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REVUE CRITIQUE

DE

Législation et de Jurisprudence.

AN EPITOME OF THE HISTORY AND SOURCES OF THE LAWS OF LOUISIANA AND OF THE CIVIL LAW.

By Hon. Thos. J. Semmes,

Professor of Civil Law in the Louisiana University.

Before I enter upon the consideration of the history and sources of the Civil law, I propose to review the history and sources of the laws of Louisiana.

In Louisiana, the Civil law prevails, and it is the only State in the Federal Union, carved out of the vast territories acquired by the United States from France, Spain and Mexico, in which the Civil law has been retained as the basis of jurisprudence.

The common law modified by statute dominates all our sister States. The intimate relations and intercourse between the people of Louisiana and the citizens of other States, have given rise, in our courts, in consequence of the dissimilarity of the two systems of law, to more numerous and intricate questions of conflict of laws than in the court of any other State.

Happily for us, many of these questions were considered and adjudicated while Chief Justice Martin was, by his ability and learning, the ornament of our Supreme Judicial tribunal.

You will perceive in Story's elaborate work on Conflict of Laws, numerous and copious references to the decisions of the Louisiana Courts. The conflict of laws is a subject daily considered by the legal practitioner in Louisiana, and I commend it to your careful study as an essential branch of the law, and necessary to fit you for the intelligent performance of your professional duties.

Louisiana was settled by the French in 1699, and was subject to the dominion of France until August, 1769, when it was

taken possession of by O'Reilly for Spain under a secret treaty concluded in November, 1762, but not made public until 23rd April, 1764. About three months after taking possession, O'Reilly published in the French language extracts from the whole body of the Spanish law, with references to the books in which they are contained, purporting to be intended for elementary instructions to the inhabitants of the province. This publication, followed by an uninterrupted observance of the Spanish law, was received as an introduction into Louisiana of the Spanish Code in all its parts. 4 Martin, p. 368.

The laws of Spain are contained in various Codes, the most complete of which is that known under the name of "Las Sieté Partidas." The other Codes are the "Fuero Juzgo," "Fuero Viejo" and "Fuero Real"; to which may be added the laws regulating the practice of Courts, the "Royal Ordinances," and those of "Alcala;" the laws of "Toro," the "Recopilacion de Castilla," and the "Recopilacion de las Indias."

The "Fuero Juzgo" was published about the year 693. It was first published in Latin under the title of "Forum Judicum" and afterward translated into Spanish in the 13th century under Ferdinand III. It was originally called "El Fuero de los Jueces," this name was changed by corruption of words into Fuero Juzgo, and under that title it was published in the year 1600.

El "Fuero Viejo" was published in the year 992, and contains the ancient customs and usages of the Spanish nation.

Alphonso the wise, desiring to establish a uniform jurisprudence in all his dominions, published a third Code, under the name of "Fuero Real;" this was the precursor of the "Partidas," which Alphonso had ordered to be compiled, and is to the Partidas what the "Institutes" are to the "Pandects."

The "Partidas" is the most perfect system of Spanish laws; they were compiled in imitation of the "Pandects," and as a digest of the laws of Spain are worthy of the praise bestowed on them by jurists of every country.

The work was projected by Ferdinand III., but accomplished by his son and successor, Alphonso the wise, who appointed four jurists to execute it. This task was entered upon in the year 1256, and finished in seven years. Strange to say, the names of these enlightened jurists have not been preserved. All those parts of the new Code relating to religious matters, were compiled from

the canonical laws of Spain: those which relate to civil and criminal matters, are derived principally from the Roman laws, which were freely translated without acknowledgment of the fact. The Partidas were not promulgated until 1343, and were not actually put in operation until 1505, when Ferdinand and Joanna gave them their sanction at the Cortez held that year in the city of "Toro."

The Partidas are divided into seven parts, each part divided into titles, and each title sub-divided into laws.

The first part treats of the canons and liturgy of the church. The second is a summary of the ancient usages of the Spanish nation and of the rules of its government. The third, fifth and sixth parts contain an abridgement of the principles of the Roman laws on actions, suits, judgments, contracts, successions, testaments, minority and tutorship. The fourth is a compendium of the laws relative to marriage and family relations, legitimate and illegitimate, freedom, slavery and enfranchisement. The seventh treats of crimes, offences, and punishments, and, in imitation of the Pandects, concludes with one title on the signification of words, and another on the rules of law.

The Partidas contain the fundamental principles of the Spanish law, expressed with grace, with simplicity and in the purest idiom of the Spanish language. The elevation of the sentiments of the Pandects has attracted the admiration of the learned. They contain these remarkable words, "despotism tears the tree up by the roots; a wise monarch prunes its branches."

The laws of Toro were published at the Cortez held at the city of Toro, in 1505; they relate principally to wills, successions and donations.

The Royal Ordinance was published by Ferdinand and Isabella in 1496; it is divided into eight books and the greatest part of it has been inserted in the "Recopilacion of Castilla," which completes the system of Spanish legislation. This recopilacion was published by Philip II., in the year 1567. The ordinance of Alcala, the Royal Ordinance and the laws of Toro, are contained in it.

The laws of Spain regulating and governing her immense dominions in America were collected and digested by order of Philip IV., and published in the year 1661, under the title of "Recopilacion de las Indias."

The transfer from France to Spain did not change the system

of law governing the territory; for the civil law, as a system, then was, and now is, the law of both those nations. Spain, so far as possession affected our laws, remained in possession until 1803, when Louisiana was transferred to the United States.

It is true the territory was acquired from France during the administration of Mr. Jefferson, for by the treaty of Ildefonso, in the year 1800, Spain had retroceded Louisiana to France, but the actual possession of France lasted only from 30th November to 20th December, 1803. During this brief interval no material change in the law was made. The French merely re-established the Black Code of Louis XV., prescribing rules for the government of slaves, and subsituted a Mayor and Council in the place of the Cabildo, for the administration of the affairs of the city of New Orleans.

Therefore, so far as our law is concerned, it may be said, it was French from 1699 to 1769, and Spanish from 1769 to 1803.

But as French and Spanish law both descend from the same parent source, the changes made during Spanish rule, so far as private rights are concerned, were not radical, but modifications of the system founded by the French.

The material changes consisted in the substitution of the Spanish for the French language in all legal proceedings, and the introducting of Spanish laws respecting public order, and the disposition of the national domain. It is thus perceived, that at the time Louisiana came into the possession of the United States, her law was a system established by the French and modified by the Spaniards, but derived from the Civil law, which was common to both people.

By the treaty of Paris, the inhabitants of Louisiana became citizens of the United States, and were guaranteed the enjoyment of their liberty, property and religion.

Congress, in anticipation of the transfer, on the 31st October, 1803, provided for the temporary government of the territory by a statute, vesting all the military, civil and judicial powers, exercised by the officers of the existing government, in such person or persons as the President might appoint, to be exercised in such manner as he might direct. By act of Congress approved 26th March, 1804, a territorial government was organized, under the name of the "Territory of Orleans." The territory described in that act embraced all the territory of the present State of Louisiana, and separated it from the residue of the Louisiana

cession, as described in the treaty of Paris. For Louisiana, as acquired from France, embraced all the country from the Gulf of Mexico to the 49th parallel of latitude, and from the Mississippi River to the Rocky Mountains.

But although the terms of the territorial act of 1804 embraced the territory now comprised within the limits of the State of Louisiana, that part of the State, commonly called the Florida parishes, was at that time actually in the possession of Spain, and was held by her until the year 1810.

The territorial act of 1804 vested the legislative power in a Governor, to be appointed by the President, and thirteen persons who were to be appointed annually by the President. But on the 2d March, 1805, Congress authorized the President to establish in Louisiana a government similar to that existing in the "Mississippi Territory," which had been created by adopting the ordinance of 1787, relative to territory northwest of the Ohio River, excluding that portion of the ordinance regulating successions and the last article prohibiting slavery. It is thus perceived, that the celebrated ordinance of 1787, regulated the form of government existing in Louisiana until she was admitted into the Union as an independent State. The second article of the ordinance of 1787 guaranteed among other fundimental rights, the benefit of the writ of "habeas corpus," the right of trial by jury, and judicial proceedings according to the course of the common law.

The first important and radical change made by the new government in the laws of territory, was the necessary results of the change of rulers, and of the guarantees contained in the ordinance of 1787.

The criminal law and proceedings of the Latin races of Europe, whose absolute governments ignored the guarantees contained in our Federal Constitution, were repugnant to the Anglo-Saxon ideas of individual liberty, and constitutional limitation of governmental power, which predominated in the American mind. The territorial statute of 4th May, 1805, defined what acts should constitute crimes and offences, and provided for the trial and punishment of offenders. In so doing, the language and terms of the common law of England were used, and the following provision was embodied in that act, viz: "All the crimes, offences, "and misdemeanors hereinbefore mentioned, shall be taken, in- "tended and construed according to, and in conformity with, the

"common law of England, and the forms of indictment, (divested, "however, of unnecessary prolixity,) the method of trial, the "rules of evidence, and all other proceedings whatsoever in the "prosecution of said crimes, offences and misdemeanors, changing "what ought to be changed, shall be (except by this act otherwise "provided for) according to said common law."

This section of the act of 1805 has never been repealed; even in the Revised Statutes of 1870, it is expressly excepted in the general repealing clause contained in the last section of those Statutes. The result of this enactment was, an entire displacement of the existing criminal law of the territory, and the substitution of the provisions of the act in its stead Hence, no act of man is criminal in Louisiana, unless a statute of the State can be produced stamping it as a crime or offence. There is no such thing in Louisiana as a common law offence; all offences are created by statute. The common law is resorted to for the purpose of interpretation and construction of the terms of the statutes creating offences, but criminality cannot be predicated of an act, which the legislature has not, in express terms, denounced as a crime or offence.

An additional result of this statute of 1805 is, that the common law of England, as constructed and interpreted in 1805, is the standard by which we are governed: hence, no change or modifications of the English laws affect our criminal jurisprudence in Louisiana, unless adopted by statute; and the English decisions, and the opinions of English commentators since 1805, in opposition to the decisions and standard works prior to that period, are not authoritative expositions of our criminal law.

The next important legislative measure was a codification of the civil law of the Territory. Prior to this codification, the laws were in the Spanish language, and the fact that the vast majority of the people were of French descent and Americans, rendered it necessary that the new compilation should be published in English and French. It is generally supposed, that the Civil Code of Louisiana is but a re-enactment of the Napoleon Code; but such is not the fact. It is true the French Code preceeded our Code of 1808 by five years, and a project of it may have suggested to our legislators the idea of codification; but, at the time of the preparation of the Louisiana Code of 1808, the Napoleon Code, as adopted, had not reached the Territory.

In June, 1806, the legislature of the Territory appointed two

lawyers of eminence, James Brown and Moreau Lislet, to prepare a Civil Code, with express instructions to make the Civil Law by which the Territory was then governed, the ground work of the Code.

On 31st March, 1808, the Code was adopted by the Territorial Legislature, and all the ancient laws inconsistent with it were repealed. The effect of this was, that the Spanish laws remained in force, to the extent to which they were not in conflict with the Code of 1808, and they were quoted and acted on as authoritative until 1828.

On the 28th March, 1828, the legislature repealed all the civil laws of the State which were in force prior to the Code of 1825, except so much of the title tenth of the Code of 1808 as treated of the dissolution of corporations.

The State of Louisiana was admitted into the Federal Union under the dominion of the Code of 1808, and the Spanish laws not in conflict with that Code.

On the 20th Febuary, 1811, Congress passed an act to enable the people of the "Territory of Orleans" to form a constitution and State government, and for the admission of said State into the Union on an equal footing with the original States. 2 Stat. 641.

The people, in convention assembled, having framed a constitution, and adopted the name of Louisiana as the title of the new State, Congress, on 8th April, 1812, declared Louisiana to be one of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever. Provided, that it should be taken as a condition upon which the said State is incorporated into the Union, that the river Mississippi, and the navigable rivers and waters leading into the same, and into the Gulf of Mexico, shall be common highways and forever free as well to the inhabitants of other States and the territories of the United States, without any tax, duty, impost or toll therefore, imposed by the said State, and that the above condition, and also all the other conditions and terms, contained in the third section of the act of 1811, shall be taken and deemed as fundamental conditions and terms upon which the said State is incorporated into the Union.

It was further declared, that all the laws of the United States not locally inapplicable were by that act extended to the said State.

At the same time the State was organized into one federal judicial district, and the appointment of District Judge of the United States, with Circuit Court powers, was provided for.—While on this subject of judical districts, I may as well mention, that on the 29th July, 1850, by act of Congress, the State was divided into two judicial districts, called the Eastern and Western districts, but since the war, these two have been merged into one, styled the "District of Louisiana."

The Partidas were translated into English at the expense of the State, by virtue of a law passed 3rd March, 1819. On the 14th March, 1822, a resolution of the legislature of the State, was adopted, by which Messrs. Livingstone, Derbigny and Moreau Lislet, three distinguished members of the bar, were appointed to revise the Civil Code of 1808, by amending it in such manner as they should think proper, and adding to it such laws in force as had not been adopted in that Code.

The report of these jurists was adopted by the Legislature on the 12th April, 1824, and is denominated the "Civil Code of 1825," because it was put in operation during that year. Many articles of the Codes of 1808 and 1825 are identical with the articles in the Napoleon Code; no doubt the compilers appropriated the language of the Code Napoleon, or its project, whenever the rule of law, intended to be established in Louisiana, was the same as that adopted in France. Many provisions of the Code Napoleon are not to be found in either of our Codes, and, in some instances, the text of the Code Napoleon was amended to conform to our law, and so adopted; in other instances, the Spanish law was first written in French and translated into English. The constitution of the State required the laws to be enacted in the English language, hence in case of difference between the English and French texts of the Code of 1825, the English text prevailed. But, as the Code of 1808 was enacted during the reigme of the territorial government, when laws were passed in both languages, the French text of that Code has been held to be of equal force with the English text, and has been accepted by the Courts to avoid the evils of an incorrect translation.

The practice of the State Courts of Louisiana in civil causes, was based on the Spanish law and was regulated by the Territorial act of 1805 and its amendments, until the Code of Practice, approved April, 1824, was put in operation in September, 1825.

The Code of Practice, prepared by authority of the Legislative resolution of 1822, was written in French, and many inaccuracies exist in the English translation.

By the act of 1828, all other rules of proceeding in civil cases, except those contained in the Code of Practice, were abrogated. In case the Code of Practice contains any provisions contrary, or repugnant, to those of the Civil Code, the latter are considered as repealed or amended, by the Code of Practice. Revised Statutes, sections 314 and 592.

The Revised Civil Code and Code of Practice adopted in 1870, were prepared under legislative sanction; they are almost identical with the Codes of 1825, except that all the provisions in relation to slaves are omitted; and the statutory amendments, enacted from time to time, are incorporated in the new Codes. The Codes of 1870 are written and promulgated in the English language only, in conformity with the mandate of the Constitution of 1868.

The Legislature, in 1855, undertook a revision of the Statutes of the State. This revision was effected by the enactment of many separate statutes, relating to various and distinct subjects; all previous statutes, relating to a particular subject, were grouped together and incorporated into one statute relative to that subject, and at the end of each revised statute was annexed a clause, repealing all laws on the same subject matter, except what was contained in the Civil Code and Code of Practice. The object of the Legislature was to facilitate the study of law, by confining investigation, so far as our statutory law was concerned, to the two Codes and the Revised Statutes. The object was not fully accomplished, because the Courts have held, that there are statutes previous to 1855 not repealed by that revision, as the subject of the unrepealed statutes is entirely omitted from the Revised Statutes of 1855. The Revised Statutes of 1870 are but a re-enactment of the Revised Statutes of 1855, with amendments and additions since made, omitting, however, all legislation pertaining to the institution of slavery.

