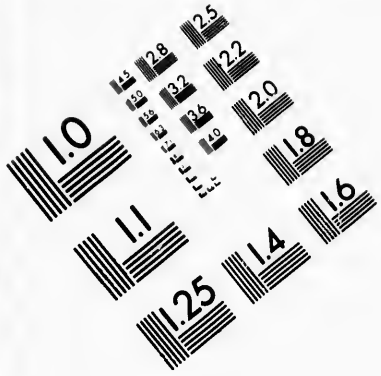

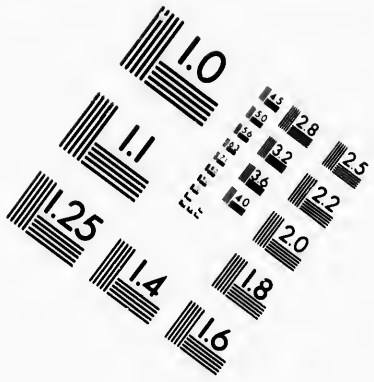

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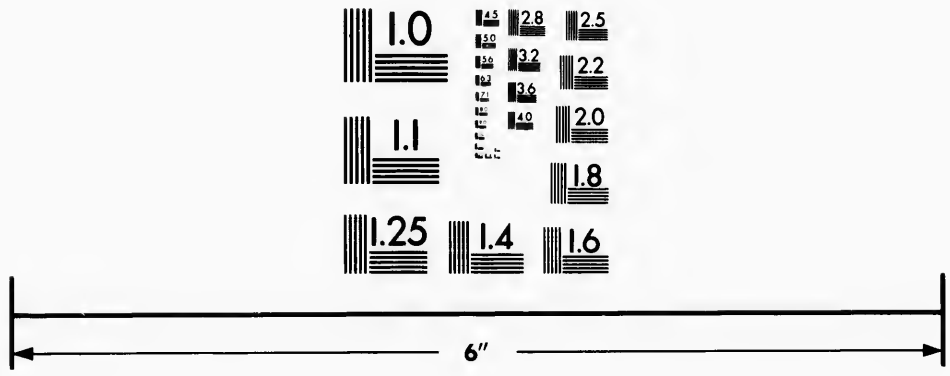

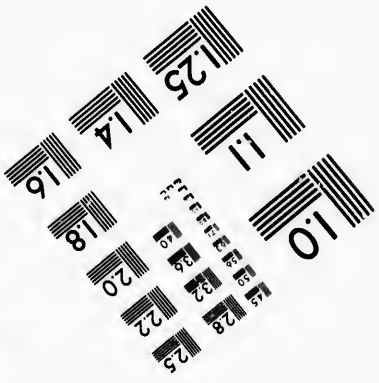

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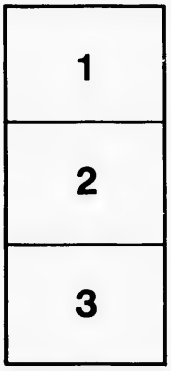

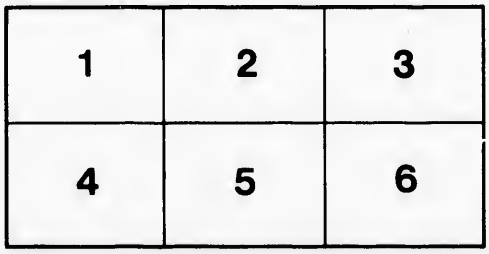

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OPINION

OF

MR. DUPIN,

ADVOCATE,

OF THE ROYAL COURT OF PARIS,

ON THE

RIGHTS

OF THE

SEMINARY OF MONTREAL,

IN CANADA.

PARIS, 1826.

MONTREAL:
PRINTED BY JOHN LOVELL,
ST. NICHOLAS STREET.

1840.

OPINION

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RIGHTS OF THE SEMINARY OF MONTREAL,

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PARIS, 1826.

THE UNDERSIGNED COUNSEL,

After reading the several Memoirs published by either party to the suit now pending between the Seminary of Montreal and Mr. Fleming; and also a Memoir of the English Crown Officers, the analysis of the different pleadings, and the extract from the opinion of one of the Judges before whom the said suit was brought, together with divers other documents relative to the questions discussed therein,

Is of opinion as follows:—

When the undersigned was consulted for the first time on this subject in March 1819, he had before him none of the Documents just enumerated;—he had only to give

his opinion on the merits of the Instrument styled a "*Concession*," executed on the 29th of April 1764, between the Seminary of Montreal and that of St. Sulpice at Paris; an Instrument which, considered as an isolated act, it appeared to him might be considered as a kind of partition, by which the right to certain property was not conferred, but declared to exist.

The same thing may be said of the opinion dated 18th August 1819, drawn up by Mr. Hennequin, and on which the undersigned was consulted as were also several other Members of the Bar at Paris: in this opinion no other Documents are considered than the Treaty of Peace of 1763, and the above cited Instrument executed in 1764, to the appreciation of the form and effects of which the said opinion is confined.

The Counsel consulted then were in fact ignorant of the real questions in the solution of which the Seminary of Montreal is interested; and therefore they have not discussed them.

At the present time when the information is more complete, it becomes possible to understand precisely the true point of view in which the position of the Seminary of Montreal is to be considered.

As the Seignior and Proprietor of the Island of Montreal, and as exercising throughout the said Seigniory the right of *Banalité*, which is one of the accesssory rights of the said Seigniory, the Seminary of Montreal brought an action against Mr. Fleming for the purpose of sup-

pressing a Mill which he caused to be constructed in violation of the said right of *Banalité*.

The Defendant instead of answering to the merits of the question (which it would have been difficult for him to do, as the right of the Seignior is incontestible) conceived the project of contesting the existence of the Seminary as a legally constituted body, its right to property of which it is in possession, and consequently its power to act by Attorney in defence of the said right of property and possession.

Thus we have the following questions to examine:

1stly. Whether the Seminary of Montreal has a legal existence as a Seminary and Community?

2ndly. Whether it is in fact the Proprietor of the Establishment at Montreal, and of the Land and Seigniory thereon depending?

3rdly. Whether its possession (which last at least is incontestible,) is not sufficient to maintain an action of complaint? (*complainte*).

Such are the questions which we are now about to treat separately.

FIRST QUESTION.

Has the Seminary of Montreal a legal existence as a Seminary and Community?

In every civilized State, no Corporation or Community can exist except such as have been established or con-

firmed by the authority of the Government:—*Nisi ex senatusconsulti auctoritate vel Cæsaris, collegium vel quodcumque tale corpus coierit; contra senatus consultum, et mandata, et constitutiones collegium celebrat. Loi* 3, §, 1 *ff de Collegiis et corporibus.*

We do not state this proposition as an objection which it is the business of the Seminary of Montreal to refute, but as a salutary rule which forms the very basis of its existence.

