the persons named Hays "& Gillesie, the defendant's foremen, was cut on one side or on "the other side of said line, and on which side, and to this end "the said *experts* shall obtain from the said William John "McDonell, or from some other competent person well posted on "the subject, an indication of the spot where the said Hays & "Gillesie cut said timber, with power to said *experts* to receive "oath one of the other, as also to swear all witness that may be "heard before them."

This judgment was reversed by the Court of Queen's Bench. Four of the judges being of opinion that a Court in Lower Canada had no authority to name *experts* for the purposes mentioned in this interlocutory, the line to be established and were being in the Province of Ontario, Mr. Justice Caron, dissenting.

Bossé, Appellant, v. Hamel, Respondent.—Action by an heir-at-law against the executors to render an account of their administration. The executors plead that the whole of the estate moveable and immoveable was bequeathed to a Miss Jourdain *en usufruit*, and that the heir-at-law, the plaintiff in the Court below, was present at the *délivrance* and sanctioned this proceeding.

The facts of the case are correctly stated in detail as follows:

The appellants in the above cause, along with Augustin Jourdain, were, by the last will and testament of the late Charles François Hamel, named executors.

By the first clause in this will, the testator directed that his executors above named should pay all his lawful debts.

By a subsequent clause, after making several particular legacies, he directed, as respected the remainder of his property, that his said executors should dispose of the same in such a way as he should desire by a memorandum that he would leave with his said executors or one of them.

By the ninth clause, the testator disseized himself of all his property in favor of his executors, according to the custom, declaring it to be his will that his said executors should act as such until his will should be carried into effect.

The testator died on the day the will was executed, and there-

upon the then executors, above named, became seized of all the moveable property left by the testator, and acted as executors.

At the expiration of the year and a day, the executors were called upon by the respondent, heir-at-law of the testator, to render their account. This they refused to do, and thereupon the present action was instituted. The appellants seem to have entertained the opinion that because a writing styled a *délivrance de legs* in favor of one of the particular legatees, an unfructuary, was signed by the executors, without its being stated therein that any particular sum of money had been paid over a balance established, they were thereby exempted from the obligation imposed by law on all executors to render an account. It will be remarked that the respondent was party to the *délivrance* and that the whole estate was transferred to the universal legatee *en usufruit.*

The Court below by its judgment rendered the 28th day of December 1869, held the contrary, by condemning the executors above named to render an account. Mr. Jourdain, one of the executor did not appeal from the judgment.

The Court of Appeals were unanimously of opinion that the article of our Code did not apply and that the executors could not be compelled to render any account to the heir-at-law under the peculiar circumstances of this case.

Michon, Appellant, v. Gauvreau Respondent.—The respondent, on the sixth day of June, 1868, issued out of the Superior Court, Quebec, a writ of attachment before judgment, against one François Julien, under which a vessel, then in the possession of the latter, on the stocks in his ship yard, was seized. The present appellant intervened in that suit and claims the vessel seized, as his property, under two deeds mentioned in the pleadings, and upon this intervention the respondent joined issue with the appellant. Subsequently the respondent recovered judgment against Julien for the amount claimed, and as the latter had contested the legality of the issuing of the writ of attachment, the respondent, as soon as the delay to issue execution expired, caused the same vessel to be seized under a writ of *fieri facias.* To the last mentioned seizure the appellant fyled an opposition whereby he claimed the vessel as his property. This opposition was, on the 11th day of December last, dismissed by judgment of the Superior Court, and it is from this judgment that the present appeal is taken.

The opposition alleges that the appellant is proprietor of the vessel seized, under a certain deed bearing date the 20th March, 1868, under which the appellant claims as vendee, and further that the vessel had been already seized under a writ of attachment before judgment, that an intervention had been fyled by the appellant claiming said vessel and asking *main-levée* of the seizure, which intervention was still undecided.

The judges of the Court of Appeals were unanimously of opinion that until the intervention was disposed of the respondent could not cause the vessel to be sold by Sheriff's sale, and that the appellant's opposition should have been maintained.

The judgment of the Court below was therefore reversed.

Gugy, Appellant, v. Brown, Respondent.—In this case the appellant recused the Chief Justice, upon amongst other grounds the fact of rancorous and persistent personal hostility to him the appellant.

Upon the recusation being prescribed the Chief Justice retired, and the Court was then composed of Caron, Drummond, Badgley, and Monk, JJ.

After statement of the case by the appellant and argument by him, the Court held that in every case of the recusation of a judge, two days' notice must be given to the opposite party, that the recusation must be sustained by affidavits, authentic copies of which must be previously communicated to the adverse party.

It was stated that both the Code and the Rules of Practice of the Court of Appeals required the observance of these formalities.

That although neither the Code or the Rules of Practice made special mention of recusations, yet this proceeding comes under the general provisions respecting incidents before the Court not appearing on the face of the Record.

Mr. Justice MONK dissented from this ruling, being of opinion that recusations were highly exceptional proceedings and did not come under the general rule as to notice. In regard to the production of affidavits such a requirement he thought was in the discretion, and might in some cases of an extraordinary nature be insisted upon by the tribunal.

Exparte Baker on an application to be admitted to bail.—Baker was accused of murder at the Coroner's inquest, and a verdict of wilful murder was given against him.

An indictment for the same crime was submitted to the Grand Jury and a true bill was found. He was tried and the jury differed in opinion and were discharged. It did not appear how the jury were divided or what was the precise obstacle to their unanimity the one or the other.

Application was made by the prisoner's counsel for permission to give bail for his appearance to take another trial. A writ of *Habeas Corpus* was allowed and made returnable before the full Court. Upon the return of the writ, Parkyn, Q.C., was heard upon the application at great length. The Solicitor General resisted the admission of the accused to bail, as being wholly without precedent and in that view being not only a dangerous innovation but also as likely to lead to an evasion of the law in a case of great and paramount importance.

On the last day of the term the application was granted and accused admitted to bail, himself for £500 and two securities for £250 each.

Mr. Justice MONK concurred, stating however, that the application was an extraordinary one, that he was induced to concur in the decision rendered by the majority, solely upon the ground that the learned judge who tried the case, and who was then on the Bench, one of his own colleagues, was of opinion that under all the circumstances of the case and with which he was necessarily quite familiar, he did not consider it fell under the general rule in these matters, and that he the learned judge was not himself opposed to granting the application. For him (Mr. Justice Monk) this expression of opinion by the learned judge was he thought a sufficient reason perhaps for departing from the general rule, and he therefore concurred with his colleagues though not without great hesitation.

Exparte Foster for a writ of *Habeas Corpus* returnable before the Court of Queen's Bench, at its next sittings in Montreal.—Foster was committed for extradition under the treaty to that effect with the United States. As the Court would not sit at Montreal before the lapse of the 7 days after commitment his Counsel, Mr. Devlin, applied to the Court at Quebec for a writ of *Habeas Corpus* returnable on the 11th December 1872, the first day of the term in Montreal.

After argument the application was granted, and the writ made returnable as prayed for, the Solicitor General opposed the issuing of the writ.

N.B.—This decision was contrary to the judgment of the Court rendered about two years previous in the case of Caldwell, where an application made under precisely similar circumstances, and for the same object, was refused. From this latter decision, Badgley & Monk, JJ., dissented, and consequently concurred in granting the application in Foster's case.

The Glasgow Bank, Appellant, and Thomson, Respondent.—Held: That an insolvent debter, partner in a commercial firm, composed of himself and another person, may vote in the appointment of an assignee to the estate of his firm, such estate being in insolvency under a writ of attachment directed against both partners; his only claim being advances made by him, AS A PARTNER, to his own firm.

On the 26th October, 1868, the City of Glasgow Bank, being the only creditor of the firm of Arbuckle & Bruce, composed of James Arbuckle & James Bruce, trading at Montreal, sued out a writ of attachment against their insolvent estate. This proceeding was contested by one Robert Watson, styling himself Assignee of the estate of the said James Bruce, upon various grounds which it is not necessary here to specify, since they were all rejected by the judge in insolvency, by the Court of Review, and by this Court. Those proceedings being at an end, Messrs. Kerry Brothers & Crathern, creditors of James Bruce presented a petition to set aside the attachment, but were equally unsuccessful. They prudently retired, after trying whether the fortunes of the Court of Review might not turn in their favor.

After two years and four months had thus been consumed in a matter usually considered to be summary, and which certainly ought to be so—a meeting of creditors took place, before Mr. Justice Torrance, on the 3rd day of February last. At this meeting there appeared, The City of Glasgow Bank, creditor for £1423.15 sterling; certain Montreal creditors of James Bruce (one of the insolvents), to the amount of £1450.00, and James Thomson (representing James Arbuckle) not a creditor at all, but holding claims of Arbuckle upon the partnership estate, in which he was one of the partners, to the amount of £6,739.16 sterling.

The votes of all these parties were taken subject to objection, and on the 4th day of February last, Mr. Justice Torrance gave judgment, and one of the *considérants* in that adjudication disposed of Thomson's pretensions in the following terms.

"Considering further that the claim of the said James Thom-
"son is the claim of one of the co-partners against the partnership
"of Arbuckle & Bruce, and that the same cannot be allowed to
"count in the election of an assignee."

The case was then taken into the Court of Review and the three judges there reversed the ruling of Mr. Justice Torrance. In this latter judgment is to be found the following *considérant.*

"Considering that there is error in the said judgment, to wit
"in excluding the claim of James Thomson, at the meeting of
"the insolvent's creditors, held in February last, and in not
"admitting his vote for Robert Watson to be assignee of the
"estate of bankrupts, in this cause, and in declaring James
"Court the duly appointed assignee of the said insolvents; doth,
"revising the said judgment, reverse the same by the present
"judgment and proceeding to render the judgment that ought to
"have been rendered in the premises, considering that said
"James Thomson had a right to prove a claim, as in fact he did
"at the meeting referred to, to wit, of the third day of February
"last against the separate estate of James Bruce, one of the firm
"of Arbuckle & Bruce, insolvents, and that he Thomson had
"right to vote for assignee to the insolvent estates at the meet-
"ing referred to."

This decision was confirmed by the Court of Appeals after a rehearing. The Chief Justice & Mr. Justice Badgley however dissented from the judgment of the Court.

Ibbotson, Appellant, v. Wilson, Respondent.—This was an action of damages for $2000 for alleged false imprisonment in causing the plaintiff (respondent) to be proceeded against for obtaining on the 4th December, 1868, money under false pretences, to which the defendant and appellant pleaded an exception alleging nullity of service in which he was served with the writ in his office as clerk of the Recorders' Court and whilst fulfilling the function of such, the exception setting forth the circumstances under which that service was made, and invoking article 71 of the Code de Procédure Civile which is in these words.

"A summons cannot on pain of nullity be served in Church,
"nor in Court, nor upon a member of the legislature on the floor
"of the house."

The evidence shows that there was no "service a l'audience,"

that is "Cour tenante," but that it was served in the office of the appellant, that is in an apartment that forms no part of the Court properly so called. That it is an office which bore the same relation to the Recorder's Court as the Prothonotary's Office does to the Court Room of any of the divisions of the Superior Court.

The Court below and the Court of Appeals were both of opinion that such a service did not come within the prohibition of art. 71 of our Code. Mr. Justice Badgley dissented.

The Grand Trunk Railway, Appellant, v. Campbell, Respondent.—Plaintiff's action is brought to recover $150.00 as damages suffered by the plaintiff and claimed from defendants.

The plaintiff bought in London, Ontario, in June, 1870, two vehicles, one called "a buggy" and the other "a carriage" both with curtains and aprons complete; and on the 14th June, 1870, delivered these two vehicles to defendants, at London, to be conveyed to Montreal.

These vehicles arrived in Montreal, about the 22nd of the same month. They were injured and damaged on the way down, while in charge of defendants, and the curtains and aprons of both vehicles were not delivered to plaintiff in Montreal, but were missing. The receipt given by Thompson the shipper at London, Ontario, was in the following words:

"GRAND TRUNK RAILWAY,

London Station, June 14th, 1870."

"Received from W. J. Thompson the undermentioned pro-"perty in apparent good order addressed to S. C. Campbell, "Montreal, to be sent by the Grand Trunk Railway Company "of Canada, subject to the terms and conditions stated upon the "other side, and agreed to by this shipping note delivered to "the Company, at the time of giving the receipt therefor. "1 carriage with cover, 1 buggy with cover, 2 poles, 1 pair of "shafts." On the other side was the following among other conditions. "No. 198. Vehicles, except when tightly boxed, taken "entirely at the owners' risk of damage from fire, the weather, "and all other contingencies."

Upon this receipt and upon this condition, the Grand Trunk based its defence to the action; there was also an allegation that they were not guilty of negligence as alleged.

The respondent Campbell met this species of law issue by citing :

Article 1676 C. C., which says : " Notice by carrier, of special " conditions limiting their liability, is binding only upon persons " to whom it is made known ; *and notwithstanding such notice " and the knowledge thereof, carriers are liable whereever it is " proved that the damage is caused by their fault or the fault of " those for whom they are responsible.*"

In this instance the vehicles were not boxed, but placed on open platform, the usual place where carriages so conveyed were put. The covering was not very strong, but on the contrary rather slight for such a distance. It was furnished by Thompson the consignor.

Notwithstanding the clause in the receipt given by Thompson to the Railway and the 19th condition, the Court below was of opinion that there was a presumption of negligence against the Company and that they were bound to rebut that presumption. The Company was condemned accordingly.

The Court of Appeals took the same view and confirmed the judgment.

Badgley & Monk, JJ., dissented, holding that proof of negligence under the circumstances rested with the owner of the vehicles, and that in consequence of the condition to the Bill of Lading, no presumption of negligence could exist against the Company in this case. This was a special contract which the parties could legally enter into in regard to their liability, and even then that the Company could be held liable only for gross negligence, that Campbell did not prove any negligence for which the appellants could be held liable in this case.

Gagnon, Appellant, and Clouthier, Intimé.—Le présent appel était d'un jugement rendu en juillet dernier, par la Cour de Circuit du District de Beauce, dans une action en radiation d'hypothèque. Voici en substance les allégations de l'action :—

En 1863, l'intimé avait obtenu jugement contre l'appelant pour la somme de £19 de capital et £7, 1, 10 de frais. Il avait fait enrégistrer ce jugement contre les immeubles de l'appelant, subséquemment le jugement a été payé tant le capital qu'intérêts et frais, et la seule question qui se présentait était celle de savoir si le débiteur a droit de poursuivre en justice pour se faire donner par son créancier, un certificat ou acte notarié prou-

vant l'acquittement de l'hypothèque enregistrée, avant d'avoir mis son créancier en demeure de lui donner tel certificat.

D'abord l'appelant était-il tenu d'alléguer dans son action qu'il avait requis l'intimé de lui donner quittance et que ce dernier ait refusé de la lui donner ?

Les sections 41 et 42 du chap. 37, S. R. B. C., page 361, établissent d'une manière bien évidente que ce n'est que dans le cas où le créancier refuse de donner à son débiteur tel certificat ou acte notarié que celui-ci a droit de poursuivre en justice.

"La section 41 dit:" Toute personne ayant acquitté en tout "ou en partie une hypothèque enregistrée, pourra demander à "son créancier un acte notarié ou certificat prouvant cet acquit-"tement partiel ou total, et elle aura droit de poursuivre en "justice pour se faire donner tel certificat, s'il lui est refusé," &c., &c.

"Et la section 42 dit: "Chaque fois qu'une personne se pré-"tendant créancier aura fait enregistrer contre les biens de son "prétendu débiteur tout droit, privilège ou hypothèque qu'elle "réclame, et que le titre sur lequel ce droit, privilège ou hypo-"thèque est fondé ne confère en loi aucun tel privilège, &c., &c., "et que le créancier après en avoir été *duement requis* refuse de "consentir à la radiation de l'enregistrement de ce titre contre "les biens de tel débiteur, ce dernier pourra alors par voie d'ac-"tion demander que le titre ainsi enregistré soit déclarée nul, "&c., &c., &c."

Vide 7 Vict. chap. 22, Section 8, 25 Vict. chap. 2, Section 1.

Code Civil, art. 2149. "Si la radiation n'est pas consentie elle peut-être demandée au tribunal compétent par le débiteur, &c., &c., &c."

Il résulte donc disait l'intimé des autorités ci-dessus citées que l'appellant était tenu d'alléguer pour donner ouverture à son droit d'action, que l'intimé lui avait refusé un certificat ou quittance constatant l'acquittement du droit enregistré.

Si l'on admet prétendit encore l'intimé que l'appelant était tenu d'alléguer ce fait, de là il s'ensuit qu'il devait le prouver, vu que cet allégué de la déclaration se trouve nié par la défense en fait produite par l'intimé.

Le jugement dont appel à été interjetté en cette cause était redigé en ces termes.

"La Cour ayant entendu les parties en cette cause, par leur "avocat respectif finalement sur le mérite de l'action en icelle,

"examiné la procédure, la preuve et les pièces du dossier et "ayant mûrement délibéré."

Considérant que le débiteur n'a droit de poursuivre en justice pour se faire donner par son créancier un certificat ou acte notarié prouvant l'acquittement de l'hypothèque enregistrée, que si tel certificat lui est refusé par ce dernier.

Considérant qu'il n'est aucunement prouvé que le défendeur ait jamais refusé de donner au demandeur un certificat ou quittance constatant que le jugement mentionné dans la déclaration était acquitté et jugé, (suivant que l'allègue la déclaration), et que partant l'action du demandeur est prématurée, puisque le droit d'action dans la présente circonstance ne prend naissance que sur le refus du créancier de donner tel certificat, la Cour déboute avec dépens la défense au fonds en droit produite par le défendeur le neuf de Mars, mil huit cent soixante et douze, attendu qu'elle n'a aucun rapport quelconque à la difficulté en question, et déboute aussi avec dépens l'action en cette cause. Le jugement a été confirmé a l'unanimité par la Cour d'Appel.

Le juge Monk a déclaré qu'il concourait dans le jugement de la Cour, mais principalement sur le fait d'après son appreciation de la preuve, que le demandeur en Cour Inférieure n'avait pas établi par une preuve suffisante le paiement du jugement prononcé contre lui en capital intérêts et frais.

Gadbois, Appellant, et Trudeau & al., Intimés.—Cet appel fut interjété d'un jugement rendu par la Cour Supérieure siégeant à Montréal, le 30 Octobre, 1869, par M. le Juge Torrance. Voici les faits de la cause et le jugement de la Cour Inférieure : Par son testament, feu Joseph Beaudry nommée l'Appellant conjointement avec l'Hble J. L. Beaudry et M. Jean-Bte. Beaudry ses exécuteurs testamentaires. Après son décès, son épouse, Marie Anne Trudeau, fut nommée tutrice a ses enfants mineurs. C'est en cette qualité qu'elle institua contre l'appellant, conjointement avec M. M. Jean Louis et Jean Baptiste Beaudry, une action en destitution d'execution testamentaire.

Cette action est basée principalement sur le fait que l'appellant avait des interêts opposés à ceux de la succession et qu'il s'était conduit de manière à entraver la question et administration des autres exécuteurs.

L'appelant plaida a cette action le 18 Fevrier 1869, les Intimés ne répondirent pas, et la procédure en resta là jusqu'au 23 Octobre suivant.

Le 23 Octobre l'appelant reçus un avis de motion; par cette motion les Intimés demandaient la permission de produire et ajouter à leur demande, des *moyens supplémentaires et additionnels*, vu que depuis l'institution de leur action, il *etait survernu des faits nouveaux*. Ces faits nouveaux ainsi qu'allégué étaient que l'appellant avait établi avec M. Lafricain, un magasin dans le même genre que celui de la ci-devant société Joseph Beaudry & Cie., dont ils étaient les seuls membres survivantes, et qu'ils avaient pris titre de successeurs de "Jos. Beaudry & Cie.," et en outre que l'appelant avait en une querelle avec l'Hble. J. L. Beaudry, pendant lequelle ils étaient venu sur le point d'en venir aux mains. L'appelant s'opposa à l'introduction dans la procédure de ces moyens additionels, sur le principe qu'un demandeur ne peut rien ajouter à sa demande, si ce n'est par demande incidente, et non ajouter des moyens nouveaux basés sur des faits postérieurs à l'action pour étayer et peut-être établir un droit qu'il n'avait pas.

La Cour Supérieur a accordé la motion des intimés et leur a permis de produire leurs moyens *supplementaires*. C'est ce jugement que l'appelant a sommis à la revision de la Cour d'Appel. Voici le jugement:

"The Court having heard the parties by their counsel upon "the motion of the plaintiffs of the twenty-sixth October instant, "to be permitted to produce and fyle *certains moyens supple-* "*mentaires et additionnels*, annexed to the said motion, having "examined the records and proceedings, and deliberated, doth "grant the said motion, and doth permit the said plaintiffs to "fyle the said *moyens supplementaires et additionnels*, reserving "to adjudge hereafter upon the costs, and doth grant to the said "defendant a delay of eight days to plead in answer to said "*moyens supplémentaires et additionels.*"

Ce jugement fut infirmé par la Cour d'Appel. Voici les considérant qui se trouvent dans la décision de la Cour d'Appel: Considérant que bien qu'il soit permis au Demandeur dans une action de produire une demande incidente supplétoire dans les cas prévus par les articles 18 et 149 du Code de Procédure Civile, il ne lui est pas permis par la loi de faire une demande supplétoire ou additionnelle fondée sur des faits nouveaux qui n'existaient pas lors de l'introduction de son action: Considérant que les moyens supplétoires et additionels produits en cette cause sont

fondés sur des faits nouveaux, et n'entent pas dans la catégorie des cas prévus par les articles ci-dessus cités ; Casse, &c., &c.

Mr. le Juge en chef et Mr. le Juge Caron n'ont pas concouru dans le jugement.

N.B. by LA REDACTION.—It was supposed that this decision either directly or indirectly contradicted some previous adjudications of the Court of Appeals. That tribunal seems to have laid down a rule that they would not disturb decisions of the Superior Courts on questions of practice and procedure. But it was also stated that to this general rule exceptions would necessarily arise in cases of obvious injustice or of palpable violation of law. This was not an instance of amendment of the evidence adduced or of an amendment at all, properly so called, but as the Court seemed to think, a supplementary demand based on facts occurring after the institution of the motion, and such as did not fall within the provisions of the *Code de Procedure*, arts. 18 and 149 ; and therefore upon general principles, and under the articles of the Code, the judgment was manifestly contrary to law and the practice of our Courts. Whatever may have been the practice heretofore in the Superior Court, it must be admitted that the above articles go very far and would seem in a great degree to sustain the judgment of the Court below. The articles referred to in the judgment of the Court of Appeals are as follows :

Art. 53. The writ of summons and declaration served upon the defendant and filed in the office of the Prethonotary, may be amended or altered with the leave of the Court. The amendment cannot be allowed if it changes the nature of the demand.

Art. 149. The plaintiff may, in the course of the suit, make an incidental demand.

"1o. In order to add to the principal demand something he has omitted to include in it.

"2o. In order to claim a right accrued since the service of the principal suit and connected with the right claimed by such suit.

"3o. In order to demand something which he requires for the purpose of avoiding a ground of defence set up by the defendant."

Beliveau, Appellant, et Martineau Intimé.—Cette cause est venue en Appel sous les circonstances suivantes :

Le demandeur en Cour Inférieure, l'intimé en Cour d'Appel, allègue par sa déclaration que le 6 Septembre 1870, il a été frappé par la voiture du défendeur qui l'a blessé et qu'il a souffert des dommages au montant de $500.

Le défendeur, appelant en Cour d'Appel à répondu à cette action qu'il n'était nullement coupable des faits en question : que le 6 Septembre dernier, il avait loué sa voiture à un nommé Voyer pour aller au Sault-au-Récollet.

Que Voyer n'était ni le domestique, ni l'agent, ni l'employé de l'appelant et aucunement sous le contrôle de ce dernier, lors de l'accident.

Que Voyer avait lui-même conduit la voiture, et que ni l'appelant, ni aucun de ses employés ne sont sortis ce jour-la avec sa voiture, en sorte qu'il n'était pas responsable de l'accident qui avait pu arriver à l'intimé et dont il n'avait aucune connaissance.