The revisory legislation of 1870, was mainly intended to obliterate from our system of laws, every vestige of the institution of slavery and to accommodate our legislation to the new order of things, inaugurated by the various amendments of the Federal Constitution, or resulting from the adoption of the new Constitution of 1868, and the reconstruction measures of Congress.

A project of a Commercial Code was prepared under the resolution of 1822, but it failed to meet the approval of the Legislature. Questions of Commercial law are, therefore, settled in Louisiana by reference to approved works on the subject, and the decisions of the enlightened judicial tribunal of the civilized world. The decisions of the English and American Courts are most generally consulted and accepted as authority.

An attempt was made in 1820 to codifiy the criminal law of the State. In 1821, Edward Livingstone was appointed by the Legislature, to prepare and submit to its consideration a Criminal Code. This distinguished legist made an elaborate and scientific report, which increased his literary fame, but its philosophic speculations never received the sanction of law.

Our lawyers, accustomed to the civil law practice, were much embarassed as to the method of conducting civil causes in the courts of the United States. The distinction between "law and equity" is unknown in Louisiana practice; the courts adjudicate all civil causes without reference to such distinction which is pecular to countries in which the common law prevails. In Louisiana, where the distinction, derived from the common law system, between writ of error and appeal, is ignored, the evidence in any civil case of which the court of final resort has jurisdiction, is, at the request of either party, reduced to writing; the appellate court reviews the law and the fact, without regard to the circumstances whether or not the case was tried by a jury in the court below.

All the evidence is transmitted to the appellate court, which disposes of the case on its merits, even though no bills of exception are taken by either party, to the judgment of the court below on question of law. All that is necessary to bring into activity the revisory power of our Supreme Court, is, the presentation of all the evidence, on which the judge below decided the case; on the evidence, the court will proceed to adjudicate de novo, both the law and fact involved in the cause.

Congress attempted to conform the practice of the courts of the United States, sitting within this State, to the practice of the State Courts. A special statute for Louisiana was passed by Congress, 24th May, 1824, (4 Statute, 62,) by which it is enacted, that the mode of proceeding in *civil causes* in the courts of the United States, that now are or may hereafter be established in the State of Louisiana, shall be comformable to the

laws directing the mode of practice in the District Courts of said State; provided, the judge may alter the times limited or allowed for different proceedings in the State Courts, and make by rule such other provisions, to adapt the said laws of procedure to the organization of the United States Courts, and to avoid discrepancy between such State laws and the laws of the United States.

The object of this act has been almost completely nullified by the decisions of the Supreme Court of the United States.

That court was compelled to admit, that the terms " civil causes," used in the process act of 1824, would include cases at law or in equity, but it held, that the acts of Congress in the general legislation of the country, have always distinguished between remedies at common law and in equity; and to effectuate the purpose of the Legislature, the remedies in the courts of the United States are to be at common law or in equity, not according to the practice of the State Courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles; and since there are no courts of equity cases, the federal courts in the State are bound to proceed according to the principles and usages of courts of equity, and the rules prescribed by the Supreme Court of the United States.

Louisiana had not then, and has never had, a representative of her legal system on the bench of the Supreme Court of the United States. This decision, which was not given without a vigorous protest from Mr. Justice McLean, renders it absolutely necessary for a Louisiana lawyer, who desires to practice in the Federal courts, to study the common law in order to ascertain what is a common law case and what is a case in equity. When he finds out that his case is one in equity, he must become familar with chancery practice in order to prosecute it with success. 13 Pet. 368 and 406; 9 Pet. 656; 12 Pet. 339; 15 Pet. 14; 12 Pet. 474.

If his case is a common law case, he can adopt the Louisiana practice of pleading, but he must be careful in the trial of the case, to resort to the common law method of proceeding, for the Supreme Court has held:

1st. That if the record contains the evidence, but no bills of exceptions, and nothing raising any point of law, distinct from the evidence, the Supreme Court cannot revise the judgment on writ of error. 2 How. 362.

2nd. If a case is tried by a jury, even though all the evidence may be reduced to writing and transmitted to the Supreme Court, that court cannot revise the judgment on the facts, as the Supreme Court of Louisiana does. This decision is based on the 7th amendment of the Constitution of the United States, which provides "that no fact once tried by a jury shall be otherwise re-examinable in any court of the United States, than according to the rules of the common law." 3 Pet. 433.

3rd. When the judge passes on the law and the fact, if a jury trial is not claimed, the judge must find the facts, and the Supreme Court must treat such facts as conclusively settled and, therefore, cannot revise the case on the facts, even though the evidence on which the judge based his findings is transmitted in the record. 7 How. 838.

4th. The practice of the courts in Louisiana as to giving reasons for judgment, which the Louisiana law requires under penality of nullity, and as to the form and effect of verdicts of a jury, is governed by the acts of Congress, and the rules of the common law, and not by the laws of the State. 12 How. 39.

It is therefore perceived, that, so far as practice is concerned, in the courts of the United States, but little is left of the State laws with which these courts are to conform. If the case is an equity case, the pleadings and rules of evidence are the same as those in the courts of the State; the method of trial, and preparing a case for the appellate court, the form of the verdict and judgment, and the effect of the verdict are totally different. I do not perceive that the judicial acts of 1872 have made any material changes in the particulars I have mentioned.

The act of Congress, approved June 8th, 1872, departs from the practice of the State Courts as to the number of peremptory challenges in civil cases; in the State Courts four peremptory challenges are allowed, while only three are permitted in the Federal Courts. The same rule applies to criminal cases, except in trials for treason and felony. The act of Congress approved June 1, 1872, merely requires the practice, pleadings and forms of proceedings, in other than equity and admiralty causes, to conform to the practice, pleadings and forms of proceedings in the State Courts. This act seems to adopt the views of the Supreme Court of the United States, in regard to the process act of 1824, as it expresly excludes "equity causes" from its operation.

CIVIL LAW.

The Justinian collections called the "Corpus Juris Civilis," constitute the basis of modern civil law so far as private rights are concerned.

The public law of the Romans, their criminal law, their laws of practice, or procedure, and also their laws as to private rights, before and after Justinian, are not received; though a few of the provisions and principles derived from these sources, have been incorporated in the modern civil law system.

Even the Justinian collections exercise little or no influence on modern civil law, except in regard to rights of Roman origin, or growing out of transactions known to the Romans.

The law in regard to bills of exchange and promissory notes, insurance, stocks, banks, the modern rights of corporations, the modern laws of trade and commerce, and the law of community between husband and wife, are not of Roman origin; or they have been so radically and thoroughly transformed in the process of adaptation to the requirements of modern civilization, that the germ of the Roman law can be scarcely traced.

The Roman jurists are distinguished above all others, ancient or modern, for their classic mode of enunciating principles of law, as well as for the art of tracing, and the method of our applying those principles. The celebrated metaphysician, Leibnitz, remarks: "I have often said, that after the writings of the "geometricians, there is nothing extant comparable for force "and subtility with the writings of the Roman juriscousults; so "much nerve is there in them, and so much profundity." Again he says, "I admire the digests, or rather the labors of the "authors from whom the Digests are extracted; whether you "consider the acumen of the reasoning, or the vigor of expression, "I have never seen anything more nearly approach the precision "of mathematics."

The law of Pandects, is but a system of general legal principles, and for this reason, the enlightened jurists of the civilized world resort to it, as a magazine of jurisprudence, based on reason and philosophy, and therefore, in its applications and usefulness, unrestricted by time or place.

It is necessary, however, that you should have some idea of the manner in which the Roman law was gradually developed

and moulded into the system embodied in the "Corpus Juris Civilis," as well as of the sources of that law. I proceed to give you a rapid, and therefore imperfect sketch of the history and development of the Roman law, preparatory to a discussion of its principles, so far as they are incorporated into the jurisprudence of Louisiana.

It is well known, that in the earliest period, the Roman Government was a limited monarchy, the political power being vested in King, Senate and people; but the people were separated into two classes, the patricians, or hereditary nobility, and the plebeians or free citizens. At first the plebeians were excluded from any participation in the government, and from the use of the public lands.

The King and Senate proposed laws, which were submitted for adoption to the vote of the national assemblies, called the curiæ, composed exclusively of patricians.

In later times, the laws were submitted for adoption to assemblies, called centuriæ, in which the plebeians, to a limited extent, obtained some share in legislation. The law adopted in assemblies of the curiæ was called lex curiata, and that adopted in assembles of the centuriæ, was called lex centuriata.

When the Kings were expelled, a republic was established, and two consuls, who were patricians, were substituted for the King.

The plebeians dissatisfied with the insignificant influence exercised by them in the assemblies of the centuriæ, which had been so constituted as to almost overwhelm their voice by the weight of rank and wealth, succeeded, after severe contests, in establishing officers called tribunes of the people, to be chosen from the plebeians, and, for the protection of their rights, vested with authority to render any law ineffectual by a veto.

Soon, however, the tribunes acquired the right of proposing laws to assemblies of the plebeians called comitia tributa, and these laws, when approved, were called plebiscita.

The struggle between the two parties resulted in the adoption of the celebrated law of the twelve tables. This law is both a political constitution and a law in regard to private rights. One of its objects was to establish the political equality of the plebeians with the patricians, and to define the limits of judicial power then in the hands of the consuls. Besides this, it reduced to writing the laws in regard to private rights, which had previously

existed, and merged the peculiar law of each tribe in one system. This law is also called lex decemviralis from the number of persons selected to compose it.

The decemvirate first appointed, was composed solely of patricians; they reported ten tables; but the year following, a decemvirate, composed of seven patricians and three plebeians, added two to the former ten. These twelve were engraved on wood, or ivory, or brass, and exposed on the rostra for public examination. It is said, that an Ephesian exile imparted his knowledge to the Roman legislators, and in recognition of his services, a statute was erected in the forum to the memory of Hermodorus.

The Romans entertained the greatest reverence for the twelve tables, and delighted to bestow encomiums on them, as the highest evidence of the wisdom of their ancestors. They vaunted the superiority of Roman legislation over the jurisprudence of Draco, Solon and Lycurgus, which Cicero does not hesitate to characterize as rude and ridiculous; while he asserts, that the brief composition of the Decemvirs surpasses in genuine value the libraries of Grecian philosophy. De Legibus, 223; De Oratore, 123. The twelve tables survived the devastation of the Gauls, and subsisted at the time of Justinian; their subsequent loss has been imperfectly repaired by fragments, collected by modern critics, from the commentaries of Gaius, contained in the Pandects, from Ulpian's fragments, and from the lately discovered Institutes of Gaius, and the Vatican fragments.

After the twelve tables, the Romans divided their law into jus scriptum, and jus non scriptum, or law established by custom. The Institute of Justinian perpetuated this distinction, and define "the unwritten law to be, that which usages has approved: for daily customs, established by the consent of those who use them, put on the character of law." Inst. 1, 2, 9. The written law consisted of the leges, the plebiscita and the Senatus Consulta.

The leges were enacted on the proposal of a magistrate presiding in the Senate, and adopted by the Roman people in the assemblies of the Centuriæ, composed of patricians and plebeians. These related almost entirely to Public Law.

The plebiscita were proposed by the tribune, and adopted by the plebeians alone in the comitia tributa. For this reason, they were binding on the plebeians only, until, at a subsequent period, it was decreed, that all the Roman people should be bound by the plebiscita.

The Senatus consulta were decreed by the Senate, without the concurrence of the plebeians, who objected to the force of these decrees as to them; but when the Senate submitted to the plebiscita, the plebeians in turn acquiesced in the authority of the Senatus Consulta.

The proper administration of justice in civil cases, soon required the establishment of the office of Prætor. He was styled "Prætor Urbanus;" his jurisdiction, at first was restricted to cases in which both parties were citizens of Rome. The increase of business intercourse with strangers, occasioned about a century later, the establishment of another Prætor, to decide the suits of strangers among themselves, or with Romans, and he was styled "Prætor Peregrinus." The term of office of the Prætor was one year.

The proper Roman law, "jus civilis," was never applicable to strangers, it was intended for Roman citizens only. But when Roman power was extended over Italy and other countries, the necessities arising out of the new relations, and the incessant intercourse with strangers, led the Romans to acknowledge and apply a universal natural law, in addition to their peculiar "jus civile."

The principles of this universal natural law (called by them jus gentium) were at first applied to strangers, but subsequently, they were extended to the Romans also, to moderate the rigor and correct the injustice arising from the strict application of the jus civile. This change was effected by the edicts of the Prætors, who annually, on taking possession of office, announced the legal principles, in accordance with which they would administer justice during the year. Each successive Prætor adopted such rules of his predecessor as had been sanctioned by reason and justice, so that the annual edicts, by continual repetition of the same principles, soon became in practice a fixed system of law. So fixed, indeed, had become the principles of the Prætorian edicts, and for such a long period had they been annually announced, that the annual edict assumed the name of the 'Perpetual Edict.' This pretorian law was denominated "jus honorarium," because, says the Institutes, "the magistrates who have honour in the State have given it their sanction." Inst. 1, 2, 7.

The main principles of law having been thus established by the twelve tables and the prætor's Edicts, the lawyers began to develope them more fully by interpretation. The law thus intro-

duced by jurists was called "auctoritas prudentum." But these opinions of lawyers were never regarded as authority, until the Emperor Augustus allowed some distinguished jurists to answer in his name. In the reign of Tiberius, these "responsa prudentum" grew into considerable credit. But it was not until the reign of Hadrian, that the "responsa prudentum" were vested with the authority of law. He decreed, that the unanimous opinion of the jurists, specially authorized to respond, should have the force of law. In case the lawyers disagreed, the judge should follow the opinion which he himself considered just. At a later period, Constantine determined, by special ordinance, what writings of the old jurists should have special authority, and a century later, in the year 426, Theodosius II, issued a more extensive ordinance, in which he confirmed, by name, the writings of Gaius, Ulpian, Paul, Papinian and Modestinus, and forbade the judges to depart from the opinion of these lawyers on questions of law; and in case they differed in opinion, the Emperor ordained, the judges should be governed by a majority, and in case of equal division, they should follow those to whom Papinian adhered. This ordinance was intended for the Eastern Empire, but it soon obtained force in the Western.

From Augustus to Trajan, says Gibbon, "the modest Cæsars "were content to promulgate their edicts in the various characters "of a Roman Magistrate; and in the decrees of the Senate, the "epistles and orations of the princes were respectfully inserted."

The Institutes of Justinian expressly declare "that the plea- "sure of the Emperor has the vigor and effect of law, since the "Roman people, by royal law, have transferred to their prince "the full extent of their own power and sovereignty." "There- "fore, whatever the Emperore ordains by rescript, decree or "edict is law. Such acts are called *Constitutions*. Ins. 1, 2, 6."

In what manner the Emperors were invested with the legislative power, is not precisely known. The newly discovered institutes of Gaius state that it was in virtue of a law; but it is uncertain, whether this was a general law, passed on the transition of the government from a republican to the imperial form, or a law passed on the accession of each Emperor. At all events, from the time of Hadrian, the public and the private jurisprudence was moulded by the will of the sovereign. The "gloomy and intricate forest of ancient laws" in the language of Tertullian, "was cleared away by the axe of royal mandates and constitutions."