In conformity to this principle, it has always been held as a maxim in France, that in order to be legal, Corporations and Communities must either be constituted or approved by Letters Patent from the King, enregistered in the *Parlement* or in the *Conseils Supérieurs.* (See in particular the Edict of the month of August 1749, Art. 1, which in this respect only renews the provisions of the ancient Ordinances).

We say constituted or approved: for the authorization given after the performance of the act, has the same effect as that which should have preceded it:—*Ratihabitio mandato comparatur.*

And thus it has repeatedly happened that Corporations, the first establishment of which was by no means legal for want of Letters Patent, have been subsequently confirmed by the Sovereign, and have forthwith enjoyed as incontrovertible, an existence dating from their first establishment, as if they had been originally erected by the authority of the Prince.

This point was especially decided in favor of the Seminaries by the Declaration of the 26th May 1774, (addressed to several *Parlements* under date 1762) in which, interpreting as far as need was, the 13th Article of the Edict of 1749, by which the King reserved to himself the right deciding the fate of establishments unauthorized, but virtually and peaceably existing before the promulgation of the said Edict, His Majesty declares that, "it "is not his intention to include within the meaning of the "said 13th Article, the Seminaries established before "the Edict, *which shall remain authorized and confirmed* "*by virtue of these presents.*

The necessary result of this act of Legislation, (which as far as the Seminaries are concerned is special) is, that the Seminary of Montreal, the existence of which is anterior by nearly a century, to the Edict of 1749 and the Declaration which followed it, would have a legal existence by virtue of the confirmation contained in the said Declaration, even if it had no other Title in its favor.

But it has a Title of so positive a nature that it is impossible not to pay especial regard to it.

In the Collection of Edicts, Royal Ordinances, Declarations and Decisions of the King's Council of State, relating to Canada, printed at Quebec in 1803, by order of the Lieutenant Governor of the Province of Lower Canada, in consequence of two several Addresses of the House of Assembly, dated the 5th and 7th of March 1801,

a collection which is consequently official, (*) there will be found, in the first volume page 80, under the Title—"Establishment of a Seminary in the Island of Montreal, &c." Letters Patent of Louis the Fourteenth, dated at St. Omer, in May 1677, countersigned "*Colbert*," and enregistered in the *Conseil Supérieur* at Quebec, Register A. folio 67; in which we find these words, "Being willing to "favour the Petitioners, *we have permitted and permit* "*them*, by these presents signed with our hand, *to erect* "*a Community and Seminary of Ecclesiastics in the said* "*Island of Montreal.*"

After these formal expressions, can there remain the slightest doubt of the force of the authorization contained in the Letters Patent?—We do not for the moment insist on the clause of mortmain inserted therein: the consideration of that clause belongs to the second question;—but for the present, and in answer to the first question, *whether the Seminary of Montreal has a legal existence;* we reply most positively "*yes, it has a legal existence.*"

Special Letters Patent would not even have been ne-

* This may serve for an answer to the demand of Mr. Fleming that the Seminary should produce the original Title.—A party to a suit is only bound to produce such Documents as he ought to have in his possession; but Laws are not addressed to Individuals;—they are kept of record in the public archives where all who wish to cite them may see them.—In former times they were addressed to the Courts of Law in order that they might be enregistered therein.—Their existence is therefore legally proved when they are found on the Registers, or, if there be no Registers (for every thing perishes in time) when they are found in collections printed by order of the supreme authority.

cessary, as we have said in referring to the provision of the Declaration of 1774.

But even if they had been necessary, they were granted;—the terms are express and unequivocal: "We "have permitted and do permit them by these presents "signed with our hand, to erect a Community and Semin- "ary of Ecclesiastics in the said Island of Montreal "therein, &c."

The Sulpicians of Paris could not of their own private authority constitute a Seminary and Community at Montreal; and if they had attempted to do so, the act would have been null.—In order that the erection should be legal, Letters Patent enregistered in the Council of the Province were necessary. But from the moment that such Letters Patent were granted and enregistered, the Seminary of Montreal acquired an existence *peculiar to itself*,—a *legal* existence, as *indisputable* and as *independant* as that of the Seminary of St. Sulpice at Paris; and in like manner the Sulpicians of Paris could not alone have erected the Seminary of Montreal without Letters Patent, so likewise would it have been impossible for it to do any thing which could affect the existence of the latter when once duly authorized.

It is then a point which cannot hereafter be contested, that the Seminary and Community of Montreal has, from its origin, *had a legal existence as a Seminary and Community.*

This point is important, and ought in the first place to

be considered distinct from any other; it is independent of the possession of any particular property, or the exercise of any particular real or Seigniorial rights: the Community may be more or less rich, it may or may not possess any particular property (this point will be considered presently); but considered in itself, it exists *legally* by virtue of Letters Patent duly enregistered, and as a *Community*, with all the rights and privileges attached to a Corporation legally constituted.

It has, therefore, the right of being represented in Court or out of Court, in all its proceedings, and in the different acts in which it is interested, by a legally appointed Attorney; for this is the privilege of all Corporations: *Quibus autem permissum est corpus habere collegii societatis, sive cujusque alterius eorum nomine, proprium est, ad exemplum reipublicæ, habere res communes, arcam communem, et actorem communem sive syndicum, per quem, tanquam in republicâ, quod communiter agi, fierique oporteat, agatur, fiat.* Loi 1, 5, 1, *ff. Quod cujusque universitatis nomine.*

The Conquest introduced no change in this order of things:

1stly. In order to prove that it did, an express article to that effect must be produced.

In fact, says Vattel (*Droit des Gens*, Vol. 2, page 144, in the paragraph intituled, "*des choses dont le Traité ne* "*dit rien*, the state of things which exists at the time the "Treaty is made, must be considered as the legitimate

"one; and if it be wished to make any change, express "mention must be made of such change in the Treaty "As a consequence of this, all those things of which the "Treaty makes no mention, *ought to remain in the state* "*in which they were at the time it was concluded.*"

2ndly. Now, far from offering an argument simply negative, founded on the fact that the Treaty of 1763 is silent on this head, that Treaty stipulates generally for the preservation of the rights of all French Subjects, and the free exercise of the Roman Catholic Religion; and in the particular capitulation of Montreal, it is stipulated expressly, that the existing Communities shall be maintained. That article is conceived in the following terms: "All the Communities and all the Priests shall preserve "their moveables, the property and Revenues of the "Seigniories and other estates which they possess in the "Colony, of what nature soever they be; and the same "estates shall be preserved in their privileges, rights, "honors and exemptions."