Il a été prouvé que le jour en question l'appellant avait loué son cheval et sa voiture à Edmond Voyer, que celui-ci en passant sur la rue Notre Dame, près de la rue McGill, avait frappé l'intimé avec le timon de la voiture, l'avait renversé et que l'intimé avait souffert des dommages assez graves.

Il a de plus été prouvé que le cheval de l'appelant était un cheval tranquille et facile à diriger, et que Voyer, a qui le cheval a été loué, était parfaitement capable de le conduire.

Sur cette preuve, la Cour, par son jugement du 30 Décembre 1870, a condamné l'appelant a payer $150 de dommages.

L'appelant a demandé la revision de ce jugement, qui a été cependant confirmé le 30 Juin 1871, par Messieurs les Juges Mackay et Beaudry, M. le Juge Torrance ayant différé de la majorité de la Cour.

L'appelant en demandant que ce jugement soit infirmé a prétendre qu'il ne devait pas être condamné à des dommages qui n'ont été causés ni par lui, ni par ceux dont il pouvait être responsable en vertu de l'article 1054, Code Civil du Bas-Canada. Voyer n'était ni le préposé, ni le domestique de l'appelant et celui-ci ne peut a aucun titre être responsable de ses délits ou quasi délits.

La Cour Inférieure a paru s'appuyer sur l'article 1055 du Code Civil pour rendre l'appelant responsable comme si l'accident avait été causé par l'animal de l'appelant.

Mais d'après l'article 1055, disait encore l'appelant il n'y a que deux cas où le propriétaire d'un animal soit responsable de dommages causés par cet animal; le premier est lorsque l'animal est sous sa garde ou sous celle de ses domestiques, et le second lorsqu'il est égaré ou échappé: or, ni l'une, ni l'autre de ces hypothèses ne s'applique au cas actuel.

Le second paragraphe de l'article 1055, qui déclare que celui qui se sert d'un animal est responsable des dommages qu'il cause pendant qu'il en fait usage, est le seul qui soit applicable a cette cause, et d'après ce paragraphe Voyer seul est responsable et non l'appelant.

L'appelant a cité les auteurs suivants qui ont commenté les articles 1384 et 1385 du Code Napoléon qui correspondent aux articles 1054 et 1055 de notre Code.

Sourdat: de la responsabilité, tome 2, Nos. 886–887, au quatrième paragraphe de ce numéro, pose la règle suivante. "Le "rapport de commettant a préposé entre deux personnes dans le "sens de l'article 1384 du Code Civil défaut de ces deux condi- "tions réunies: 1o. Que le préposé ait été volontairement et "librement choisi: 2o. *Que le commettant ait le pouvoir de lui* "*donner des instructions cé même des ordres sur la manière d'ac-* "*complir les actes qui lui sont confiés.* Partout où l'esistence de "ces deux conditions sera constatées on pourra dire hardiment "que la responsabilité existe: que si l'une d'elles vient a man- "quer, la responsibilité cesse."

Au No. 895, le même auteur établit que le principe que le louage de choses n'établit pas le rapport de commettant à préposé.

Voir encore Pandectes Françaises, Vol. 10, p. 398: Story, Agency, No. 453, p. 599: Hilliard; On Torts, Vol. 2, p. 447.

Larombière: Vol. 5, Obligations p. 785. Commentaires de l'artlcle 1395, en parlant des dommages causés par un animal, dit:

"Celui qui s'en sert (de l'animal) est pendant que l'animal "est a son usage, tenu de la même respousabilité. *Il est alors* "*seul responsable, sans que la partie lésé puisse dans le cas ou* "*il serait en état d'insolvabilité, exercer un recours en garantie* "*contre le propriétaire.*"

Zacharias, tome 3, page 203, note 4: "En cas d'insolvabilité "de celui qui à l'usage ou la jouissance d'un animal, le propriéé- "taire peut-il être recherché pour le dommage causé par cet ani- "mal? Le Code Rural du 6 Octobre 1791, titre II, article 12,

"décide la question affirmativement pour ce qui concerne les "dégâts causés aux champs, *mais nous ne pensons pas que cette "disposition puisse être étendu, par voici d'analogie aux domma-"ges d'une autre nature.*"

Dalloz: Dictionnaire de Législation et de Jurisprudence, Vol. 4, Vo. Responsabilité p. 242, §608; "Je vous ai prêté un cheval: "tandis que vous le montiez, le cheval d'un des cavaliers qui "vous accompagnaient, se jette sur vous, vous renverse et casse la "cuisse à mon cheval: j'ai action contre celui qui montait ce "cheval, s'il y a eu faute de ce cavalier, mais je n'ai action, *ni "contre vous, ni contre le propriétaire du cheval qu'il montait.*"

Sirey: Année 1837, page 508, 2e partie, rapporte un arrêt de Juin 1837, *Dambresville vs. Hennequière*—jugé que "le propri-"étaire d'un bateau n'est pas responsable des dommages causés "par ce bateau à l'écluse d'un canal, lorsque la personne qui le "conduisait au moment de l'événement n'était ni son domestique "ni son préposé, mais seulement le locataire du bateau."

Sherman et Redfield—On Negligence, page 67, No. 60: "No "one is liable for the negligence of another person, unless the "latter is his servant or agent. The owner of property whether "real or personal cannot be held responsible on the mere ground "of such ownership, for any injury suffered by another person "from the contact of such property with his person or property. "The lessor of property of any kind as for example, the lessor of "a ferry is not responsible for the negligence of the lessee, or his "servants, in its management."

Voir encore page 80, note au bas de la page *Baird vs. John*, 26 Penn, §482: "A master who permits his servant to go to a "fair for his own pleasure with the master's horse and cart is not "liable for damages arising from the servants' negligent manage-"ment of the horse." Cette décision est rapportée par Sherman et Redfield, note 1re. page 70

L'intimé a cité l'article 1055 du Code Civile qui le dit comme suit:

"Le propriétaire d'un animal est responsable du dommage que "l'animal a causé, soit qu'il fut sous sa garde, ou celle de ses "domestiques, soit qu'il est égaré ou échappé. *Celui qui se sert "de l'animal en est également responsable pendant qu'il en fait "usage.*"

Il y a évidemment disait l'intimé par article 1055 ci-dessus cité, deux personnes responsables, dans tous les cas qu'il signale;

le propriétaire par le fait seul qu'il est propriétaire, et celui qui se sert de l'animal qui doit porter la peine de sa négligence ou de sa faute.

Ce principe affirmé par Domat, livre 9 du volume 4, p. 196, Titre I. "*Si canis cum duceretur ab aliquo, asperitate suâ "evaverit; autsi contineri firmius ab alio poterit vel si per eum "locum induci non debuit, et alicui damnum dederit, tenebitur "qui canem tenebat,*" est élucidé d'un autre manière par le "même auteur à la page 474 du premier volume; "Ainsi celui "qui pour trop charger un cheval ou une autre bête, ou pour ne "pas éviter un pas dangereux, ou par quelqu'autre faute donne "sujet à une chute qui cause du dommage a quelque passant, "répondra de ce fait. Et dans *tous ces cas celui qui aura souf-"fert le dommage, aura son action contre ce voiturier ou contre "celui qui l'avait employé.*"

C'est aussi ce qu'enseigne Perrin, code des construction No 1315.

"Le maitre est responsable non seulement, du dommage causé "par son propre fait, par celui de ses agents et proposés, mais "encore de ceux causés par les choses qui lui appartiennent, ou "dont il a la garde."

Touillier tome II, page 400, Nos. 296–297, "On a toujours "une action contre le maitre de l'animal qui a causé du dom-"mage."

Favard—Vol. 2, p. 47.

Merlin—Vol. 4, p. 94.

Sourdat—Titre 2, pages 49 et 50.

La Cour d'Appel à l'unanimité a renversé le jugement de la Cour de Révision et a déclaré que Beliveau n'était pas responsable de la négligenee de Voyer. Deux des Considérants de la Cour d'Appel sont comme suit :

"Considérant que d'après la preuve faite en cette cause il appert que le cheval appartenant à l'appelant et qui a causé le dommage dont ce plaint l'intimé était un cheval doux tranquille et facile à mener.

"Considérant qu'il est également prouvé que ni l'appelant ni aucun des employés ni personne à son service n'accompagnaient le nommé Voyer auquel le dit cheval avait été livré et qu'il le conduisait lui même; Casse, &c., &c."

COURT OF REVIEW.

Present: Mackay, Torrance and Beaudry, JJ.

February 28, 1873.

Lafarge vs. The Liverpool, London and Globe Insurance Company.—MACKAY, J.—On 17th June, 1871, plaintiff insured at defendant's office a house at Upton for $2,000 and a stable for $200. The policy was granted upon a written application, in which the cash value of the house was stated to be $3,000 and of the stable $300. On the 10th of October, 1871, the house was destroyed by fire, and the plaintiff is sueing for the insurance money. The defendants plead fraudulent overvaluation by the plaintiff of the subjects insured; fraudulent false representations of value in the application; that in September, 1871, plaintiff by deed bound himself to sell the buildings and land to one Boisvert for $2.000, and plaintiff was to disinterest the tenant by paying him $200; that shortly before the fire plaintiff made use of language indicating a fixed purpose to burn the property to realize the insurance money. Another plea sets up the tenth condition of policy requiring notice by the insured in writing fortwith after a fire, and delivery within fifteen days of a particular account of loss, verified by his oath, and in case of buildings and machinery, by certificates under oath of practical architects or builders, and says that plaintiff never complied with this condition, and the policy stipulated against any waivers, and none were; another plea sets up the same condition No. 10, and its provisions against false swearing upon claims, and says that plaintiff did make fraudulent claim; there is also a plea of general issue. The plaintiff answers by denying the imputations against himself and his claim, says that defendants knew all about the buildings before assuming risk, &c., that due notices were given of fire and loss, &c. The case was tried before Mr. Justice Beaudry and a jury. Fifteen questions were put to the jury; these are not such as I would have settled had I had time allowed me; they were put before me at the last minute while I was on the Bench on judgment day, the parties declaring to have arranged them to their mutual satisfaction, and praying me to accept them, and fix then and there a day for the trial. I shall be more cautious in future. The questions now calling for attention, particularly, are the following:—3rd. At the date of

the application what was the actual cash value of the several buildings mentioned in the application? The jury answered:—The testimony on this point is contradictory, but the jury are of opinion, upon what appeared to them the most reliable evidence, that a cash value is established of $3,000 for the house destroyed, and $300 for the stable; and this estimate was accepted by the insurers when issuing the policy as the cash value of the insured property, and the jury consider this conclusion as the correct cash value at the application. 6th. Did plaintiff, after the insurance, at any time before the fire, use expressions indicating an intention to destroy by fire the said premises, or to avoid the payment of the $200, meaning to the tenant? No. 7. Was notice of the fire given to defendants by plaintiff within the delay required by the policy, and when, and in what manner? A—Yes! On 10th October, 1871, to the sub-agent Thurber as per document C, receipt of which was acknowledged by Mr. Smith, the manager on 13th October, 1871; also by document D transmitted by said sub-agent to Mr. Smith on or about the 19th October, 1871. 8. Did plaintiff deliver within fifteen days after the fire, to defendants or their secretary an accurate and particular account of the loss caused by the fire, supported by vouchers and certificates of practical architects or builders and mechanics, verified by solemn oath or affirmation, and if not within 15 days, state in what manner and when? A—Yes; as by document D. 9. Were the affidavits required by the policy furnished to, and received by the defendants, and state when and whose the affidavit. A—The affidavits were in due form as per document D. 14. Were any of the conditions of the policy waived by defendants by any writing, &c. A—No. 15. Amount of plaintiff's loss? A—$3,000 (less $250 value of foundations) $2750. The defendants have moved for a new trial, and we will take up their material reasons in order: 1st. The cash values found by the jury are unsupported by the evidence, and in fact contrary to the evidence, and the jury, "without any evidence," found that plaintiff's estimates had been accepted by defendants. All must admit that the question of value of the subjects insured is one of fact. In this case there was evidence on both sides, conflicting evidence, upon this question. The jury find, upon these contradictions, that it appears to them that the values were $3,000 for house and $300 for stable (*i.e.*, they support plaintiff.) Courts and judges might differ as to this upon the

same evidence. I have great difficulty, considering the sale to Boisvert, and plaintiff's obligation to disinterest the tenant by paying him $200, to see that the house burnt was worth $3000, or over $2000. I would probably have told the jury to reflect upon it with care. Yet the defendants must submit to the jury's finding about it. Were we to hold otherwise, we would violate the principles governing jury trials. (See Hilliard, on New Trials, pages 341, 340, 345.) We cannot say that the verdict upon the point of value is unsupported by evidence. The jury report that the evidence is contradictory, but that so and so appeared to them, from what they considered the most reliable evidence, &c. Why did defendants take plaintiff's premium? Why did they not examine the buildings before taking the risk. It is said that they did, and it is proved that plaintiff had insured before with defendants these very buildings. After the loss, why did they not make option to rebuild? They had a right to do this by a condition of their policy. The second reason in the defendants' motion is that the jury ought to have answered the sixth question in the affirmative. That question was to whether plaintiff before the fire used expressions indicating intention to destroy his house by fire. The jury have answered in the negative. Upon this point two witnesses have sworn that plaintiff did use the language attributed to him; but they will not say that he meant it seriously, in the bad sense that defendants would have it. It is to be observed that the question referred to is not pertinent to any issue. There is no allegation that plaintiff set fire to his house, or that he gave defendants reason to suspect it. Supposing that speech proved, and that the jury were to find so; in the absence of a plea that the assured set fire to the house, or that defendants suspect so, what pertinence would the finding have? In the absence of an appropriate plea all presumptions are to be of plaintiff's innocence. The plea states among other things, bearing only upon the plaintiff's representations of value, that plaintiff said so and so, and it breaks off, leaving that allegation there, naked and alone. Under those circumstances we are against defendant upon this part of the case. The third reason alleged for new trial is that the jury's finding as to the notice in writing by plaintiff of the fire, was contrary to the evidence. Document C relied upon by the plaintiff not being such notice, but only defendant's agent's letter to them. The plaintiff did not literally give notice in writing of

the fire. He informed defendants' agent at Upton of it, and asked him to notify the head office, which he did. The resident secretary got the agent's letter of notification, acknowledged it, and directed the agent to get plaintiff's proofs; the letters show this. We unanimously consider this a waiver of the condition requiring notice of the fire to be given by the insured in writing. The policy authorizes us to hold this waiver—the waiver is in the form appointed by the last condition of the policy. So upon this point of the case we are against the defendants. We pass to defendants' next three reasons, which are in substance connected, and charge that plaintiff did not make proof in writing and declarations, under oath, as to his loss within fifteen days after the fire; that no proof was made of document D; that the learned Judge at the trial improperly admitted as evidence, documents D and F without proof of the parties named in them having been sworn before the Justice of the Peace, and that the Judge misdirected the jury that the Justice's signature was complete proof of itself of his handwriting, and of the parties (deponents) having been sworn. Document D is composed of affidavits dated 19 Oct., 1871, of four persons, two are carpenters, one a blacksmith. These affidavits have *jurats* to them, purporting to be signed by the Mayor of Upton, who is *ex-officio* a Justice of the Peace. The affidavits reached defendants within fiffteen days of the fire, but plaintiff made none within that time. Document F is made up of a Notarial notification to defendants on the 6th February, 1872, at the request of plaintiff accompanied by the affidavits of plaintiff, himself, and of two other men, as to plaintiff's loss and the value of the house burned. These affidavits all bear date 29th January, 1872, and purport to be sworn before a Justice of the Peace commissioned for receiving affidavits. The Judge allowed these documents D and F to be fyled at the trial, as evidence, and held, as to the jurats to the affidavits, that they proved themselves without other proof having to be of the attesting officer's handwriting, or of the affidavit-maker's having been sworn. We are of opinion that the Judge was not wrong. There are things judicially taken notice of, for instance, our constitution, the division of the country, our political agents, public officers, &c. The signatures purporting to be of Justices of the Peace to *jurats* such as in documents D and F have always been admitted as genuine, upon trials of insurance cases, in the absence of proofs to the contrary.

But there remains the question of whether owing to plaintiff's not having made any declaration under oath within the 15 days after the fire, he has not forfeited the right of action Is the term of 15 days a fatal period, or can plaintiff, through having fyled his declaration under oath only 3 or 4 months after the 15 days, recover? This is a difficult part of the case. The clause requiring declaration under oath within 15 days may be held to look directory or comminatary only; it reads at first to be absolute, but a later paragraph of it says: "and until such particular account, &c., shall be produced, the amount of loss shall not be payable." If, instead of the word "until," the word "unless" had been used the 15 days would have been a *terme de rigueur*. Why has this paragraph been added to what precedes it requiring the declaration under oath in 15 days? It seems a qualification of it, and as if what was meant to be *de rigeur*, before any money should be payable, was the particular account under oath rather than the account within the 15 days absolutely. By condition xi. no money is payable before 60 days after adjustment of loss. *A fortiori* no money could possibly be recoverable within the 15 days. During the 15 days, never mind what proofs or oaths the insured might make, he could not pretend that anything was payable. "Shall not be payable" cannot refer to any kind of payment within the 15 days. It refers to some payment without, or outside of them, outside of 60 even, to be made on proofs being furnished. This condition then is ambiguous, and likely to mislead; so it calls for interpretation. The policy, and the conditions upon it, involve the stipulations of the two parties. The contract is an express one, with conditions for the benefit of the insurers, introduced by them, and obligation by the insurer for the benefit of the insured. By many of the conditions the insured obliges himself to do things. If such obligations be ambiguous interpretation of them must be in favor of the insured who obliged himself to do something. 1,019, C. Civil L. Ca. Pothier, Obl., and so in the U. S. they hold that conditions of that kind are to be construed against those for whose benefit they are introduced. Catlin vs. Springfield, F. In. Co. 1, Sumners' Rep.: A clause of doubtful meaning is interpreted against him who got it put into the Act; he ought to have been more clear. He, for whose advantage or purpose a clause is put into an Act, is supposed to have put it in. Insti. fac. sur les conv, p. 72. Conditions about proofs to be made with certain formality and in a time stated,

are for the purposes of the insurers; so they must be clear. Upon these principles we think that plaintiff may be allowed to stand with his demand in Court, though his own declaration under oath was only delivered to defendants in February, 1872. We hold also that the jury's findings on the documents D and F ought not to be disturbed. The defendants' eighth reason reads in substance thus: Because the jury have found that no waiver in writing was by the defendants of any condition of the policy. This of itself or alone cannot be urged by defendants (in favor of whom the finding is) as substantive cause for new trial. This reason was meant perhaps to be connected with some other one, but is not. The tenth, eleventh and twelfth reasons involve substantially this: That plaintiff's representations in his application were warranties, and by reason of his gross exageration of values, fraud is to be presumed and the policy held null. Upon this it is necessary to say that the question of fraud has not been put to the jury; the question of values has been and over valuation is negatived; how can the court, in the face of such things, hold the policy null as for fraudulent gross exageration? Insurers gain every day from over-valuations; there are over-valuations simple, and others fraudulent; provision is made against both in defendants' condition eleven. Here the jury find no over-valuation. Had there been one it would have been fitting, under this policy, to put to the jury a question: Was such over-valuation simple or fraudulent? but none such has been suggested. The court has considered all the other lesser reasons assigned by defendants, and upon the whole sees no reason to allow a new trial.

Desmarteau et al. vs Harvey.—MACKAY, J.—The plaintiffs are merchants in Montreal, and sue Harvey, of Hamilton, Ont. They charge him as upon a sale made here in March, 1872, of about 450 minots of timothy seed at $2:85, the minot of the same quality as a sample shown to the defendant's agent, Evans, present at the sale, who declined to go and see the bulk. The delivery was to be by sending the seed to Hamilton by the Grand Trunk Railway in bags to be furnished by the defendant. Plaintiffs say that 417, 32, 45 bushels were sent, and more could not be, for want of bags; that the seed fell in price, and afterwards defendant would only offer $2:35 per minot for what they had received. The conclusions are for $1091:53. The defend-

ant's plea sets up the memorandum of the sale and denies that plaintiffs fulfilled their contract, or that defendant accepted the seed; it says that the seed was not up to the sample, but very inferior; that the defendants refused it, stored it for plaintiffs account, notifying them of the facts. The judgment *a quo* has found that what was sent to defendant was inferiorto the sample, and that no perfected sale has been; so the action has been dismissed. The plaintiffs appeal. At the argument before us one point insisted upon was that the seed certainly was not all bad, that defendant ought to have been condemned to pay for so much of it as was good, and that, at most, only 70 bags are proved inferior. Authorities were cited. Our Code Civil, it was contended, supported the proposition that deficiency of quality being only as regarded a small part of what had been sold, as the purchaser would, probably, have bought without this part, he ought not to be allowed to rescind the sale in totality. I notice that in the course of the proceedings the sale is sometimes called sale of 225 bags of timothy seed, and sometimes sale of about 450 minots, while the contract reads as sale of one car load, say 450 bushels. The declaration alleges that defendant's agent declined, or did not think fit to examine the bulk: but the proofs establish that the bulk was not possessed by plaintiffs at time of the contract; plaintiffs had to make it up afterwards by buying; they bought in lots of two to twenty minots to complete it. In that March the seed was sent to Hamilton in one lot, 225 bags 70 of which were very inferior to the sample. Is plaintiffs' proposition that defendant can be charged with so much of the seed as was not inferior to the sample, sound? Can seller of a large named quantity charge the purchaser upon a delivery of a lesser quantity, acceptation of what has been delivered having been refused? Suppose a contract for 1,000 bushels, seller sells 900, of which 200 are bad. The nine hundred are refused. Can the purchaser, nevertheless, be charged with 700 admitted to be good? A car load of seed being sold, can the purchaser be held to accept a half or a quarter of a load? In the case in hand, defendant has right to say that his contract was one, and that entire performance of it had to be. See Champion vs. Short. 1 Camp Story on sales, sect. 376, says: "Where goods are sold by sample warranty is implied that the bulk corresponds to the sample." "The exhibition of a sample is equivalent to an affirmation that all the goods sold are similar to it, and if they be

not, the vendee may rescind the contract." Another argument of plaintiffs was that, possibly, the sample had been tapered with by defendant. This we do not see. It was argued, also, that the proofs for plaintiffs are stronger than those for defendant. Plaintiffs' witnesses look somewhat interested; the strongest of them are those who bought the seed for plaintiffs to make up the bulk with. They do say that the seed is good, but others prove the contrary. There is evidence pro and con. That for defendant is strong. The Judge *a quo* has passed upon all, and not unreasonably; so his judgment is confirmed.

Hart vs. Mc Dougall.—BEAUDRY, J, dissenting, said the action was by a lawyer who acted as agent and attorney for the defendant, the proprietor of certain lands in the Eastern Townships. His Honor regarded the present claim, for a balance of account, as well founded, and thought the judgment should be reversed.

MACKAY, J—The defendant is a proprietor of lands in the Eastern Townships, and an absentee. On the 1st August, 1868, he appointed plaintiff his attorney, to collect his revenues and attend, as an agent, to his business. The agency lasted till February 1st, 1869, when it was revoked. The plaintiff afterwards instituted this suit for the recovery of $309, balance alleged due him upon his account. The defendant pleads that he owes nothing. That plaintiff accepted the management of defendant's estate on a commission of 7 per cent on collections, for his services; that receipts by plaintiff of moneys of defendant more than cover all just claims of plaintiff; nevertheless to prevent trouble, and by way of precaution, defendant offers $50 more to plaintiff, with costs of Circuit Court. The plaintiff replies by a general denial (answer), to the pleas, and fyles also a special answer to the effect that the agreement for a commission of 7 per cent on collections, pleaded by defendant, cannot be maintained, because on the 1st of August, 1868, the defendant gave the plaintiff a power of Attorney to make these collections, and only a few months later, to wit: on the 1st of February, 1869, the defendant, without assigning any cause or reason, revoked said power of attorney by appointing a new attorney, and totally deprived the plaintiff of realizing anything under the agreement. The judgment appealed from finds that plaintiff's receipts, with the $50 added, more than extinguish any just

claim of plaintiff; the defendant is condemned in the $50 with costs of Circuit Court; but plaintiff is condemned to pay the costs of contestation. Upon hearing of the case in revision, as in his special answer, Mr. Hart made grievance of having been discharged from the agency suddenly. But there is nothing in this, for he was not a hired servant, or agent hired for a fixed term. He was free to take other employment and to carry on his profession. His *mandat* could be revoked at any time, without right to him to complain. It was also urged that items had been overlooked by the judge *a quo*, for instance, $68.31. But, taking up all the accounts, and crediting plaintiff with all that he is entitled to, even the $68.31, and with 7 per cent commission on receipts and $82.45 for his bills of costs, we find, nevertheless, that by the result of the judgment *a quo* plaintiff has gotten as much as he was or is entitled to. So that judgment is confirmed in its *dispositif*. The *considerans* will be altered, to conform to our findings.