The period just preceding Augustus, surpassed all the others for the variety and profundity of the productions of its jurists, whose learning and sagacity, advanced the science of law to a high degree of perfection; but little is preserved of their writings, to vindicate their title to the appellation of "the classical jurists." It is certain, however, that the jurists of the age, in which Cicero's voice resounded in the forum, being thoroughly imbued with Grecian philosophy and the logic of Aristotle and the stoics, established law as an art on a certain and general theory, and diffused over its then shapeless mass, the light of order and eloquence. The foremost and most distinguished of these jurists was Servius Sulpicius.

The period from Augustus to Alexander Severus is illustrated by the writings of Gaius, Papinian, Ulpian, Paulus and Modestinus, none of which, but the Institutes of Gaius, have been preserved, except such fragments as are contained in the Pandects, or in the Fragments Vaticana. The Institutes of Gaius are particularly interesting to us, because they formed the foundation of the Institutes of Justinian. It was not until the year 1816 that the genuine Institutes of Gaius were discovered by Neibuhr, in a codex rescriptus in the library of the Cathedral chapter of Verona.

While the Syrian priest of the sun, Heliogabalus, surrounded his throne with eunuchs, buffoons and dwarfs, made senators of coachmen and strollers, and created a senate of women to decide upon questions of fashion, his successor and cousin, Alexander Severus, was learning the great art of ruling from the celebrated Christian doctor, Origen, who, in the early part of the third century, was the friend of the future Emperor's mother. Alexander Severus, it is true, never became a Christian, but he reverenced Christianity and its divine founder. He rendered divine honors to Jesus Christ, whose statute was placed in his Oratory. He even made a proposition to the Senate, to admit to rank among the Gods the founder of a religion, whose morals were so pure. But the Senate, having consulted the Oracles, received a response, that if this new apotheosis were to be celebrated, the temples would soon be abandoned and all the world become Christian. Notwithstanding the good will of Alexander towards Christianity, the Roman legislation had not been changed in its hostile disposition towards the disciples of Jesus Christ. The legists of the Imperial Palace, Ulpian and Paulus, whose

names are as imposing in jurisprudence as they are odious in the annals of Christianity, had taken pleasure in compiling the ordinances which devoted the Christians to death.

The assassination of Alexander Severus at Mayence, in the 28th year of his age, extinguished the hopes of good government which seemed so flattering at his accession to the throne.

The Roman law never felt the influence of the Gospel until after the battle of Actium for Christianity was fought in the year 312. The famous labarum of Constantine floated from a staff in the form of a cross; above it sparkled a crown of gold and precious stones, in the midst of which was the monogram of Christ. "Under this banner two religions and two worlds met "at the Milvian bridge; two religions were face to face, armed, "on the banks of the Tiber, in view of the capitol. Maxentius "interrogated the Sybilline books, sacrificed lions, and opened "pregnant women, to search the bosom of infants torn from their "mother's womb, for it was supposed that hearts that had never "palpitated could not conceal imposture. Constantine came by "a divine impulse and the greatness of his genius. These words "are engraved on his triumphal arch, 'Instinctu divinitatis, "mentis magnitudine.'"

Scarcely had the Successor of the Cæsars entered Rome as victor, when he sought out the representative of the Christian Church, the purple of whose spiritual royalty until now had been the blood of the martyrs, and presented to him the Lateran palace as a pontifical residence.

Constantine, born in ancient Mœsia, brought up at the court of Nicomedia, proclaimed Emperor in Britain, had no sympathy with Rome. Julius Cæsar had once wished to rebuild Troy, the fabled cradle of the Roman race, and to make it the seat of Empire. Constantine took up the idea with modification, and fixed his throne at Byzantium, which he called Constantinople. The rising city was enriched with the spoils of Greece and Asia; they brought idols of the now unworshipped gods, and the statues of great men; the old metropolis also paid its tribute to the youthful rival now growing at its side; Constantinople clothed itself with the nakedness of other cities. The families of senatorial and equestrian rank were brought from the banks of the Tiber to those of the Bosphorus, here to find palaces equal to those they had forsaken. From this time the Christian religion became predominant, and the Latin language was gradually dis-

placed by the Greek. The two principle cities had each an administration of its own, unconnected with that of the Empire; the former State authorities thereby became municipal magistrates. The Empire itself was divided into four præfecturæ prætoriæ, in such manner, that the præfectus orientis resided at Constantinople; the præfectus Illyrici, at Thessalonica; the præfectus Italiæ, at Millan, and the præfectus Galliæ, at Treves.

Another political change of considerable importance in the history of private law, was, that the natural free development of the law by the courts and jurists become more and more limited, in confirmity with the spirit of the autocratic government; the autocracy assumed even the interpretation of the law, and hence the multitudinous imperial decrees and constitutions.

Before Constantine, most of the Imperial ordinances were decrees and rescripts. A decree was a decision in a judicial cause, which had been brought by appeal before the "Auditorium principis."

The rescript was the answer or direction of the Emperor upon applications, or questions, in doubtful cases.

The edicts were general ordinances, intended for the whole people, and called "constitutiones generales."

During the reign of Constantine and subsequently, the edicta became frequent, and often introduced extensive changes in the constitution of the nation, for the prevalence of Christianity had changed, or subverted, many ancient opinions and usages.

The imperial constitutions, or edicts, having become very numerous, and complex, two jurists, about the middle of the 5th century, made two compilations; that of Gregorius contained the constitutions from Hadrain to Constantine, that of Hermogenes was a supplement to the former, containing the constitutions of Diocletian and Maximian.

These were followed by the Theodosian code. Sixteen jurists compiled this code under an ordinance of the Emperor Theodosius the younger; it was a collection of the edicts and many of the rescripts, and was published as a code for the Eastern Empire in the year 438. Theodosius sent this code to his son-in-law, Valentinian III., who confirmed it in the same year for the Western Empire. The Theodosian code consisted of sixteen books, each of which was subdivided into titles; from the conclusion of the sixth book to the end it remains entire; lately the first five books and part of the sixth have been discovered at Turin.

The "Fragmenta Vaticana" edited by Angelo Mai, in 1823, from a codex rescriptus of the Vatican Library, contains fragments of the law-writers from the time of Alexander Severus to Justinian, and also of imperial constitutions; they appear to be the remains of a large collection during the time that intervened between the codex Hermogenianus and the codex Theodosianus.

In the year 500, Theodoric, King of the Ostrogoths, after the fall of the Roman Empire in the West, issued an edict, intended not only for the Romans, but also for the Ostrogoths. This edict is entirely derived from the Roman law, and especially from the codex Theodosianus, the later novels and the Pauli sententiæ rescriptæ.

Alaric II., King of the Visigoths, in the year 506, published a code affecting only the Romans living in his Empire. This code is a compilation from the previous codes, from the later novels, and from the writings of Gaius, Paulus and Papinian.

This collection is called the Breviarium Alaricianum, and in it many passages have been preserved, which would otherwise have been lost, from the first five books of the Theodosian code, and the writings of Gaius, Paulus and Papinian.

After the time of Theodosius II., nothing was done in the East to facilitate the administration and study of the law, until Justinian ascended the Imperial throne in the year 527.

Justinian was the first, after Theodosius, who undertook a new collection of the Imperial Constitutions, which was intended to form a substitute for previous collections.

For this purpose, he appointed ten lawyers; among them was the celebrated Tribonian, and at their head was Johannes the Ex-quæstor of the Sacred Palace.

In fourteen months the labors of this commission were completed. This new code consisted of twelve books; it was confirmed by a special ordinance prohibiting the use of the older collections of rescripts and edicts. This first code of Justinian is called the Codex vetus and is now entirely lost.

After the code was published, Justinian, in the year 530, ordered Tribonian and sixteen other jurists, to select all the most valuable passages from the writings of the old jurists, which were regarded as authoritative, and to arrange them according to their subjects under suitable heads: he gave them extensive powers, and suspended the citation law of Theodosius II., who had prohibited citation from the writings of any other jurists than

those specified in his ordinance. The Tribonian commission, however, were not confined to the letter of the passages they might select: they had the privilege to abridge, to add and to alter, but were directed to avoid repetitions, remove contradictions and omit the obsolete. The result was, that the extracts contained in the Pandects, did not always truly represent the originals, which were often interpolated, or amended to conform to the views of the commission as to the existing law.

These alterations, additions. or modifications were called "Emblemata Triboniani."

The work was completed in three years; within this time the commission had extracted from the writings of thirty-nine jurists all that was considered valuable; it is said the writings inspected and extracted from consisted of two thousand treatises, containing, in the aggregate, three million lines, which were e duced to fifty books containing one hundred and fifty thousand lines. Over every extract, a heading was placed, containing the name of the work from which it was, or should have been, derived.

The whole composition consisting of fifty (50) books was entitled "Digesta sive Pandectæ juris enucleati ex omni vetere collecti."

The Pandects were published 16th December, A. D. 533, and were put in force on the 20th of the same month.

In compiling the Pandects, the commission met with important unsettled controversies.

Justinian, however, settled thirty-four of the controverted questions before the commencement of the Pandects, and, before its completion, these decisions increased to fifty. These decisions were afterwards embodied in the new code of Justinian called "Codex" repetitæ prælectionis.

As the Pandects were unsuited to the use of those just beginning the study of law, Justinian ordered Tribonian, with the assistance of Theophilus and Dorotheus, to prepare a brief treatise, which should contain the elements of legal science.

This resulted in the Institutes, published 21st November, 533, which obtained legal force on the same day as the Pandects, December 30, 533. This work is but a revised edition of Gaius' Institutes, in which the obsolete was omitted and the new Constitutions of Justinian were referred to After the publication of the Pandects and Institutes, the Code was revised by Tribonian and

four other lawyers. This revision included a great many new constitutions and the fifty decisions; it was put in operation 16th November, 534, and the old Code was abolished.

During the long reign of Justinian, after the publication of the new Code, many constitutions were issued, by which the laws were materially changed; the greater part of these new constitutions were written in Greek and are called Novels, "Novellæ Constitutiones."

After the death of Justinian, a collection of 168 novels was made, 154 of which had been issued by him and the residue by his successors.

Justinian's law collections were intended only for the East, but after he conquered the Ostrogoths, who then ruled Italy, he sent his compilations there, and, by special edict, ordered them to be introduced in the courts and law schools.

During all the political changes which subsequently took place in the West, the use of Justinian's collections continued uninterruptedly, even under the Empire of the Lombards in France.

RIGHT OF USE OF NAVIGABLE RIVERS.

Four cases of considerable importance to the lumbermen and to the riparian proprietors along the St. Lawrence and the Ottawa Rivers have just been decided by the Harbour Commissioners of Montreal.

The statute of the late Province of Canada, 12 Vict. c. 117, sect. 7, declares that three members of the Trinity House of Montreal shall have jurisdiction "to hear and determine *all* "*matters and things relating to any beach of the River St.* "*Lawrence, or of any other rivers within the jurisdiction of* "*the corporation* . . . . as well as *to hear and determine* "*all offences committed against this Act, or against any such* "*By-laws, Rules, Regulations, or orders (of the Master, &c., of* "*the Trinity House of Montreal)*, by any person or persons "whatsoever."

The statute of the Dominion, 1873, 36 Vict. c. 61, s. 2, declares that "all and every the then remaining powers, authority, "*jurisdiction*, rights, duties, and liabilities of the said Trinity "House of Montreal, shall become and be transferred to and "vested in, and shall be exercised and enjoyed, assumed and "discharged by the said corporation of the Harbour Commis-"sioners of Montreal."

Under these statutory provisions, the plaintiffs in these four cases were endeavouring to obtain the enforcement of two By-laws of the late Trinity House of Montreal, and of one statutory enactment.

The two first cases are based upon section 8 of By-laws of the Trinity House of Montreal, 1860, sections 5 and 7 of 27-28 Vict. c. 58, 1864, and sect. 2 of By-laws of 1861, which read as follows:

Section 2 of By-laws of 1861.—"That all rafts navigating "the waters, within the limits of the jurisdiction of the Trinity "House of Montreal, shall have *the name of the Owner or Owners* "thereof *legibly painted* in letters not less than eighteen inches "long on both sides of a board not less than five feet in height "to be affixed to the *Cabane* or other prominent place on the "raft, so as to be easily discernible, under a penalty not exceed-

"ing ten pounds against the owner, master, or person in charge "thereof."

Section 8 of By-laws of 1860:—"That all and every the per- "son or persons who *shall encumber the navigable part of the* "*River St. Lawrence*, the River Richelieu, the River Yamaska, "the passage called the Doré, the Channel du Moine, *or other* "*navigable water within the limits of the jurisdiction of the* "*Trinity House of Montreal*, or any of the harbours, creeks, in- "lets *and beaches within the said limits, or in any way obstruct* "*the navigation thereof* with stones, filth, rubbish, timber, logs, "spars, *rafts or cribs*, wrecks of steamers or other vessels, shall "incur a penalty not exceeding ten pounds for each and every "offence, and a further like penalty, for neglecting or refusing "to remove or cause to be removed any such incumbrances or "obstructions within ten days after being acquired so to do by "the Registrar or other Officer in the service or employment of "the Trinity House of Montreal, and a further like penalty for "every subsequent ten days such incumbrances or obstructions "shall not be removed."

Section 5 of the Statute of 1864.—"The Trinity House of "Montreal shall have power, after the expiration of ten days "from the time at which any timber, logs, spars, *rafts or cribs*, "wrecks of steamers or other vessels, or the cargoes of such "steamers or other vessels, *or other description of obstruction* "*whatsoever, may be placed or otherwise happen to be in the* "*navigable part of the River St. Lawrence*, or in any other part "of the rivers or waters generally, or *on any of the beaches*, "*shores* or wharves, within the limits of the jurisdiction of the "said Trinity House of Montreal, *to remove, or cause to be* "*removed*, such timber, logs, spars, *rafts or cribs*, wrecks of "steamers or other vessels, or cargoes of such steamers or vessels, "or other description of obstruction as aforesaid, either by rais- "ing or blowing up the same, or in such other manner as the "said Trinity House of Montreal may deem advisable, and to "sell, in such manner as the said Trinity House of Montreal "may think proper, such portion of such timber, logs, spars, "rafts or cribs, wrecks of steamers or other vessels, or cargoes of "such steamers or vessels, or other description of obstruction as "aforesaid, as may not be entirely destroyed in the removal "thereof as aforesaid, and to apply the proceeds of such sale to- "wards defraying the expenses which the said Trinity House

" may incur or cause to be incurred in and about the removal of " such obstructions as aforesaid."

7.—" Nothing herein contained shall in any way affect the " *liability of any person or persons who shall encumber the said* " *navigable or other waters, or any of the said beaches, shores or* " *wharves, for any penalty or penalties recoverable under any* " *by-laws*, orders, rules and regulations of the said Trinity House " of Montreal, which may presently or at any time hereafter be " in force."

The third case rests upon the application of section 2, art. 21, sect. 5 and sect. 8 of the Statute of Canada, 31st Vict. c. 58, 1868:

" ART. 21.—*Rafts* while drifting or *at anchor on any navig-* " *able water shall have a bright fire kept burning thereon from* " *sunset to sunrise;* whenever any raft is going in the same " direction as another which is ahead, the one shall not be so " navigated as to come within twenty yards of the other; and " every vessel meeting or overtaking a raft shall keep out of the " way thereof."