When it has appeared that any of the said Communities could not be preserved, either because they did not comply with the conditions of the Treaty, or for any other reason, the British Government has made known its intention in this respect, by preventing them from admitting new Members, and allowing them gradually to become extinct. It allowed the Seminary of Montreal, on the contrary, to admit new Members; and this Community has in fact preserved its existence since the Trea-

ty of 1763, in the same manner as before it. The most recent acts of the British Ministry, tend to confirm this assertion.

It is then true, both in fact and in Law, that the Conquest made no change in the pre-existing order of things, and that since it was concluded, as before, the Seminary of Montreal has never ceased to have a legal existence.

The sole effect of the Conquest was that the Priests of the Seminary of Montreal instead of remaining French Subjects, became English Subjects; their Community instead of remaining under the protection of the King of France, passed necessarily under that of the King of England; but this change affected the Sovereignty only; every thing else continued unchanged, for the benefit of the conquered Country.

There is of course no intention to contest with the Parliament of England, and the Government of that Country, the right which became vested in them by the effect of the Conquest, and which certainly belongs to them since the Treaty of Peace, to make new Laws, and to modify the temporal Government of Communities, if the public interest should require it; all that is asserted is, that the Conquest did not as a matter of course annul any of the acts of Sovereignty exercised by the French Government while in possession of the Country. We maintain on the contrary, that the Laws given to the Country, the Institutions founded, and the rights acquired, continued to subsist in so far as they were not de-

rogated from either at the time of the Conquest or subsequently.

And if the British Government should wish to effect any change in any of these matters for the *future*, as this would only be done with the view of promoting the supreme welfare of the State, neither would it be done until after the state of things had been examined, the parties interested heard, their right weighed, the treaties reviewed, and all other considerations discussed; with that scrupulous attention to the preservation of the interests of its Subjects, which that Government always displays. Until a change is thus effected, every thing which legally existed before the Conquest will continue to subsist as it has done since that event.

SECOND QUESTION.

Is the Seminary really the Proprietor of the Establishment at Montreal, and of the Lands and Seigniories thereon depending?

In like manner as the Seminary of Montreal could not legally have existed as a Corporation without Letters Patent to authorize and render valid its establishment, so likewise it could not validly have acquired and possessed temporal property without being authorized to that effect by Letters Patent duly enregistered.

But this double authorization was obtained; and in like manner as the Seminary became *legally a Corporation*,

so likewise it became at the same time the *legal holder* of the property assigned to it: let us go back to an earlier period.

From the year 1660 or thereabouts, a free society had existed, composed of many individuals, Priests as well as Laymen, *for the conversion of the Indians in New France.*

The Gentlemen of the Seminary of St. Sulpice, listening only to their zeal, had used all their efforts to second this pious undertaking.

It was then that the primitive associates found that they should do much better by leaving the task of continuing the work thus commenced to the Sulpicians: and, to this end, they, acting by their Attornies, subscribed a Notarial Act, executed at Paris, on the 9th of March, 1663, which states: "That the said associates, in their "quality aforesaid, for the promotion and in consideration "of the conversion of the Indians in New France, have "given and do give by these presents, by pure, simple and "irrevocable Donation, to take effect during the lives of "the parties, to the Priests of the Seminary of St. Sul- "pice, hereunto present and appearing by *Messire* "Alexandre le Ragois de Bretonvillière, Priest, Superior "of the said Seminary, all the right of property which "they (the said associates) have or may have to the Is- "land of Montreal, situate in New France, at the Sault "St. Louis, on the River St. Lawrence, ... together "with the Seigniorial House called *La Forêt*, in the said

"Island of Montreal; the Farm and cleared Lands and
'other dependencies of the same; and also the Seigniory,
"and all Seigniorial rights, jurisdiction and dues, all
"debts due to them from the country or from individuals
"in Quebec, Montreal or in France, and generally all
"powers, rights and rights of action which appertain and
"belong to them on account of the said Island of Mon-
"treal, either in France or in New France, for any cause
"or reason whatsoever; to have, hold and enjoy the same,
"the Members of the said Seminary accepting hereof as
"incommutable proprietors thereof: the said Donation and
"abandonment being made on the following conditions:
"1stly: That the Donation and Property of the said Is-
"land shall for ever be inseparably united to the said
"Seminary, without being liable to be separated there-
"from for any cause or reason whatsoever: (and the last
"clause is in these terms:) "And the said parties have
"agreed, that if after the charges herein above mentioned
"shall have been paid, together with the ordinary costs
"and expenses necessary *for the preservation of the Island,*
"*and the continuance of the work*, there shall remain any
"portion of the revenue arising from the property hereby
"ceded, *such remainder shall be employed for the ad-*
"*vancement of the work*, in such manner as the zeal and
"prudence of the Gentlemen of the said Seminary shall
"suggest, without including in this condition the Lands
"which are not now cleared, or which the Gentlemen of
"the said Seminary may hereafter cause to be cleared,

"nor the improvements, augmentations and additions "which they may make to or about the same, of all which it "shall be lawful for them to dispose as they may think "proper."

This Donation was enregistered at the *Greffe* of the *Châtelet* of Paris, on the 5th June 1663; but this formality was not all that was required. It was a formality appointed with reference to transactions between private individuals; and in this instance the quality of the Donees, and the conditions of the Donation made the intervention of the Sovereign necessary.

The Donees could not legally acquire property unless they were authorized so to do by Letters Patent.

But in what manner were these Letters Patent themselves to be demanded and obtained?

The Donation merely and simply transferred the right to the property; it was made for an object clearly pointed out, *for the promotion and in consideration of the conversion of the Indians in New France.* The whole was consecrated to the performance of this work; and even in case of excess or increase of Revenue, such excess or increase was to be *employed in like manner.* The Seminary of Paris was only at liberty to dispose of such clearances, additions and improvements as it should itself make, which were thereafter to constitute a sort of *peculium* at its own disposal; but, we repeat it, *the whole principal of the Donation was exclusively destined to the accomplishment of the work pointed out.*

Now it is evident, that as this work was to consist in the conversion of the Indians of Canada, it could not be executed by the Gentlemen of the Seminary of Paris: it could only be performed *on the spot*, in Canada, by Members of the Society taken from that body, but *sent to and resident in Montreal.*

Hence the necessity of establishing a *stationary* Seminary and Community at Montreal, there to possess the property and to perform the work stipulated. With this design the Donees drew up the following Memorial to the King, which is prefixed to the Letters Patent of May 1677. "The Ecclesiastics of the Seminary of St. "Sulpice, of the Suburb Saint Germain-les-Paris, have "most humbly represented to Us, that ..... made "a Donation to them, by a Deed bearing date the 9th "March 1663, of the Island and Seigniory of Montreal, "in New France, with the appurtenances and dependen- "cies thereof, to which said place they have sent Priests "who have laboured in converting the Indians with so "much success, that they have been invited to send "others to make up the number of fourteen, who might "form a Community there, if it should please us to grant "them the requisite Letters Patent."