John Young et al., vs. Converse, and E. Contra.—MACKAY, J.—The plaintiffs are commission merchants, and used to advance money to Converse to carry on his rope works, the plaintiffs to have the making of all sales, and to have a *del credere* commission of five per cent.; also seven per cent interest on moneys due then. In June, 1866, the agreement ended, and afterwards differences arose in settling accounts. The plaintiffs, at last, in 1867, sued Converse for $3,365, balance alleged due them. The defendant resisted, objecting to different items in plaintiffs' accounts, claimed credits beyond what plaintiffs were allowing, and pleaded that instead of his being in debt to plaintiffs, the latter owed him $3,329 with interest at 7 per cent. from 30th June, 1866, for which defendant brings incidental demand. The parties went to proof and argument, when the learned Judge, who heard the case, ordered it on the 30th January, 1872, to be referred to John G. Dinning as accountant, with authority to hear the parties, examine the record and accounts, and to report as to whether certain sales of cordage made to one Dinning of Quebec were guaranteed by plaintiffs: also whether a sale to Harvey & Bolton, of Chicago, was so guaranteed; what amount is due, &c. Mr. Dinning proceeded to his operations, the plaintiffs refusing to go before him, and on the 14th March he fyled his report, which is very formal, as execution of the work that

was assigned to him. Converse moved to homologate the report, while the plaintiffs moved that it should be set aside, upon the ground that the reference as made to Dinning was *ultra vires* of the Court or Judge who ordered it, and the report itself illegal. By the final judgment of May, 1872, now appealed from, Converse's motion was granted; the plaintiffs' was rejected; plaintiffs' action was dismissed, and the incidental demand maintained to the extent of $3,197.97, with interest at 7 per cent from 30th June, 1866; the learned judge *a quo* evidently basing his judgment upon Dinning's report. The plaintiffs and incidental defendants inscribe in revision, and we have to determine, first, as to the validity of the reference to Dinning, as made. We are unanimously of opinion that that reference was *ultra vires* of the Court that ordered it. Mr. Dinning has questions purely of law put to him for his report. This cannot be allowed, and his report is by us now rejected. There remains in consequence to be disposed of the case generally upon the merits. The parties addressed themselves in debate before us, to three things principally. 1st. The correctness of the charge of $1.894.34 for the Dinning note. The sale to Dinning, of Quebec, for which the note was taken, never mind how, or by whom the sale was made, we find to have been guaranteed by plaintiffs. It was credited to Converse. Plaintiffs proved upon the note against Dinning's bankrupt estate, and now we hold that they can't charge back the note against Converse. *Del credere* commission was charged by plaintiffs upon the sale. The very nature of such a charge is that the merchant making it becomes an insurer. *See Troplong Cautionnement*, 37. Plaintiffs here were insurers of Converse, they wrote this down; they might have done otherwise and kept this affair in suspense had they pleased, but they did not. 2nd. The correctness of the charge of $2,400 for commissions on hemp purchases, and sales of cordage by Converse himself. This is charged in June, 1866. This was not referred for report to Dinning, and was apparently disallowed by the judgment *a quo*, and we think with reason. 3rd. The right of defendant to the $1,408.75 claimed as short credit on the Harvey & Bolton transaction. The sale to Harvey & Bolton in November, 1865, was repudiated afterwards by them. The sum of $4,045.63 was credited to Converse in plaintiffs' exhibit No. 8, October, 1866, in respect of this, as being the result of that transaction, but we find that, really, Converse is entitled to $1,408 75 more, for

plaintiffs must be held to have guaranteed this sale too. Plaintiffs drew on Harvey & Bolton for the amount of the sale; they accepted but refused to take the rope afterwards, throwing it back upon plaintiffs, who sold it at Chicago. It was argued that Converse's silence, after receipt of the last accounts, current rendered by plaintiffs, is tantamount to an admission of the correctness of the accounts v. g., the 24th October, 1868, account stated the Chicago loss, crediting Converse with only $4,045 in respect of that transaction, and Converse made no objection till August, 1867. Yet Converse is not yet estopped from objecting; his silence is not fatal to him. Massé, Dr. Com. No. 1,461 to 1,470. Upon the whole, except in so far as setting aside Mr. Dinning's report, we see no reason to disturb the condemnation of plaintiffs towards the incidental plaintiff, to the same amount as by the judgment complained of, and plaintiffs' principal demand will stand dismissed. Costs of Superior Court against plaintiffs and incidental defendants. The costs here divided.

England & Ux, vs. The Corporation of Roxton, & Kearney, intervening.—MACKAY, J.—On the 6th February, 1866, a tax sale took place (under the Municipal Act) of lands in Roxton. On the 12th of February. 1868, a deed was executed to Kearney, by the Secretary Treasurer, for a lot of land bought at the sale. On the 23rd of August, 1867, the plaintiffs, former owners, they say, of the land, sued the Corporation of Roxton for $300 damages as for having illegally sold it. The plaintiffs, Francis England and Jane Ruiter, his wife, say that on the 6th of February, 1864, they had paid all taxes; that they never had any notice of the sale proposed; that there always had been upon the land enough moveables to pay the taxes, and that these ought to have been discussed before the land could be resorted to, and that the sale to Kearney was null. They conclude for damages, and that the deed to Kearney be declared null and the plaintiffs put into possession of the land, the east half of No. six in the first range of Roxton. The defendants plead that the land was regularly taxed; that it was assessed as John Ruiter's, who was apparently owner; that all requisite formalities were observed, and that over two years having passed plaintiff's action is barred. Section 61 of chap. 24 of C. S. of Lower Canada regulates sales for taxes. Sub-section 12 says that the deed of sale executed after two years shall transfer to the purchaser all the original

holder's rights, and purge the property from all privileges and hypothecs; and 27 Vic. chap. 9 of 1863 by sec. 11 orders that every action to annul any sale made under section 61 of cap. 24 C. S. of L. C. shall be brought within two years next after the adjudication at the tax sale. Was Kearney to keep quiet, knowing of the conclusions that the plaintiffs were taking against his title and land? We think he was not, whether his title was weak or strong. He might interfere, for he has the interest requisite under 154 Code of Procedure. He did intervene, but his intervention has been dismissed. His conclusions of intervention are peculiar; they are: That plaintiffs' action be declared prescribed and barred, and that it be dismissed. Is the plaintiffs' action against defendant prescribed? Has Kearney a title valid against plaintiffs from the fact of over two years having passed? Suppose that plaintiffs prove that they had paid all taxes, and that John Ruiter did not own the land, may Kearney's title, not the less, be held good? The Superior Court will pass upon these questions. Had Kearney merely asked that as to him and plaintiffs' claim to his land the action should be dismissed, it would have been better. He seems to conclude for the defendants as well as for himself. But as the minor is comprehended in the major, Kearney's conclusions, though over large, are not fatal to him. They are *plus petitio*, that's all, and ought to have been treated so, (as in *Foley vs. Elliott.*) The plaintiffs ask to be put into possession of the land that Kearney has bought; his title first to be declared null. Plaintiffs' plea to the intervention says that the intervenant has no interest at all in the cause, because no conclusions are against him. The judgment reads: "Considering that, inasmuch as the plaintiffs have not proceeded in this suit against the intervening party, no judgment affecting his rights could or can be therein rendered, and that intervention on his part was, therefore, unnecessary." We cannot agree; where conclusions are as here, that the title to land of a third party be declared utterly null, surely that party not previously summoned may intervene, if he see fit, to repel such conclusions, and it is not answer against him, upon which his intervention shall be dismissed; "you needed not intervene; "had you remained quiet, though, your title might have been "declared null, this could not hurt you; it could not be *res* "*judicata* against you." We are unanimously of opinion that the judgment complained of should be reversed, and that the intervenant, Kearney, be allowed a standing in the cause.

SUPERIOR COURT.

Sept. 18th, 1872.

Griffin vs. Molson et al.—In this case there were some forty defendants, of whom twelve have pleaded, six by dilatory pleas, and the rest by demurrers. The declaration contains some 49 pages of printed foolscap. [The substance was stated at some length by his Honour.] The plaintiff complains of certain transactions of defendants, W. M. Molson and others, in connection with the Moisic Company, a company which worked an iron mine down the river. The declaration recited the circumstances attending the organization of the company, and the subsequent proceedings. The company, which at first promised well, got into difficulties; and plaintiff charged improper conduct against Molson, alleging that the shareholders were cajoled by him. And that Molson by suits against the Company, judgments fraudulent, and executions, had obtained all of the Company's property at a very small part of its value. The allegation of the declaration is that all was contrived by Molson for the purpose of enriching himself. There were also charges of mismanagement, etc. The conclusions were that the Moisic Company should be held to be dissolved and a curator appointed to it; as to damages, the plaintiff claimed them from certain of the defendants only, ; he asked also that the suits and executions complained of should be declared null, and Molson condemned to pay deficiency mentioned of $200,000, money unpaid on his shares of stock. To this action, the exposition of which took 49 pages of printed foolscap, some of the defendants, as already mentioned, had pleaded by exceptions dilatory, and others by demurrers. The reasons of each sett of the exceptions were pretty much alike, the principal ground of dilatory exception being that incompatible grounds of action had been joined and that defendants had been improperly sued together by the same action. Each of the defendants seemed to insist on being sued separately. The court was against the defendants on this point, and held that the plaintiff was not bound to make option between the cause of action as demanded. The ordinance of 1667 was favourable to joining together several causes of action. The exceptions dilatory would, therefore, each, be dismissed with costs. Upon the demurrers the court was also with the plaintiff. The declaration was not bad. It was quite right to call on the

various defendants therein named. Had the plaintiff not served them with process, they might have intervened; as to those of defendants against whom no charges of fraud are, they are all stockholders in the Moisic Company to which plaintiff asks a curator to be appointed. Surely this interests each stockholder. Where was the impropriety of serving them with notice; not asking them to pay costs? The plaintiff just seemed to say this: Come in and take notice of what I am doing, or hold your peace. The thing did not seem unreasonable. The demurrers would therefore be dismissed.—MACKAY J.

30th Sept. 1872.

Laflamme vs. Legault dit Deslauriers.—This was an action of damages arising from the breach of a contract for the delivery of a quantity of wood. The plaintiff claimed large damages from not having the wood in the winter, when the price rose very high. This pretension could not be sustained. The rule was well established that the damage was to be estimated by the price at the time the contract was broken. The wood was deliverable in July, 1871, and the defendant said that he was liable only for $1 a cord for the 22 cords not delivered; $1 being the difference in price at the time he failed to deliver. The court would sustain the plea, and give judgment for $22 with costs, as in an action *exparte* for that amount.—TORRANCE, J.

Doutre vs. St. Charles.—This was an action of damages by a proprietor in this city against the proprietor of an adjoining property for carrying on an offensive trade, whereby damage was occasioned to the plaintiff through the loss of tenants, diminution of rent, and injury to the character of his property. It was entirely a question of evidence. A great many witnesses had been examined on one side and the other, but the Court had no hesitation in saying that the plaintiff had a grievance for which he was entitled to recover some damages. Mr. Papineau, notary, was a tenant in one of the houses for a year, and he said that he certainly would not go back again. A doctor, who was produced by the defendant to prove that the trade was not of an offensive character, admitted that he would not live in one of the houses if he got it free. The trade complained of was a pork trade—the manufacturing of sausages, hams, and such like. The plaintiff cited quite a number of authorities, sustaining the legal proposition that an adjoining proprietor must use his premises in

such a way as not to inflict damage upon his neighbours. His Honour referred to Larombiere, vol. 5, p. 693, articles 1382, 1383. There was also a case in the Cour de Cassation on the 17th April last, deciding the same principle, that the right which belongs to a proprietor to dispose of his property in the most absolute manner is qualified by the obligation imposed upon him to abstain from anything which will inflict damage on the property of another. Upon the whole, the Court was disposed to award the plaintiff damages. The loss of rent up to the time of the institution of the action was proved to be $174.80, and this sum would be allowed as special damages. The sum of $20 would also be allowed for the character of unhealthiness which the premises had acquired by the carrying on of the trade—an item of damages which it was difficult to estimate at present. Judgment for $194.80.—TORRANCE, J.

Lamoureux vs. Lamoureux.—This was an action of damages of an exceptional character. The plaintiff is a young girl who makes her living as a seamstress, and lives at or in the neighborhood of Contrecœur. On the night of the 23rd of March, 1870, she was in the house of a Mr. Gervais, a hotel keeper in the village. There was a house close by, occupied by the defendant Lamoureux and his wife, and on the evening in question some friends were visiting them. Among the latter were two young men, one of them in the employ of Lamoureux and the other a nephew of his. The young men dressed themselves up in the *habillements* of Indians, one of them carrying a long *calumet* and the other an old *fusil* with a bayonet at the end of it. One of them also had on his face a huge mask. They exhibited themselves before the company in Lamoureux' house, and the question was started where they should pay visits that evening. Those present advised them that they should not go into any house where there were small children. While they were discussing the different houses they should go to, it was suggested that they might at any rate pay a visit to Mr. Gervais, the hotelkeeper. The young men departed on their excursion, and sometime after reappeared with sad looks. It seems they went to Gervais's house and entered a public room were some of the family were sitting. The plaintiff was sitting at the time on a sofa immediately facing the door by which these young men, dressed as above described, made their appearance. They seem

to have entered without notice, and the moment she saw them she hurried out of the room and fell down in a swoon in the appartment adjoining. She did not recover from this state of insensibility for six or seven hours. She was twice bled, and her friends thought her state so critical that they sent for the *curé*, and for some time afterwards she was quite unwell. A doctor was called in, and was in attendance for four or five days after the affair. This doctor's evidence had not been taken, and the reason for the omission did not clearly appear. But a bill of a certain amount was incurred towards him. Another doctor was called in some days after the occurrence, and he described in his evidence the delicate state of the girl, though he was unable to state positively whether what he observed was due to the fright —it might or might not have been. A suit for damages having been instituted against defendant, the demand was met by a denial that either the defendant or his wife had anything to do with the matter. The allegation of plaintiff was that the young men were instigated to do what they did by the wife of defendant. As the Court read the evidence, it found that the instigator of this practical joke was the wife of defendant. There was a conflict of testimony as to whether the defendant did not promise to hold Bouvier, one of the young men, harmless as to the damages that might arise. On the whole the Court came to the conclusion that the defendant's wife was responsible for what had happened; and the next question was, how far could the defendant be held responsible? The ordinary rule was that the husband was not liable for the *delit* of his wife *commune en biens* with him if he repudiates her acts. In the present case the defendant had not repudiated the act of his wife, but had simply denied that she was guilty in the premises. The Court was of opinion upon the whole, notwithstanding the absence of the evidence of the first doctor called in, that the plaintiff was entitled to damages, and these damages would be estimated at the sum of $100. It might be observed that although there was not the evidence of a doctor to say that the fright was the cause of the illness of the plaintiff, yet there was other evidence which the Court regarded as satisfactory. Judgment for $100, interest and costs as in an action above $100.—TORRANCE, J.

McLennan vs Hubert et al.—The declaration sets out that the Prothonotary in a certain case for $7 in the Circuit Court

improvidently issued a writ of *saisie arret* on an affidavit in the following words: That a barge was about to leave the port of Montreal to go to the United States, and that without the benefit of a writ of *saisie arret* to stop the barge the plaintiff might loose his debt and sustain damage. Upon this affidavit, the Clerk of the Court—Mr. Papineau being the particular clerk that had to do with this matter—issued a writ of *saisie arret* before judgment, and under this writ the barge was stopped in the act of passing through the canal. She was one of a convoy of barges that were on the way to the United States, and the whole convoy was stopped for ten hours. The plaintiffs, who were the proprietors of the barge, say they disbursed a sum of between $60 and $70, and besides that suffered damages, in all about $300. They now charge the prothonotary with having issued the *saisie-arret* without reasonable or probable cause; that they did it in ignorance of the law, which they ought to have known, as settled in the case of *Delisle and L'Ecuyer*, and in *Dagenais and Douglas;* and that under the circumstances of the case there was such great *laches* on their part that they ought to pay these damages. The function which the prothonotary performed here may be regarded as a *quasi* judicial one, and in a case of *Carter and Burland* the Court has already to-day decided that a magistrate is not liable where there is no misconduct or malice on his part. Broom's maxims show that even inferior magistrates cannot be called in question for a simple error. It is better that an individual should occasionally suffer wrong than that the course of justice should be impeded by constant apprehension on the part of those who have to administer it. The question raised here as to the issue of the *saisie-arret* is one upon which different judges have held different views, and is it to be said that a prothonotary is liable because he does not refuse to give out a writ of *saisie-arret* on what at least appeared to be a sufficient affidavit? In this case, after the return of the process into the Court, the attachment was at once quashed without any resistance by the plaintiff in the case. Upon the whole the Court considers that the plaintiff has failed to prove that the *saisie-arret* issued without reasonable and probable cause, and the action is dismissed with costs.—TORRANCE, J.

30th Nov. 1872.

Ex parte Nield, and Laporte, mis en cause.—The petition sets up a number of grievances against Laporte, the *mis en*

cause, who is a bailiff of this Court. The petitioner was supposed to be a debtor of one Gowan for a considerable sum of money for which he was capiased, and about the time he was going to England, Gowan issued a *saisie-arret* for about $40, and the execution of this *saisie-arret* was entrusted to Laporte, the bailiff. The petitioner now charges Laporte with having made a number of false returns; that he was entrusted to carry off said effects and prevent Gowan from proceeding to England. The bailiff asked a person in the Albion Hotel to become *gardien*, and on this refusal appointed one Samuel Davis as guardian. The petition goes on to say that Samuel Davis was a barkeeper in the hotel, and was an undischarged insolvent, hopelessly bankrupt. With regard to another return, it is stated that Laporte well knew it to be untrue in many respects; that said Davis cannot be found, and has secreted himself. The prayer of the petition is that Laporte be removed from the list of bailiffs. The charges against this bailiff amount to general misbehaviour, bad conduct and corruption in the discharge of his duty. The Court has looked over the evidence very carefully and sees that the bailiff has made one very serious mistake. He appointed Samuel Davis as guardian, of whom he knew nothing. He says so himself;—he took him at the request of another person—and this Davis was an uncertificated bankrupt. The Court, however, does not think it would be justified, on these grounds, in striking Laporte from the list of bailiffs and depriving him of his means of living; but he may have to answer for his default in another manner. The Court will not grant the prayer of the petition, but there has been carelessness on the part of the bailiff, and the petition, therefore, though dismissed, is dismissed without costs.—TORRANCE J.

Leveseque vs. McCready.—This is a dispute between two neighbours with regard to the boundary line between their properties. These actions I regard as of a very delicate character, and I desire to render such a judgment as will stand some chance of not being disturbed when it goes through the ordeal of another court. In the meantime I do not feel in a position to decide upon the rights of the parties, and I give an order for an *arpenteur* to prepare a *plan figuratif* of the property in question, in order that I may be better prepared to render my judgment. —TORRANCE J.

Trust and Loan Company of Upper Canada vs. Monk es qual. and Attorney General, opposant.—The opposition of the Attorney-General on behalf the Crown claims moneys, proceeds of real estate belonging to one of the late prothonotaries of the Superior Court, and is based upon the security bond of $8000 given for the due discharge of his duty. The claim is resisted by other creditors on a variety of grounds. The Court holds that the bond must take precedence of the other creditors, the claim of the Crown being privileged, and the terms of the bond being large enough to cover the claims preferred by the Attorney-General. The contestations of G. H. Monk and Elizabeth Stamworth are therefore dismissed.—TORRANCE J.

Avery vs. Lawlor.—This is a *saisie revendication* of a horse. In the month of July last a horse was in the custody of defendant, and according to the affidavit was valued at $300. The facts are that in July last the horse was given in charge to a livery stable-keeper to be kept. The horse was sick at the time, and was left to be nursed by a veterinary attendant. It was understood that the charge should be at the rate of $17 per month. The plaintiff, just one week after leaving the animal, asked to have him back again. The defendant refused to give up the animal unless he was paid much more than the proportion for the time he had him in charge. The plaintiff then tendered the sum of $4.25 for the one week, and caused the present proceeding to be taken. He, defendant, in answer to the action, contends that he is entitled to more than the amount tendered, and that it is not usual to board a horse at the same rate by the day as by the month. Most of the witnesses say that they would charge a larger proportion. The defendant has cited the 1642 article of the Code as to lease of houses. But upon the whole the Court considers that the defendant has failed to prove his right to a larger sum than the amount tendered. His plea is therefore overruled, and the judgment declares the *saisie-arret* good and valid, and orders the horse to be delivered up to plaintiff within eight days, or in default, the defendant to pay $250. —TORRANCE, J.

Lenoir vs. Desmarais.—Action for a *prix devente*. The defendant meets the action by saying he is liable to be troubled in possession, and that he ought to have security given him before

judgment should go in favor of plaintiff. The apprehension of *trouble* arises from the fact that one of the vendors is an absentee. The plaintiff says in answer that he does not claim the portion of the absentee; and, further, that the defendant accepted of the deed from the plaintiff acting for the absentee as well as for himself, in that way taking the risk of the ratiffcation by the absentee on a future day. The judgment overrules defendant's plea, and condemns him to pay the amount demanded, $116.66.—TORRANCE, J.

Phillips et al. vs. Joseph.—This is an action to recover a sum of £120, amount of a dividend which defendant is charged with having collected as the agent of the plaintiff. This sum, it is said, was the amount of a dividend paid by George Weekes, as assignee, in 1853, to the defendant as the authorized agent of the plaintiff, creditors of the estate. It is charged against the defendant that he collected this money, put it into his own pocket and applied to his own use. There was a demurrer which has been overruled. The case comes up now on the merits, and the fact is proved that defendant collected this money. He says he has a contra account, but relying upon the statute of limitations, had destroyed his vouchers. The Code says C. C. 1714 where an agent has used money of his principal, he must pay interest. Judgment will therefore go for £123. 7s. 4d with interest from 1853 in favour of plaintiff.—TORRANCE, J.

Lapierre vs Gavreau.—This case comes up on an exception declinatory. It is an appealable case, and I am sorry to be obliged to differ from my brother Beaudry. The point raised is the old question as to what is meant by the cause of action. Some time ago I decided that the "cause of action" meant the whole cause of action, and the "right of action" the whole right of action. Since that decision a case was decided in the non-appealable Circuit Court by Mr. Justice Beaudry, taking a different view, and that being a non-appealable case, I said, in a subsequent non-appealable case, that my objection to have contrary rulings in the same Court being very great, I would follow the ruling already made in the Circuit Court by Mr. Justice Beaudry, reserving my right, when the question should present itself in an appealable case, to decide it as I think it ought to be decided. Following the decision, therefore, which I have

already given in *Gault and Wright*, I hold that the declinatory exception must be maintained, the action not being brought where the whole right of action arose, or in the district where the parties reside.

Gravel vs. Stewart, assignee, and Vilbon, petitioner.—In this case there is a conflict of jurisdiction between the assignees, Vilbon making a complaint of Stewart for taking an assignment in the county of Hochelaga, which is alleged to be out of his jurisdiction. Before entering upon the question I must see what interest the petitioner has to make this complaint, and a re-hearing will be ordered on this point.

Dec. 30th, 1872.