" 5.—*All owners, masters, and persons in charge of any* ship, " vessel or *raft, shall obey the rules prescribed by this Act*, and " shall not carry and exhibit any other lights nor use any other " fog signals than such as are required by the said rules; *and in* " *case of wilful default, such master or person in charge, or such* " *owner, if it appears that he was in fault, shall, for each occas-* " *ion in which any of the said rules is infringed, incur a penalty* " *not exceeding two hundred dollars nor less than twenty dollars.*"

" 8.—Except as hereinbefore provided, all penalties incurred " under this Act, may be recovered in the name of Her Majesty, " by any Inspector of Steamboats, or by any party aggrieved by " any act, neglect, or wilful omission by which the penalty is in- " curred, before any two Justices of the Peace, on the evidence " of one credible witness; and in default of payment of such " penalty, such Justices may commit the offender to gaol for any " period not exceeding three months; and, except as hereinafter " provided, all penalties recovered under this Act shall be paid " over to the Receiver General, and shall be by him placed at " the credit, and shall form part of " The Steamboat Inspec- " tion Fund;" except always, that *all penalties incurred for any* " *offence against this Act shall, if such offence be committed* " *within the jurisdiction of* the Trinity House of Quebec, or of

"*the Trinity House of Montreal, be used for, recovered, enforced*
"*and applied in like manner as penalties imposed for contraven-*
"*tion of the by-laws of the Trinity House within whose juris-*
"*diction the offence is committed.*"

Mr. Girouard on behalf of the prosecution said:—If the raft in question is held to be still navigating, that is subject to the laws of navigation (and in fact it must be so considered, so long as it has not reached its destination), it must also be considered as being at anchor, and therefore should have a sign and also a fire at night.

The two cases, based upon the By-laws of 1860 and the Statute of 1864, involve questions of no small magnitude and difficulty. Section 8 of the By-laws of 1860 above quoted enacts that *all persons who shall encumber the navigable part of the River St. Lawrence . . . . or any of the beaches*, etc., shall incur a penalty, etc. The statute of 1849, creating the Trinity House of Montreal, also declares that they shall have jurisdiction to hear all *matters and things* connected with the beach of the River St. Lawrence or of any other navigable river as far as the Provincial line. The point at issue is, therefore, what constitutes an obstruction or encumbrance of a portion of a navigable river or of its banks; in other words, what use may be made of said river and beach by the public and riparian proprietors.

It is an undeniable fact that for the last fifteen or twenty years lumber merchants, notwithstanding the protests of the adjoining residents, have been in the habit of mooring their rafts for months and months along and on the beach of the River St. Lawrence, from Lachine to St. Anns and upwards, in some cases seriously obstructing the navigation of the river, in some others using the trees of the banks, even depriving the inhabitants of the use of the water for household purposes, exposing the life of children to constant danger and being in all instances a common and public nuisance. The object of the present prosecution is to determine whether these gentlemen have the right to act in this manner.

The Roman law declared all navigable rivers the property of the nation. Boating, bathing, fishing, washing, mooring, landing, etc., was allowed to every one and in every portion of the stream and its shores. Daviel, Des Cours d'eaux, No. 74; Garnier, Régime des eaux, 68.

In England, the sovereign has also the dominion over public

navigable waters, but only as far as the flowing and reflowing of the tide extends. Beyond this the soil of the stream belongs to the riparian owners. Woolrych on Waters, 23, 24; Angell on Watercourses, § 535, § 545.

This rule of the English common law has been recognized by the Courts of the States of New York, Massachusetts, New Hampshire, Connecticut, Maine, Maryland, Virginia, Ohio, Indiana, also Illinois—Angell § 547. On the other hand the principle of the Roman Law has been maintained by the Courts of Pennsylvania, North Carolina, Tennessee, Louisiana, and forms part of the common law of Europe and South America.

In France, it seems that the sovereign did not claim the soil of all navigable rivers till after the fourteenth century; until then it was the property of the *Seigneurs*. Championnière, Propriété des Eaux Courantes, pp. 645 *et seq*. But there is no doubt that long before the settlement of this colony, the *domain* of all navigable streams, that is capable of being navigated, whether of fresh or salt water, was vested in the Crown for the purpose of navigation. Ordonnances of 1415, 1520, 1583, art. 18; Bouteiller, Somme rurale, tit. 73; Duparc-Poullain, t. 2, p. 398; Loyseau, Des Seigneuries, ch. 12, No. 120; Legrand, Coutumes de Troyes, art. 1791 gl. 1; Loysel, tit. 2, reg. 5; Garnier, Régime des eaux, vol. 1, pp. 44 *et seq*.

The Civil Code of Lower Canada has reproduced the provision of the old French law. Article 400 says that "navigable and "floatable rivers and streams *and their banks* . . . . are "considered as being dependencies of the crown domain." The corresponding article of the French Code (538) is substantially the same, with the exception that it does not contain any provision concerning the banks of rivers.

If the rule of the English law, which prevails in Ontario and the sister provinces, was to be applied to the River St. Lawrence in the Province of Quebec, above water tide, it would be clear that the riparian proprietors, being owners of the stream, would also own the shore which is a mere accessory of the river. "The banks of rivers," says Woolrych, p. 44, "together with the trees belong to the owner of the soil adjoining." Callis, on Sewers, pp. 73, 115.

What constitutes the bank of a navigable river is a point upon which commentators do not agree. According to the best authorities in France, a division must be drawn between high

and low water marks. The inferior half is the bank proper of the river and belongs to the Crown, and the superior one is a portion of the adjoining land. Rolland de Villargues, vo. chemin de halage, No. 9, 14; Garnier, vol. 1, No. 73, 102: vol. 2, No. 477; arrêt de Rouen, 16 dec. 1842, S. 43, 2, 409; Daviel, vol. 1, No. 91; Isambert, De la Voirie, No. 127.

It is unimportant to the determination of this case to examine at any length this question of proprietorship of navigable rivers and of their banks. Both the English and the French law have nearly the same regulations concerning the use that can be made of these things.

Woolrich, p. 40, says: "Waters flowing in land where the "public have been used to exercise a free right of passage "from time whereof the memory of man is not to the contrary, "or by virtue of legislative enactments, are public navigable "rivers."

By use and by legislative enactments the River St. Lawrence is a public navigable river, and it is immaterial whether the channel, which is entirely or partly filled up by the rafts, is used for steamboat or heavy transportation, or only barges and boats.

Navigable rivers, says again Woolrych, p. 1, are considered in law as "highways." Even at common law any encroachment upon a public stream was considered to be purpresture, that is to say, the making of that several and private which ought to be common to all. Woolrych, 196, 199, 257. The public, said Lord Chief Justice Abbott, has a right to all the convenience of the former state of the river. *Rex* v. *Lord Grosvenor*, 2 Stark 511. It is no excuse that the obstruction is beneficial to the public. Woolrych 208. A floating dock in a public river is a nuisance, although beneficial for repairing ships. Id. 200. To construct and moor a floating storehouse or vessel, for the receiving and delivery of goods, is an offence indictable as a public nuisance. Angell, § 556. There is no common law right to bathe in a river. Woolrych, p. 2, 6 et seq.; *Blundell* v. *Catterall*, 5 B. & A. 268. No right exists at common law to tow on the banks of navigable rivers; it depends on usage; *Ball* v. *Herbert*, 3 T. R. 261; *Kinloch* v. *Nevile*, 6 M. & W. 794; Woolrych, 9, 164; Angell, § 551. (The French and Canadian law is different in this respect.) *The mooring of barges in an inconvenient manner* has been deemed an obstruction. Woolrych, 200, 201; *Rose* v. *Miles*, 4 M. & S. 101. No length of time

will legitimate a public nuisance, so that the acquiescence of twenty years will not divest the rights of the public. Woolrych, 208; Angell, § 563.

It appears that in certain cases the obstruction may be removed without any judicial process. In a case of *Wyat* v. *Thompson*, 1 Esp. 252, the plaintiff brought trespass for cutting a rope belonging to his barge, by which the rope was spoiled and the barge set adrift. The defendant replied that he was possessed of a wharf and that the rope was injuriously fastened without his leave. He was condemned, but only because it was proved that "the custom of "mooring barges at low water is *for one tide* at the piles in the "front of the wharf, *and if there are no piles, the custom does "not allow the barges to moor at the wharf, unless through dis-"tress.*" Woolrych, 201. In *Arundell* v. *McCulloch*, the defendant cut down and removed a bridge built over a public river without authority from the Government, and the Court declared it to be clear "that when *any public way is unlawfully obstructed*, "any individual who has occasion to use it in a lawful way, may "remove the obstruction." 10 Mass. 70; *Mayor of Colchester* v. *Brooke*, 7 A. & E. (N.S.) 339. See also *Dimes* v. *Petley*, 19 L. J. Q. B. 453; Woolrych, p. 199, 200, note a; *Hart* v. *Mayor of Albany*, 9 Wend, 571.

The regulations of the English law are plain enough; those of the French law, which are in force here, are not less explicit. Article 649 of the Code Napoleon says: "Les servitudes établies "par la loi ont pour objet l'utilité publique ou communale "ou l'utilité des particuliers." Article 650: "Celles établies "pour l'utilité publique ou communale ont pour objet le marche "pied le long des rivières navigables ou flottables, la construc-"tion des chemins et autres ouvrages publics ou communaux.

"Tout ce qui concerne cette espèce de servitude est déterminé "par des lois ou des règlements particuliers."

These provisions of the French Code have been reproduced word for word in the Civil Code of Lower Canada. Article 506 says: "Servitudes established by law have for their objects pub-"lic utility or that of individuals." Art. 507: "Those estab-"lished for public utility have for their object the foot-road or "tow-path along the banks of navigable waters or flotable rivers, "the construction or repairs of roads or other public works. "Whatever concerns this kind of servitude is determined by "particular laws or regulations." The two Codes being similar,

the French authorities must therefore be of great weight in this Province for the determination of any question connected with navigable rivers or their banks.

Garnier, Régime des eaux, vol. 2, p. 82, says: "La servitude "imposée aux riverains est exclusivement réservée au service de "la navigation, et ne peut en conséquence donner à des tiers "aucuns droits étrangers à ce service, tels que de construire des "aqueducs, *de puiser de l'eau, de laver*, etc." See also Garnier, vol. 1, p. 91; Favard, vo. chemin de halage; Rolland de Villargnes, vo. chemin de halage; Proudhon, de la Propriété, Nos. 779, 782, 784; Gilbert sur Sirey, notes 1, 10, sur l'article 650; Pardessus, des Servitudes, No. 139.

Garnier: "Le chemin de halage ne peut être employé par les "navigateurs à un autre usage que le simple passage, *et ceux ci* "*ne peuvent le transformer en un port fixe d'abordage où ils* "*demeureraient amarrés.*" Garnier, vol. 1, p. 93; vol. 2, p. 82; Gilbert, loc. cit. note 15 bis; Proudhon No. 784; Daviel No. 116; Arrêt du Conseil, 26 Août 1818; Sirey, 18, 2, 332; Bulletin des lois, 1818, p. 234. On ne peut se servir du marche pied du fleuve afin de s'y baigner, Daviel, p. 78.

Garnier, vol. 1, p. 93, says: "Un arrêt de la Cour de Cassa-"tion du 11 Juin 1822 a décidé dans l'affaire Duboury & L'alle-"mand que le premier n'avait pu amarrer son bateau aux arbres "existant sur les rives d'une île appartenant au second." Daviel vol. 1, p. 79, No. 74. "Ce n'est qu' en cas de nécessité, par "exemple de naufrage ou de péril manifeste, que, soit le depôt "de quelques objets, soit l'amarrage des câbles, devrait être "accidentellement toléré par le riverain." Daviel, vol. 1, Nos. 73, 74, 76.

Dumont, des Cours d'eau, p. 61: "La fréquentation du che-"min de halage est interdite à tous autres qu'aux navigateurs "et aux pêcheurs. Ceux ci même ne peuvent s'en servir que "pour trainer leurs filets, *non pour les sécher et les déposer.*" Daviel, vol. 1, p. 80, No. 76.

In Louisiana, where the same principles prevail, it has been decided that any work or establishment which obstructs the free use of roads and banks of a river, is a nuisance, and may be abated by the police authorities of the place, or perhaps even a private individual, *Henderson* v. *Mayor*, 3 L. 566; *Natchiches* v. *Cox*, 3 N. S. 141. See also *Hanson* v. *Lafayette*, 18 L. 295. No one has a right to a permanent occupancy of the banks of

a river; *Shepherd* v. *Municipality No. Three*, 6 R. 349. See also *DeBen* v. *Gerard* 4 A. 30; *Carrollton R. Co.* v. *Winthrop* 5 A. 36.

The lumber merchants have pleaded that they have no other place where they can moor their rafts. I do not know that such is the case; in fact it has been proved that they could be moored at *Grande Anse* or *Isle Perrot*, without any inconvenience to the public; but it is alleged that these places are out of the way. Whatever this may be, the plea of the defendants cannot be a good answer to the complaints made. The law is precise and must be respected. Lumbermen, like other boatmen, should buy or lease the necessary ground to receive their timber. If the Government does not give them public booms, they ought to construct private ones, as is done near Quebec, and ask permission from the proper authorities to keep their rafts in moorage along their own banks. No more than ordinary importers, have they a right to trespass on the property of their neighbours or of the public, and expect that others should provide them with the proper storage. If the bay at Upper Lachine is the only safe place where rafts can be moored, they ought to buy the property adjoining. No one has the right to forcibly take the land of his neighbour and carry on his trade there, because it is the most suitable. What would one of the honorable commissioners do if one morning he was finding a herd of cattle fastened on to his trees along the land public highway? I do not suppose that he would wait for a judgment of the court to remove the nuisance. No one would be surprised to hear that even the honorable Chairman of this Commission had cut the rope or ropes and let the whole herd wander at large. It is hard to see any difference between this case and that of a nuisance committed on a water public highway. A recent telegram received from Ottawa informed the horrified public that cattle is far less dangerous than certain raftsmen. At all events, if no one can abate a nuisance on a public highway without the intervention of courts of justice, that intervention ought to be readily granted in favour of citizens who merely demand justice, the peaceable and full enjoyment of their property and rights and the enforcement of the laws of the country.

Mr. Carter, in reply, argued that the raft having arrived at its destination, there was no longer any necessity for any light being shown or the name of the owner being affixed to the cabin,

they being only required while the raft is in transit. With regard to encumbering the beach, he quoted from the Civil Code of Lower Canada, No 400:—

"Roads and public ways maintained by the State, navigable and floatable rivers and streams and their banks, the sea-shore, lands reclaimed from the seaports, harbours and roadsteads, and generally all those portions of territory which do not constitute private property, are considered as being dependencies of the Crown domain."

And again, from sub-section 2 of the Consolidated Statutes of Lower Canada, chapter 26:—

"It shall be lawful nevertheless to make use of any navigable or floatable river or watercourse, and the banks thereof, for the conveyance of all kinds of lumber, and for the passage of all boats, &c., subject to the charge of repairing, as soon as possible, all damages resulting from the exercise of such right, and all fences, drains or ditches so damaged."