And here, before we proceed to consider the Royal answer, let us obtain a clear idea of the Letters Patent obtained in like cases. They are not a matter of pure form, they are *requisite in that behalf.* The Seminary

does not misunderstand this truth; far from this, it is the first to announce it.

The Letters Patent are the *complement* of the Donation; without them it would have remained without effect; the Donees would have continued unable to acquire the property, and the stipulated conditions could not have been executed.

Let us next observe that the King does not in this and similar cases give a merely passive consent; He speaks with authority; He acts as a Sovereign, as the Patron of the Church, as the tutor politically speaking of all the Corporations and Communities under His dominion. He does not in this case perform a mere act of executive power, His act is one legislation, relating to a matter of public interest, the legal transmission of property. Letters Patent of this kind have always been subjected to verification and enregistered in the Supreme Courts, and were null and void if not enregistered.

The Patents were not a vain formality: they were never granted but upon good cause shewn, and sometimes the Donation was modified, either by the Letters Patent themselves or by the Edict of enregistration, and these modifications affected either the amount of the Donation when it was considered excessive, or the nature of the conditions when they appeared to be illegal, undesirable, or susceptible of amendment.

Let it not be objected that in so doing the King and the Parliament altered the Contract! For them there was

no Contract, their authority was not fettered by an Instrument, which, on the contrary, could have no force, except what it derived from their approval, which, until so approved, was no more than a mere promise, *solius offerentis promissio*, an act which remained a nullity if they did not think proper to agree to it, and which might be modified, if they thought proper not to adopt it without some modification.

In this last case, if the modifications introduced were disagreeable to the Donor, it was for him to declare that his will not having been perfectly complied with, it was not his intention to hold the Donation good, and that he annulled the Gift. But if he omitted to make such a declaration, or merely permitted the Donation to be executed according to the conditions prescribed by the Letters Patent, he was considered to have acceded to them; and the Letters Patent being from that time forth confounded with the Donation, formed with it one act, and inseparable and indivisible from it, as if both had been executed simultaneously and for the same object.

This being stated, let us now see what answer the King made to the Memorial of the Gentlemen of the Seminary of St. Sulpice: "For these reasons, being well "informed that We could do nothing more advantageous "to the propagation of the true faith, or more conducive to the establishment of the Christian Religion in "Our Province of *New France*, and being willing to "listen favorably to the said Memorialists, We have per-

" mitted and do permit them by these presents, signed
" with Our hand, to erect a *Community and Seminary of*
" *Ecclesiastics in the Island of Montreal*, there to labour
" according to the instructions they receive and in con-
" formity to the Holy Councils of the Church, and the
" Ordinances of Our Kingdom, in the conversion of the
" Indians, and the instruction of Our Subjects, and to
" pray to God for Us, and Our Royal Successors, and
" the Peace of the Church and of Our Kingdom: and
" with the intention of further facilitating the said Esta-
" blishment, We have accepted, consented to, and
" approved, and do accept, consent to and approve the
" said Donation, set forth in the Contract, bearing date
" the said ninth day of March, one thousand six hundred
" and sixty-three, hereunto annexed under the counter
" Seal of Our Chancery; and of Our further Grace, *We*
" *have directed and do hereby direct that the said Island*
" *and Seigniory of Montreal be held in mortmain for ever*,
" as being dedicated and consecrated to God; willing
" that it be united for ever to the said Community, with-
" out its being possible that it be bound, hypothecated
" or alienated by any Member thereof in particular, for
" any cause or reason whatever, to be held by the Mem-
" bers of the said Seminary and Community, freely and
" absolutely, without any obligation on their part to dis-
" possess themselves thereof, to appoint a man whose
" death shall be considered as that of the Seignior, or
" to pay to Us or to Our Royal Successors, any fine or

" indemnity, mutation fines or dues, or other dues what-
" soever from all which we have relieved and discharged
" them, and of which (to what sum soever the same may
" amount) We hereby make a Donation to them, on con-
" dition of their paying all such indemnities and other
" dues as may accrue to any Seignior other than Our-
" selves. And We further enjoin Our trusty and well
" beloved subjects holding Our Supreme Council *at*
" *Quebec*, and all others Our Officers whomsoever, to
" cause these presents to be *enregistered*, and the said
" Ecclesiastics of the said Seminary and their Successors,
" to enjoy the benefit thereof fully, peaceably and for
" ever, and neither to disturb nor allow others to disturb
" them in the enjoyment thereof."

Immediately after these Acts, we find this entry in the collection before cited, page 86: "Enregistered, to the " end that it may avail according to its tenor, to the Se-" minaries of St. Sulpice at Paris and Montreal, accord-" ing to the order made this day; Quebec, this 20th September 1777." Signed, "Becquet." And in the margin of the Letters Patent themselves, page 80, of the printed collection, there is the following note: "*Enre-* " *gistered in the Conseil Supérieur*, Register A, folio 67, " verso," to which Register any one is at liberty to refer, to verify the said Documents, and to demand a copy thereof.

The Act having thus become perfect in itself, what have been its consequences? Two things equally cer-

ain:—1stly. The legally authorized establishment of the Seminary of Montreal, with the legal quality of *Community*, as we have already said in the first paragraph:—2ndly. The permission that the Land and Seigniory of Montreal should be held in *mortmain* by and for the benefit of the said Community.

Let it not be objected here, that in this respect the wishes of the Donors, who had on the contrary given the property to the *Seminary of Paris*, were not complied with. The Donation was made to the Seminary of Paris, but the property given was to be exclusively employed in promoting the *certain objects in Canada*.—The establishment of a Community *ad hoc* in Canada, to be resident there, to possess the property which was situate there, and to perform there the work which could be performed no where else, was the method employed by the Donors, with the consent of the supreme authority, and without any remonstrance on the part of the Donors. —A long possession, in conformity to this order of things, followed.—No one has any longer a right to complain of it.

So long as Canada remained united to France, the Seminary of Montreal had beyond all doubt, two kinds of superiors: 1stly. In spiritual matters, the Seminary of Paris, as the Chief Establishment of the Society of the Sulpicians, and the natural Director of the Communities dependent on that Society: 2ndly. In civil matters, the King of France, to whom the Seminary of Montreal

owed Fealty and Homage in its quality of possessor of certain Fiefs, and who was, as King, the Patron of all Public Institutions.