Larocque vs. Willet.—An action of damages for malicious criminal prosecution, by which the plaintiff seeks to recover from the defendant $20,000. The action was instituted in November of last year, and the declaration sets out that in February, 1870, the defendant maliciously, falsely, and without probable cause made complaint before W. H. Brehaut, accusing the plaintiff of having in the canton of Chambly, on the 21st May, 1869, while in the defendant's employ, fraudulently converted to his own use $1200 U. S. currency, the property of the defendant. The warrant of arrest, issued 18th February, 1870, and the arrest was made on the 22nd September, 1871, at St. George de Henryville, by High Constable Bissonnette, and the plaintiff conducted to the Chaboillez Square Station. On the 23rd Septemper, 1871, he was brought before W. H. Brehaut, and gave bail for his appearance before the magistrate; and he remained on bail till the 5th of October, 1871, when he was discharged by Mr. Brehaut. The plea of the defendant is that about the 1st February, 1869, the defendant engaged plaintiff to buy wool for him; that in March, the plaintiff falsely represented that there was a certain lot of wool of the value of $1,200 United States currency, at Beatmantown, New York, which plaintiff had bought for defendant, and paid on account $50; that on or about the 21st May, the defendant gave plaintiff $1,200 for the purpose of paying for the wool, the plaintiff agreeing that he would have it in two or three days; that plaintiff never delivered the wool or any part of it to defendant, and never accounted to him for the money; that plaintiff never bought any wool at Beatmantown, or paid any money on acccount of it;

that all his representations as to the wool were false; that on the day when he received the money, he intended to convert it to his own use: and that, therefore, there was reasonable and probable cause for the arrest. The evidence in the case shows that the defendant did deliver this sum to plaintiff on his representation that he owned the wool, and that the wool was never bought, nor the money accounted for. He delivered, however, a certain quantity of other wool which he got from the Townships. It may be remarked that this is not a private matter between two individuals; it concerns society in general, and so much is it a public matter that parties cannot compound without committing a misdemeanour. Credit is destroyed by bad faith in merchants. The law has laid down a number of general rules applicable to the case, and it imposes upon the plaintiff the duty of proving that the proceedings were instituted without probable cause. Has he done so? The Court finds no evidence whatever to this effect. The defendant has proved the substance of his allegations, and there can be no hesitation in dismissing the action.—TORRANCE, J.

McBean vs. Carlisle, et al.—The action is brought against the Seignior of Rigaud for the demolition of a dam. The plaintiff was a lumberer who was in the habit of sending his logs down the Riviere a la Graisse. He complains that in the year 1870 his logs were stopped by a dam which the defendants had constructed across the river. The parties have had a contest at *enquete* as so whether this new dam was really an obstruction or not. The evidence is contradictory, but the preponderance of testimony is in favor of the plaintiff. The river is a kind of highway down which the plaintiff has a right of passage for his logs, and the right cannot be interfered with. The Court allows the sum of $250 as damages, and orders the dam to be removed by the 15th April next.—TORRANCE, J.

Dorwin vs. Thomson, and divers parties collocated, and La Banque Jacques Cartier, opposants, and contesting collocation of plaintiff.—A somewhat complicated case, arising out of the distribution of proceeds of defendant's lands which have been sold by the Sheriff. The moneys being before the Court, a report of collocation was prepared by which Dorwin, Ogilvie and Wood were as hypothecary judgment creditors collocated for portions of their claims. The Banque Jacques Cartier contested the colloca-

tion on the ground that the judgments in favour of the parties collocated were registered at a time when the defendant was insolvent, and when consequently no judicial hypothec could be acquired. C. C. 2023 says, hypothecs cannot be acquired to the prejudice of existing creditors upon the immoveables of persons notoriously insolvent, or of traders within the 30 days previous to their bankruptcy. Johnston Thomson does not come within the scope of this article. He was not notoriously insolvent at the time the judgments were inscribed, and he was not a trader. The Court therefore, holds that the registration of the judgments gave a valid hypothec, and the contestations must be dismissed. —TORRANCE, J.

Walker vs. Workman.—An action against the late Mayor of the City of Montreal by an engraver for an alleged balance of account, $273.50. The declaration states that the defendant was the proprietor of a journal called "Grinchuckle;" that plaintiff did work for the journal, and furnished woodcuts of cartoons and designs. It appears from the evidence that the paper was in the name of Denis Gorman, a messenger in the City Bank, who issued cheques as proprieter of the journal, and had an office for which he paid rent. Gorman stated again and again that he was the proprietor of the journal and that he hoped to make a good deal of money out of it. The conclusion that the Court has come to, without any hesitation, is that the defendant had a certain interest in the journal in this way—it took his side, in the contest for the mayoralty, against another comic paper called *Diogenes*, which was doing its best to injure the defendant in the estimation of the citizens. *Grinchuckle* took the defendant's part, and he liked it very well, and was glad to assist it and did assist it pecuniarily. But the evidence does not show that the defendant was the proprietor of the journal; in fact, it appears that from first to last he was very careful to refuse to have anything to do personally with the paper so as to make himself liable. The evidence of A. G. Gilbert is entirely against the plaintiff's pretensions. The action is therefore dismissed with costs.—TORRANCE, J.

Ballantine vs. Snowdon.—This is an action to rescind a lease. Ballantine made a lease with defendant, who was proprietor of a farm in the neighborhood of Montreal, of part of the farm. By the notarial lease, the defendant undertook to build for the plaintiff

a good farm house, and also barns and a stable. The farm house was to be ready on the 1st May last. The plaintiff complains of the defendant that the house was not ready in time, and prays that the lease be rescinded. The defendant sets up a subsequent understanding or agreement by which the plaintiff accepted other accommodation in lieu of the house. The court upon the whole finds that the plaintiff has made out his case, and the conclusions of the declaration must, therefore, be granted, and the rescision of the lease ordered.—TORRANCE, J.

St. Patrick's Hall Association of Montreal vs. E. E. Gilbert et al.—This is an action of damages for $32,000, instituted on the 4th of May, 1869, against E. E. Gilbert as principal and Mitchell as surety. It appears that on the 25th April, 1867, a contract was entered into between the plaintiffs and Gilbert for the construction of wrought iron girders, wrought iron roofing, and cast iron stanchions, according to plans and specifications. The price was $5,560. At the end of the contract there is a stipulation that Gilbert is in no way to be held responsible for the sufficiency of the design of his work, furnished by the architect. The complaint is that Gilbert performed the work with inferior and bad materials, in every way far inferior to those contracted for and specified in plans, drawings and specifications, and so "carelessly, negligently and recklessly that the same was wholly worthless and inadequate to support the roof and parts of the said building depending for their support on his, said E. Gilbert's work, so by him undertaken under said contract, so that soon after he had completed his said works, as alleged by him as aforesaid, the said works and materials therefor, furnished by him, gave way and broke down, and the roof, which was the principal part of the work done by the said Gilbert, fell into said building, breaking through the ceiling, plasterings and floorings of said Hall, thereby ruining and destroying the same. It is further charged against Gilbert that there was breach of contract on his part in not supplying the best iron—called Thorneycroft's best—and that he wholly ignored the specifications; that the angle iron of the tie rods and girders was 20 per cent less in area, strength and dimensions than the size provided for by the drawings; that the cover plates were 33 per cent less in strength than required by the drawings, plans and specifications; and the plaintiffs also averred that the workmanship in and about the

roof was different from and inferior to that contracted for as above mentioned, and that by reason of all and singular the premises, and the gross and reckless ignorance and negligence of the said defendant, E. E. Gilbert, and the fraud and deception by him practiced in furnishing bad and inferior materials for the said roof, and of a name and kind totally different from and inferior to that also contracted for and specified, the said roof, on or about 3rd February last past, and after he had falsely and fraudulently declared to plaintiffs that the same was completed according to said drawings, plans and specifications, and he had been fully paid as aforesaid for the same, fell, carrying with it in its fall all the inside works and departments of the said hall, to the total ruin of the same, and the great damage of the plaintiff." The items of damage include the loss of rents, $3600 per annum for principal hall, $9000 per annum for shops, &c., $5560 paid Gilbert, $16,000 for furniture and fittings, $1600 paid for labour in clearing away the debris, &c. The plea of E. E. Gilbert is:—1. Defense *en fait*. 2. That the deviations were according to contract, on the written instructions of J. W. Hopkins and Henry Wood; that there was a change in the place of the joints of the tie rods from below the struts to a distance therefrom; that by contract the angle iron was to be of the thickness of half an inch, but Wood changed it to three-eighth inch; that E. E. Gilbert is only responsible for his own work, and not for the sufficiency of the design of the architect; that plaintiffs overloaded the building, and made no allowance for contraction and expansion of metal; that 1000 persons were gathered into the building on the night of the accident, and a fierce storm was raging. The evidence is very conflicting. Hutchison, a witness for the plaintiff, says: "In my opinion the most important omission, and that to which the direct cause of the accident ought to be traced, was the making of the joints in the angle iron of the rod between the struts without putting on cover plates, which at their weakest part would be equal in area to the area of the angle iron of the tie rods. The trusses should have been four times stronger than the strength necessary to support the said load. The area of the angle iron was 3.844 inches—should have been 15.5 inches, about three times more than the original drawings." Charles Legge says: No provision was made for the expansion or contract of trusses by friction rollers; 1 inch in 92 feet should have been allowed for this;

no side supports to girders stretching 90 feet across the building, the consequence being a tendency to twist or buckle. Legge's opinion of the cause of the fall of the roof is the total want of facility for the expansion and contraction of the girders, and also the end pressure communicated to them by the action of the wall of the building under the influence of the wind, both of which causes operated to create buckling and undue strain on the girders. The law regulating these matters is exceedingly severe. Our Code lays down that the architect and builder are jointly liable for defect of foundation and defect of construction; C. C. 1688, 1696. The doctrine has been discussed and affirmed in the cases of Brown and Laurie, David and McDonald, and Wardle and Bethune. Further, it is not allowed to a builder to stipulate that he shall not be liable for the insufficiency of the plan. Trop. Louage. Tom. 3. n. 995. The stipulation of defendant that he shall not be responsible for the insufficiency of the design of the architect is "vox et praeterea nihil." We see by the declaration that the blame of the accident is cast upon the defendant, because the iron in one case was weaker than the original specification by 33 p. c.; in another case by 20 p. c. It is also said that inferior iron was used, but we have also evidence that a structure to be safe should have four times the strength of the iron necessary to support it. On the whole the Court adopts the opinion that the structure intended by the contract was wholly unsuited to the purpose for which it was made; that the contract and specifications provided for a structure much weaker and less substantial than what the roof of St. Patrick's Hall ought to have been. The Court thinks that the want of friction rollers, of horizontal supports to the trusses, the want of a structure three or four times as solid as what is specified in the contract, had much to do with the disaster. But do the allegations of the declaration fasten a liability upon the defendant according to the evidence? The Court comes to the conclusion that the plaintiff having charged upon the defendant that his departure from the plans and specifications was the direct and immediate cause of the disaster, has failed to prove this charge, and the action must be dismissed.—TORRANCE, J.

Dorwin v. *Thomson* and divers parties collocated and *La Banque Jacques-Cartier*, opposant, and contesting collocation of plaintiff.

Held that the *hypothèque* created by a judgment on the property of an insolvent is valid in a case where as a matter of fact C. C. 2023 could not apply.

PER CURIAM.—The lands of the defendant had been sold by the Sheriff. The moneys being before the Court, a report of collocation was prepared by which the plaintiff and A. W. Ogilvie et al., and Robert Wood were as hypothecary judgment creditors collocated for portions of their debts. The Banque Jacques-Cartier contested the collocation on the ground that the judgments in favour of the parties collocated were registered at a time when the defendant was insolvent and when consequently no judicial hypotheque could be acquired. This is a question which I think can be settled by authority. The general principle is that the property of a debtor is the common pledge of his creditors, and where they claim together they have its price rateably, unless there are amongst them legal cause of preference C. C. 1981.

The ordinance de Moulins was the origin of the judicial hypotheque of the French law. By art. 35 it is said: "Dès lors, et à l'instant de la condamnation donnée en dernier ressort, et du jour de la prononciation, il serait acquis à la partie droit d'hypothèque sur les biens du condamné pour l'effet et exécution des jugements et arrêts par lui obtenus."

See also Grand Cont. Tom. 2, Art. 178, n. 19, p. 1354,5.

Merlin, in his Répertoire, *Vo.* Inscription hypothécaire, §13, p. 297, gives a judgment of the Court of Appeals at Toulouse.

Within ten days before the 8th November, 1806, Les sieurs Davescens, Moncal, Cassenac, Bonafond, and Combes took hypothecary inscriptions, some in virtue of notarial obligations, others in virtue of judgments, against the property of Jean Jacques Raynaud. On the 8th November, 1808, Raynaud made a declaration of cessation of payments, "comme il importe au dit Sieur comparant que tous ses créanciers aient une égale part dans la distribution des deniers qui proviendront de la vente de ses biens, proportion nettement au montant de ses créances, sans qu'aucun puisse se prévaloir sur l'autre, sous prétexte qu'ils sont porteurs d'obligations publiques, jugements de condamnation ou autrement, &c."

The property of Raynaud was then sold, and the proceeds being for distribution, the question come up what would be the effect of the inscriptions mentioned above. The Court of original jurisdiction set aside the inscriptions. The Court of Appeals reversed the judgment, and the Cour de Cassation on the 9th February, 1812, confirmed this judgment "attendu que les dispositions du Code de Commerce relatives aux faillites, ne sont applicables qu'aux commerçants." There is also an arrêt of the Court of Appeals at Nantes 5th December, 1811, an arrêt of the Court of Appeals of Rennes, 24th March, 1812, and an arrêt of the Cour Royale of Paris, 9th June, 1814. Merlin remarks "Le nombre de ces arrêts, et plus encore la force des raisons qui les justifient, empêcheront sans doute la question de se reproduire désormais dans les tribunaux. Troplong, Hyp. Tom. 3, n. 661 says: "Jamais dans l'ancienne jurisprudence, il n'avait été défendu d'acquérir privilége ou hypothèque sur les biens d'un individu non négociant en état de déconfiture."

2 Pont. Hyp. n. 876; * * * Les dispositions de la loi qui établissent l'incapacité du failli à l'effet de conférer hypothèque ne doivent pas être étendues au débiteur non-commerçant en état de déconfiture. Applicant ici cette doctrine, nous disons que, même après la cessation publique de paiements d'un débiteur non-commerçant, une inscription hypothécaire pourrait être prise utilement sur les biens de ce débiteur, parce que la faillite et la déconfiture ne produisent les mêmes effets que sur les points où la loi s'en est formellement expliquée. * * * * La Cour de Bruxelles s'est prononcée cependant en sens contraire; mais son arrêt est sans écho dans la jurisprudence, et les auteurs sont unanimes pour en rejeter la solution.

Vide Note.—Battuz, no. 416, p. 140.

Grenier Tom. 1, n. 123, is exceedingly pertinent on this subject. Reviewing the matter, he says p. 255: On n'appercevoit rien dans l'ancienne législation, qui peut servir à ce sujet, de guide sûr. Il y a donc lieu de penser qu'un simple état, tel que celui auquel, sous cette ancienne législation, on avait donné le nom de déconfiture, ne rendait pas une hypothèque nulle, au moins de droit.

His conclusion in p. 258: Ainsi, tous les actes qu'on attaque de nullité pour cause de l'état de déconfiture ou d'insolvabilité, rentrent dans le droit commun, d'après lequel tout ce qui est fait en fraude des créanciers est nul; et le caractère de la fraude est nécessairement soumis aux circonstances.

6 Toull, n. 363,4, payment of non commercial debts within 10 days before faillite without fraud, valid.

7 Toull, n. 45, payments by man *en* deconfiture without fraud are valid

I have no hesitation in saying that in such a case as the present, the judicial hypotheque would have held good in France. I may add that the jurisprudence of Lower Canada prior to the Code has been in the same sense. So I understand it, C. C. 2023 has the following words: "Hypotheques cannot be acquired to the prejudice of existing creditors, upon the immoveables of persons notoriously insolvent, or of a traders within the 30 days previous to their bankruptcy." Johnston Thomson does not come within the scope of this article. He was not notoriously insolvent when that inscription was taken and he was not a trader. I therefore hold that the registration of the judgments gave a valid hypotheque, and the contentations must be dismissed.—TORRANCE, J.

Jan. 31. 1873.

Ex parte Lachapelle, petitioner for Certiorari.—The petitioner has been condemned by the Recorder to pay a fine of $10, also 10s. costs, and to be imprisoned for fifteen days in the common jail, for violation of a bye-law of the Corporation. The charge against petitioner is that he has repaired certain roofs with shingles in the city limits. The extent of repair is stated to have been a quarter of the superficies of one roof, and a third of another. No particular bye-law is named by date or number as having been violated. From the time of the passing of 14 and 15 Vic., c. 128, the Corporation has had right (with the view to prevent accidents by fire) to prohibit and prevent "the construction of any wooden buildings, or the covering of any building, of any kind whatsoever, with shingles" That 14 and 15 Vic, has been amended by various acts. One is 32 Vic, c. 70, of 1869. Its section 17 allows the Corporation, towards enforcing its bye-laws, to enact some things *extra*, such as condemnations in costs as well as penalties, imprisonment, &c. By a bye-law of 15th March, 1870, it is ordered, as a former bye-law of 1865 had ordered, that no person shall cover, wholly, or in part, any building of any kind with shingles. And by section 5, no person shall repair or cause to be repaired any roof, of any brick or stone house, with any shingles. The charge against petitioner is not that he has covered any building with shingles,

but that he has repaired two roofs of a stone house with shingles. The bye-law under which petitioner has been condemned is doubtless the one of 15th March, 1870. The petitioner's contention before me is, that the conviction of him is illegal, the bye-law prohibiting repairing roofs with shingles being unauthorized, the only power in the Corporation being to prevent the covering of buildings with shingles; that though repairs in shingles are prohibited by bye-law, no statute expressly mentions repairs. Says the petitioner: "I have not covered any building with shingles, and in reparing my roofs with shingles I was in my common law right. Show me statute to prevent me." When we talk of covering a thing, we have for idea a body or surface that shall be covered, covered over its whole surface. The English word "cover" means that. The question is whether the bye-law preventing even the repairing of roofs with shingles is authorized by any statute or law. Allowing even (as some hold) that the intention may prevail over the literal sense of the words of a statute, it can only be where we are able to collect the intention with an amount of clearness or certainty. Is it certain that the Legislature intended to allow the Corporation to prohibit even the repairing of roofs with shingles? They have authorized a prohibition of wooden buildings, or the covering of any building with shingles. Between the covering of a building with shingles, and merely repairing a roof with shingles, there is a distance. This is apparent even from the bye-law; else why did the makers of it go beyond prohibiting, in the language of the statute, to add prohibitions of repairs, and to add to the word "covering" the words "*wholly, or in part?*" The by-law cannot be stronger than the statute. Suppose it had been in the very words of the statute, and that defendant had been charged with violating its prohibition against "covering" any building with shingles, could he have been condemned, as here, for having merely repaired a roof? I think it likely that the Legislature did *not* intend to prohibit mere repairing. Suppose five or ten shingles requisite for a repair of an old roof, did the Legislature mean to prohibit such repairs? Perhaps they did not; I cannot see that they did. The expression of the statute does not clearly involve such intention; so the words of it must be followed, and the petitioner go free. This may lead to inconveniences and extra risks of fire; but the Legislature is at hand to afford a

remedy. It may, if it please, prohibit any application of shingles to roofs, or to repairs of them. The petitioner had the right before the bye-law in question to repair with shingles. The prosecution was bound to show law that, before the date of the prosecution, had taken away that right. If no such law can be shown there is no offence, nor liability to imprisonment or penalty. I see no such law. Penal laws cannot be extended; so the certiorari is to be maintained and the conviction complained of quashed, with costs to the Petitioner.—MACKAY, J.

Ruston vs. Lord et al.—The defendants are sued for one hundred dollars; penalty stipulated in a reference to arbitration. The parties had a dispute, and on 29th August last, declaring that they "were willing to adjust the matter upon principles of justice," they signed a memorandum referring all to two arbitrators, whose award should be conclusive, under a penalty of $100, to be paid by the party dissenting from the award. The two arbitrators were authorized to name an umpire if they differed. James Coghlan was the arbitrator named by plaintiff and Fairbanks for defendants. On the 7th of September these arbitrators differing, named an umpire, Thomas S. Brown. There is nothing to show that Brown, if notified of his appointment, ever acted, nor has there been any award made. In a paper fyled by plaintiff called award, signed only by his own arbitrator, Coghlan, it is said that Fairbanks refused to act after Brown's appointment, because of defendants' objecting to Brown. The defendants plead simply a defense *en fait*, or general denial. The only witness examined is Coghlan, the plaintiff's arbitrator. He says that Brown accepted the office of umpire, but that Fairbanks afterwards said that defendants objected to Brown; he, the witness, after that, went to the defendants, and saw Mr. Lord, one of them, who said he positively refused to proceed. Owing to this "no award could be given," says Coghlan; "though the three arbitrators were willing to proceed." At the final argument, plaintiff contended that the defendants, having hindered or prevented the abrbitration from going on to a natural end, are liable to pay the penalty; just as if an award were against defendants which they now were dissenting from. Is there enough to warrant condemnation of defendants? They deny Coghlan's and plaintiff's statements. The Court holds that some formal putting *en demeure* of defendants ought to

have been. The arbitrators and umpire were free to go on; the Court has no kind of statement from Fairbanks and Brown, or either of them, nor have the defendants been examined. There has been no award. Plaintiff's pretensions, as seen at the end of the case, are quite unjust. His cause of action, as stated in the declaration, is good enough; but were we to condemn defendants upon the slender proofs we have, we would open a way to any man hereafter to wrong his neighbour through an arbitration. For instance A and B, referring their disputes to two arbitrators, with power to name an umpire, either of A. and B. would be at the mercy of his adversary's arbitrator, who who would only have to say, or swear, that his party's adversary had refused to go on. This would fasten upon that adversary the obligation to pay any penalty stipulated for the case of either party refusing to carry out the arbitration award. The plaintiff ought to have furnished more proofs. The action is dismissed.—MACKAY, J.

March, 14.

In the matter of Worthington, Insolvent, and Thomas S. Brown, Assignee, and The Mechanic Bank, Claimant, and George Bell, et al. Contesting.—JOHNSON, J.—A petition has been presented to me on behalf of the claimant recusing the assignee, who by law has to hear and determine the contestation pending in this case, and asking for an order to him to suspend further proceedings as official assignee upon the contestation in question, until the matters alleged are substantiated or otherwise. This application is resisted by the assignee, and by the party contesting; and they contend that an assignee cannot be recused, and that the insolvent statutes have regulated the cases in which his functions can be superseded by order of the Court. Sec. 137 of the Act of 1869 provides for certain cases of disqualification in a judge sitting in insolvency, and also for the case of assignees being so disqualified. The language of the Act as respects the assignee is as follows:—"And if the assignee to any estate be a claimant thereon as a creditor, or be collocated for any charges or renumeration, or be the agent, attorney, or representative of any claimant thereon, he shall not hear, award, or determine upon any contestation of his own claim or collocation or of the claim of the person represented by him, or of any dividend thereon, or upon any contestation or issue raised by him, or by the person represented by him; but in such case, such

contestation shall be decided by the Judge, subject to appeal, as hereinbefore provided." By Sec. 9 of the 34 Vic. c 25, it is enacted that relationship by marriage, or within the degree of first cousin to any of the parties before him, shall disqalify the assignee in the same manner as he is disqualified for the causes mentioned in 137 section of the Act of '69. The position before me sets out that in the contestation of the claims of the Bank, the assignee has acted with partiality, as if he were the agent or solictor of the contending parties. That he expressed a decided opinion that he had formed upon one considerable part of the contestation respecting 46 cases of books—an opinion which he stated he had formed on private information received by him. It further alleges that the assignee has been illegally employed by the contestants and their agents to collect information for the purpose of contesting the claim of the Bank, and without the authority of the Inspector of the Insolvent's estate. There are more ample allegations still tending to show gross partiality, which it is not now necessary to refer to. The assignee has fyled his declaration denying the truth of the contents of the petition, and the suggestion now before me is whether I am to order a suspension of proceedings, and proof of petition. The present application is apparently not based on the 137 Section, as it does not ask simply, as provided by that Section, that the hearing of the contestation be transferred from the assignee to the Judge; but only asks now that the petitioners may be allowed to prove their allegations, and to *recuse* the assignee, and that upon proof he may be recused and declared incompetent to act further in the matter. It is argued that there is no such thing provided for in the law as the *recusation* properly so called of an assignee; but I hold that I am bound under the supervisory discretion vested in the Judges of this Court over their officers, of whom the assignee in this case is clearly one, to deal with facts and remedies; and not merely with names and forms. It is not my duty to seek texts of statutes directly authorizing strictly and technically the recusation of an assignee to an insolvent estate. There is, indeed, I believe, no such direct authority in the case of an assignee *eo nomine;* though the proceeding is substantially had every day in the case of *experts;* and even in the case of commissoners for expropriation it has been adopted. But it would rather be the duty of a Court of Justice in such a case to make sure of the existence of

some plain legal provision abrogating the natural right of every man to have his case determined by those who have no direct interest in deciding against him. The assignee in this case is exercising within certain and narrow limits suited to his office the functions of a judge. One of the parties before him says, you are acting with partiality, and as the agent of another party contesting my right. I do not want to be judged by you. I have good reasons. I will prove them, if I am allowed. Under these circumstances it is my duty to turn to the written law of the land, and to the plain principles and practices of the administration of justice. I find the first words of the written expression of the law in the Code of Procedure Act, 176, to be: "Any judge may be recused." It is true I do not find the word assignee, any more than I do that of expert, or commissioner for expropriation, or commissioner for the trial of small causes, or justice of the peace; but I will not violate a sacred principle inseparable from the due administration of justice for the mere omission of a name. I rather hold that the words 'any judge' include all those who exercise even within certain limits judicial functions, and I therefore order the proceedings on this contestation to be suspended, until this petition has been disposed of upon proof. It is not necessary to observe that the declaration of the assignee would be conclusive unless the contrary were proved by the petitioner, and that this proof must by law be made in writing; but as all the facts referred to in the petition are facts depending upon written memoranda said to be in possession of the assignee, and upon the books and proceedings also in his custody, the vertification of the facts cannot cause any serious delay. As to whether the recusation was necessary at all, I give no opinion, the matter, if it could have been brought before the Court by simple petition, would probably have been disposed of quite as satisfactorily; but the preliminary step of a recusation having been taken, I consider it my duty to the party applying, as well as to the assignee, to order proof.