On the 20th August, 1874, judgment was given as follows:

DÉSIRÉ GIROUARD, complainant, *vs.* JOHN GRIER *et al*, defendants.—The undersigned, three of the Harbour Commissioners of Montreal, having heard the complaint against the said defendants, as set forth in the information in this matter fyled, and having also heard the several witnesses who were duly sworn and examined by and before us touching the charge and accusation contained in the said information, and the arguments of counsel on behalf of the prosecution and defence, and having deliberated, and considering that all or every the person or persons who shall encumber the navigable part of the River St Lawrence or the navigable waters within the jurisdiction of the Corporation of the Harbour Commissioners of Montreal, or any of the harbours, creeks, inlets and beaches within the said limits, or in any way obstruct the navigation thereof with stones, filth, rubbish or cribs, wrecks of steamers or other vessels, shall incur a penalty not exceeding £10 for each and every offence, and a further like penalty for neglecting or refusing to remove or cause to be removed any such encumbrances or obstruction, within ten days after being legally notified so to do, and a further like penalty for every ten days such encumbrances shall not be removed; and also considering that it hath been satisfactorily proven before us that at the time of the laying of the information in this matter

and of the commission of the offence therein alleged, the said defendants, John Grier and Brock Grier, were the owners of a certain raft, which raft obstructed a navigable part of the River St Lawrence in the upper part of the Parish of Lachine, within the jurisdiction of the Corporation of the Harbour Commissioners of Montreal, which said raft has, as has been proven before us, obstructed the inside channel of navigation on that part of said river hereinbefore described, and also prevented access to the beach of said river by the proprietors thereof, and by said raft lying partly in the navigable part of said river, and also on its beach and on that part of it hereinbefore described, the said defendants are by us adjudged and condemned to pay for their said offence a fine of $20 to the said Harbour Commissioners, together with the costs of the present prosecution, and it is by us further ordered and adjudged that the said defendants, John Grier and Brock Grier, be forthwith required by the Secretary-Treasurer of this Corporation or some other of its officers in that behalf duly authorized, to notify the defendants to remove or cause to be removed the obstruction and incumbrance complained of in and by the said information, and further, that if said removal of said obstruction be not effected in 10 days after being required so to do, then it is by us further ordered and adjudged that said defendants be condemned to pay to the Corporation of Harbour Commissioners of Montreal a further penalty of £5 for every subsequent 10 days the said obstruction and incumbrance shall not be removed after said notification; and also considering that the other defendant, W. Murphy, is not liable in manner and form as set forth in said information, the present complaint, in so far as it affects him, is hereby dismissed without costs.

JOHN YOUNG, Chairman.
ANDREW ALLAN.
A. ROY.

ALEXIS BRUNET, complainant, *vs.* JNO. GRIER, *et al.*, defendants.—The undersigned, three of the Harbour Commissioners of Montreal, having heard the complaint of the said Alexis Brunet against the said defendants, as set forth in his information in the matter fyled, and having also heard the several witnesses who were duly sworn and examined by and before us touching the charge and accusation contained in the said information, and the argument of counsel on behalf of the prosecution and defence, and

having maturely deliberated, and considering that under the law owners or persons in charge of rafts within the jurisdiction of the corporation of said Harbour Commissioners are not obliged to keep a bright fire or any fire burning thereon from sunset to sunrise, unless said rafts are drifting or at anchor on any navigable water, and considering also that the prosecutor has failed to establish the material allegations of his information, to wit: That the raft complained of was, while drifting or anchored on any navigable river, without a bright light burning thereon; and also considering that it hath been satisfactorily proven before us that said raft was not at time of the laying of said information or of the commission of the offence therein alleged drifting or anchored on any navigable water which imposed upon the said defendants the obligation of keeping a bright fire burning thereon from sunset to sunrise, or any fire, but on the contrary was anchored to a beach in the parish of Lachine, within the jurisdiction of said corporation and at a place which exempted defendants from the obligation of keeping a fire on said raft. It is therefore ordered and adjudged that the complaint and information of the said Alexis Bouret be, and the same is hereby dismissed with costs.

JOHN YOUNG.
A. ALLAN.
A. ROY.

PIERRE ETIENNE NORMANDEAU, informant and prosecutor, *vs.* JOHN GRIER *et al*, defendants.—The undersigned, three of the Harbour Commissioners of Montreal, having heard the complaint of said informant and prosecutor against the said defendants, as set forth in the information of said Pierre Etienne Normandeau in this matter, produced and fyled, and having also heard the several witnesses produced upon the trial of said cause, and who were duly sworn and examined before us touching the charge and accusation contained in the said information, and having heard the arguments on behalf of the prosecutor and defendants, and having maturely deliberated, considering that by law all rafts navigating the waters within the limits of the jurisdiction of the Corporation of the Harbour Commissioners of Montreal, shall have the name of the owner, or owners thereof, legibly painted in letters not less than eighteen inches long, on both sides of a board, not less than five feet in heighth, to be

fixed in some prominent place on the raft, so as to be easily discernible, under a penalty not exceeding ten pounds against the owner, master or person in charge thereof; and, considering that at the time of the laying of the information in this matter, and of the commission of the offence therein alleged, the raft complained of in and by the said information was being navigated through the waters of the St. Lawrence, in the Parish of Lachine, in the County of Jacques Cartier, within the jurisdiction of the said Corporation of the said Harbour Commissioners; and also considering that it hath been satisfactorily proved before us that the defendants, John Grier and Brock Grier, are the owners of the said raft and were such at the time af the offence complained of, and that they had not, as alleged in the said information, the name of the owner or owners of the said raft painted on the *Cabane* or any other prominent place on the said raft, as by law required; we adjudge and condemn the said John Grier and Brock Grier to pay for their said offence to the Corporation of the Harbour Commissioners the sum of five pounds currency money of the Dominion of Canada, to wit, twenty dollars, with also the cost of the present prosecution. And further, considering that the said William Murphy, the said other defendant, is not liable in the manner and form, as set forth in said information, the present complaint, in so far as it concerns him, is dismissed without costs.

JOHN YOUNG.
A. ALLAN.
A. ROY.

Hon. John Young, after delivering the judgments of the Board said: "In giving this judgment, which the Commissioners "believe is quite in accordance with the rules and by-laws of "the Harbour Commissioners, they cannot give it without "stating that the lumber trade of Montreal and of the Ottawa is "so large in its character and of so much interest to the whole "community, that although this is the law according to our "opinion, yet some steps should be taken by the lumber merchants "whereby provision should be made for the accommodation of "their trade. No communication whatever has been made either "to the late Trinity Board or to the Harbour Commissioners. "No attempt, no request has ever been made by the lumber "trade of the country for any provision by which they could

"obtain ample means for its accommodation without infringing "upon the rights of private parties. We believe that the rights "of private parties have been infringed, and we have given judg- "ment accordingly.

"I believe I speak the unanimous opinion of the Commission- "ers when I say that we shall be glad to receive any application "from the lumber trade setting forth how provision could be "made for their accommodation either by booms or in some "other way.

"I deem it my duty to make these remarks in giving this "judgment, in order that the public may understand that while "the Commissioners have no alternative but to carry out the "law, yet they are perfectly sensible to the requirements of the "lumber and timber trade of the country."

LA RÉDACTION

DOUGLAS & *al. vs.* RITCHIE & *al.*—STATUTE OF FRAUDS.

The allegations of the declaration and pleas in this case, as set out in the Appellants' Factum in Appeal, are the following:

"The action in the court below was brought for the recovery of damages for the non-delivery of a quantity of teas, sold by the Defendants to the Plaintiffs, and was dismissed by judgment rendered in the Superior Court, Montreal, on the 30th day of December, 1872 (Beaudry, Justice), on two grounds, both of which are submitted to be erroneous, namely:—1st, that there was no sufficient legal proof of the sale by memorandum in writing, signed by the Defendants and containing all the terms of the sale; and, 2nd, because the Plaintiffs in not making a motion to have the interrogatories *sur faits et articles*, served upon the Defendants and to which they made default, taken *pro confessis*, were not in a position to obtain the benefit of the default.

"The declaration set up in effect a purchase on the 2nd May, 1872, by Plaintiffs from the Defendants, through the Defendants' broker, Archibald Moir, acting as their agent, the following quantity of teas, to wit:—Seventy half-chests of Hyson tea, at 48 cents per pound; fifty-four half-chests ditto, at 46 cents per lb., each chest containing sixty-five pounds; in all 7650 pounds, as per sample of each kind of tea delivered by Defendants to Plaintiffs, said teas deliverable on the arrival of the Steamers "Niger" or "Nile" at Montreal, which steamers arrived on or about the 15th of May.

"The declaration also alleged Plaintiffs' readiness to receive the teas, and to pay for the same; their demand of delivery, and Defendants' refusal of delivery, and the sale of the teas by Defendants to other parties at an increased price; that teas had increased in value to the extent of twelve cents per pound, and that the Plaintiffs had suffered damage to the extent of one thousand dollars, for which sum they pray judgment.

"1st Plea.—That Plaintiffs had not set up any acceptance of part of the goods, or any payment of earnest to bind the bargain, or any memorandum in writing signed by the Defendants as required by Article 1235 of the "Code of Civil Procedure" (should

be of the *Civil Code*), and therefore had no right to recover. Conclusion to dismiss action.

"2nd Plea denies the allegations of the declaration; also the sale as alleged in the declaration, or that any memorandum in writing was made or any contract binding on the Defendant. There are in this plea the following allegations which are invoked by Appellants as forming *commencement de preuve par écrit* set up in the declaration:—

"The said Defendants, *d'abondant*, aver that the only "transaction in the article of tea ever entered into between them "and Plaintiffs, was the following, and none other, to wit:— "That Defendants agreed to sell and deliver, and Plaintiffs "agreed to purchase and buy and receive delivery of from them "and pay them, for seventy half-chests of Young Hyson tea, "containing, each half-chest, the quantity of fifty-six and a half "pounds of tea or thereabouts, which Plaintiffs agreed to buy "and receive delivery of from Defendants, and to pay for the "same at the rate of forty-six cents per pound; and sixty-eight "half-chests of Young Hyson tea, of the total weight of four "thousand one hundred and forty-four pounds in all or there- "abouts, which Plaintiffs also agreed to buy and receive delivery "of from Defendants, and to pay for the same at the rate of "forty-eight cents per pound; in all eight thousand one hun- "dred pounds or thereabouts.

"And further, *d'abondant*, Defendants say that they faith- "fully carried out the agreement made by them with Plaintiffs; "and upon the arrival of said tea at Montreal, to wit, being the "time agreed upon for such delivery, they faithfully and duly "offered and tendered delivery to the said Plaintiffs of the said "70 half-chests of tea so sold Plaintiffs at the rate of forty-six "cents per pound, and of the said 68 half-chests of tea at the "rate of forty-eight cents per pound, to wit, as they had agreed "upon with Plaintiffs; but that the Plaintiffs, unmindful of "their said agreement, refused to accept delivery of or to pay "Defendants for the said tea, but repudiated their bargain with "Defendants, and refused to comply with the same, thus causing "Defendants much injury and trouble, and loss of time in seeking "another purchaser therefor.

"And further do the Defendants specially deny that the "Plaintiffs ever demanded delivery of or offered to pay for the "tea by them bought from the Defendants, or that Defendants

" refused to deliver to them the tea they, Defendants, had " agreed to sell them, Plaintiffs.

" And further, *d'abondant*, Defendants say that the tea " really sold by them to Plaintiffs, and which they duly offered " and tendered delivery of to them, was, in fact, of equal and " superior quality and value to that now falsely alleged by " Plaintiffs to have been sold them by Defendants, and that they " have suffered no loss in the premises."

With the articulations the Appellants produced a paper, writing, worded as follows:—

" On the 2nd May, 1872, I bought from Messrs. Ritchie, " Rae & Co., for account of Douglas, Kirk & Co., 70 half-chests " Y. Hyson tea, 48 cents; 54c. do., do. 46c., duty paid, and " then due by steamers " Niger " and " Nile."

" Arrived 15th May.

A. Moir."

And a letter from the Respondents in the following terms:

" Montreal, 27th May, 1872.

" *Messrs. Douglas, Kirk & Co., City.*

" Dear Sirs,

" We regret there should be an error about " these two lots of Y. Hyson teas.

" We gave the samples in good faith to Mr. Moir, believing " them to represent two lines coming by the " Nile," which we " proposed to sell you, and which on arrival we tendered you. " It appears by some unaccountable accident, whether occurring " with us or otherwise it is impossible to say, the papers in the " cans got shifted.

" The thing is purely a mistake, and under the circum- " stances it is not respectable of you to charge us with wilfully " substituting one for another.

" The teas are fair value, and if you decline taking them, " we can easily place to same or better advantage.

Yours truly,

Ritchie, Rae & Co."

The Appellants also served the following interrogatories on *faits et articles* on the Respondents:—

Interrogatories *sur faits et articles* to be submitted to the Defendants:—

First.—Is it not true that the said Defendants sold the seventy half-chests of tea referred to in the pleadings in this cause, and say when and to whom and at what price?

Second.—Was not the weight of said seventy half-chests of tea fifty-six pounds each ? If not, what weight were they, and what were the weights of the other half-chests mentioned in the Plaintiffs' declaration, and for what price did Defendants sell the same, and to whom and when ?

Third.—Is it not true that Defendants never delivered to Plaintiffs the seventy half-chests of tea, or the fifty-four half-chests mentioned in Plaintiffs' declaration ?

Fourth.—Did not the Plaintiffs demand the delivery of the *said* tea, and offer to pay for the same after the steamers "Niger" and "Nile" arrived at the port of Montreal ?

Fifth.—Is it not true that on or about second of May last past (1872), the said Defendants authorized Archibald Moir, of Montreal, Broker, to sell certain lines of tea for them, and furnished and delivered him samples of the same, with a memorandum of prices to be obtained thereof ?

Sixth.—Did said Moir offer, at any time, for and on behalf of said Defendants, any teas ; and if so, say when ?

MONTREAL, 14th November, 1872.

A. & W. ROBERTSON,
Plaintiffs' Attorneys.

The interrogatories were not answered.

At *enquête* the Respondents made the following objection to oral evidence being adduced by Appellants, which objection appears on the face of the deposition of Archibald Moir, a witness produced by Appellants, and was, by consent of record, to be held as if made to the evidence of each witness produced. This objection was at the time reserved, but on a motion made at the hearing on the merits it was maintained.

It was in these words :—"The Defendants object to the "Plaintiffs being allowed to prove any contract of sale, it not "being even pretended by the Plaintiffs' declaration that they "ever received any part of the goods pretended by them to be "sold to them, or gave anything in earnest to bind the parties, "or that there was any writing signed by Defendants or their "authorized representative."

The evidence given on behalf of the Appellants was parole, with the exception of the two paper writings given above. No brokers' notes were produced nor any entry in a brokers' book proved, and Mr. Justice Beaudry holding the Superior Court on the 30th Dec., 1872, rendered the following judgment :—

"The Court having heard the parties by their counsel, respectively, as well on the merits as on the motion to reject the oral evidence, to prove the contract alleged in Plaintiffs' declaration, examined the proceedings of record and proof, and on the whole maturely deliberated:—Considering that no action could be maintained on the alleged promise of sale mentioned in Plaintiffs' declaration of a certain quantity of teas to arrive, without a writing signed by the Defendant or his representatives under Article 1235 of the Civil Code; and considering that no such writing was proved in this cause, and that no bought or sold notes were drawn or made in relation to the said pretended sale by Archibald Moir, alleged to have acted as broker in this transaction; and considering that the Defendants have not admitted said pretended sale, but have denied it, and pleaded a different contract: doth dismiss the said Plaintiffs' action with costs, *distraits* whereof is granted to Messrs. Monk & Butler, Attorneys for Defendants."

The case was taken into Appeal before the Court of Queen's Bench, and on the 20th June last a majority of that Court (Ramsay and Sanborn, JJ., and Loranger, Assistant J.,) rendered the following judgment, (Taschereau, J., dissenting):

"Considering that the Respondents neglected to answer the interrogatories, *sur fait et articles*, served upon them in this cause.