But the effect of the Conquest was to transfer this superiority in Civil matters to the King of England; and France ceased to exercise any influence over the Government and affairs of the Seminary of Montreal.

This existence of the Seminary of Montreal, as an establishment distinct and separate from the Seminary of Paris, is the less liable to be called in question, as this separation was established even before the Conquest, by a number of instruments of indisputable authority. (The whole of these acts are extant and may be seen from 1696 to 1744.)

It is in vain to oppose to this, arguments drawn from certain expressions which seem to have indicated the Seminary of Paris as the proprietor. It is a principle that qualities erroneously ascribed cannot affect the right of any one.—The same thing must be said of certain Petitions presented, before the Conquest, to the French Government, by the Seminary of Paris, acting for that of Montreal.—If on these occasions the Seminary of Paris appeared to identify its interests with those of the Seminary of Montreal, to which it naturally bore a paternal affection, it is not the less true either in fact or in Law that the property of the Seminary of Montreal was not the property of the Seminary of Paris, any more than the property of the Seminary of Paris was that of the Semi-

nary of Montreal.—Now, if this separation between the two Seminaries and of their interests, was a settled point even before the Conquest, how is it possible to refuse to acknowledge it, after the Conquest has rendered it even more clear by destroying every kind of connection between them?

And let us further consider to what consequences the arguments brought forward by the opponents of the Seminary would lead.—According to them, the Donation was made to the Seminary of Paris alone;—the Seminary of Paris was the sole owner of the property up to the day of the Conquest; and as it did not sell the same within the delay stipulated by the Treaty of 1763, and as on the other hand the Act of the abandonment made in favor of the Seminary of Montreal on the 29th April 1764, was a nullity for want of being duly authorized, it must follow that the property at Montreal remained without any owner, and consequently fell to the Crown of England as property belonging to the Demesne thereof.

If the premises on which this argument is founded were true, the consequence to be deduced from them would be completely the reverse of those just stated.

The consequence would, in fact, be, that the parties to the cession, acting in good faith, had merely mistaken their rights and the manner in which the Treaty was to be construed.—The Seminary of Paris did not believe itself the absolute proprietor of an Estate over which it understood itself to possess, at most, certain honorific

rights, without any pretension to the profits arising from that Estate :—it did not believe itself entitled to sell for its own advantage and for the purpose of conveying the price to France, a property which, in its opinion, ought to remain consecrated to the performance of a work which could only be performed in Canada, by a Community established for that very purpose and to remain for ever resident in Canada.—If there was error in this, all the parties at least acted in good faith; and the British Government has itself too much good faith, to allow it to be possible to suppose that it would wish to take unfair advantage of so innocent an error for the purpose of subsequently despoiling both parties, one of which at incontestibly the true proprietor.

Now, this being the case, if this error is now for the first time pointed out and acknowledged, is it not evident that the parties ought to be replaced in the same condition in which they were before, and that from the very annulment of the cession of the 29th April 1764, as containing a transfer which was null from a defect in point of form, there would arise a right to dispose of the property as it might have been disposed of on the day on which the Treaty was made.

In fact, the Treaty having prescribed that the sale should be effected within a certain time, is it, for example, to be supposed, that if a sale made by a French subject to an English subject, and completed within the said time, became void afterwards either by default of the

payment of the price or through any defect of form, or other legal cause, the property would be forfeited to the Crown of England?—Is it not evident, on the contrary, that in default of payment the Frenchman might take the property back, on condition that he should sell it again immediately?—The reason is that there would in this case be no infraction of the Treaty to which it was the intention of the Frenchman to conform, and that it was only in consequence of a purely fortuitous and accidental circumstance that the sale became void.

The same would be the case with regard to the Society of the Seminary of Paris.—They believed that they had complied with the condition of the Treaty, by declaring that they abandoned, *as far as need be*, their right to the property in question, in favor of those members of their Society who had become British subjects: the validity of this abandonment cannot be disputed without an acknowledgment that they are reinvested with the right to dispose of the property within the shortest delay possible.—The whole effect then, of the objection (if it were well founded) would be to despoil the Sulpicians of Montreal who are British subjects, and to re-invest temporarily the Sulpicians of France who have remained French subjects.—An argument of this kind would scarcely be brought forward by the very well informed agents of the British Crown, and still less by those who only affect the language of men devoted to the advance-

ment of the public interest, for the purpose of masking their schemes of private advantage.

But it is necessary that a more correct method of considering the cession of the 29th of April 1764 should be adopted.

In the first place it may be said, that if it was necessary that the said cession should be authorized by the King of France, it was so authorized by virtue of the Treaty of Peace, by which that Monarch ceded the entire property of Canada to England, and placed his subjects under the necessity of disposing of their property or of becoming British subjects.

The validity of the cession might also be maintained by the arguments developed in the opinion given on the 18th August 1819, or it might be explained, (as it has been by me) in the sense given to it in my former opinion, as an instrument which neither transferred nor conferred any right of property but was simply *declaratory that such right was vested in the only Members of the Society who, being resident in Canada and having consented to become British subjects, would thenceforward be capable of continuing to possess it, to the exclusion of all others.*

But it appears to me that its validity may also be maintained by considering it in a new point of view.—The Seminary of Montreal must always have looked upon the Seminary of Paris as its superior.—In the latter there was, if I may so say, a sort of moral proprietorship, a

dominion of superiority, a power of superintendence.—This tie (except with regard to what was purely spiritual in it) was doubtless dissolved by the Conquest; but men who are by their station devoted to the service of God, would naturally be more scrupulous than the generality of mankind: for the latter it frequently suffices that a thing is not forbidden to induce them to consider it as permitted; a purely moral obligation does not stop them, and they only give way to a rigorous obligation which they would not be permitted to violate with impunity.—If they had reasoned like men of the world, the Sulpicians of Canada would not have required any act of the nature of that of the 29th of April 1764.—They would have been satisfied with considering that they were as effectually separated from the Sulpicians of Paris by the Conquest, as Canada was from France by the Treaty.—But the Seminary of Paris, by reason of the tender affection which its Members bore to their brethren at Montreal, was not willing that the latter should preserve the slightest scruple.—Looking on the Conquest as an event which irresistably destroyed all temporal superiority, and placed the Seminary of Montreal in a state of perfect independence in this respect, the Seminary of Paris generously came forward, and *so far as need was,* (but without its being necessary) declared itself to have abandoned all the property of the Order at Montreal to such of the members thereof as were about to become British subjects, and to remain at Montreal.