RECENT DECISIONS IN NEW BRUNSWICK.

SUPREME COURT.

Upon the question of the Constitutionality of "The Common Schools Act, 1871," delivered in Hilary Term, 1873, in the case of *Auguste Renaud and others.*

The Chief Justice delivered the following, as the judgment of himself and Justices Allen and Weldon.

We are asked to set aside the Assessment in this case, on the ground that the Legislature had no power or authority to enact the Law under which such Assessment was levied—The Common Schools Act 1871—inasmuch as, it is contended, it contravenes 'The British North America Act, 1867,' and is consequently void and of no effect. We have never doubted that when a Provincial Act and an Imperial Statute are repugnant, so far as such repugnancy extends, but no further, the Provincial Act is void; and this principle has been, since the passing of 'The British North America Act, 1867,' on several occasions enunciated and acted on by this Court; and we should not have thought it necessary now to refer to it, still less to support by authorities the views we have always entertained on this point (without any doubts), were it not that we observe that in the neighbouring Province of Quebec the question has been much discussed, and the Court divided in their opinions on the subject, though the majority arrived at the same conclusion as that which has hitherto governed this Court. We have always thought it a constitutional principle, too clear to be seriously questioned, that the subordinate legislative power of a Colonial Legislature must succumb to the supreme legislative power and control of the Parliament of Great Britain, and therefore have heretofore considered it wholly unnecessary to cite any authority; but as there is a clear statutory recognition, as well as the highest Judical declaration in support of the accuracy of the view we have acted on, we think it as well now to name them. In the Imperial Act 28th and 29th Vic. cap. 63, sec. 2, it is enacted—"That "any Colonial Law which is, or shall be, in any respect repug- "nant to the provisions of any Act of Parliament extending to "the Colony to which such Law may relate, or repugnant to "any order or regulation made under authority of such Act of "Parliament, or having in the Colony the force and effect of such

"Act, shall be read subject to such Act, order, or regulation, "and shall, to the extent of such repugnancy, but not otherwise, "be and remain absolutely void and inoperative." And sec. 3 says—"No Colonial Law shall be or be deemed to have been "void or inoperative on the ground of repugnancy to the Law "of England, unless the same shall be repugnant to the provis- "ions of some such Act of Parliament, order, or regulation as "aforesaid." And this Statute has undergone judicial comment in the case of Phillips *vs.* Eyre, (Law Rep. 6, Q B., 20,) where Willes, J. in delivering the judgment of the Exch. Ch., in stating the effect of this Statute, after putting forward what has always been considered Law in this Province, viz. that an English statute only binds the Province when it is by the express words of the statute, or by necessary intendment, made clearly applicable to the Province, says—"It was argued that "the Act in question (an Act passed by the Legislature of Ja- "macia) was contrary to the principles of English Law, and "therefore void. This," he says, "is a vague expression, and "must mean esther contrary to some positive law of England, or "to some principle of natural justice, the violation of which "would induce the Court to decline giving effect even to the Law "of a Foreign Sovereign State. In the former point of view, it "is clear that the repugnancy to English Law which avoids a "Colonial Act, means repugnancy to an Imperial statute or order "made by authority of such statute applicable to the Colony by "express words or necessary intendment, and that so far as such "repugnancy extends, and no further, the Colonial Act is void."

But long prior to the passing of either the 28th and 29th Vic. cap. 63, or 'The British North America Act, 1867,' the Judiciary of England authoritatively declared what the Law was on this subject, in answer to a question propounded to the Judges by the House of Lords.

On the fourth day of May 1840, the Lord Chief Justice of the Court of Common Pleas delivered the unanimous opinion of the Judges (with the exception of Lord Denman and Lord Abinger, who did not attend the meeting of Judges) upon the questions of Law propounded to them, respecting The Clergy Reserves' (Canada) Act. In answer to the question lastly propounded, (question 3), which is as follows:—"Whether the Legislative Council and Assembly of the Province of Upper

Canada, having, in an Act 'To provide for the sale of the Clergy Reserves, and for the distribution of the proceeds thereof,' enacted that it should be lawful for the Governor, by and with the advice of the Executive Council, to sell, alienate and convey in fee simple, all or any of the said Clergy Reserves; and having further enacted in the same Act, that the proceeds of past sales of such Reserves which have been or may be invested under the authority of the Act of the Imperial Parliament, passed in the seventh and eighth years of the Reign of His late Majesty King George the Fourth, intituled 'An Act to authorize the sale of part of the Clergy Reserves in the Provinces of Upper and Lower Canada,' shall be subject to such orders and directions as the Governor in Council shall make and establish, for investing in any securities within the Province of Upper Canada, the amount now funded in England, together with the proceeds hereafter to be received from the sales of all or any of the said Reserves, or any part thereof, did, in making such enactments, or either of them, exceed their lawful authority;" His Lordship said—"In answer to the question "lastly propounded, we all agree in the opinion, that the Legis- "lative Council and Assembly of the Province of Upper Canada "have exceeded their authority in passing the Act 'To provide "for the sale of the Clergy Reserves, and for the distribution of "the proceeds thereof,' in respect of both the enactments specified "in your Lordships' question. As to the enactment, that it "should be lawful for the Governor, by and with the advice of "the Executive Council, to sell, alienate and convey in fee "simple, all or any of the Clergy Reserves: we have, in answer "to the second question, already stated our opinion to be such, "as that it is inconsistent with any such power in the Colonial "Legislature; and as to the enactment 'that the proceeds of all "past sales of such Reserves, which have been or may be invested "under the authority of the Act of the Imperial Parliament, "passed in the 7th & 8th George 4th, for authorizing the sale of "part of the Clergy Reserves in the Provinces of Upper and "Lower Canada, shall be subject to such orders and directions "as the Governor in Council shall make and establish for invest- "ing in any securities within the Province of Upper Canada "the amount now funded in England, together with the proceeds "hereafter to be received from the sales of all or any of the said "Reserves;' we think such enactment is, in its terms, inconsist-

"ent with and contradictory to the provisions of the statute of "the Imperial Parliament, 7th and 8th George 4th, and there- "fore void, there being no express authority reserved by that Act "to the Colonial Legislature to repeal the provisions of such "latter Statute."

Assuming, then, that it is not only the right, but the bounden duty of this Court deal with questions of this nature when legitimately presented for its consideration, we must endeavour to ascertain whether there is such a repugnancy in this case as will constrain us to declare "The Common Schools Act 1871," void, in part or in whole.

By the 93rd section of 'The British North America Act, 1867,' it is enacted, that—"In each Province the Legislature "may exclusively make Laws in relation to Education, subject "and according to the following provisions:—

"(1) Nothing in any such Law shall prejudicially affect any "right or privilege with respect to Denominational schools, which "any class of persons have by law in the Province at the Union.

"(2) All the powers, privileges and duties at the Union by "law conferred and imposed in Upper Canada on the Separate "Schools and School Trustees of the Queen's Roman Catholic "subjects, shall be and the same are hereby extended to the "Dissentient Schools of the Queen's Protestant and Roman Ca- "tholic subjects in Quebec.

"(3) Where, in any Province, a system of Separate or Dissen- "tient Schools exists by law at the Union, or is thereafter "established by the Legislature of the Province, an Appeal shall "lie to the Governor General in Council, from any act or decision "of any Provincial authority affecting any right or privilege of "the Protestant or Roman Catholic minority of the Queen's sub- "jects in relation to Education.

"(4) In case any such Provincial Law as from time to time "seems to the Governor General in Council requisite for the due "execution of the provisions of this section is not made, or in "case any decision of the Governor General in Council on any "Appeal under this section, is not duly executed by the proper "Provincial authority in that behalf, then and in every such "case, and as far only as the circumstances of each case require, "the Parliament of Canada may make remedial Laws for the "due execution of the provisions of this section, and of any deci- "sion of the Governor General in Council under this section."

It is now contended, that the rights and privileges of the Roman Catholic inhabitants of this Province, as a class of persons, have been prejudicially affected by The Common Schools Act 1871, contrary to the provisions of sub-section (1) of section 93 of 'The British North America Act.' We have now to determine whether any class of persons had, by law in this Province, any right or privilege with respect to Denominational schools at the Union, which are prejudicially affected by The Common Schools Act of 1871. This renders it necessary that we should, with accuracy and precision, ascertain exactly what the state of the law was with reference to Denominational schools, and the rights of classes of persons in respect thereto, at the Union. At that time, what may fairly and legitimately be called the Common School system of the Province, was carried on under an Act passed in the 21st Vic. cap. 9, intituled "An Act relating to Parish Schools." There were, no doubt, at the same time in existence, in addition to the schools established under the Parish School Act, schools of an unquestionably denominational character, belonging to, and under the immediate government and control of particular Denominations, and in which, there can be no doubt, or it may reasonably be inferred, the peculiar doctrines and tenets of the Denominations to which they respectively belonged were exclusively taught, and therefore had, what may rightly be esteemed, all the characteristics of Denominational schools, pure and simple. We do not here refer to Collegiate Institutions, which it has been strongly, and with great force urged, were not within the contemplation of the Imperial Parliament, or intended to be affected by 'The British North America Act, 1867;' but we refer to such schools as the Wesleyan Academy, Sackville, as incorporated by the 12th Vic. cap. 65, amended by the 19th Vic. cap. 65, a Corporation entirely distinct in Law, as we presume also, in fact, from the College which the Trustees of that Academy are authorized to found and establish under the 21st Vic. cap. 57; an Institution entirely under the control of the Wesleyan denomination, and in which, or in any department thereof, or in any religious services held upon the said premises, it is enacted that no person shall teach, maintain, promulgate or enforce any religious doctrine or practice contrary to what is contained in certain Notes on the New Testament, commonly reputed to be the Notes of the Rev. John Wesley, A.M., and in the first four volumes of Sermons, commonly reputed to have

been written and published by him. The Varley School, endowed by the late Mark Varley, who bequeathed certain property "To the Trustees of the Wesleyan Methodist Church of the City of Saint John, for the establishment and maintenance of a day school," which devise was confirmed by the 13th Vic. cap. 2, and the property vested in certain persons, viz., the Trustees of said Wesleyan Methodist Church in the City of Saint John, in connection with the British Conference, upon the Trusts, &c., in said Will. The Madras School, which by its Charter is to be conducted according to the system called the Madras system, as improved by Dr. Bell, and in use and practice in the British National Education Society, incorporated and established in England; which National Society established in 1811, was incorporated in 1817, for promoting the education of the poor in the principles of the Established Church throughout England and Wales; the schools established by such Society being purely denominational, in which the children are to be instructed in the Holy Scriptures, and in the Liturgy and Catechism of the Established Church, and, "with respect to such instruction the schools are to be subject to the superintendence of the Parochial Clergyman, and the Masters and Mistresses are to be Members of the Church of England." And the Baptist Academy or Seminary—the Roman Catholic School established in the City of Saint John—the Free School in Portland, under the Board of Commissioners of the Roman Catholic School in Saint John—the Roman Catholic School in Fredericton—the Roman Catholic School in Saint Stephen—the Roman Catholic School in Saint Andrews,—all of which are recognized by name by the Legislature in various Acts, anterior to the 21st Vic. cap. 9, and received specific annual grants from the Public Provincial Funds, outside the Parish School Act.

In the year 1857, and subsequently thereto, the money intended for educational purposes has been annually granted in a lump sum, viz., so much "to provide for certain educational purposes," not specifying any particular school or purpose, as had been theretofore customary. But the Estimates of the Public Expenditure which appear in the Public Journal, shew that appropriations of a similar character have been since annually made. Thus in the year 1867, but before the 1st day of July (the day of the Union), it will be seen by the Journals of the House of Assembly, page 45, that in addition to the amount

authorized by Law, the following schools, among others, received special grants, viz:—The Madras School; the Wesleyan Academy; the Baptist Seminary; the Roman Catholic School, Fredericton; the Presbyterian School, St. Stephen; the Roman Catholic School, St. John; the Varley School, St. John; the Roman Catholic School, Milltown; the Roman Catholic School, St. Andrews, male and female; the Roman Catholic Schools, Carleton, Woodstock, Portland, and Bathurst; the Presbyterian School, Chatham; Roman Catholic School, Newcastle; and the Sackville Academy; and in the Journals for 1871, the year the Common School Law passed, are to be found special appropriations for the above Schools; so that it is obvious there were in existence at the time of the Union, and have been ever since in this Province, apart from Schools established under the Parish School Act, denominational schools, recognized by the Legislature and aided from the public revenues. But as it is not contended that the Common School Law prejudicially affects any right or privilege with respect to these Schools, which any class of persons had by Law at the Union, it will be necessary to examine minutely and critically the Parish School Act of 1858, under which it is contended 'Rights and Privileges' existed which it is alleged have been so affected. By that Act, the Governor in Council, with a Superintendent appointed by the Governor and Council, constituted the Board of Education; the Province was to be div'ded into Districts by the Governor and Council, who were to appoint an Inspector for each District; and to the Board of Education was confided the power of making Regulations for the organization, government and discipline of the Parish Schools, and for the examination, classification, and mode of licensing teachers; to appoint examiners of teachers; to grant and cancel licenses, and to hear and determine all appeals from the decision of Trustees; to prescribe the duties of Inspectors of Schools; to apportion all moneys granted by the Legislature for the support of such schools, among the several Parishes, in proportion, &c.; and to provide for the establishment, regulation and government of School Libraries, and the selection of Books to be used; but no Books of a licentious, vicious, or immoral tendency, or hostile to the Christian Religion, or Works on Controversial Theology, were to be admitted. To the Superintendent was confided, subject to the order of the Board, the general supervision and direction of the Inspectors, and the enforcement and the giving effect

to all the regulations made by the Board; he was to collect information on Education, hold meetings in different parts of the Province, to which he was to invite the attendance of the Inspectors, teachers, and inhabitants; to address such meetings on the subject of Education, using all legitimate means to excite an interest therein; to cause Trustees, School Committees, and Teachers, to be furnished with copies of the Regulations of the Board of Education, &c.; to adopt measures to promote the establishment of School Libraries; to provide plans for the construction of School Houses, &c.; with power to sue for Books, &c., purchased for the use of Parish Schools, and for all moneys due on sale thereof; and he was required annually to prepare a Report upon the condition of the Schools and School Libraries, with information upon the system and state of Education generally; the amount expended in promoting it; with suggestions, accompanied with a return of moneys received for the sale of Books, &c., to be laid before the Legislature within ten days after the opening thereof. Provision was then made that three Trustees of Schools should be annually elected in each Town or Parish, at the time and in the same manner as other Town and Parish Officers; who should be subject to the same pains and penalties for neglect or refusal to act, or the non-performance of their duties, as other Town and Parish Officers; and when any Town or Parish failed to elect, the Sessions should appoint as in other cases. In incorporated Towns, Cities, or Counties, the Council were to appoint the Trustees. The duties of the Trustees were pointed out: they were to divide Parishes into convenient School Districts; to give any licensed teacher authority in writing to open a school in a District where the inhabitants had provided a school-house and secured salary, and with their assent to agree with such teacher; to suspend or displace teachers for incapacity, &c. They were required immediately after ratifying the engagement of a teacher, and annually thereafter, to call a meeting of the rate-payers of the District, for the purpose of electing a School Committee of three persons; they were to accompany the Inspector in examination of schools; they were at least once a year to examine all schools; to authorize such number of schools in any Town, &c., as the wants of the inhabitants might require; and if they deemed it necessary, authorize the employment of an Assistant Licensed Teacher in any large school; to apportion among School Districts any money raised by County or Parish

Assessment for support, &c., of schools. The election of a School Committee by the rate-payers was then provided for, and their duties pointed out, viz., to have charge of school-house furniture, &c.; to call meetings of inhabitants for providing school-house, books, &c.; to have control of any Library, and appointment of a Librarian, &c.; to receive and appropriate all money raised in the District for providing a Library, &c.; to admit free scholars, and children at reduced rates, being children of poor and indigent parents, &c.

The duties and qualifications of Teachers are minutely detailed in section 8. That section is as follows:—

"8. The teachers, male and female, shall be divided into three "classes, qualified as follows—

"Male teachers of the first class, to teach spelling, reading, "writing, arithmetic, English grammar, geography, history, book-"keeping, geometry, mensuration, land-surveying, navigation, and "algebra; of the second class—spelling, reading, writing, arith-"metic, English grammar, geography, history and book-keeping; "of the third class—spelling, reading, writing, and arithmetic.

"Every teacher of the first and second class, shall be quali-"fied and enjoined to impart to his pupils a knowledge of the "geography, history and resources of the Province of New "Brunswick, and of the adjoining North American Colonies.

"Female teachers of the first class to teach spelling, reading, "writing, arithmetic, English grammar, geography, history, and "common needlework; of the second class—spelling, reading, "writing, arithmetic, English grammar, geography, and common "needlework; of the third class—spelling, reading, writing, "arithmetic, and common needlework.

"Every teacher shall keep a daily register of the scholars, "which shall be open for inspection at all times; a visitor's book, "and enter therein the visits of the Inspectors, Trustees, and "School Committee, respectively; maintain proper order and dis-"cipline, and carry out the regulations made for his guidance.

"Every teacher shall take dilligent care and exert his best en-"deavors to impress upon the minds of the children committed to "his care, the principles of christianity, morality, and justice, "and a sacred regard to truth and honesty, love of their country, "loyalty, humanity and a universal benevolence, sobriety, indus-"try, and frugality, chastity, moderation and temperance, order "and cleanliness, and all other virtues which are the ornaments of

"human society; but no pupil shall be required to read or study "in or from any religious book, or join in any act of devotion "objected to by his parents or guardians; and the Board of "Education shall, by regulation, secure to all children whose "parents or guardians do not object to it, the reading of the "Bible in Parish Schools; and the Bible, when read in Parish "Schools by Roman Catholic children, shall, if required by their "parents or guardians, be the Douay version, without note or "comment."

Provision is then made for Provincial assistance for support of Superior Schools and Libraries; and the subsequent sections of the Act provide for Assessment whenever the majority of rate-payers in any County, Parish, District or Municipality determine to provide for the support of Schools therein by assessment, with a provision that any District School supported by assessment shall be free to all the children residing therein. As these latter sections do not touch the questions we are discussing, it is unnecessary to refer to them more particularly. This Act was amended by the Act 26th Vic. cap. 7, which, however, merely gives to the Board of Education authority to order a re-division of Districts improperly divided, and to limit the number of teachers, &c. This, then, was the state of the Law relating to Parish or Common Schools at the time of the passing of "The British North America Act 1867," and continued so until repealed by 'The Common Schools Act 1871'; and because it is alleged that rights and privileges secured by or enjoyed under this Act have been prejudicially affected by the Common Schools Act, it is contended that the latter Act is void.

The Parish School Act clearly contemplated the establishment throughout the Province of Public Common Schools for the benefit of the inhabitants of the Province generally; and it cannot, we think, be disputed, that the governing bodies under that Act were not in any one respect or particular, 'denominational.' The Board of Education was the Governor and Council, with a Superintendent appointed by them. The Trustees were elected or appointed as the case might be, as *other* Parish officers, and they were put in other respects on precisely the same footing as other Parish officers; and the School Committee was elected by the rate-payers; and in nothing pertaining to the organization, regulation or government of the schools, had any class of persons or denomination whatever, as such, the slightest voice or right of

interference. The Board of Education, on behalf of the inhabitants of the Province at large, being responsible for the general working of the system, and the Trustees and School Committees having the management and direction of certain matters, under the Board of Education, in the particular localities for which they were respectively elected, but (without reference) so far as can be gathered from the statute, in any or either case to class or creed.

The schools established under this Act, were then, Public Parish or District Schools, not belonging to or under the control of any particular denomination; neither had any class of persons nor any one denomination—whether Protestant or Catholic—any rights or privileges in the government or control of the schools, that did not belong to every other class or denomination, in fact, to every other inhabitant of the Parish or District; neither had any one class of persons or denomination, nor any individual, any right or privilege to have any peculiar religious doctrines or tenets exclusively taught, or taught at all in any such school. What is there then in this Act to make a school established under it a denominational school, or to give it a denominational character? A good deal has been said as to the intention of the Imperial Parliament in using the words "Denominational schools," in sub-section (1). There seems to be no difficulty in giving a legal construction or definition to these words, if they are read in their ordinary sense. It is a well-established canon of construction, that an Act is to be construed according to the ordinary and grammatical sense of its language, if precise and unambiguous; and it is likewise a rule established by the highest appellate authority, that the language of a statute taken in its plain, ordinary sense—and not its policy or supposed intention—is the safer guide in construing its enactments. See Philpott *vs.* St. George's Hospital, (6 H. Lords Cases, 338; 3 Jur. N. S. 1269.) And in the great Sussex Peerage Case (11 C. & F. 86: 8 Jur. 793), the Judges declared the law to be, that if the words of the Act are of themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense; that the words themselves do in such cases best declare the intention of the Legislature.