"Considering that the said interrogatories may be taken *pro confessis* without any motion being made to that effect by the opposite party, and that the interrogations in this cause being so taken *pro confessis*, furnish a *commencement de preuve par ecrit* to warrant the introduction of parole evidence, and considering that it appears by the evidence adduced that the Appellants did on or about the second day of May, eighteen hundred and seventy-two, purchase from the said Respondents through Archibald Moir, their broker, 70 half-chests of tea at 48c. per lb. and 54 half-chests of tea at 46c. per lb., to arrive by the steamers "Niger" and "Nile," similar to the samples then exhibited by said Appellants.

"Considering that the said steamers arrived on or about the fifteenth day of May, and that the said Respondents refused to deliver said tea according to said samples.

"Considering that the time the said Respondents failed and refused to deliver the said tea to Appellants the price of tea had

advanced at least six cents per lb., and that the said seventy half-chests of tea and the said fifty-four half-chests of tea ought to have contained fifty-one and one-half pounds each.

"Considering that the failure of the Respondents to carry out their said agreement caused a damage to said Appellants of $383.00.

"Considering that there is error in the judgment appealed from,

"Doth reverse the said judgment appealed from, to wit, the judgment rendered by the Superior Court, sitting in the District of Montreal on the 30th day of December, 1872, and proceeding to render the judgment which ought to have been rendered by the said Superior Court on the day and year last aforesaid; doth condemn the said Respondents, jointly and severally, to pay and satisfy to said Appellants (Plaintiffs in the Court below) the said sum of $383.00, and interest from the 3rd of July, 1872, and costs, as well of this Court as of the Court below, and doth order that this record should be remitted to the Court below."

The learned judges composing the majority of the Court of Queen's Bench held expressly that the place of the writing required under Art. 1235 of the Civil Code, signed by the Respondents, was supplied by their default to answer interrogatories on *faits and articles* exhibited to them; and the ground they apparently went on was that the old Civil Law of the country relating to *commencement de preuve par ecrit* always existed in this Province, side by side with the 17th section of the Statute of Frauds, since the introduction of the English Law of Evidence in Commercial matters and still continued to exist side by side with Art. 1235.

No more important question presents itself for consideration in the commercial law of the Province than the one decided in this case by the Court of Queen's Bench. Its critical examination is absolutely required in order that it may be finally determined.

The third section of the ninth chapter of the third title of the third book of the Civil Code of Lower Canada is headed "Of testimony," and contains eight articles numbered from 1230 to 1237, both inclusive.

Art. 1233 provides, among other things:—"Proof may be made by testimony.

1. Of all facts concerning commercial matters.

* * * * * * * * *

7. In cases in which there is a commencement of proof in writing. In all other matters proof must be made by writing or by the oath of the adverse party. The whole nevertheless subject to the exceptions and limitations specially declared in this section, and to the provisions contained in Art. 1690.

Art. 1235 provides "In commercial matters in which the sum of money or value in question exceeds fifty dollars no action or exception can be maintained against any party or his representatives unless there is a writing signed by the former in the following cases:—

1. * * 2. * * 3. * *

4. Upon any contract for the sale of goods, unless the buyer has accepted or received part of the goods, or given something in earnest to bind the bargain. The foregoing rule applies, although the goods be intended to be delivered at some future time, or be not at the time of the contract ready for delivery."

In the Province of Quebec, it may be said that there are two general rules regulating proof in all suits brought before the tribunals. One applicable to civil cases only, the other to commercial cases alone.

In civil cases the general rule is that proof must be made by writing or by the oath of the adverse party. In commercial cases, on the other hand, proof may be made by parole evidence of all facts concerning commercial matters. (Art. 1233; C.C.L.C. 1 and 2 and 7.)

To each of these rules there are certain exceptions and limitations. (*Vide* Art. 1233, C.C.L.C. § 2, 3, 4, 5, 6, 7; arts. 1235, 1236, 1237, 776, 1690.

Art. 1233 is not drawn in the most skilful manner for taking the whole body of our law of evidence, the general dominating principle is that proof must be (to use the words of subsection) made by writing; whilst the article in question would seem to recognize proof by testimony as the leading rule to which proof in writing is but one of the exceptions. Had the article been framed as follows:—"In all matters proof must be made by writing or by the oath of the adverse party, save and except" giving subsections 1–7, no difficulty would have been experienced in understanding the whole article, but the plan adopted is evidently that of placing the cart before the horse.

By changing the phraseology of the article as above sug-

gested, each of the exceptions letting in parol testimony would clearly be an exception to the general rule by which parol testimony is forbidden, would be separate and distinct from its fellows, would not apply to them or any of them, but would solely mitigate the harshness of the general rule.

It would then be impossible to maintain that the first sentence of subsection 7 of art. 1233 was an exception, or intended at all to apply to subsection 1 of the same article. How, if in commercial matters under that subsection, proof may be made by testimony of all facts, can it be pretended that a *commencement de preuve par écrit* is necessary to admit such proof. "In cases in which there is a commencement of proof in writing," (§ 7, art. 1233), clearly applies solely to civil cases governed by the rule of the general law, that in all matters proof must be made by writing or by the oath of the party."

But the whole of art. 1233 is controlled by its concluding paragraph: "The whole neverthless subject to the exceptions and limitations especially declared in this section and to the provisions contained in article 1690."

It becomes necessary then to discover the exceptions and limitations contained in the third section of the ninth chapter of the third Title of the Civil Code of Lower Canada, of which article 1233 is part.

Article 1235 forming part of the same section as article 1233 is in the following words:—

In commercial matters in which the sum of money or value in question exceeds fifty dollars, no action or exception can be maintained against any party or his representatives, unless there is a writing signed by the former in the following cases:—

1. Upon any promise or acknowledgment whereby a debt is taken out of the operation of the law respecting the limitation of actions;

2. Upon any promise or ratification made by a person of the age of majority of any obligation contracted during his minority;

3. Upon any representation in favor of a person to enable him to obtain credit, money or goods thereupon;

4. Upon any contract for the sale of goods, unless the buyer has accepted or received part of the goods or given something in earnest to bind the bargain. The foregoing rule applies, although the goods be intended to be delivered at some future time or be not, at the time of the contract ready for delivery."

The words with which the last cited article commences, "In commercial matters," evidently connect it with section 1 of article 1233, by which it is declared that proof may be made by testimony, of all facts concerning commercial matters." It is also evident that the article contains special exceptions to, and limitations of, article 1233, section 1, because in all matters in which the sum of money or value in question exceeds $50, proof by testimony cannot be made in the cases mentioned in the three first sections of article 1235, unless there be in existence a writing signed by the party against whom, or his representatives the action is taken or the exception pleaded, and section 4 contains also a special exception to, and limitation of, article 1233, section 1, under certain circumstances.

Article 1235 providing that "testimony cannot in any case be received to contradict or vary the terms of a valid written instrument," clearly creates an exception to or limitation of article 1233, sections 1 and 2.

Articles 1236 and 1237 also contain exceptions to, and limitations of, article 1233, but it is unnecessary for the elucidation of the question now under consideration to enter into an examination of the restrictions thereby imposed.

Article 1690, however, which as has been already shown, art. 1233 recognizes as containing provisions controlling art. 1233 is in the following words: "When an architect or builder undertakes the construction of a building or other works by contract upon a plan and specifications at a fixed price, he cannot claim any additional sum upon the ground of a change from the plan and specifications or of an increase in the labor and materials, unless such change or increase is authorized in writing and the price of them is agreed upon with the proprietor."

A contract between an architect or builder and an individual for the building of a house is clearly a commercial matter, consequently article 1690 contains an exception or limitation of article 1233, section one. So that articles 1235 and 1690 contains exceptions or limitations of article 1233, section 1, by which the rule that proof of testimony can be made of all facts in commercial matters is made to suffer an exception. They are, therefore, of the same class, and although the writing under article 1235 requires the signature of the party, whilst no mention is made in article 1690 of the signature being requisite, yet it may be taken for granted that if the place of the writing

under article 1690 cannot be supplied, neither, if there be no writing signed by the party. can its place under article 1235 be supplied by any other species of proof.

It is exceedingly fortunate that with respect to article 1690, we have the opinions of numerous French authors of the highest eminence on article 1793 of the Code Napoleon, of which our article 1690 is almost a perfect copy. Marcadé, in his 6 vol. art. 1793, § 2, p. 542 of the 5th edition, thus expresses himself: "Comme c'est précisement par ces changements au plan primitif que les constructeurs trouvent le moyen d'arriver a ces dépenses ruineuses contre lesquelles il s'agit de protéger ici le propriétaire, le Code ne permet aucune reclamation que sous la double condition que le propriétaire ait autorisé ce changement par écrit et qu'il soit formellement convenu du prix. Si donc il n'y a pas d'écrit, toute reclamation est interdite au constructeur qui ne peut pas plus recourir à la délation du serment ou à l'interrogatoire sur faits et articles qu' à tout autre moyen de preuve." See also Gilbert Codes Annotés, Code Napoleon, art. 1793, for authorities cited there.

The provisions of article 2, title 20, of the Ordonnance of 1667, relative to proof, did not affect commercial matters. It was in these words: "Seront passés actes par devant notaires ou sous signature privée, de toutes choses excédant la somme ou valeur de cent livres meme pour dépots volontaires et ne sera reçu aucune preuve par témoins contre et outre le contenu aux actes, ni sur ce qui serait allégué avoir été dit avant lors ou de puis les actes encore qu'il s'agisse d'une somme ou valeur moindre de cent livres sans toutefois rien innover pour ce regard en ce qui s'observe en la justice des juges et consuls des marchands." Art. 1341 of the Code Napoleon is in the following words:—

"Il doit être passé acte devant notaires ou sous signature privée de toutes choses excédant la somme ou valeur de cent cinquante francs même pour dépots volontaires; et il n'est reçu aucune preuve par témoins contre et outre le contenu aux actes, ni sur ce qui serait allégué avoir été dit avant, lors ou depuis les actes, encore qu'il s'agisse d'une somme ou valeur moindre de cent cinquante francs. Le tout sans prejudice de ce qui est prescrit dans les lois relatives au commerce."

It is apparent from the very wording of the article of the Ordonnance of 1667 above given, that even at that time a diffe-

rent rule of evidence prevailed in commercial cases from that which governed ordinary civil cases under the Ordonnance de Moulins (1566). The last-mentioned Ordonnance in fact was the first barrier erected in France to the absolute and unlimited admission of testimony. Previous to its being made, in the language of Bouteiller (*Somme rurale*, tit. 106), "S'il advient que, en jugement, une partie se veuille aider de lettres en preuve, et l'autre partie veuille aider des témoings singuliers, sachez que la vive voix passe vigneur de lettres, si les témoins sont contraires aux lettres. Et se doit le juge plus arrester à la deposition des tesmoings qui, de saine memoire, deposent et rendent sentence de leur deposition qu'a la teneur des lettres qui ne rendent cause."

Previous to 1566 the rule was "*témoins passent lettres.*" Nowadays the rule is "*lettres passent temoins.*"

The first part of section 7 of art. 1233 admitting testimony "In all cases in which there is a commencement of proof in writing," is but a repetition of the provision contained in the Ordennance of 1667, title 20, article 3. Previous even to that year, although the Ordonnance de Moulins contained no express provision on the subject, the exception of the *commencement de preuve par écrit* to the general rule erected by that Ordannance was universally admitted in practice. (5 Larombière art. 1347, No. 2.)

Thus it may be said that there was no change in the law of the Province of Quebec, from its first settlement up to the cession of the country by France to Great Britain in 1763. At the time of that cession the Ordonnance of 1667 regulated all matters of proof before the tribunals. In France all commercial cases were carried before the *juges et consuls des marchands*, but in Canada the consular jurisdiction never having been established, in all cases before the Courts the general rule as declared by that Ordonnance was carried out, so that the rules of evidence peculiar to the Consular jurisdiction were never in force.

By the 25 Geo. 3, c. 2, s. 10, it was provided that in proof all facts concerning commercial matters in Lower Canada, recourse should be had to the rules of evidence laid down by the laws of England.

By that statute there can be no doubt that the provisions of the 17th section of the Statute of Frauds, enacting that "no contract for the sale of any goods, wares or merchandises for the price of ten pounds sterling or upwards, shall be allowed to be

good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain, be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized," were introduced into the law of Lower Canada. (Pozer v. Meiklejohn, Pyke's Rep. 11.)

It was urged by one of the learned judges in rendering judgment in the case now under consideration, "that the practice of the Courts has been ever since the 25 Geo. 3, c. 2, to allow the *commencement de preuve* created by the default to answer, or by answers on *faits et articles* to supply the place of the memorandum in writing required by the Statute of Frauds. An assertion so made from the Bench commands attention, but strange to say there is not one case in the reports previous to Levy & Sponza, 6 L. C. Jur. 143, in which that doctrine is positively laid down.

It may be urged that the case of Levey & Sponza is a precedent directly in point, but even supposing that it was, surely there is nothing clearer than the fact that it militated against the principles of common sense and of law. A precedent under the system recognized in Quebec is not of such authority that it cannot be overruled. The sooner a decision discovered to be unfounded in law is overturned the better. Why should we import into the administration of our law a horror of touching what are called precedents peculiar to English practice.

The clinging to the old rule of the French law with respect to questions on, or answers to, *faits et articles* by the Court of Queen's Bench in Levey v. Sponza, may perhaps be attributed to the dislike entertained by that Court to abandon any of the peculiarities of the old French law for the rule of the English commercial law. But by the Code the matter has been made so clear that no excuse can be offered for the judgment now under consideration.

If the principles relied on by the Court in pronouncing judgment in this case were founded in law, no difficulty would be experienced in finding their recognition in the decisions of the commercial tribunals of France and in the writings of the eminent French jurists, whose works are received as authority before our Courts.

But no such decisions or data can be found; on the contrary, the principles laid down by the Queen's Bench in this case are

declared to be inapplicable in France in commercial cases. Mr. Massé thus expresses himself on the subject:

"Je l'ai dit, la règle qui, en matière commerciale, admet la preuve par témoins, quelque soit la valeur de la contestation ou celle de la chose qu'il s'agit de prouver, cesse d'être applicable dans tous les cas ou il s'agit d'un fait, d'une obligation, ou d'une libération, pour la preuve desquels la loi exige un acte écrit. Il est clair en effet, que lorsque la loi détermine un mode spécial de preuve pour la constatation d'une obligation ou d'une libération, elle exclut par cela même tous les autres. Il ne peut y avoir, en principe, aucune difficulté sur le sens des dispositions de cette nature, qui d'ailleurs, ne sont pas particuliers au droit commercial et dont le droit Civil fournit aussi des examples en interdisant la preuve testimoniale de certains actes même dans les limites déterminés par l'article 1341 du Code Napoléon."

4 Masse, No. 2548.

"Le même raisonnement s'applique a la règle exceptionnelle du droit Civil qui autorise la preuve par tèmoins quand il y a un commencement de preuve par écrit. Le droit commercial qui ne tient aucun compte d'un commencement par écrit quand il autorise la preuve testimoniale ne doit pas en tenir compte d'avantage lorsqu'il la prohibe."

4 Masse, No. 2566.

See 1 Delamarre & Le Poitevin, No. 193: 2 Delvincourt 393, 3 Vincent, p. 267.