This act was not a Sale, for there was no price; nor was it a Donation, for nothing was transferred to the Sulpicians of Montreal, which they did not before possess: they alone were proprietors, for the Letters Patent of mortmain had been issued in 1777 for their sole benefit, "*to be held and enjoyed by them and their successors, "Members of the said Seminary and Community;*" they alone were actually in possession; and if the Sulpicians of Paris had offered to sell the property to any person whomsoever, they would have opposed the sale. The Seminary of Paris then abandoned nothing but its dominion as Superior, the temporal superiority which had belonged to it. The act performed by it on the occasion in question may be compared to the Proclamation by which Louis the Fifteenth, on ceding Canada, bade a farewell to His former Subjects, and released them from their oath of Fidelity. Declarations of this kind add nothing to any existing rights, but they contain a declaration of them; they serve to reassure the more timorous consciences. It was not necessary that an act of this kind should be authorized by Letters Patent in France; for they are only required to acts of alienation; no authorization on the part of England was necessary, for by the act the Seminary of Montreal made no new acquisition; and the sole effect of it was, *to ascertain in a more authentic manner the fact of the separation operated by the Conquest, and better to shew the willingness of all the*

Sulpicians to submit frankly to all the consequences arising from it.

Besides, the act in question ought not to be considered without regard to an important circumstance connected with it: before it was signed, the Seminary of Paris caused a Letter to be written to Mr. de Guerchy, the French Ambassador in England, for the purpose af ascertaining the views of the latter Power: and the said Ambassador answered that the King of England consented that the Seminary of Montreal *should continue* to enjoy its property in Canada, but without being dependent in any way on the Seminary of Paris.

Now, it was precisely for the purpose of abdicating the Supremacy which had constituted this independence, that the Seminary of Paris subscribed the Declaration of 1764.

It is then most strange that an individual founding an exception on the right of a third party, and usurping the right of the Government, should venture to hold on this head a language which the British Government could not hold without violating its pledge, and that an attempt is made, under cover of its name, to bring forward as an infraction of the Treaty on the part of the Sulpicians, an Act of Supererogation performed solely with the view of better ensuring the execution of that Treaty, and conceived in terms to which the King of England had declared diplomatically that He gave His assent.

The factitious importance thrown around the objection now refuted arises from the superstitious attention paid to the circumstance that the Donation was originally made *to the Seminary of Paris*, and a clause inserted, *that the Island of Montreal should remain inseparably united to the said Seminary, without its being possible that they should be separated for any cause or any occasion whatsoever.*

But, on the one hand, the sole object of this clause of union with the Seminary of Paris, was to provide that the *work* should not be transferred or entrusted to Clergymen of any Order. The wish of the Donors was that the property should always be possessed by Sulpicians; and this is the whole meaning of the clause.

On the other hand, it will be seen that it was impossible that the Donation should be made otherwise than to the Seminary of Paris, when it is remembered that at that time there were in Canada only a few isolated Sulpicians, not united into a Corporation, and not then forming a legally constituted Community on the spot, capable of acquiring property directly. Under these circumstances it was necessary to make the Donation to the chief Establishment of the Order, leaving it to that Establishment, since it could not itself take possession, to obtain (as it afterwards did) the necessary authority for establishing on the spot, a Community capable of possessing the

property given, and of fulfilling the conditions annexed to such possession.

Let us make this clear by an example: I bequeath to the University at Paris, a house situate in the Department of Ardennes, and an annual income of twenty thousand *francs*, on condition that the University shall establish a College at the said place for the instruction of the people of the Country. The bequest is accepted; the College is established. Is it not evident that the Department of Ardennes might be conquered a hundred times, without any possibility that its separation from the Kingdom of which Paris is the Capital, should effect a revocation of the bequest? All that would result from the Conquest, would be, that the College would cease to be under the same system of Government as the Universities of France, and would be thenceforward under the inspection of the authorities established by the new Sovereign; but the College would remain the property of the Country, for the benefit of which it was founded.

The same thing would take place, if, wishing to found an Hospital, or an Establishment of any other public nature whatever, in any of the Provinces, I had bequeathed to the King as the head of the State, a certain sum to be there employed for that purpose. When the money had once been so employed, the establishment would remain the property of the Country, for the benefit of which it was founded; if that Country were conquered,

all its dependencies would be conquered with it, and the former Sovereign would not be allowed to say, "The "bequest was originally made to me." He would be answered, "Yes, it was made to you, as the Head of the "State of which you were then King, in an intermediate "capacity, and as having alone the power to authorize "the execution of the condition; but when that authori- "zation was once given by you, the establishment ac- "quired an existence peculiar to itself: by the Conquest "you ceased to have any right to the soil, and were "deprived of your supremacy; you have no right to "deprive the Country of a right which has been con- "ferred on it, of an Institution which was founded for its "benefit and which it ought to continue to enjoy." Now the same argument holds with regard to the Donation made to the Sulpicians of Paris. It was only made on condition that the property should be applied to the conversion of the Indians in Canada: for this purpose a Community and Seminary was specially erected in Canada, and authority given to hold the property in mortmain for the benefit of the said Community; from that moment, *the whole benefit of the said Institution was vested in Canada;* and the Conquest, the effect of which was to cause Canada and all that belonged to it to pass under the Sceptre of England, had not the effect of authorizing the Seminary of Paris to take back or to sell the property of the Seminary of Montreal, any more than it had that of authorizing the King of France to dispose of

the Hospitals, Magazines and Establishments belonging to the French Government in the Province of Canada.

And the consequence thus deduced is so much the more legitimate, that it is strictly conformable to the spirit of the Institutions of the Church, which in every article which is not a matter of faith, adapt themselves to all the changes which take place in the Government. *Be ye subject to the Powers that be*, is the recommendation of the Gospel: be obedient to the Princes, *etiam discolis*. And thus the Conquest of Countries, and the partition of States, have indeed the effect of changing the temporal Master to which Church Establishments are subject, but have not the effect of annihilating Establishments founded with a view to their being maintained for ever.

Let us then conclude with regard to this second question, that the Seminary of Montreal being before the Conquest legally the proprietor of the property to be held in mortmain for its benefit, did not cease to be so after that event; that its right continued to subsist, and that the declaration of 1764, in recognizing this right, did not confer it, but merely made it more evident in so far as need might be.

§ III.

The Seminary of Montreal would, by the mere fact of its possession, by virtue of a Title uncontested by any

party entitled to contest it, have a right to bring the action which forms the subject of dispute.

It is uncontestible that the Sulpicians of Montreal are *in possession* of all the property attached to their Community. They inhabit the house which is the seat of their establishment; they lease the lands belonging to it; they enjoy both the lucrative and honorific rights depending on it; they enjoy the whole peaceably, publicly, *animo domini*, and in good faith, that is, with a conscientious belief that they have a right so to enjoy it.