The 5th paragraph of section 8, of the Parish School Act, has been very strongly relied on, as establishing a right in respect to

denominational schools. Under that paragraph, the teacher is most certainly enjoined to take diligent care, and exert his best endeavours to impress on the minds of the children committed to his care, *the principles of christianity, morality, &c., &c.* As we think it cannot be denied that the Schools under this Act were to be Public Parish Schools, for the benefit of all the inhabitants of the Parish or District in which they might be established, and the pupils attending the schools would necessarily, in a vast majority of cases throughout the Province, be children of parents belonging to different denominations; can it be supposed, with any reason, that the Legislature could have intended that the teacher, who might possibly himself belong to a persuasion differing from all his pupils, should impress on the minds of his pupils the principles of christianity, by instructing each one in the peculiar doctrines of the denomination of its parents? Still less, do we think it could have been intended, that the principles of christianity to be impressed, should be those of a denomination to which any of the pupils did not belong, simply because they might happen to be those of a denomination to which the teacher, or even a large majority of his pupils, may have belonged. It seems to us, that in view of the entire scope, object, and policy of the Act, that the duty imposed on the teacher by the 5th paragraph of section 8, was a duty outside of the Educational teaching of the school, (which is specifically provided for in paragraphs 1 & 2), to be performed as opportunities occurred, by precept and example, rather than by any direct or continuous system of dogmatic teaching; that the principles of christianity, honesty, &c., to be impressed, were to be principles of general applicability, interfering with the peculiar religious views of none;—doctrines, precepts, and practices, which all christian people hold in common, rather than the dogmatic teachings or tenets of a particular denomination or sect. This view would seem to be strongly confirmed by the last clause of the 4th paragraph, because, while under the first clause of that paragraph, the duty referred to is to be discharged by the teacher in respect to all the children committed to his care, without any exception in favor of any class or creed: the provision in the last clause is—"but no pupil shall be required to read or study in or "from any religious book, or join in any act of devotion objected "to by his parents or guardians," leaving the duty still on the teacher "to impress on the minds of the children committed to

"his care, the general principles of christianity, morality, justice, "a sacred regard for truth and honesty, &c., &c.;" and the paragraph ends by providing that the Board of Education shall, "by regulation, secure to all children whose parents or guardians "do not object to it, the reading of the Bible in Parish Schools; "and the Bible, when read in Parish Schools by Roman Catholic "children, shall, if required by their parents or guardians, be "the Douay version, *without note or comment*." This paragraph, so far from making the schools denominational, or giving any rights or privileges in respect to a denominational school, appears to us to be directly opposed to the idea of denominational teaching in the schools. Does not the very last clause, (that most relied on at the argument), permitting the use of the Douay version, by the addition of the words "without note or comment," shew, that with the Bible read from that version, no denominational views of any kind shall be put forward; and is not the whole in this view entirely consistent with the exclusion from the School Library, and from use, of all works on controversial theology? But it has been said, that under the Parish School Act, schools were in fact established in certain localities where all, or a large majority of the rate-payers, happened to belong to one particular persuasion, in which the catechisms of particular Churches were taught, prayers peculiar to a particular religious body were used, and books inculcating the doctrines, views and practices of a particular denomination were used as Class Books; and that these schools were therefore denominational, and consequently the class of persons belonging to any such denomination, had a legal right or privilege with respect to denominational schools. Assuming what is alleged to have been the case,—though on the point we have no information before us of which we can take judicial notice,—surely it is begging the whole question. How can the mere fact, that in exceptional cases, certain schools under the Parish School Act, drawing Provincial aid, may have been made for the time being, with or without the knowledge or sanction of the Board of Education, denominational, by reason of the teacher instructing the children exclusively in doctrines of a particular denomination, or using the prayers or books, or daily teaching the catechism peculiar to such denomination, confer any legal right or privilege on any class of persons with respect to denominational schools, or give the denomination whose tenets may have been so taught in any such schools, rights

or privileges other than those possessed by all and every the humblest inhabitant of the Parish in which such school existed, free and independent of all denominational connection?

It is not by what the Board of Education, Superintendent, Inspectors or Trustees may have done or allowed to be done under the Act, nor is it from the mode in which the principles of Christianity may have been actually practically taught in one or a hundred schools which may have drawn public money under the Parish School Act, that the question in a legal view must be determined; we must look to the Law as it was at the time of the Union, and by that, and that alone, be governed. When then do we find any legal exclusive right or privilege conferred on any denomination to any school established or that might be established under that Act; or any right or privilege conferred on any class of persons to deal with such a school as belonging to such persons as a class or denomination; or as being under their control as such; or that as a class they had any right to have taught therein, the peculiar doctrines of their denomination? The assumption that the character or status of the school could be legally altered or affected, or rights gained by reason of the religious opinions or feelings of the inhabitants of a District, or a majority of them, because in such a case Trustees and a School Committee might perchance be elected from a particular denomination, and so that then the school might be made denominational, is in our opinion entirely erroneous. To the Board of Education is entrusted the controlling, governing power. By those rules and regulations, made and ordained within the letter and spirit of the Act, must all Acts under them be controlled and governed, wholly independent of the religious opinions of the electors of the District, or of the Trustees elected by them. It appears to us, then, that in passing the Parish School Act, the Legislature contemplated a general system of Education for the benefit of all the inhabitants of the Province, without reference to class or creed; that such schools were to be organized, regulated and governed by public bodies, not owing their existence to, or being in any way under the control of any class or denomination; that the Act made no provision for any schools established thereunder being denominational, and did not provide that any sect or denomination whatever, as such, was in any such schools to have control or precedence, nor in any way give or recognize any right in any class of persons to have in

the schools established thereunder, the doctrines, precepts or tenets of their denomination taught as part of the system of instruction, or to have such schools in any other respect denominational in their character. That with reference to religion, the Act simply recognized the duty of impressing on the minds of the pupils the general principles of christianity, honesty, &c., common alike to all Christians; and simply required to be secured by regulation the reading of the Bible as the inspired Word of God, accepted by all Christians as the basis of their faith, securing always to the Roman Catholics the use, when read by Roman Catholic children, if required by their parents, the version recognized by their Church, but without note or comment; but at the same time, with the greatest apparent caution and scrupulous care, lest the religious principles of any should be interfered with, providing that even with respect to the inculcating the principles of christianity, morality, &c., as indicated, no pupil should be required to read or study in or from any religious book, or join in any act of devotion, objected to by his parents or guardians. And so, even with respect to the reading of the Bible, it is to be secured only to those children whose parents and guardians do not object. If, then, the establishment of denominational schools, or the teaching of denominational doctrines, was not recognized or provided for by the Act, and the Roman Catholics had therefore no legal rights, as a class, to claim any control over, or to insist that the doctrines of their Church should be taught in all or any schools under the Parish School Act, how can it be said (though as a matter of fact such doctrines may have been taught in numbers of such schools) that as a class of persons they have been prejudicially affected in any legal right or privilege with respect to "Denominational Schools," construing those words in their ordinary meaning, because, under 'The Common Schools Act 1871', it is provided that the schools shall be non-sectarian?

But it is contended in this case, that the words "Denominational Schools," were not used by the Legislature, and should not be construed by us, in their ordinary grammatical sense and meaning, but should have a much broader interpretation. While freely admitting that though the general rule is, that every word must be understood according to its legal meaning, in construing an ordinary, as opposed to, a penal enactment, where the context shows that the Legislature has used it in a popular or more en-

larged sense, Courts will so construe the language used; we are at a loss to discover anything in "The British North America Act, 1867," indicating a legislative intention of using the words otherwise than in their ordinary meaning. It is clear enough that the reference in sub-section 2 to separate and dissentient schools in Ontario and Quebec, is especially to schools of Protestants and Catholics; and it is, perhaps, equally clear that sub-section 3 applies only to schools of a like character existing in any of the four Provinces. But we are at a loss to understand why sub-sections 2 & 3 should be held to control or in any way limit or affect a previous distinct enactment, couched in plain and unambiguous language, and which, by quite as clear and unequivocal terms, has relation to all classes of persons or denominations, and to all the Provinces of the Dominion; or why, because separate and dissentient schools, as between Protestants and Roman Catholics, not only in Ontario and Quebec, but in any Province in which they may exist at the Union, or be thereafter established, are provided for and protected, therefore we must necessarily infer therefrom, that in using the term "Denominational Schools" in sub-section 1, the Legislature intended to legislate only as between Roman Catholics and Protestants, and then also as to schools not necessarily denominational in the ordinary acceptation of the term. We think that the term "denomination" or "denominational" as generally used, is in its popular sense more frequently applied to the different denominations of Protestants, than to the Church of Rome; and that the most reasonable inference is, that sub-section 1 was intended to mean just what it expresses, viz. that "any" that is, every "class of persons" having any right or privilege with respect to denominational schools, whether such class should be one of the numerous denominations of Protestants or Roman Catholics, should be protected in such rights. If it had been intended that the clause was to be limited in its application to Roman Catholics and Protestants, only as dissentient one from the other, and apply to schools other than those usually understood as denominational schools, is it not fair to presume that the Legislature would have used some expression in the sub-section itself indicating such a particular sense, especially as we have seen there were at the Union, in this Province at any rate, strictly denominational schools, both Protestant and Roman Catholic, to which such a cause would be applicable; and for the very reason also,

that when dealing with schools as between Protestant and Roman Catholic in sub-sections 2 & 3, the language clearly confines it to those bodies respectively?

But assuming that the term "Denominational Schools" is not to be construed in what has been called its narrow signification, perhaps the most favorable position to assume would be, to read the sub-section 1 as meaning substantially that nothing in any such law shall prejudicially affect any right or privilege which any class of persons, as a denomination, had by law with respect to schools in the Province at the Union. Let us endeavour to ascertain whether in such a case we would be justified in pronouncing the Common Schools Act 1871, *ultra vires*, and therefore void.

Except in the matter of compulsory taxation, there is no very great difference in principle, that we can discover, between the Parish School Act of 1858 and the Common Schools Act of 1871. The general government, superintendence and control of the schools, are, under both laws, vested in a Board of Education almost similarly composed, the only difference being, that to the Governor and Council and Superintendent, is added the President of the University, under the latter Act; in fact, the power to make Regulations for the organization, government and discipline of the Schools, appointment of Examiners of Teachers, and the power of granting or cancelling licenses, and of making such Regulations as may be necessary to carry into effect the Act, and generally to provide for any exigencies that may arise under its operations, are precisely the same in both;—(See sec. 4, paragraphs 3 to 10, of the Parish School Act, and sec. 6, sub-sections 4 to 8, of the Common Schools Act): and the details are to be carried out by a Superintendent, Inspectors and Trustees, alike substantially under both Acts; and the duties and powers of these officers do not in principle substantially differ. But there are, of course, differences. Those relied on are, that the Common Schools Act has no enactment similar to section 8 of the Parish School Act; that the Parish School Act had no enactment similar to section 58, sub-section 12, of the Common Schools Act; and this section, it is alleged, prohibits the granting Provincial aid to any but Schools under the Common Schools Act; and that by the 60th section of the Common Schools Act, all schools conducted under its provisions shall be non-sectarian —a provision not to be found in the Parish School Act; and it

is contended, that the omission in the one case, and the express enactment in the other, prejudicially affect the rights and privileges which the Roman Catholics, as a class of persons and a denomination, had in the schools established or which might have been established under the Parish School Act; in other words, that the rights and privileges which they had under the one, the omission and the enactments referred to, prevented their claiming or obtaining under the other.

With reference to the omission: The Parish School Act no doubt declares that the Board of Education shall secure to all children whose parents do not object, the reading of the Bible, and that when read by Roman Catholic children, if required by their parents, it shall be in the Douay version, without note or comment. Here, we have expressly directed to be secured to all children, what many persons no doubt consider a great right and privilege; and Roman Catholic parents have a great right secured to them, viz., to have, if they require it, a particular version of the Bible read. As to the reason why a similar provision, securing these important rights in which Protestants and Catholics were both interested, was excluded from the Common Schools Act, it is not our business to inquire; what we have to determine is, does this omission make the Law void, if in other respects unobjectionable? We think not. If this was a right or privilege which existed at the Union, the Legislature certainly have not protected it by any express enactment. But is the right taken away? May it not still exist, provided always, it is a right which legitimately comes under sub-section 1, section 93? Because that section declares that nothing in any such Law shall prejudicially affect any such right; and in such case, reading the Common School Law by the light of this section, would it not be the duty of the Board of Education under the Common Schools Act, instead of making Regulation 21, declaring as follows:—that "It shall be the privilege of every Teacher to open "and close the daily exercises of the school by reading a portion "of Scripture (out of the Common or Douay version, as he may "prefer), and by offering the Lord's Prayer—any other Prayer "may be used, by permission of the Board of Trustees; but no "teacher may compel any pupil to be present at those exercises, "against the wishes of his parents or guardian, expressed in "writing, to the Board of Trustees;" to secure by Regulation, just what the Board of Education were bound to secure under

the Parish School Act of 1858; that is, to make just such a Regulation as the Parish School Act require to be made? We have seen they have precisely the same, and only the same powers to make Regulations, as the Board had under the Parish School Act. By this simple means, the rights of all the children and their parents in the Province—as well Protestant as Roman Catholic—which existed at the Union, would be preserved, and all just cause of complaint on this head removed. Why the Board of Education should have departed from the principle and policy of the Parish School Act, and taken from the parents of all the children of the country—Protestant and Roman Catholic alike—the great boon and privilege of insisting on the Bible being read in schools, as they have done, and should have conferred on the teacher, not only the privilege of reading the Bible or not as he likes, but out of the Common or Douay version—not as the children or their parents may choose, but as the teacher may prefer, though he cannot compel the attendance of the pupils, —is not for us to attempt to explain; we simply point out the fact. But if the right secured by the Parish School Act is protected by 'The British North America Act, 1867,' we fail to see, because the Board of Education may not have made such a Regulation as they ought in such case to have made, or have made a Regulation they ought not to have made, that the action of the Board, or its non-action, can render the Act of the Legislature inoperative.

If the right and privilege falls under section 93, and if there is no power to compel the Board of Education to make such a Regulation, or the Legislature should have inserted a clause in the Common Schools Act, requiring them to do it, is not this just a case where sub-section 4, of section 93 of 'The British North America Act, 1867,' applies? viz:—"In case such Pro-"vincial Law, as from time to time seems to the Governor "General in Council requisite for the due execution of the pro-"visions of this section is not made, then as far only as the cir-"cumstances of the case may require; the Parliament of Canada "may make remedial laws for the due execution of the provisions "of this section." In this connection we may refer also to the 20th Regulation, which, it has been contended, prejudicially affects the rights and privileges which the Roman Catholic had under the Parish School Act. This Regulation declares that "symbols or emblems distinctive of any national or other society,

"political party, or religious organization, shall not be exhibited "or employed in the school room, either in its general arrange- "ment or exercises, or on the person of any teacher or pupil." It may be, that the Board of Education have disregarded the general policy of the Common Schools Act, and interfered with the rights of teachers, parents, and children, in excluding from the schools alike teachers and pupils, who may exhibit on their persons, in dress or ornament, symbols or emblems distinctive of any national or other society, political party, or religious organization: for, however clear the right of the Board of Education may be to make regulations necessary for the good government and discipline of the schools; to make arbitrary, restrictive regulations, as to the dress or personal adornment of the teachers and pupils, or which are calculated, unnecessarily to interfere with their feelings, national, social, or religious, in matters not calculated to give any just cause of offence to others, or to interfere with good order in the schools, is quite another question. And while it is by no means clear to us, that any power exists in the Board of Education, under the Common Schools Act, by regulation, to deprive teachers, parents, and children, of their right of access to the Free Schools of the country, to the support of which they, and all others, are forced to contribute, unless they submit to such regulations; and though the assumption of such a power of practical expulsion by the Board of Education, raises a question involving important and delicate rights,—rights which, in this land of civil and religious freedom, few may be willing to see infringed—or at any rate, raising discussions which must be unpleasant to those engaged in them, and calculated to result in consequences which can scarcely fail to produce acrimonious feelings, and in the end be injurious to the cause of Free Education, which we must presume the Regulation objected to was intended to further; all we can say is, as the case stands, the Regulations are not before us in such a way that we can deal with them, and therefore we are not called upon to express any decided opinion as to their validity, because the constitutionality of the Act cannot, in our opinion, be affected by any regulation made under it, there being nothing unconstitutional in the Aet itself, that we can discover.

The second objection is easily answered. The provision in sec. 58, sub-sec. 12, of The Common School Act, declaring that no public funds shall be granted, would seem to apply to the

schools particularly referred to in the preceding part of that section, and not to all schools. But, if it was intended to apply generally to all schools, as Mr. Duff's argument assumes, what does it amount to? It cannot take from the Legislature the right to make such grants. Thus, we see in the Estimates of the year 1872, grants were recommended by the Lieutenant-Governor, and no doubt made, for all the denominational schools before specifically referred to, (see Journals of House of Assembly, page 124); and if such a clause was *ultra vires*, and we declared it void—*cui bono?* It would not affect the other parts of the Act, and what would practically be attained? The Legislature could, whether the clause stands or is declared void, do just as it pleases about granting or withholding the public funds.

But it is contended that the 60th section, declaring "that all "schools conducted under the provisions of this Act shall be non-"sectarian," prejudicially affects the rights and privileges which the Roman Catholics, as a class, had in the Parish Schools at the time of the Union. It cannot be denied that to the Provincial Legislatures is confided the exclusive right of making laws in relation to Education; and that they, and they only, have the right to establish a general system of Education, applicable to the whole Province, and all classes and denominations, provided always they have due regard to the rights and privileges protected by section 93 of 'The British North America Act, 1867.'

Now, what in this case, is the right or privilege claimed to have been prejudicially affected? Is it a legal right or privilege that could have been put forward and enforced by the Roman Catholics, as a class, under all circumstances and in every Parish or Common School; or is it a legal right confined to the Roman Catholics as a body; or does it belong equally to all and every of the other denominations of Christians in this Province, and capable by them of enforcement; or, on the contrary, was it not the mere possible chance of having religious denominational teaching in certain schools, dependent entirely on accidental circumstances; as, on what might happen to be the religious views of the majority in a Parish, and then on the accidental result of the election of Trustees and School Committee, and on the views of the parties so elected, as to religious denominational teaching, and their willingness to permit it in the schools, (admitting that the Trustees or Committee had any discretion in the matter, which perhaps is more than doubtful); was it not also dependent

on the Board of Education, who had the general controlling power? If, dependent on circumstances such as these, how can it be considered such a legal right as could have been contemplated by the Imperial Parliament in passing the 93rd section of 'The British North America Act, 1867'? Where is there any thing that can, with any propriety be termed a legal right? Surely the Legislature must have intended to deal with legal rights and privileges. How is it to be defined—how enforced?

It by no means follows as a necessary legal consequence, that because a majority of the inhabitants of a Parish or School District may belong to a particular persuasion, they would necessarily vote for Trustees favourable to denominational teaching, nor could they be compelled by any legal process so to vote; nor does it follow that Trustees when elected even by a majority of one denomination, would necessarily prove favourable to denominational teaching; and by what legal process could they be constrained to assent to its introduction in the schools? And again, suppose up to this point all were favourable, might not the whole scheme be ignored by the Board of Education; and how then could any class of persons, as such, no matter to what denomination they may belong, claim of right to control or direct the acts or doings of any of these parties; or how could Electors, Trustees, School Committees, or the Board of Education, be compelled to make any school in any sense denominational, or in other words, to confer on any such class, denominational rights? Surely the rights contemplated, must have been legal rights: in other words, rights secured by law, or which they had under the law at the time of the Union. If any such existed they must have been capable of being clearly and legally defined, and there must have existed legal means for their enforcement, or legal remedies for their infringement; for it is a clear maxim of law, that *ubi jus ibi remedium*. It was said long ago in a celebrated case, that if a man has a right, he must have a means to vindicate and maintain it, and a remedy if he is aggrieved in the exercise and enjoyment of it; and that it was indeed a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal What possible legal means could any denomination have invoked under the old Parish School Act, to compel any one school to be made denominational, or to require and insist that in any one school, denominational tenets, doctrines, precepts or practices, should be taught or used? But then it was re-

peatedly urged upon us, that under the Parish School Act, circumstances might and very often did concur, where schools might, and in numerous cases did, become denominational; but that by reason of section 60 of the Common Schools Act, such was not now possible. The answer is simply this: The inability of a class of persons to have under the Common Schools Act, that which possibly they might under certain exceptional and accidental circumstances have had under the Parish School Act of 1858, but which they had no right to insist on having, is a damage not occasioned by any thing which the law esteems an injury,—a kind of damage termed in law, *damnum absque injuria*, and for which there is no remedy. And so, in this case, as there was no legal right to have denominational schools or denominational teaching, there is no injury in legal contemplation committed, by the Legislature dealing with the question in such a manner as to prevent the possibility arising, and consequently no right to have the action of the Legislature abrogated. It may be a very great hardship, that a large class of persons should be forced to contribute to the support of schools to which they are conscientiously opposed, or be shut out from what they have hitherto under certain circumstances enjoyed, and be without remedy; but by any such considerations, Courts of Justice ought not to be influenced: hard cases, it has been repeatedly said, are apt to make bad law; and it has also been justly remarked, that if there is a general hardship affecting a general class of cases or persons, it is a consideration for the Legislature, not for a Court of Justice.

FISHER, J.—I concur in the judgment of my brethren, as to the constitutionality of The Common Schools Act 1871; but as there are some sentiments in it which I do not agree, I have thought in a matter of so much delicacy and importance, it was better to read the judgment that I had written, than attempt to qualify opinions which my brethren had so fully considered.

The right to impose this Assessment is objected to on the ground that it includes a sum for the support of schools under the authority of the Act relating to Common Schools, 34 Vic. cap. 21, which it is contended is unconstitutional; that the Legislature have no power to pass it, because it contravenes the exception in the Act of Union.

By the 93rd section of 'The British North America Act,

1867,' it is declared—"That in and for each Province, the Legislature may exclusively make laws in relation to Education, subject and according to the following provision:—

"(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools, which any class of persons have by law in the Province at the Union.

"(2) All the powers, privileges and duties at the Union by law conferred and imposed in Upper Canada on the Separate Schools and School Trustees, of the Queen's Roman Catholic subjects, shall be and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec.

"(3) Where in any Province a system of Separate or Dissentient Schools exists by law at the Union, or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to Education.

"(4) In case any such Provincial Law as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor General in Council, on any Appeal under this section, is not duly executed by the proper Provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor General in Council under this section."

The exclusive power of legislating upon the subject of Education, is thus conferred upon the Legislature of each Province, subject to the reservation of the rights of any class of persons with respect to Denominational Schools.

Every one acquainted with the history of the Provinces which comprised Canada, before the Union, knows the reason for the insertion of some of the provisions of this section. It was found to be the only mode of solving a question that had caused serious difficulty with the Government and Legislature of that Province.

Paragraphs two and three were constructed to soothe and settle these difficulties, and at present only apply to that Province, now consisting of Ontario and Quebec, where schools were in opera-

tion at the Union, answering the description given them in these paragraphs.

Whether the fourth paragraph applies to any other law than such as is referred to in the third paragraph, it is not necessary to consider, as the constitutionality of the School Act depends entirely upon the meaning of the first paragraph.

The simple question for solution is, does The Common Schools Act 1871, prejudicially affect any right or privilege with respect to Denominational schools, which any class of persons had by law in the Province at the time of the Union? It is not merely a right or privilege. A denominational right or privilege, of itself, if any such existed, would not alone make The Common Schools Act unconstitutional. It must be a right or privilege with respect to a denominational school, which a class of persons had by law at the Union, which is prejudicially affected by this Act, to render it unconstitutional.

It appears to me, that the first inquiry is—What is a denominational school? In my opinion, it is a school under the exclusive government of some one denomination of Christians, and where the tenets of that denomination are taught. But assume that a school answering either of these requisites is a denominational school, and this is the lowest ground upon which it can be put, and then examine the laws in force at the time of the Union, to ascertain if any such school then existed by law, and if the right of any class of persons therein has been prejudicially affected by The Common Schools Act.

There were denominational schools in existence at the Union, such as the Varley School in Saint John, the Sackville Academy, the Madras School, and the like, but they are not touched by The Common Schools Act 1871; they remain in the enjoyment of all the rights they had at the Union.

The Act 20 Vic. cap. 9, intituled "An Act relating to Parish Schools," with some unimportant amendments not affecting the present question, was in force at the Union. As it has been superseded by The Common Schools Act 1871, which is objected to, we must refer to its provisions to ascertain whether it authorized any denominational school; for if it did not, then the Act under consideration has not in any of its provisions prejudicially affected any right or privilege any class of persons enjoyed at the Union.

The very title of the Act proclaims its unsectarian character

as fully, to my mind, as the positive enactment in the Act of 1871, that the schools conducted under its provisions should be non-sectarian—a useless provision in an Act which alone provided for the establishment of such schools.

Parish Schools, that is, schools in and for every Parish in the Province, according to the political division of the Province into Counties, Towns, and Parishes, distributed and sustained by public aid according to the population and extent of each Parish, —the number and classes of the schools must, in the very nature of things, be other than denominational.

I will now refer to the provisions of the Act, and see if there is any authority for the establishment of a denominational school under it, or any countenance in the Act for such a school.

The Governor in Council appoints the Superintendent of Schools, who, with the Governor and three members of the Executive Council, constitute the Board of Education. The inspection of the schools is done altogether by political agency. The Governor in Council is authorized to divide the Province into four Districts, and appoint one Inspector for each District.