In the rule laid down by the Code Civil, "Deeds containing gifts *inter vivos* must under pain of nullity be executed in Notarial form and the original thereof remain of record; the acceptance must be made in the same form. Gifts of moveable property accompanied by delivery may however be made and accepted by private writings or verbal agreement," (art. 776) we have analogous positions to that requiring the writing signed by the party under art. 1235. So far as the gift of immoveables is concerned, such gift can only be proved by the copy of the *acte authentique* containing the gift. So far as moveables are concerned the gift of them may be as complete as porsible, but if there is no delivery, no *acte authentique*, there is no donation which can be enforced in Lrw. The delivery in such case, where there is no *acte authentique*, is something without which there can be no action on the contract, as in the case of sale where there is no partial delivery, or acceptance, or earnest, or writing. The wri-

ting in the case of sale signed, by the party to be charged, is that requisite alone which gives to the contract where there is no partial delivery, acceptance, or earnest, the vitality required to sustain an action or exception against the party signing it.

According to the authorities on the 17th section of the Statute of Frauds, the memorandum in writing must contain all the points of the contract, that is, the names of the parties, the article sold, and the price, if settled, should at all events be there apparent, all under the signature of the party to be charged. Benjamin on Sales, 148, 177. Story on Sales § 266.

If the memorandum, however, does not contain the whole bargain, but merely a part of it, it is worthless, and it is impossible to have recourse to verbal evidence to fill up the *lacune*. *Elmore v. Kingscote*, 5 B. & C. 583; *Acebat v. Levy*, 10 Bing. 375; Benjamin, p. 148; *Boydell v. Drummond*, 11 East. 142; *Fitzmaurice v. Bailey*, 9 H. of L. 78; *Holmes v. Mitchell*, 7 C. B. N. S. 361; Story, § 270.

If this case is to be considered an authority, the English cases would be set aside, and upon an analogous enactment to s. 17 of the Statute of Frauds, we should have an entirely different jurisprudence.

It may then be laid down that art. 1235 expressly makes exceptions and limitations to the general rules laid down iu art. 1233. It provides in fact that no action shall be maintained against any party or his representatives, on any contract of commercial sale in pursuance of which there has been no partial delivery, acceptance, or payment of earnest, unless such party has signed a memorandum in writing embodying the terms of the contract. Consequently *as an act is required to be performed* by such party, without which an action cannot be maintained against him or his representatives, the answers on *faits et articles* even although they expressly admit the contract do not cause the party to perform the act without which the action cannot be maintained. (See 6 Marcade, art. 1793, s. 2, p. 548. 6th ed.)

If such be the case how can it be pretended that the default to answer on *faits et articles* produces that effect?

Another reason conclusively showing the fallacy of the argument of the learned judges in this case is that under the English authorities and their own jungment as renderod in Lynn & Cochrane & al. the memorandum in writing must be in existence

previous to the institution of the action (Bill *v.* Bament, 9 M. & W. 36; Gibson *v.* Holland L. R. 1 C. P. 1; Benjamin 152).

Under those authorities, the position that the place of such memorandum can be supplied by the default to answer or by the answers on *faits et articles* is shown to be untenable, for interrogatories on *faits et articles* can only be exhibited to the party sought to be charged after the institution of the action.

In conclusion, it is submitted that the rule laid down in Douglass *v.* Ritchie cannot be upheld, and that that case should be considered as of no authority.

WILLIAM H. KERR.

PRIVY COUNCIL

Judgment 21st May, 1874.

RICHER *vs.* VOYER & AL.

Present: Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague Smith.
Sir Robert P. Collier.

This is an action brought by the heirs of Madame Voyer against M. Richer, the Appellant, to recover a sum of 2,000 dollars, deposited on behalf of Madame Voyer in the Banque du Peuple of Montreal, upon a Certificate of Deposit payable to her order, and which sum the bank paid to the Appellant after Madame Voyer's death.

The defence was that Madame Voyer had transferred the certificate, which was said to be a negotiable instrument, to the Appellant, by indorsing and delivering it to him as a gift. And whether there was a valid gift of this certificate and of the deposited money is the principal question in the appeal.

The Judge of the Superior Court decided this question in favour of the Appellant, and dismissed the suit, but his judgment was reversed by the unanimous decision of three Judges in the Court of Revision, which was affirmed on appeal by the unanimous judgment of the Court of Queen's Bench.

The Appellant was a grandson of Madame Voyer. He was an advocate, and had managed the property of his grandfather

M. Voyer, and, after his death, continued to manage it as the agent of Madame Voyer. It is said the management of this property, which produced a yearly income of £700, or £800, took up much of his time, and there is no reason to doubt that he conducted it to the satisfaction of both his grandfather and grandmother. By her will, dated 30th November, 1859, Madame Voyer bequeathed to him a piece of building land at Montreal, declaring it to be to recompense him for the services he had rendered to her and her late husband, and to mark her gratitude for them. Some time afterwards she anticipated this bequest by making a gift of the land to the Appellant by a deed in due notarial form. This deed bears date the 19th February, 1863, and contains a similar declaration to that in the will, that the gift was made to recompense the Appellant for his services.

It is material to state that, soon after her husband's death, Madame Voyer, by a deed of procuration, dated 19th January, 1859, appointed the Appellant, whom she describes as "avocat' to be her "procureur général et spécial," with full power, for her, and in her name, to manage her affairs and receive monies due to her.

The 2,000 dollars were deposited in the bank by the Appellant, as the agent of Madame Voyer, on the 7th September, 1863. The account was opened in her name, and so remained up to the time of her death.

The Certificate of Deposit is as follows:—

(Incorporée par Acte du Parlement.)

$2000\frac{00}{100}$

LA BANQUE DU PEUPLE.

No. 249.

Montréal, 7 *Septembre*, 1863.

O. A. Richer, Ecr., a déposé dans cette banque à intérêt à quatre pour cent par an, la somme de deux mille dollars payable à l'ordre Dame Marie Anne Ste. Marie, lors de la remise du présent certificat. Cette somme pour porter intérêt devra rester au moins trois mois dans cette banque, et le porteur de ce certificat ne pourra la retirer qu'après quinze jours d'avis, l'intérêt cessant du jour de cet avis.

(Signé) G. PELTIER,

(Signé) M. TROTTIER, *Act. pour la Caissier.*

Receveur.

It appears from indorsements on the document that four payments were made on account of interest in Madame Voyer's lifetime.

This certificate has the signature of Madame Voyer indorsed on it, and it is not disputed that it was handed by her to the Appellant so indorsed. The time when this was done does not appear; but there is a reasonable presumption that it was before the time when interest was first received, viz., 9th March, 1864, since it was the custom of the bank to require the indorsement before paying it.

It is stated by the Appellant, in his answers to interrogatories, that he never accounted to Madame Voyer for the interest on the deposit, and there is no evidence that he did; but he makes a statement, strongly relied on by the Respondents as inconsistent with his assertion of an absolute gift, to the effect that, when the first interest was received, he offered it to Madame Voyer with the view of giving her pleasure, and she answered, "Gardeles, ils sont à toi."

It appears that the Appellant built houses upon the land given to him, and required money to pay the builder; and that he borrowed a sum of 1,200 dollars, for which he paid interest at the rate of 8 per cent., whilst the deposit of 2,000 dollars, which he alleges to have been his own money by his grandmother's gift, was lying in the bank at 4 per cent. only.

Madame Voyer died on the 17th April, 1867, and the Appellant, on the 7th June following, obtained payment of the 2,000 dollars and interest from the bank.

There is an entire absence of evidence to prove what took place when Madame Voyer endorsed the certificate.

Before referring to the questions of law which have been argued, it is right to point out that the title of the Appellant must rest on donation only. His services may supply motives for a gift, but were rendered in such a way that no contract to pay for them can be implied.

The 776th Article of the Code relates to the form of gifts *inter vivos*:—

"Deeds containing gifts *inter vivos* must under pain of nullity be excuted in notarial form, and the original thereof be kept of record. The acceptance must be made in the same form. Gifts of moveable property accompanied by delivery may, however, be made and accepted by private writings or verbal agreements."

There being no notarial instrument of gift, the Appellant, to establish his defence, must prove two things—(1) a delivery of the property, and (2) an agreement of gift.

On the first point, his case is, that the certificate is a negotiable instrument, capable of being the subject of "don manuel," and that his possession of it, endorsed by Madame Voyer, satisfies the requirement of the law as to delivery.

Much discussion took place at the Bar on the true nature of this document. On the one side, it was said that it had all the attributes of a promissory note; on the other, that it was an acknowledgment only of the deposit, and that the indorsement was no more than an authority to the holder to receive the money which, unless coupled with an interest, would be revocable. It appears that certificates of this kind are in common use among bankers in Canada and the United States, and considerable discussion has taken place in those countries as to their legal character. The American and Canadian law does not apparently differ from that of England with respect to the essential qualities of a promissory note. Article 2,344 of the Canada Code thus defines it :—

"A promissory note is a written promise for the payment of money at all eventa, and without any condition. It must contain the signature or name of the maker, and be for the payment of a specific sum of money only. It may be in any form of words consistent with the foregoing rules."

The word "payable" in the certificate in question unquestionably imports a promise to pay the sum deposited, and interest at 4 per cent., and "à l'ordre" are the apt words to constitute a negotiable instrument, transferable by indorsement. (See Art. 2286.) So far the essential attributes of a negotiable promissory note are obtained; but it was said that the provisions that the money should not carry interest unless it remained at least three months in the bank, and that the holder of the certificate should not withdraw the money until after fifteen days' notice, the interest ceasing from the day of the notice, imported conditions and contingencies incompatible with the certainty required in such an instrument. The answer given to this objection was, that the provision as to interest only prescribed the time when it was to commence and cease; and that the stipulation for fifteen days' notice introduced no more uncertainty into the promise than occurs in a bill payable so many days after sight.

With regard to authority, the Respondent's Counsel relied on a decision in Pennsylvania, in which the Court held that certificates of this nature are not negotiable (Patterson *v.* Poindexter, 6 Watts and Sargent, 227). On the other hand, the Appellant's Counsel referred to an American text writer of high authority, Mr. Parsons, who in his "Treatise on Promissory Notes and Bills of Exchange," after stating that certificates of this nature were in common use, and had given occasion to much discussion, and after referring to numerous cases containing conflicting decisions, and among them Patterson *v.* Poindexter, says: "We think this instrument (of which he gives the form) possesses all the qualities of a negotiable promissory note, and that seems to be the prevailing opinion." (Vol. i. p. 26.) It is to be observed, however, that the form given by Mr. Parsons omits the provisions as to interest and notice which appear in the present certificate.

From the evidence given by bankers and others who were called in this case to prove a custom, it certainly appears that these certificates have been commonly treated as transferable by indorsement, but whether with recourse to the indorser does not appear.

If it were essential to the decision of this Appeal to determine the vexed question of the nature of this certificate, it would, of course, be their Lordships' duty to do so; but in the view they take of the second branch of this case they are relieved from this necessity. It is enough, therefore, for them to say of a document not in use in England, and which has been the subject of conflicting decisions in America, that there is high authority in favour of the Appellant's construction of it, and they will assume, in dealing with the rest of the case, that his contention on this point is well founded.

It was further contended for the Respondent that the delivery was ineffectual in point of law, on the ground that it was made some time before the alleged gift, and with another object. The point was fully and ably discussed at the Bar, with the result that it appears to be the law of Canada that anterior possession of property which can be the subject of "don manuel" is equivalent to delivery at the time of the gift, although the former possession was for another purpose. (See Richard, "Traité des Donations, chap. 4, sec. 2, dist. 1).

Demolombe is very clear upon this point. He says:—

"La donation manuelle pourrait même s'opérer sans tradition, ('etiam sine traditione,' disait Justinian), si celui auquel le propriétaire de certains objets mobiliers veut les donner se trouvait déja en possession de ces objets à un autre titre; la seule déclaration du donateur qu'il entend les lui donner, suffirait sans qu'il fût besoin d'en dresser un acte; la tradition, en effet, n'est que le moyen de transférer la possession; et ce moyen est parfaitement suppléé par la déclaration du propriétaire qui change la cause de la possession antérieure; la donation s'accomplit donc alors sans tradition mais non pas certes sans possession." ('Traité de Donations,' vol. iii. livre iii., titre 2, chap. 4, sec. 73.)

Assuming then there was a sufficient delivery of the certificate to satisfy the requirement of the law, the next question to be considered is, whether the agreement of gift is proved. On this point the indorsement and delivery are equivocal facts, consistent by themselves with the position of the Appellant either as agent or donee. It was, indeed, contended that as he held a power of attorney, the indorsement was not required to enable him to receive the interest, but the bank, notwithstanding this was so, may have desired to have Madame Voyer's own signature.

Mr. Justice Caron, in his reasons, has tersely stated the Appellant's position:

"Il a déposé comme procureur, c'est à lui à établir le changement dans son titre et sa position L'endossement seul et dénué d'explication n'a pas cet effet."

The Appellant attempted to prove that the certificate was the only document of Madame Voyer he had in his possession, and that she kept all others in her own custody. The evidence of this fact is weak; but, assuming it to be proved, it would not conclusively negative the presumption that he held it as her agent. It is plain the Bank required the production of the certificate whenever interest was paid, to enable an indorsement of the payment to be made upon it. Under these circumstances the maxim of the French law "la possession vaut titre" cannot be invoked with effect.

The evidence of the gift thus becomes reduced to the testimony of witnesses who speak to conversations with Madame Voyer.

Exception was taken by the Respondents in the Courts below to the admissibility of this evidence, and it seems to have been rejected; but whether on the ground that it was wholly inad-

missible, or was deemed to be, when examined, irrelevant as affording no proof of a present gift, does not appear.

It seems to their Lordships that the parol testimony of witnesses is, of necessity, admissible to prove the agreement in certain cases coming within the class of "dons manuels," since it would be incompatible with the law, which allows such gifts to be made by verbal agreement, to exclude the only evidence by which such an agreement can be established.

But assuming the testimony given in this case to be fully admissible, their Lordships have come to the conclusion that it is insufficient to prove with reasonable certainty that an absolute gift of this property was ever made by Madame Voyer to the Appellant. The witnesses who speak to the conversations do not profess to prove words of present gift. The utmost that can be contended for is, that they give evidence of statements of Madame Voyer, which, it is said, amount to an acknowledment that she had made it; but these statements are in themselves so vague, and the occasions on which they were made are so indistinctly described, that they cannot be safely relied on for proof of the gift, especially when they are not supported by the presumptions which arise from other facts appearing in the case.

In the first place, the manner of the deposit is opposed to the presumption that a gift of it was made at that time. The money was deposited in the name of Madame Voyer, and the account opened with her. It is not clear, from the Appellant's statements, at what subsequent time he asserts the gift to have been made; but he certainly means to allege it was before the first interest was received by him; if this be so, his offer to pay over that interest to Madame Voyer is unaccountable, and entirely opposed to his pretension that an absolute gift had before that time been made and accepted. It is said by him that he never accounted to Madame Voyer for the subsequent interest, but the manner of his accounting with her is not shown. All that appears is, that on two occasions after the deposit, she declared herself satisfied with the administration of her affairs, and gave him formal discharges before a notary.

Again, it does not seem probable that the gift of a large sum of money should have been made to the Appellant in recompense, as it is said, of his services so soon after Madame Voyer had given him a valuable piece of land to reward him for them, or that, if it were intended, the Appellant, who knew the law,

should be content to rely on the mere indorsement of the certificate as the sole proof of the new gift.

It could not be suggested that the motive of the gift was to assist the Appellant in his building operations, for the fact is beyond dispute that he borrowed money at 8 per cent. for this purpose, whilst this money remained on deposit at 4 per cent. only.