To all these characterirtics of a legitimate possession, is added the length of its duration. The period of this possession may be divided into two:

1stly. That from 1667 to 1763, comprising eighty-six years before the Conquest.

2ndly. That from 1763 until the present time, comprising seventy-two years since the Conquest; the whole period being one hundred and forty-eight years; and assuredly to a possession of this length, the epithet *longissima possessio* is applicable.

It may be further urged, that this possession is not merely the work of the Sulpicians of Montreal, but is also that of the two Governments which were successively established in Canada; that it took place with their knowledge and in their sight, and contradictorily with them since this possession has been recognized in public and authentic acts emanating from the Government of the

Country at different periods. We shall not enumerate these acts here, because the list would be too long; but they are extant, and it would be easy for the Advocates to lay an analysis of them before the Judges.

And this is the place for considering the objections which are found in the opinion emitted by the Chief Justice (Sewell,) who has looked upon the question chiefly with reference to the possession.

The Judge in question says, that those who have only a possession *à titre précaire*, cannot bring an action of complaint: he is right; and it was superfluous to cite Domat as an authority to prove this incontestible point.

The fact is, that he who has only obtained possession by borrowing from another, and has only permission to inhabit, or to enjoy temporarily the property of another, can bring no action with reference to the thing itself, to which he has not and cannot have any right whatever. He whose title is *précaire*, knows, says, avows, confesses, that he is not on his own property, that he does not possess on his own account, and is bound to quit the property as soon as he is called upon to do so.

But this is not the position of the Ecclesiastics of the Seminary of Montreal; they are in possession, and have always been so, on their own account, and in their own name, and not on account of others. They are in possession, at the same that they call themselves and claim to be proprietors, *animo domini*.

The action of complaint then belongs to them in their quality of possessors, and as the actual owners of the Land and Seigniory of Montreal.

To this it has been objected by the Chief Justice, that the right of *banalité* being a servitude, the Seminary of Montreal could only be entitled to bring the action on its producing *a Title;* and he has cited divers authorities in support of this position, and more especially the 71st Article of the *Coutume de Paris.* "Now," he continues, "the Respondents have felt how necessary it was for "them to prove that a Mill had been built; they have "also proved themselves to be the *Seigniors in posses-* "*sion;* but in order to maintain the action, it would have "been necessary for them to prove that they were "*Seigniors and Proprietors.*"

The Judge is right: It would not be sufficient for them to be possessors, if there was no title. But in what sense is this expression to be understood? Pothier answers this question in his *Traité de la Possession,* No. 90, where, after having cited the maxim: "*Nulle* "*servitude sans tître;*" he proceeds as follows: "But "when he who has enjoyed the servitude produces a "title by virtue of which he has enjoyed a right of way, "or any other *servitude* whatever on an estate, then, "although the possessor of the estate who has troubled "such enjoyment, should *contest the validity of this* "*title,* still the enjoyment which has been had by the "other party under such title, is no longer to be con-

" sidered as a mere act of sufferance, and is sufficient to " enable that party to maintain an action of complaint, " and to demand to be provisionally maintained in the " enjoyment of the servitude, *until the petitory action be* " *finally decided.*"

" No. 91. The same rule holds with reference to all " such rights as are of a nature not to be acquired by " mere possession without a Title, such as the right of " *banalité*, the right of *Corvée*. The Seignior who has " enjoyed them without a title, cannot maintain an action " of complaint in order to enforce them; the possession " which he has had without a title being presumed to " have been originally unjust and forcible, and founded " on an abusive exercise of his power; but when the " Seignior produces a *title*, although that title be *disputed*, " it is sufficient to enable the Seignior to maintain his " action, and to entitle him to be maintained provisionally " in the right to which he lays claim, until such time as " the *petitory action shall have been finally decided.*"

We are to remark here that Pothier supposes that the contested title in question, is the title *which establishes the right of banalité;* the title which vests that right in the Seignior; and not the title which would prove such or such person to be the proprietor of the Seigniory and entitled to the rights attached to it.

Now in the particular case in question, it is not contested that the right of *banalité* in itself is vested in the Seignior of Montreal, this fact has always been avowed,

and is admitted ; and Fleming, as a *censitaire* of the Seigniory, could not have contested this right without contradicting the tenor of his contract.

What then is the point which he contests? He merely denies that the Ecclesiastics of the Seminary of Montreal are personally the proprietors of the Seigniory of Montreal: he maintains that the said Seigniory belongs to the Crown of England: he supports this assertion by arguments which we have refuted in the two preceding paragraphs. If then the Crown of England despoiled the Seminary of its possession, Fleming would without hesitation acknowlege that he ought to lose his case: he maintains simply that he ought not to lose it while the Ecclesiastics aforesaid are his adversaries: his objection is *personal*, and not *real;* it does not go to the right of *banalité* itself, which he recognizes as existing, but to the person who is legally the proprietor of the Seigniory and of the rights attached to it.

Now, in this point of view, Fleming is beyond the terms of the question, because the title of which Pothier speaks is the title proving that the right of *banalité* belongs to the Seigniory, whoever may be the Seignior, and not the title proving that any particular person is proprietor of the Seigniory in preference of any other.

The mere possession of the right of *banalité* which is contested, is not sufficient to maintain a possessory action of complaint founded on such right; there must be a title shewing that the right of *banalité* belongs to the Sei-

gniory. It is in this sense only that the Chief Justice is right. But when this point (which is the only one in which the vassal is really interested) is admitted; it matters little who is the Seignior; for who ever he may be, the right of *banalité* belongs to him as such.

Even if the actual possessor of the Seigniory were not the legitimate proprietor, the question is one which the vassal would have no right to raise; for as far as he is concerned, this would be to found an exception on the right of a third party. The vassal has a right to maintain that the right of *banalité* is not due, if he thinks it is not; but if he admits that it is due to the Seignior, he cannot go beyond this, and dispute the personal title of him who is at the time in possession of the Seigniory.

And so far is he from having a right to do this, that even when he contests the title on which the right of *banalité* is founded, this does not bar the action of complaint; it is sufficient that there is an apparent title. How then can an action of this kind be barred by a contestation, not of the right of *banalité* (which is admitted), but of the personal title of the possessor of the Seigniory.

It is in a case like this that possession alone is sufficient for the possessor; because though his want of a valid title to the proprietorship of the Seigniory, may be a subject of interest to the real proprietor of the Seigniory, it is by no means so to the vassal with reference to whom a right of *banalité* has once been shewn to be vested in the Seignior.