The Board of Education, a purely political body, make rules and regulations for the organization and government of the schools, and such other regulations as may be deemed necessary to carry the Act into effect. There was no restriction whatever upon the power of the Board in this respect. The Board regulates the mode of licensing, examining, classifying, and paying the teachers, and prescribes the duties of the Inspectors.

The Superintendent, a political officer, has the general direction and supervision of the schools, subject to the order of the Board.

Each Parish was to be divided into School Districts by three Trustees annually elected by the rate-payers, at the same time and in the same manner as other Town or Parish officers were elected, and subject to the same penalties and disabilities, with the same provision for appointing them, in case of failure in the election. They employ the Teachers, and may dismiss them, subject to an appeal to the Board of Education. They are to examine the schools, and apportion the money raised by assessment, when so raised, amongst the different schools.

Each school was under the immediate supervision of a School Committee elected annually by the rate-payers of the District. They were empowered to admit free scholars, and children of poor parents at a reduced rate.

The law also provided for a Superior School in each Parish, thus also supplying the means for higher education.

The Teachers, both male and female, were divided into three classes, with an appropriate allowance to each class from the Provincial Treasury, and with duties, as to the subjects taught, prescribed in the Act for each class.

It provided for a School Library in each District, by a money grant in aid of the amount raised in the locality for that purpose, and placed the selection of books under the control of the Board of Education; but expressly excluded works of a licentious, vicious, or immoral tendency, or hostile to the Christian religion, or works on controversial theology. This is the only part of the law in which any thing of a denominational character is referred to in any way; and it shews how jealous the Legislature was in guarding the law, and in preserving the schools from any denominational or sectarian tendency. Provision was made for the education of the children of the whole people, in schools of every grade, and by teachers of both sexes; and by the Superior School, the wants of higher education were provided. The whole machinery of the Act is designed to make the schools common to the child of every man, irrespective of his religious opinions. The Act recognizes the agreement of the inhabitants of any locality with a teacher licensed by the Board of Education, when they have provided a sufficient school-house and secured the necessary salary, raised by voluntary contribution or tuition fee. It contains provision for voluntary assessment in the District, Parish or County where the rate-payers determine to adopt that mode of supporting the schools; and in such case the schools are declared to be free to the children of all the inhabitants.

The system is prescribed by the Board of Education; the localities take an active part in the establishment and government of the schools, subject to the general control of the Government.

The local agency is exercised, and the local officers appointed, in the same manner as for the government and support of the poor, the highways, or any other local or parochial object. Neither class, creed, nor colour, affect or influence the one more than the other. The only qualification for the electors of any officer is that they are to be rate-payers upon real or personal property, or income. No class or creed had, under the Act, any peculiar right, either in the general government of the whole Province, or in any Parish or School.

Now, when all the machinery for working the Act relating to Parish Schools had been made, is it not a striking proof of the determination of the Legislature to avoid the very thing which it is contended the Act authorizes, by restricting the power of the Board of Education to make Rules and Regulations in this respect, and expressly excluding from the School Libraries works hostile to the Christian religion, or works on controversial theology; while it left the inhabitants free to elect their local agents, who should employ the teachers, and look after the schools. To secure to every man, and the child of every man, a just equality with regard to his religious faith, it enacted, in effect, that the great leading principles of Christianity should be inculcated in the schools; but there should not be in the Library a book upon controversial theology, or, in other words, with denominational teaching.

What sort of denominational school would that be, where the master would not be aided in his dogmatic teaching by the writings of men of his own faith? When a denominational school is established, how strictly this is provided for. Take any one of the Acts on our Statute Book, and examine its provisions. I will refer to the Act incorporating the Trustees of the Wesleyan Academy at Mount Alison, Sackville, (12 Vic. cap. 65); the 11th section is as follows:—

"No person shall teach, maintain, promulgate or enforce any religious doctrine or practice in the said Academy, or any department thereof, or in any religious service held upon the said premises, contrary to what is contained in certain Notes of the New Testament, commonly reported to be the Notes of the said Rev. John Wesley, A. M., and in the first four Volumes of Sermons, commonly reported to have been written and published by him."

Take the Charter of the Madras School, or any other Act, and the same strict provision for dogmatic teaching is made. I pass by the Colleges, which were refereed to by the Counsel on the argument on this rule, as not material to the inquiry, if they are within the category contended for.

I can hardly imagine any stronger illustration of the principle that pervades the whole Act relating to Parish Schools, than the language of the eighth paragraph of the fourth section, which thus restrains the large legislative power of the Board of Education. It is as follows:—

"To provide for the establishment, regulation, and government of School Libraries, and the selection of Books to be used therein; but no works of a licentious, vicious, or immoral tendency, or hostile to the Christian religion, or works on controversial theology, shall be admitted."

It has been urged that the sixth paragraph of section 8, countenanced denominational teaching. I think no one can read that section, and fail to discern that it enacts the very contrary. The words of the paragraph are:

"Every teacher shall take dilligent care, and exert his best endeavors to impress on the minds of the children committed to his care, the principles of Christianity, morality, and justice, and a sacred regard to truth and honesty, love of their country, loyalty, humanity, and a universal benevolence, sobriety, industry and frugality, chastity, moderation and temperance, order and cleanliness, and all other virtues which are the ornaments of human society."

Surely it cannot be disputed that this can be done without any denominational teaching, or, in the language of the statute, without entering upon controversial theology.

There are certain great fundamental principles of Christianity, common to all, that may be enforced, without trenching upon debatable ground. Take the Sermon on the Mount, or any of the lessons of the Great Teacher himself, for example.

To avoid any abuse of this duty or privilege of the teacher in the Parish Schools, the Legislature proceeds further to enact—"but no pupil shall be required to read or study in or from any religious book, or join in any act of devotion objected to by his parents or guardians." Here is a positive enactment against denominational teaching.

Knowing it to be possible for a designing teacher, under color of the authority to impress upon the minds of the children the principles of Christianity, and all other virtues, stealthily to teach doctrines of a denominational or sectarian character, and to protect the child from the influence of such teaching, the parents are empowered to interfere and withdraw the child from any such teaching, or from joining in any act of devotion having such a tendency.

The paragraph then proceeds thus—"and the Board of Education shall, by regulation, secure to all children whose parents or guardians do not object to it, the reading of the Bible in Parish Schools."

What is there denominational in thus inculcating the principles of Christianity, and all other virtues which are the ornaments of human society? What better mode could be adopted than by reading portions of the Bible? It certainly is not a denominational Book. It is the common standard of faith and practice to all Christians. To it they all appeal. Where are such enobling thoughts as in the Bible? It is said to be an historical fact, that when the question of reading the Bible in the Common Schools of one of the Cities on this Continent was debated, the Jews voted for it, on the ground that it was well adapted to the instruction of children, because of the sublime principles of morality it contained.

Though the Bible is regarded as the great charter of our salvation, as the revelation of the will of God to man, eminent Divines in one branch of the Church Catholic object that some words, some expressions, some sentences, are incorrectly rendered in our ordinary English version, and recognize another version as being a more correct interpretation of such words, expressions, and sentences.

The Legislature, with the same object of preventing any denominational right, enacts—"and the Bible, when read in Parish Schools by Roman Catholic children, shall, if required by their parents or guardians, be the Douay version, without note or comment"; the very words "without note or comment," of themselves, are significant proofs of the intention of the Legislature.

Assuming that the Bible is a denominational book, and I cannot think any one will seriously contend that it is, and that this provision created a right—a denominational right if you please—that will not help the *ultra vires* argument, because if it were so, it is a right or privilege which a class of persons had by law at the Union, to have the Bible read in a Parish School, not in a Denominational School, and that is not a right secured by 'The British North America Act, 1867,' even if it existed.

I have endeavoured to ascertain the true construction of the Act relating to Parish Schools, as the only Act affecting the question; I include the amendments, which are not important. Every other Act which confers upon any denomination a right or privilege with respect to Denominational Schools, is left unrepealed, so that no right or privilege enjoyed by any class of persons under any such Act is prejudicially or in any way affected by the Act under consideration.

I will now refer very briefly to the 34th Vic. cap. 21, intituled "An Act relating to Common Schools." It is substantially the same as the Act of 1858, relating to Parish Schools.

The Board of Education is the same, with the addition of the President of the University. It has the same large powers.

The duties of the Superintendent are the same.

The number of Inspectors is increased, with smaller Districts for each, but with duties very similar to what they discharged under the old law.

The Trustees are appointed in the same manner as under the old law, and discharge much the same duties, including the duties of the School Committee.

The Teachers are classified and paid as in the old law. Superior Schools are provided for, and Libraries, upon the same principle. The only real difference that I can discover, arises from the different modes of supporting the school.

Under the Act of 1871, the portion of the support furnished by the inhabitants is raised by assessment; and in the machinery and provision necessary for working this out, and the different modes of paying and supporting the Schools, that it involves, is the only difference. In other respects, this Act provides for the attainment of the same object by the same means.

It is said that there is no provision requiring the reading of the Bible in the schools. The Board of Education may by Regulation provide for it, as in the Act relating to Parish Schools. If it were otherwise, it would not help the *ultra vires* argument, unless the schools could be shewn to be denominational.

Upon the argument, it was contended that some of the Regulations interfered with the rights of a class of persons. I confess I was unable to discover the bearing of that argument upon the question. How, if the Law were good, a bad Regulation—if such there was—would affect it? Assume that this contention is correct, and that it prejudicially affects the right that a class of persons had at the Union, such a right, if it existed, is not saved by 'The British North America Act, 1867,' because it would be a right or privilege with respect to a Parish School, and not to a denominational school.

I cannot discover that the Regulations have any thing to do with the question of the power of the Legislature to pass the Act, or can form any guide in the interpretation of it. It appears to me that under either of the Acts of 1858 or 1871, it was com-

petent for the Board of Education to make any of the Regulations referred to; whether they exercised their powers wisely or unwisely, under the Act of 1871, is another question.

The propriety of the Regulations objected to is a question of public policy, upon which I am not called upon to express an opinion. I may, as an individual, entertain a very strong opinion as to its policy. As a Judge, all I feel called upon to do is to consider its legality, and for myself, on that point, I entertain no doubt.

I am therefore of opinion that the Rule should be discharged.

WETMORE, J.—While fully concurring in the opinion of my learned Brethren as to the constitutionality of 'The Common Schools Act 1871,' I do not wish to be understood as expressing a participation in any doubt whatever as to the Regulations of the Board of Education.

I think the only question properly before the Court is, as to the Act itself, and not as to the Regulations. We are only called upon to decide whether or no, the Schools Act, or any part of it, is *ultra vires;* and upon the decision, the Assessments, to set which aside the application is made, are to be affected.

If the Act itself is not *ultra vires*, I do not see how the promulgation of any Regulation, even supposing it to be one which the Schools Act would not warrant, or to be in violation of the provisions of Section 93, sub section 1, of 'The British North America Act, 1867,' can affect the case, any more than Assessors acting in violation of the law under which an Assessment is imposed, would affect the law authorizing the Assessment. In such case, if the Assessment is imposed in a manner not warranted by law, parties aggrieved would have their remedy for obtaining relief; and so, with reference to a Regulation sought to be established by the Board of Education. If that body should exceed the power given by law in such case, the Regulation would not have the support of law to uphold it, and therefore could not be maintained; but the law, nevertheless, would remain in full force and authority.

The application to this Court is simply to set aside an Assessment in consequence of the invalidity of the Law; it does not touch the Regulations; and though they have been referred to by Counsel in the argument, it does not seem to me they are before us in such a way as to call for a decision, or the expression

of an opinion upon any one of them. Indeed, I do not see that a most positive and direct expression by the Court, as to the legality or illegality of any of the Regulations, would in the slightest degree affect the constitutionality or unconstitutionality of the Law; and I therefore purposely abstain from expressing my opinion upon any one of the Regulations. Should a question arise respecting the Regulations, or should a decision upon them be necessary for any other matters before the Court, then, of course, I would be required to express my opinion; until it does arise, I decline doing so: to use an expression of Cockburn, C. J. in Rimini *vs.* Van Praagh, (L. Rep. 8 Q. B. 4,) "It will be time enough to do so, when the necessity arises."

Rule for a *Certiorari* discharged.

The above judgment has been pronounced by the highest judicial authority of the Province of New Brunswick, after elaborate argument by eminent Counsel; and, as a perusal will shew, pains-taking and exhaustive research on the part of the Court. The decision, as to the main question is unanimous; but Fisher and Wetmore, JJ., while agreeing with the majority of the Court, as to the constitutionality of the Law, and the authority of the Court to declare a Provincial or Dominion Statute void, when repugnant to an Imperial Statute, did not feel themselves called upon to decide upon the Regulations of the Board of Education until brought properly before them. The decided manner in which the Court has unanimously claimed and exercised the right to adjudicate upon the constitutionality or validity of a Provincial or Dominion Statute, must be a matter of congratulation to those members of the Quebec Bar, who have from time to time propounded this view through the pages of *La Revue*, at a time when there was a difference of opinion among the Judges of the Province of Quebec. This judgment is conclusive, until reversed by the Judicial Committee of the Privy Council. Without delaying to express our great regret, that any law should be enacted, distasteful to a considerable portion of the population of any Province of the Dominion, we must question the propriety of the interference of the Parliament of Canada. Such interference, in our opinion, is unwise and uncalled for.

The Supreme Court of New Brunswick has decided that the Law is constitutional, and that the Legislature acted within the limits of the British North America Act 1867, in passing such a

law. That being the case, an Act of the Dominion Parliament could not reverse that decision. The same Court which declared "The Common Schools Act 1871," constitutional, would, as a necessary sequence, declare such Act of reversal *ultra vires*. The proper tribunal is the Judicial Committee of the Privy Council, and not the Parliament of Canada. Even a reference to the Law Officers of the Crown would be of no avail. Supposing their decision adverse to the judgment of the Supreme Court of New Brunswick. As, from this judgment an appeal has been made to the Judicial Committee of the Privy Council, the necessity of non-interference on the part of the Dominion Parliament, becomes still more apparent. What the decision on appeal will be, it is of course impossible to say; but we feél quite certain the judgment of the Supreme Court of New Brunswick, will be sustained.

A. A. STOCKTON.

Michaelmas Term, 1872.

Osgood vs. Hatch.—This was an action on a promissory note given by Defendant to the Columbian Insurance Company of New York for a premium on a policy of Insurance. The Company became insolvent, and the action was brought by Receivers appointed by the Court of New York. A new trial granted on ground of defective proof of the Foreign Law.

Taylor vs. McCarthy.—This was an action on a promissory note for premiums on policies of Insurance issued by the Columbian Insurance Company of New York. The defence was that the Company had not filed a certificate in the Provincial Secretary's Office, as required by Act of Assembly relating to Foreign Corporations. Held, that the search for the certificate was not sufficient, and judgment accordingly for Plaintiff.

The Queen vs. McAvily, in re McCarthy.—Conviction for refusing to give up a certificate of registry of a vessel under 50th section of Merchants Shipping Act, set aside, complainant not being entitled to the certificate for the *lawful navigation of the vessel.*

Gilbert vs. Graham.—Application to set aside a plea *puis darrein continuance*, as being false, refused, the plea being sworn to as true.

Jusk vs. Miller.—An action for infringement of a patent granted to plaintiff for an article known as an "Advertising Frame," such as is seen in most of the hotels and steamboats. defendant made and sold a frame nearly similar, but omitting the thermometer, one of the articles in plaintiff's frame. A nonsuit was ordered on two grounds: 1st. That plaintiff had not proved the specification on which his patent issued; and 2nd. That as plaintiff's patent was not for a new invention, but merely a combination of old and known materials, the defendant's using a part of those materials was not an infringement of the patent.

Morrison vs. Gale.—An action for breach of an agreement by the defendant to freight deals from plaintiff's mill to St. John. The defence was that the plaintiff had put it out of his power to perform his part of the agreement by transferring his right under it to T. & P., and therefore that defendant was released from the agreement; also that by plaintiff's consent defendant had made a new agreement to carry the deals with T. & P., and had done so, as long as there were any deals at the mill, and therefore plaintiff's right was gone. A majority of the Court took this view of the case, and a verdict given for the plaintiff was set aside.

Hodge et. al. vs. Reid et. al.—This case grew out of a contract made by Hodge & McGlinchey in January, 1864, with the Y. C. Agricultural Society, to erect the Exhibition Building in Fredericton. The Society was represented to be incorporated; and the contract was made with them as such. By a clause in the contract the Society was authorized, in case the work was not proceeding satisfactorily, to employ men to complete it, and charge the expense to the contractors. In July, 1864, the Society, being dissatisfied with the progress of the work, took possession of the building and proceeded with the work. After some negotiation, it was agreed that each party should appoint a mechanic to value the work remaining to be done to complete the building; that from the sum found by the appraisers £200 should be deducted, and the balance charged by the Society to the contractors. A valuation was made under this arrangement in August, 1864, and after making the deduction agreed upon, and allowing for various payments to the contractors, there was a balance of $2,070 due to them on the contract. For some reason the Society refused to pay this balance, and in 1865,

Hodge & McGlinchey sued them. The cause stood for trial in June, 1865, but the plaintiff's, finding the Society was not incorporated, could not recover against them as such, and were obliged to abandon the action. Then they commenced a suit of Equity against the present defendants, who were the Executive Committee of the Society, claiming that they were personally liable in the contract.

In giving the Judgment, the Chief Justice said there were four questions to be determined in the case. (1st) Whether the Agricultural Society was a Corporation? (2d) If it was not, whether the defendants were personally liable on the contract? (3rd) Whether the plaintiffs had any remedy in a Court of Equity? (4th) If the remedy was in Equity, whether there was any evidence to warrant the decree of Judge Wilmot against the defendants?

Upon the first point, it was held that the Society was not a Corporation. The defendants had relied on an Act of Assembly, in which a sum of money was authorized to be paid to the Y. C. Agricultural Society to assist them in erecting the Exhibition Building—which, it was said, constituted them a Corporation by implication. The Court held that this was not sufficient. Then as to the personal liability of the defendants, they were in the position of persons professing to contract as agents but not having any principal, and who were consequently personally liable on the contract. If the Y.C. Agricultural Society was not incorporated, the defendants were themselves the principals, and made the contract on their own behalf. If there was no corporation, the plaintiffs had no remedy on the contract against the Y.C. Agricultural Society, as such; there ought to be some Court where the plaintiffs could recover for their work, and as the defendants had got the benefit of it, they ought to pay. By a clause in the contract the Executive Committee were not to be personally liable to the contractors; but this was intended to apply on the supposition that the Society was incorporated, and consequently liable in its corporate capacity to the plaintiffs. If there was no corporation for the plaintiffs to look to, this clause was repugnant to the general terms of the agreement of the defendants, as principal contractors, and therefore void. On the third point, the Chief Jnstice said that it was difficult to see why, if there was no incorporation, the plaintiffs could not have had a remedy at law; but it by no means followed that there

might not be a concurrent remedy in Equity; and if the remedy at law was doubtful or difficult, the jurisdiction of equity would not be pronounced against. Besides this, the objection was too late at the hearing—it should have been taken by plea or demurrer to the bill. The last objection was, that the only evidence of any amount due the plaintiffs depended upon the estimate made by Scott and Haines, (the two persons agreed upon in August, 1864); that they were arbitrators, and had taken into consideration matters not submitted to them by the parties, and consequently their award was not binding. But the Court held otherwise; that what Scott and Haines did was a mere valuation or appraisement, and not an award in the legal sense of the word, and all that was necessary for them to do was substantially to decide what they were appointed to determine. Having disposed of all the objections, the Chief Justice concluded by saying that no one could doubt that in moral justice the plaintiffs ought to recover, and it was satisfactory to think that there was no legal difficulty to prevent them. The plaintiffs would be entitled to interest on the balance due them from the date of Judge Wilmot's decision; and also entitled to the costs of the appeal, and the general costs in the cause.

Hilary Term, 1873.

Hanington vs. Harshman and others.—The defendants had been appointed Trustees of one Simpson, as an absconding debtor. About two years afterwards, Simpson became entitled to property by the death of his father, and the defendants, claiming that it rested in them as his Trustees, advertised it for sale. The plaintiff, who was a creditor of Simpson, having also taken proceedings against him as an absconding debtor, obtained an injunction to restrain the defendants from selling the after-acquired property of Simpson. The Court held that the subsequently acquired property did not vest in the defendants; that they only took the property which belonged to Simpson at the time they were appointed; and that the plaintiff was justified in filing a bill to preserve the property till new trustees were appointed.

Niles vs. Burke.—The question in this case was, whether a grant of land abounding on a lake extended to the margin of the

lake only, or to the centre of it. The Court held that it extended only to the margin of the lake; and a new trial was refused.

Boone vs. Boone.—This was an action of trespass to land in Cardigan, in which the plaintiff recovered a verdict for a small amount. The dispute between the parties was the dividing line between their respective lots, the plaintiff contending that it should run on one course, the defendant, on a different course. The Judge's opinion at the trial was against the line claimed by the plaintiff; but he also alleged that the defendant had trespassed on land in his possession, and beyond the disputed line; and this was the question left to the jury. A new trial was granted, the costs to abide the event of the suit.

Grant vs. Leonard.—This was an action of trespass to land in the County of Kent, in which the defendant obtained a verdict. There was some question as to what land passed by the deed under which the defendant claimed; but he and his father had been in possession for about thirty years, and the plaintiff shewed no title. A new trial was refused.

Ex parte Gilbert vs. Beattie.—Messrs. Gilbert and Beattie had been elected Trustees of Schools in Gagetown, in January, 1872, and acted for a time. An application was made to them by a majority of the rate-payers in the District to call a meeting to vote money for a School, under the 28th section of the Act; they refused to call the meeting, believing that they were not bound to call it unless they thought proper. In consequence of this, the Inspector appointed new Trustees under the 37th section of the Act. The Court decided that the Trustees were bound to call a meeting when a proper requisition was made.

Graham vs. Gilbert.—The plaintiff had leased a farm from the defendant under a written lease; by a subsequent verbal agreement, the plaintiff undertook to do some ditching on the land for which he was to be allowed a certain sum per rod, which was to be deducted from the rent. The defendant distrained for half a year's rent, and the plaintiff's goods were sold under the distress. At the time of the distress some of the ditching had been done, but it was not completed till some time afterwards, when the plaintiff demanded the amount of the defendant, and brought the present action to recover it. The Court decided

that the agreement for the ditching was an entire contract, and nothing was payable on it till the whole of the work was done, and therefore it could not have been deducted out of the rent for which the defendant distrained; also that the amount of the ditching was a matter entirely in the knowledge of the plaintiff, and that until it was ascertained the defendant could not deduct it from the rent; and that even if it had been ascertained at the time of the distress, and so might have been deducted by the defendant, that by submitting to the distress, and paying the half year's rent, the plaintiff was precluded from bringing an action to recover back any part of the money; that if the defendant had distrained for too much, the plaintiff should have tendered the amount which he admitted to be due, and replevined his goods.

Pomares vs. Provincial Insurance Company.—The principal question in this case was, whether there was sufficient evidence of a promise by the agent of the Company to pay the amount of the loss claimed by the plaintiff, for a loss on nails damaged on a voyage from St. John to Cuba. The Court held that there was evidence of the promise, and therefore a verdict for the plaintiff was sustained. It was also decided that the word "months" in a policy of insurance, meant calendar, and not lunar months.

Ketchum vs. The New Brunswick Railway Company.—This was an application to rescind a Judge's order changing the venue in the case from the County of Westmorland to the County of York. The order was made, on the plaintiff undertaking to give material evidence of some matter in the cause arising outside of the County of York.

Hannington vs. Stewart.—This case decides that the County Court is not a superior Court to the City Court of St. John, and therefore that a Judge of a County Court has no right to stay the proceedings in a suit in the County Court on the ground that the plaintiff might have sued in the City Court.

Ex parte Maher.—In this case the Court decided that the School assessment in Portland was distinct and capable of separation from the Town assessment; and therefore that the *certiorari* might issue to bring up the School assessment only.

Ex parte Renaud et. al.—The only point in this case was as to the constitutionality of the School Act. 34. Vic. c. 21. The Court were unanimously of the opinion that the Act was not unconstitutional; that the local Legislature had not exceeded its powers, as defined by "The British N. America Act, 1867," —generally known as the "Union Act." The 93rd section of that Act declares, that "In and for each Province, the Legisla- "ture may exclusively make laws in relation to Education, sub- "ject and according to the following provisions:—

"(1.) Nothing in any such law shall prejudicially affect any "right or privilege with respect to Denominational Schools, "which any class of persons may have by law in the Province at "the Union."