Moreover, it is only for the sake of the principle that we have drawn the distinction between the title which establishes the right of *banalité* itself in favor of the Seignior, and the title which shows that some particular person is the Seignior rather than another; for, in the case in question, the Seminary is not reduced to the necessity of founding its claim on its possession. The possession is alleged, because without it the Seminary could not maintain the action of complaint; but the possession alleged is a possession accompanied by a *title*. This title is that which we have taken pains to establish in the two first paragraphs of this opinion.

Fleming contests it! But he is not entitled to do this, and in doing it he founds an exception on the right of a third party. The decision of Pothier is against him, that author expresses himself in these terms, at No. 83 of the Treatise before cited: "with regard to the rights which "possession confers, and which are common to all posses- "sors, *the principal is that of being provisionally consi- "dered proprietors of the thing of which they are in pos- "session, until it is legally claimed by him who is really "the proprietor of it, or who has a right to claim it; and "even after it has been so claimed, until he who has "claimed it has proved his right.*"

"The possessor, be he who he may, being reputed "the proprietor of the thing he possesses, until *it be "legally taken from him*, ought in the mean time to "receive the profits, and to enjoy all the rights, either

" honorific or useful, attached to the possession of the " thing."

No. 82. "The possessor, be he who he may, will " also have an action to be *maintained in his possession*, " when he is troubled in it by any one, or to be restored " to it when any one has forcibly dispossessed him of it."

The Seigniory belongs, it is said, to the King of England: very well, let the King of England, if he thinks his claim well founded, bring an action by the intervention of his Officers, for the purpose of recovering it: the Seminary will defend the action if ever it is instituted, and then one of the two things will happen; either he will gain the suit, and so recover the Seigniory in all its integrity, without the loss of any right attached to it; or on the other hand the Seminary will prove that it is the proprietor; and, in this case also, it will not in the interim have lost any of the advantages derived from its possession. But, if in the meanwhile, and under the frivolous pretext of the possibility of a claim which will undoubtedly never be made, the Courts refuse to maintain the possession in all the integrity in which it now exists: the property itself is deteriorated and pillaged, it is left open to the attacks of the first comer, since it cannot be defended either by the Crown of England, which does not offer to become a party to the suit, nor by the possessor, who is denied the right which we maintain to belong to him, of exercising provisionally all the rights of the proprietor so long as the latter refrains from making his claim; for

this, we repeat, is the proper characteristic and effect of possession.

The possession alone would be sufficient to assure Fleming that all the payments which he might make to the Seminary would be valid, and that all the judgments which might intervene would be regular, even if the Seminary should afterwards be evicted; for possession has this advantage as far as third parties are concerned, that every transaction which takes place in good faith between them and the possessor, must be respected by the proprietor who may thereafter come into possession.

But, (and we cannot repeat this too frequently) the arguments of the Seminary are not founded on the mere fact of the possession: it has a Title; it is really the proprietor of the property in its possession; it has been so from *the beginning;*—for, from the year 1677, the time at which the Donation of 1663 received the Royal Sanction, it was *legally* constituted a *Seminary and Community*, and it is in this quality, and by the same Letters Patent, that power was given to *hold the property at Montreal in mortmain for its use and benefit.*

It matters little that the Donation was nominally made to the Seminary of Paris;—the fact is, that the latter Seminary was never in a condition to perform of itself the work for which the Donation was made;—the Establishment at Montreal was alone capable of doing so.

From that time forward the Establishment at Paris preserved nothing but a moral supremacy, a kind of mastership which was the consequence of the Ecclesiatic discipline which directed that all the secondary establishments should be dependent on the central one: but this tie, which in no way effected the exclusive enjoyment of the Priests of the Seminary of Montreal, was broken by the Conquest; and the act of abdication of the 29th April 1764, contains a more than sufficient and solemn declaration of this.

The same thing holds with respect to the Sovereignty of the King of France;—it was transferred to the King of England. But the right of property vested in the Sulpicians was in no wise affected by this.

Before the Conquest, they were co-proprietors *non ut singuli, sed ut universi*, as Members of the Company of Priests of the Seminary of St. Sulpice at Paris; and the right of property was specially vested in them as the only Members capable of performing the work for the performance of which alone the Donation had been made.

After the Conquest, this right of property, so far from being in any wise weakened, became more firmly vested in them. They acquired nothing at this time from the Seminary of Paris; but the Seminary of Paris ceased to have, even in appearance, any share in the property which its members, who remained Parisiens and French subjects, were thenceforth incapable of possessing, and which they

had no right either to sell or to retain, to the prejudice either of the terms of the Donation or of their co-proprietors in Canada.

The right to the property in Canada was not transferred in 1764 to the Sulpicians of Montreal, but remained vested in them; they did not acquire it then, but they continued to be proprietors by virtue of the same title as before; as Sulpicians exclusively bound to perform the work in Canada, they preserved their right entire *non tam jure accrescendi quam jure non decrescendi:* in the same manner as in the case of a bequest made simultaneously to several joint legatees, the right to the whole, in case of death, incapacity, or refusal on the part of any of them, becomes vested in those only who are capable of taking the thing bequeathed.

The Conquest had the same effect as would have been produced by the total extermination of the Establishment at Paris, by a plague or any other misfortune. In that case, the Members of the Community who were in Canada, would not have suffered any diminution of their right to their House and property.—*In universitatibus nihil refert utrùm omnes idem maneant, an pars maneat, vel omnes immutati sint; sed si universitas ad unum redit, magis admititur posse eum convenire et conveniri, cum jus omnium ad unum redierit, et stet nomen universitatis.—L. 7. 5, 2 ff. Quod cujusque universitatis nomine agatur fiat.*

The accumulation of so many arguments in favor of the

Seminary seem to us to have placed its rights in the clearest possible light.

This right is certain. It has not been contested by any party who had a right to contest it. There is even reason to hope that it will never be so contested.

The Seminary of Montreal has no Members who are not English subjects; they have a right to reckon on the justice of their Gracious Sovereign.--If any unhappy advice should be given him, it would not be followed.—Their enemies cannot represent these Ecclesiastics as ambitious or turbulent men, or as dangerous to the peace of the State: they have done nothing but good in Canada, by founding there, establishments conducive to the progress of science and the arts, to public instruction and the exercise of charity.

"The state of these Priests is altogether free, says "the learned Durand de Maille; (in his *Dictionnaire de* "*Droit Canonique*, under the word "*Sulpicien*") they "make no vow of greater or less strictness; they are "united among themselves by nothing but a noble zeal, "to which they join all that knowledge which is neces- "sary to enable to supply the Church with worthy "Ministers."

Can there exist a better Title to public esteem, to the protection of the Laws, and the favor of the Magistrates.

Paris, 10th June, 1826.

(Sgned,) DUPIN.

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