(Other provisions follow with respect to Separate and Dissentient Schools in Upper and Lower Canada, and relating to appeals to the Governor General in certain cases relating to education, when Separate or Dissentient Schools exist; but these provisions did not materially affect the question decided by the Court).

The important question was whether any Denominational Schools existed in this Province at the Union; and if they did, whether their rights were taken away, or prejudicially affected by the School Act of 1871. The School Law in force in the Province at the time of the Union, was the Parish School Act, 21 Vic. c. 9 (passed in 1858). This Act directed that the Board of Education should, by Regulation, "secure to all chil- "dren whose parents or guardians do not object to it, the read- "ing of the Bible in Parish Schools,—and the Bible when read "in Parish Schools by Roman Catholic children, shall, if re- "quired by their parents or guardians, be the Douay version, "without note or comment." It is under this Act that it is contended that the Roman Catholics had rights and privileges; —viz., the right to have the Bible read in the Schools, and to teach their children the doctrines of their religion—which have been taken away by the present School Act, the 60th section of which declares, that all Schools conducted under its provisions shall be non-sectarian. The Court said that Denominational Schools did exist in the Province at the Union; for instance, the Madras Schools, in which the doctrines of the Church of England were exclusively taught; the Sackville Academy, in which the Wesleyan doctrines were required by law to be taught; the various Roman Catholic Schools, where, no doubt, the religious

instruction given was according to the doctrines of that Church; but one of the rights and privileges which these Schools had, were taken away or affected by the School Act of 1871, for the Legislature had still the power, if they chose, to make grants of money for the support of these schools as they had been in the habit of doing for a number of years. Admitting that the Roman Catholics had rights and privileges under the Parish School Act of 1858, the Court said that they had, by law, no right or privileges "with respect to Denominational Schools"—no rights or privileges that they could enforce by law. The fact that a school in a district might, by accidental circumstances, become exclusively Roman Catholic, did not constitute it a Denominational School with any legal rights, as such. To constitute a Denominational School, under the Act of 1858, it must be a school in which some religious denomination or sect had the exclusive right to teach its own peculiar doctrines or tenets. So far from this being the case under that Act, the intention of it seems to have been to give equal rights to all denominations. Works on controversial theology were expressly excluded from the School libraries; no pupil was required to "read or study "in or from any religious book, or join in any act of devotion "objected to by their parents or guardians;" and the Douay Bible, when read, was to be the version, "without note or comment."

So far, the Judges were unanimous. The Chief Justice, Judges Allen and Weldon, were of opinion that though the Regulations of the Board of Education were not before the Court for decision, still, as they had been frequently referred to during this argument, they believed they were justified in making some observations on them. That with regard to the 20th regulation, relating to '*Symbols or Emblems.*' they seemed to be of opinion that part of that Regulation was beyond the powers of the Board of Education. As to the 21st Regulation, they could not understand why the Board of Education have taken away the great right and privilege of having the Bible read in the Common Schools, as it existed under the Act of 1858, and vested the right in the teacher to read the Scripture or not as *he* thought proper, and to read the Common or Douay version of the Bible as *he* might prefer. Whether the Board of Education had exceded their power, or not, in making these Regulations, that did not affect the question of the constitutionality of the

School Act. It would seem rather that if the Regulations were objectionable, the remedy was by appeal to the Governor General under the 4th sub-section of "The British North America Act, 1867," § 93.

Judge Fisher said that he did not think the Legislature had anything to do with the question; that he might have doubts as to the policy of making some of the Regulations; but of the legality of them he had no doubt.

Judge Wetmore said that he thought the Court was not called on to express any opinion on the Regulations. If they were bad, they could not affect the constitutionality of the Act; but he wished it to be distinctly understood that he expressed no opinion upon them.

Ex parte Carvill and others.—This was an application for a *certiorari* to remove the assessment of the City of St. John, in order that it might be quashed. A *certiorari* was granted on two grounds: 1st. That the assessment ordered for the interest on the Debentures issued for building the Public Hospital, under the Act 23 Vict. c. 61, was for a greater sum than the law authorised. 2d. That the assessment under the School Act of 1871 was void—not having been made within the time prescribed by the Act. The St. John Assessment Act, 22 Vict. c. 37, authorises the Common Council to make assessments on the city for various purposes on or before the 1st April in each year. The School Act of 1871, sec. 58, directs that the Board of Trustees shall "*previous to the order for the assessment for general City purposes*," notify the Common Council of the several amounts required for the support and maintenance of the Schools, the interest on debentures issued by the Board, &c.: and directs the Common Council to cause the amount "to be levied and collected *at the time* of levying and collecting other City taxes." The Common Council of St. John ordered the general City assessment for 1872 on the 5th of March; the School Trustees did not send their requisition to the Common Council for the amount required for the support, &c., of the Schools, until the 25th of April. The Court held that the Act was imperative as to the time of making the School assessment; that the requisition not having been made by the Board of Trustees till after the 5th April, and after the Common Council had made the general City assessment, they had no power to make a separate assessment for school purposes afterwards; and such assessment was consequently void.

Ex parte The Bank of New Brunswick.—The question in this case was whether the assessment should not have been made against the president of the Bank, and whether it should be made on the par value of the stock of the Bank, or upon its market value. The Court held, that under the Act 22 Vict. c. 37, § 14, the assessment should have been made on the President, and not against the Corporation by name; they also expressed an opinion that it should have been on the market value of the stock, under the 12th section of the Act.

Ex parte McInerney.—The objections to the assessments in this case were: 1st. That it exceeded the amount ordered by the Sessions of Kent. 2d. That it was bad, because it included the amount ordered for support of the Poor, for County Contingencies, and for School purposes in one assessment; that they should have been separate assessments. 3d. That the warrant of assessment should have been issued during the sitting of the Sessions—the order for the assessment having been made in December, but the warrant not issued till February following.

The Court decided that as the assessment did not exceed the amount ordered by the Sessions by 10 per cent. it was good under the 21st section of 1 Rev. Stat. c. 53; that the Clerk of the Peace, in issuing the warrant of assessment, was only discharging a ministerial duty, and that the assessment having been duly ordered by the Sessions, the warrant might be issued by the Clerk afterwards; but that there should have been separate assessments for support of the Poor; for County Contingencies; and for School purposes. Unless the assessments were separate, the Collector could not furnish the persons assessed with a statement of the "several amounts" they were required to pay, as directed by 1 Rev. Stat. ch. 53, § 24. A *certiorari* was ordered to bring up the assessment on this ground.

Ex parte McLeod.—The question in this case was, whether a person residing in St. John, and assessed there on his personal property, was liable to be assessed on personal property in the County of Kent, where he carried on a branch of his business. The Court held that he was clearly liable under the 19th sect. of the Rev. Stat. c. 53, which declares that for the purposes of assessment, every person carrying on business in any parish shall be deemed an inhabitant thereof.

Herbertson vs. Cunningham.—The question in this case was whether a deed, which conveyed a piece of land with a saw-mill thereon, together with "*the pond or flowage above the said mill,*" passed any title to the soil of the mill pond, or only an *easement*, *i. e.* a right to flow the canal for the purpose of keeping up the mill pond. Held, that no title to the soil of pond passed with the deed.

SAINT JOHN COUNTY COURT.

In the estate of A. W. Marstiss, an insolvent.—At the first meeting of creditors of said estate, under the insolvent act of 1869, the majority in value voted that one S. should be assignee, while the majority in number of the creditors voted that one G. should be assignee. A reference, under the 118th sec. of the Act, was made to the Judge under the above state of facts. Held, that there was a failure of election of assignee, and that the interim assignee, under the 6th sec., became assignee. Per Watters J.

RECENT DECISIONS IN ST. LUCIA.

IN THE ROYAL COURT.

4th January, 1873.

Trouette vs. Lartigue.—CHIEF JUSTICE ARMSTRONG: The plaintiff states that defendant has not made a special justification of each charge. The author plaintiff mainly relies on (Starkie) says: "where the original charge is specific the defendant need not further particularise in his plea." I have looked over plaintiff's declaration very carefully and I find the charges sufficiently explicit.

Plaintiff also says that defendant has not pleaded the general issue. In *Clarke vs. Taylor* (2 Bingham, 668) the plea which justified everything essential, was held good. According to Chitty on Pleading (1. p. 434) defendant may plead, as defendant in this case has done, that the libel or words were published or spoken not in the malicious sense imputed by the declaration, but in an innocent sense, or upon an occasion which warranted the publication, because it proves that the defendant is not guilty of the malicious libels charged in the declaration, although, it is now, he adds, more usual to give them in evidence under the general issue. Such a plea contains the substantial matter required to support a defence.

The question raised by the plaintiff has never been touched upon, that I am aware of, by a defendant or plaintiff in any one of the numerous commercial cases heard in this court in virtue of the Ordinance of 1826, which enacted that they should be decided according to the laws of England. I cannot see that it was argued at any time that the declaration or pleas filed in this Court must of necessity contain all the allegations deemed "substantial" in England in these cases. According to the procedure in England in 1826 (which to be logical should, according to the plaintiff, govern such cases,) the pleadings in this Court would be found very defective in substance. Were an advocate practising in this Court, to appear for a defendant against whom an action had been prematurely brought, he would, most probably, plead that credit was given for a certain time, which time had not expired. This would be considered not only sufficient in this Court, but just such a plea as a defendant in good faith should make, so that plaintiff should know the exact grounds of defence. Plaintiff might possibly have forgotten this engagement on his part, the plea would remind him of it. In England, on the other hand, this plea would be bad, "because" says Kerr, p. 202, "the declaration of the plaintiff in such a case means that the *debt* is *payable* at the time of the action brought, and the defence set up would be an *argumentative denial* of its being so payable." So much for the plea. I should have first stated that the declaration might also be bad as wanting some substantial allegation; as if it were said "that the defendant was indebted to the plaintiff for *freight* for the conveyance by the plaintiff for the defendant at his request, of goods in the ship, &c." A declaration drawn in this way and made in the case of *Place vs. Potts* (Kerr, p. 205) and which was decided twenty years ago, was held "bad in *substance* because it did not state that the debt was a money debt, or that the money was payable before the commencement of the suit." I presume we are all of opinion that such precedents are to be avoided rather than followed.

We have really nothing whatever to do with English Procedure. The Merchant Shipping Act is in force in all the colonies, but I have never heard it pretended that English Procedure was also introduced. The principle that the remedy must be sought according to the *lex fori* is now so well known that, in an ordinary case, I should content myself by citing it. "In regard

to the merits and rights involved in actions, the law of the place where they originated is to govern. But the *forms, and remedies and the order* of judicial proceedings are to be according to the law of the place where the action is instituted, without any regard to the domicile of the parties, the origin of the right, or the country of the act." This language of the celebrated Story is sufficiently explicit. In those cases where we have adopted the law of England, we have so adopted it that the merits and rights involved in actions brought before this Court shall be decided according to the laws of that country, but we have not adopted "the forms and remedies and the order of Judicial proceedings" *followed in England.* We have not set aside our own Procedure nor our right to examine parties on *Faits* and *Articles* and upon the *Serment decisoire.*

International Law, which is *as much* the law of the Island as the Ordinance of 1826, introducing the Commercial Law of England in certain cases, requires this Court to interpret contracts made in a foreign country—the Republic of Venezuela for instance—according to the laws of that country, it permits the defendant to oppose the demand on the same grounds that he might in the courts of Venezuela; but it certainly does not follow that this Court would require that the plea should contain what a Venezuelan Court would consider essential in a technical point of view. "It would," to quote Story again, "be absolutely impracticable to apply the process and mode of proceeding of the one nation to the other." Lord Brougham, in delivering his judgment in the celebrated case of *Don vs. Lippman,* put the case in the clearest light before those who will understand the difference between the law relating to the contract and the law relating to remedies. "The law on this point," he said, "is well settled in this country, where this distinction is properly taken, that whatever relates to the remedy to be enforced, must be determined by the *lex fori;* the law of the country to the tribunals of which the appeal is made. Then assuming that to be the settled rule, the only question in this case would be, whether the law now to be enforced is the law which relates to the *contract* itself or the *remedy.*"

In the case of *Trinbey vs. Vignier* (1 Bing. New Cases 151) the Court said, "the interpretation of the contract must be governed by the law of the country where the contract was made (*lex loci contractûs*): *the mode of suing,* and the time within

which the action must be governed, by the law of the country where the action is brought (*In Ordinandis judiciis, loci consuetudo, ubi agitur.*")

Whatever doubts may have existed in England on this point, have been dissipated, and there is but one opinion now held there, since the cases of *De La Vega vs. Vienna* (1 Barn and Adolph 284) and *The British Linen Company vs. Drummond* (10 Barn and Cres 903.)

If any question of pleading arose in a case brought in England upon a contract entered into at St. Lucia, it would not avail much to the party whose pleading was demurred to, to say that it contained all that was considered "substantial in St. Lucia." In the case of *Migneault vs. Malo*, and which was a suit brought in Lower Canada on a Will, and which was decided by the Privy Council last January, it was pretended on behalf of the Respondent in the Courts of Lower Canada and in appeal, that the evidence in the case was not valid according to the Law of Lower Canada, the *lex fori*, which permits a testator to make a Will according to the Law of England. The Privy Council, maintaining the decision of the court of original jurisdiction held that "oral evidence was admissible, without which, indeed, the new law would be nugatory and of no effect." This decision does not infringe upon the general principle. It is here decided that the English rule of evidence must govern as a matter of necessity. In France the same conclusions would have been come to, but for a different reason. In an action there for money lent in England it was objected that proof could not be made by witnesses, but the court admitted the proof upon the ground that the law of England permitted it. Bouhier holds the decision to be correct.

"There is scarcely any ground left," says Story, "open for controversy either at the common law or in the opinions of foreign jurists or in the actual practice of nations. It is universally admitted and established that the forms of remedies, and the modes of proceeding, and the execution of Judgments, are to be regulated solely and exclusively by the laws of the place where the actions is instituted; or as the civilians uniformly express it, according to the *lex fori.*" Our authors have always held that doctrine. Dumoulin, who wrote more than three centuries ago, thus expressed himself; *Quod in his quæ pertinent ad processum judicii, vel executionem faciendam, vel ad ordinationem judicii,*

semper sit observanda consuetudo loci, in quo judicium agitatur." Emerigon says "pour tout ce qui concerne *l'ordre* judiciaire, *on doit suivre l'usage du lieu ou l'on plaide.*" Boullenois "a l'égard du principe de décision, *quantum ad litis décisionem*, il se tire ou de la loi du contrat, ou de la loi de la situation ou de la volonté présumée des parties, lorsquelles ont contracté ensemble, en un mot la Loi seule de la jurisdiction n'y influe comme telle. *Diversitas fori not debet meritum causæ variare.* A l'égard des formalités judiciaires, *quantum ad litis ordinationem*, la règle est de suivre la procédure et les usages observés dans le lieu ou l'on plaide." The Dutch author Rodenberg and others cited by Story held the same opinion: *Primum utamur vulgatâ doctorum distinctione, qua separantur ea, quæ litis formam concernunt ac ordinationem, ab iis quæ decisionem aut materiam. Lis ordinandi secundum morem loci, in quo ventilatur.* I have entered into what may be considered too great a length on this point. It was, however, necessary for me to do so. Some proper system of pleading must be adopted; the distinction betweed Laws and Procedure must be drawn. We need not grope in the dark when we can have recourse to authors to enlighten us upon points which have been settled elsewhere than in St. Lucia. In the case of *Delisle vs. Beaudry* (12 L. C. Jurist, p. 221), I find a case upon which I would have rested my decision but for the reasons I have just mentioned. This was a case instituted in the District of Montreal, Lower Canada. Delisle conceiving himself injured by certain slanderous words alleged to have been uttered at a public meeting by Beaudry, being grave imputations on his conduct, brought an action against Beaudry. In a second plea to this action, defendant Beaudry pleaded: "That anything he ever spoke of plaintiff particularly on the occasion referred to in the plaintiff's declaration, was different from what is alleged by the plaintiff..... and that all that can be proved that he said, was and is true."

The parties were both represented by very able men. The plaintiff moved that the above portions of the plea be struck out for, among other reasons, "the said portion of the said plea neither denies the slanderous words charged in the said declaration, nor sets up matters or facts in justification of the same." The motion was rejected. Had the Judge considered himself bound by English Procedure, the motion might have had a different fate.

Plaintiff also says that defendant's plea cannot be maintained by the old French Law, and as this is one of the reasons given in his demurrer, I shall now examine this point. Plaintiff's allegation is correct. The object of all legislation before 1788 was to uphold despotism. It was such as a despotic Government required to support its institutions, and it is for that reason that the *political* laws of the French Monarchy are unsuited to us.

The learned Counsel also tells us that the law of this country as it was at the time of the conquest, unless repealed, must govern the case. This is a very important proposition. It has some *obiter dicta* to support it. If it be law, it affects the present case and will affect many others.

Sir Thomas Picton, being then Governor of Trinidad, authorised a Judge to subject one Louisa Calderon to the infliction of *piquetting*, on two occasions, to obtain a confession of the crime with which she was charged; on the second occasion she confessed being guilty of the alleged offence. He was prosecuted in England on his return to that country. Mr. Nolan, on behalf of the prosecution, maintained that the conduct of Sir Thomas could not be justified by the laws and customs of the conquered country, for that according to 2 P. Williams, p. 75, all laws *malum in se* are set aside by the laws of the conquered country, and he remarked, "there is undoubtedly a difficulty in drawing the precise line, but so there is in all human matters, and this matter must be reposed in judicial discretion;" upon which Lord Ellenborough observed: "all difficulty in drawing the line is avoided, if, in conformity to the fifth resolution in *Campbell vs. Hall*, you say, 'that the laws of a conquered country continue in force until they are altered by the conqueror'; that," he continued, "leaves no uncertainty or difficulty, as the colony was to remain as before." Sir Thomas Picton was found guilty—the law of Trinidad not having been proved. A new trial was obtained on the 26th April, 1806, on two grounds, first, because new evidence had been produced, showing the existence of the law of torture prior to the cession of the Island; secondly, that a special verdict might be found, in order to raise the question, whether such a law could remain in force in an English dependency. The second trial came on before Lord Ellenborough on the 11th June, 1808. In charging the Jury, he said that the existence of the law of torture had been proved, and this being admitted, the question he put to them was, "whether, when an island is ceded to the British arms, a species of punishment, a

mode of investigating the truth so utterly inconsistent with the constitution and laws of Great Britain, and with the habits of its people, is virtually abrogated, and whether His Majesty, in continuing the former laws of the conquered country, must not be considered as doing so with an exception of the power to inflict torture," and notwithstanding the strong language he held on the first trial, he would not intimate his opinion on this matter, stating it to be a subject of great doubt, and referred to the expression of Lord Chief Justice de Grey in *Fabrigas vs. Mostyn.* A special verdict was agreed to. The argument on the special verdict was heard, but the Judgment was never given—the case being withdrawn. Howell, in his "State Trials," says: "that it was thought by the bar that, had the opinion of the Court been given it would have been *against* General Picton. In the case of *Fabrigas vs. Mostyn*, which was an action for false imprisonment, Mr. Mostyn had banished Fabrigas without trial, as his predecessors the Governors of Minorca had the power to do, yet Chief Justice De Grey said: "I do believe Mr. Mostyn was led into this under the old practice of the Island of Minorca, by which it was usual to banish. I suppose the old Minorquins thought fit to advise him to this measure. But the Governor knew that he could no more imprison him for a twelve month than he could inflict the torture; yet, the torture as well as banishment was the old law of Minorca, which fell *of course* when it came into our possession. Every English Governor knew he could not inflict the torture; the constitution of this country put an end to this idea, (30 Howell S. T. 181.)

If the old Law of France be in force here, the Governor of this Colony could summarily dispose of any newspaper. It is in that light that the question raised in these two cases are important to the inhabitants of this Island in the absence of any order emanating from Her Majesty's predecessors, and in the absence of all colonial legislation on the subject, Chief Justice Marshall says: "the law which is denominated political is necessarily changed, although that which regulates the intercourse and general conduct of individuals, remains in force until altered by the newly created power of the state." Lord Stowell remarked, in *Ruding vs. Smith*, "that even with respect to the ancient inhabitants, no small portion of the ancient law is unavoidably superseded by the revolution of government that has taken place." Halleck in his work on International Law says "it is equally true that some of the laws of the new

sovereignty do extend over such newly acquired territory, and that the existing municipal laws of such teiritory are in some degree modified and changed by the acts of acquisition, and without any special decree, or statute of the Executive or Legislative departments of the new sovereignty." However absurd the exception as to pagans mentioned in Calvin's case may be, there can be no doubt of the correctness of the general principle that the laws of the conquered territory, which are contrary to the fundamental principles of the conqueror, cease on the complete acquisition of the conquered territory, because they are opposed to the already expressed will of the conqueror. "Each case must rest *upon* its own basis, and be judged by its own circumstances. From this view of the jurisprudence of the conquered country, we must determine what laws of the acquired territory remain in force, and what laws of the conqueror *propria vigore*, extend over such territory."

In this Island many *political* Laws, to use the very apt expression of Chief Justice Marshall, have been considered abrogated by the conquest without any Statute Law to that effect. For instance, I suppose no one would imagine that an action could be brought against a notary because he has not obeyed the *Réglement* of the 8th January, 1750, renewed on the 9th Nov. 1769, requiring him to send to the Council every three months "une liste des particuliers qui, dans les actes qu'ils ont passés, ont pris la qualité de chevalier, écuyer et autres denominations de noblesse"—If contrary to my opinion, such laws as these are really in force, in that case many among us may find not only their rights but their *état civil* seriously compromised.

In the interpretation of the old Law of the Colony, we should always bear in mind the altered situation of the country; and its position with respect to the Mother Country.

In the case of *Ruding vs. Smith* already referred to—which was the case of a marriage at the Cape of Good Hope (then as now occupied by us) between British subjects under the age of 30, and clearly invalid under the Dutch Law in force there—Lord Stowell said: "suppose the Dutch Law thought fit to fix the age of majority at a still more advanced period than thirty at which it then stood, at forty, it might surely be a question in an English Court, whether a Dutch marriage of two British subjects, not absolutely domiciled in Holland, should be invalidated in England on that account; or in other words, whether a protection intended for the right of Dutch parents, given to them

by Dutch Law, should operate to the annulling of a marriage of British subjects, upon the ground of protecting rights, which do not belong in any such extent to parents living in England, and of which the Law of England could take no notice, but for the severe purpose of this disqualification." He held the marriage valid.

The freedom of the Press in England is not established by any Statute. The regulations against it, renewed at different times, expired in 1694, and from that time the press has been free. I do believe that freedom to be essential for the well-working of our own system of Government where only quasi representative institutions exist; and which I believe are generally considered as suited to the circumstances of the country. It is true that we have the Imperial Government to appeal to, which would at once cause any wrong to be redressed. It is, notwithstanding, also important that a fair and free discussion should be permitted so as to prevent the commission of any wrongful act. As to the licentiousness of the press we are all agreed that that should not be allowed. There was no greater upholder of the freedom of the Press than Lord Camden; and as such, in delivering a Judgment in a case of libel, he said, "when licentiousness is tolerated, liberty is in the utmost danger, because tyranny, bad as it is, is better than anarchy, and the worst of government is more tolerable than no government at all." The Press has the right to discuss the public conduct of public men; it may even under certain circumstances, be justified to speak of their private conduct. While I say this, I must confess that I have been surprised to read that "public men are public property" in the sense that almost any thing may be said of them. I am not aware than when men give their services to the public—very often for a less renumeration than they would have obtained from private individuals—that they are supposed to have lost all their fine feelings, their *sensibilité*, to use an expressive French word, and that they have become a target for the meanest of quill drivers to shoot at.

I cannot decide that to be libellous here which would be considered a fair, honest and not malicious criticism of the conduct of a public functionary in England. I am not required to go any further in deciding upon the merits of the pleading filed by plaintiff. Whether the article published in the "St. Lucian" of the 17th August be or be not libellous is what the evidence will show—it is a subject for future consideration.