Further, he neither drew out the money, nor changed the account to his own name, nor gave notice to the bank of the transfer in Madame Voyer's lifetime. It is difficult to suppose that he was not aware of the importance of being able to point to some overt act to mark a change of possession, especially having regard to his double position of agent and donee; or that he would have neglected to take some step with that object if he had obtained an absolute and perfect gift of the money.

Their Lordships, whilst holding that the evidence fails to establish a valid gift, do not wish to exclude the supposition that something may have passed between Madame Voyer and the Appellant which led him to take a sanguine view of her intention to benefit him. But, be that as it may, it is obvious that in cases where formal authentication by notarial act is dispensed with, it would be dangerous for the Courts to support gifts except upon plain and conclusive evidence of the agreement; and it would be especially unsafe to do so where an agent sets up a gift from his principal and mainly relies for proof of it upon the possession of a document which was, or at least may have been, originally entrusted to him for the purposes of his agency.

An objection has been raised to the maintenance of the action on the ground that all the heirs of Madame Voyer are not made parties to it; and it was pointed out that Madame Richer and Madame Beaudry, two of her daughters, have not been joined. The answer was that shey had accepted the legacies given to them by Madame Voyer's will, and had therefore renounced all claims as heirs to her general estate. It was not denied that this would be so under Articles 712 and 713 of the Code, unless the legacies had been expressly given to them by preference and beyond their share. There is clearly no direct declaration to that effect in this will, but Mr. Westlake endeavoured to show by the authority of some French decisions collected by Merlin in his work "Questions du droit," that such a direction might be

inferred from the words of the will under the circumstances of this succession. Their Lordships would be most reluctant to dismiss the suit for want of parties at this final stage, unless it was clearly demonstrated that they ought to do so. It is enough to say that they are far from being satisfied that the decisions referred to have the effect contended for, or that their authority can control the plain words of the Code. There is nothing in either of the three Judgments of the Courts in Canada which lends any support to the objection; and if the point was really argued in those Courts, the learned Judges must have considered either that there was no substance in the exception, or that it ought to have beeen taken *in limine* by a dilatory plea.

Their Lordships think it right to notice that it was stated, during the argument, by the Respondents' Counsel that the agents who instructed him had obtained from one of the Judges of the Court of Queen's Bench notes purporting to be the reasons for his judgment. The Counsel for the Appellant loudly complained of this preference, and if the statement thus made be accurate, the complaint was justified. It was stated that the cause assigned for the notes not having been sent to the Registrar as required by the Rule of 1845, was that they had been destroyed in a fire. Whatever may be the case, whether the notes were recovered or re-written, it is obvious that the omission to send them to the Registrar, and allowing one only of the parties to have them, was calculated to give to that party an undue advantage. From the notes actually sent over by the Court of Queen's Bench it would appear that the learned Judge referred to had merely expressed his concurrence in the reasons of Mr. Justice Caron. The Rule requires the reasons given by the Judges to be communicated to the Registrar, and the observations made by Lord Kingdown in delivering the Judgment of the Committee in Brown *v.* Gugy, 2 Moore, N. S., 365, show that these reasons ought to be stated publicly at the hearing below, and should not be reserved to influence the decision of the Court of Appeal. In the present case their Lordships felt constrained to refuse to look at notes so irregularly communicated.

In the result their Lordships think they ought to uphold the judgment of the Court of Queen's Bench, and they will humbly advise Her Majesty to affirm it, and to dismiss this Appeal with costs.

KING *v.* TUNSTALL.

Judgment July 21st, 1874.

Present: Lord Justice James.
Sir Montague Smith.
Sir Robert P. Collier.

Lord Justice James—Their Lordships do not think it necessary to trouble you, Mr. Matthews.

Their lordships have listened with great attention and interest —I think I may add with great instruction—to the very able arguments which have been addressed to them by both the learned counsel in support of the appellant's case. Their lordships will assume, for the purpose of disposing of this appeal, that the law was exactly as stated by the learned counsel—that is to say, that according to the law stated in the Coutume de Paris, which was transplanted, or rather planted, in Canada by royal authority as the law of Canada under the French dominion, the gift in question to Plenderleath would be an absolutely null and void gift, by reason of the doctrines of the law established with respect to adulterine bastardy. They will assume that it was proved in point of fact that Plenderleath was an adulterine bastard, that he was incapable, under the old law, of receiving such a gift as this—that is to say, a gift by way of substitution of the family estates, as to which it could not well be predicated that they were given by way of sustentation or *alimens*. Their lordships assume, further, that the doctrine of prescription would not apply to a case of this kind; but although they assume this, probably if it were necessary for the determination of the case they would have required further argument and further consideration as to whether open possession under an instrument of this kind held during the whole of the lifetime, and afterwards for a great many years by the successor of the person who had so held, would not be brought within the description of a *just titre* where the objection was simply taken upon the ground of a doubtful construction of an instrument or the doubtful construction of an Act or Acts of the legislature. They assume, however, that the doctrine of prescription would not apply to this case.

Then the matter resolves itself really into that upon which the Courts in Canada decided upon more than one occasion, and after

a great lapse of years, as to what was the conjoint operation of the English Act and the Canadian Act, and of the provision of the Canadian law which is embodied in the Code, as to the period at which the capacity of a substitute is to be ascertained.

Now at the time when the English Act was passed, it is clear that in the settlement of Lower Canada the sovereign legislature thought fit to establish the old Canadian law, with several notable exceptions. One notable exception, to which our attention was called very late in the argument, was this: that no part of the old Canadian law would apply to lands given in common socage, from which it would follow, apparently, that with regard to lands in common socage they were perfectly within the power of the owner, whether by a gift *inter vivos* or by a testamentary disposition, to give, dispose, and sell in any way to any person whatever, without any restriction whatsoever arising from the character of the individual. It would be singular that there should be one law, based upon the grounds of public morality and public policy, which would make a gift of anything but lands in common socage void, but which would make gifts of lands held in common socage perfectly good. It would be difficult to conceive how there could be any principle of public morality, public decency, or public policy, or whatever may be the language used, which would make the disposition of one class of property void upon those grounds, and not void as to another class of property. But beyond that, the legislature proceeded to give unlimited power of testamentary disposition, the law of England having from the earliest period—from the period when testamentary dispositions were introduced—given absolute power to a testator to deal as he liked with his property. The English legislature introduced that law into Lower Canada; and it is not immaterial to observe, as was pointed out by Mr. Justice Badgley, in an argument which has been attacked on various grounds for innacuracy—a very able and very learned argument—in the old Coutume as to testamentary power, the testamentary power to the extent to which it then existed is expressed to be a testamentary power which could be exercised in favour of *des personnes capables*—those are the words. When the English legislature came to deal with it, those words were left out—their lordships do not say they were expressly omitted, but they were omitted, so that the omission is a matter that deserves observation and consideration. Therefore it stands that the testator,

the owner of property, is given unlimited and unqualified testamentary power, so far as he is concerned.

But then a question arises, or might have arisen, as to whether that removed any testamentary incapacity on the part of the donee or legatee, the incapacity of taking; and here their lordships think there was a fallacy in the arguments addressed to them. It is said that the incapacity was an incapacity of the testator; that it was the testator who was prevented from doing it, or was intended to be deterred from making a disposition in favor of his adulterine bastard, through the adulterine bastard, by making the pains and penalties fall upon the head of the innocent adulterine bastard; that therefore it was that the testator's capacity to give was aimed at, and not the capacity of the donee, the object of the bounty, to take. If that were clearly made out to be so, then it appears to their lordships that the first Act did everything that was necessary. If there was only the capacity of the testator to be dealt with, the first Act had given unlimited and unqualified capacity to the testator to deal with it. But of course beyond that, the old law had said it should not be lawful for the testator to give, but had gone on in terms frequently repeated—it should not be competent for the offspring of the adulterous intercourse to take. Indeed they were declared to be the issue of a *damnatus coitus*, and various strong expressions of that kind, from which it might be inferred, and probably was declared, that not only the testator was prohibited from giving, but that they were prohibited from receiving. Hence, when the English statute came, which might well have been thought to have removed all difficulties whatsoever, doubts and difficulties did arise—I do not say in this particular case—but doubts and difficulties did arise as to whether not only the capacity of the testator had been restored, but whether the incapacity of a donee to receive had been removed. It seems to have been held in a particular case that the incapacity of a donee to receive had not been removed, an incapacity arising from a special principle of law—that is to say, the incapacity of the guardian to receive from a pupil or ward a gift by a testamentary instrument, which of course was a thing depending upon the guardian, the object of it being not to punish or inflict any disability upon the pupil, but to prevent a guardian from abusing the influence which he had in obtaining the gift. Therefore that gift, and all other

class of gifts based upon a similar principle—that is to say, based upon the necessity of preventing the undue exercise of the influence which particular persons had who stood in a particular relation to other persons—that kind of incapacity could not have been within the intention of the English legislature, which simply removed a testamentary incapacity—the incapacity of making a testament. Then the Canadian legislature, having before it the English law, passed a law which professed to be a law to explain as well as to amend the old law; and it proceeds to recite that doubts and difficulties had arisen with respect to it; and then it does not proceed to say that there is any necessity for amending, but that doubts and difficulties had arisen with respect to the English Act of Parliament—that English Act of Parliament being an Act of Parliament which it was perfectly within the competency of the Canadian legislature to deal with as they thought fit, being a mere matter of disposition of property in the colony, not affecting any imperial policy. Having those doubts and difficulties before them, they passed an Act to say they desired to explain and amend. They recite the difficulties, and then they go on to say, in terms of futurity (because it has been very much pressed upon us as affecting this question), that it shall be lawful for a testator to give to any person or persons whomsoever; that it shall be lawful for them to give, with an exception that the Act so declared and provided that it should not extend to gifts in mortmain, the exception being, in the opinion of their lordships, of the greatest possible importance in the determination of this question. The only thing that is excepted is a gift in mortmain; therefore leaving it unqualified, in every other respect, it was to be absolutely to any person or persons whomsoever, which in truth applied to a case to which *primâ facie* it might have seemed difficult to have said that it ought to have applied, that is to say, to a gift obtained by a person in a position to exercise undue influence over another person. Then the words no doubt are words of futurity; but in the Canadian Courts, first of all in a suit which was brought, I think, as far back as the year 1834, the person who then brought it being capable of having instituted the suit as far back as 1799, it was held by the judges of first instance that the Canadian Act had the effect which is suggested on the part of the respondent. It was afterwards held by the Court of Appeal in that case that it had that effect. It is true that in that

particular case the Court of Appeal reversed the judgment of the Court below upon a technical ground—that is to say, they said you ought not to have given a judgment at all, because the then plaintiffs had not made out any character to sue, although they had had the very character in respect to which the present suit is brought; but they had not so pleaded and so proved it as to render it possible, according to the view of the Supreme Court, for the Court of Appeal then to have come to a final decision. They said it was a suit between persons who had not established in themselves any *locus standi* to have a decision at all; but still the original Court there have decided the case upon the merits, and have taken that view of the legislature which is now before us.

Well, then, the Court of Appeal in that case, although they remitted it back upon the technical ground which I have mentioned, took great care to give an elaborate judgment themselves, in which they adopted exactly the same view, and that was a great many years ago. In the present case, the Court of first instance takes the same view, the Court of Appeal by a majority takes the same view, and that has been the law, apparently understood in Canada from the time when the matter was first mooted in this particular case, but which has been more or less mooted now during the greater part of this century, and it would appear to be the view of the law which the commissioners took when they framed their Code, leaving the law so to stand on the two Acts of Parliament, but preserving or re-enacting the law with regard to gifts *inter vivos*.

Then, as it appears to their lordships, their is great ground for taking that view as to the effect of the Canadian law. It really would seem to be very difficult indeed to conceive that there can be two different systems of policy applicable to testamentary dispositions—one as to instruments dated after 1801, and the other as to instruments dated before 1801; but their lordships feel that whatever doubt they might have had with respect to the beginning of it, they are very much governed by that which has been the concurrent decision of the Courts in Canada during the lapse of so many years. No doubt a difficulty arises from the general principle of law, that you never construe an Act of Parliament or of the legislature to be retroactive or retrospective, unless it is clearly made so, unless you are compelled by express language so to do. That difficulty, it

appears to their lordships, is entirely removed in this case by the peculiar provisions of the old law derived from the Roman law, the peculiar provisions of the French law, which have been incorporated into and now form part of the Canadian Code, which is, that wherever there is a limitation by way of substitution, the time when the substitution opens is the time at which the capacity of the substitute to take is to be determined. It is difficult to say to what class of cases that would apply if not to this. If a person at the time of the will was not capable of taking, or was incapacitated from taking—if a person was at the time of the death incapacitated from taking, how and when and under what circumstances is that provision of the Code to apply which says that the question is to be tried and to be determined at the moment when the substitution opens? It is suggested indeed that that was put in with regard to the question that a person might not be in existence at the date of the will or at the death, and that it applied to that. There is no such limitation expressed in the Code, and I think it was conceded, and fairly conceded, that if the incapacity were clearly a personal matter of incapacity on the part of an individual for instance—a gift to a felon, to a person who was *civiliter mortuus*, a gift to a person who was an alien, or to a person who was under any peculiar personal incapacity of that kind—it was conceded that in that case, if the incapacity were removed before the substitution opened, that then the question would have to be determined at that moment, and that it would not suffice to say that at the date of the will, at the time of the death, you were an incapacitated person, and that incapacity therefore never could be removed afterwards. In the judgment in the original case to which I have referred, a great number of authorities were cited, and there is a passage from Ricard in which it is thus stated: "Quant aux dispositions conditionnelles lorsque la condition s'étend au delà du décès du testateur, le droit romain n'exigeait la capacité du donataire qu'au temps de l'accomplissement de la condition, parce que c'est à cette époque que le droit est ouvert et que le testateur est censé avoir prévu que le donataire pouvait devenir capable avant l'évènement de la condition. C'est comme s'il avait dit, je donne à Titius, s'il est capable de recevoir lorsque telle condition arrivera." It would be difficult to say that that would not apply to this case, the case of an Englishman who in his testamentary capacity gives to his natural child, but

says: "I give it to him if he is capable of receiving it with a substitution over." Further, the matter is very fully discussed in the quotation, but it is not necessary to read it at greater length. Indeed, it was said that it is not to be applied in that way; that the thing itself was such a wicked violation of the law on the part of a testator, that the attempt to give is so bad that it was to be struck at more strongly than anything else—that it was a violation of the law at the beginning, just as if it were a gift to a person inducing him to commit a crime. Their lordships are unable to take that view of it. No doubt it was illegal and illicit; it was inoperative and ineffective, just as in this country it is perfectly illicit for a man to give his real property or his chattels real for the foundation of the most useful charity in the world. But nobody supposes that it is a crime in a man to express by his will the use to which this property should be so given. It would be very difficult indeed to suppose that it ever could be a crime in a testator, who is merely expressing his wishes as to what should be the devolution of his property after his death, to wish that his property should go in a particular direction, even although that direction should be in favour of the illegitimate or adulterine bastard—that it is a crime in him to wish it, leaving it open to the law to say that the wish shall not take effect if that be the view of the law. It is impossible to deal with it on that ground. It could only be void so far as it was inoperative and ineffective. Therefore it was a gift under a will to a person who at the time when the substitution opened was relieved from all incapacity by the intervening Canadian legislation; and their lordships therefore, on the whole, are of opinion that the decisions of the Canadian Courts ought not to be disturbed; and they will humbly recommend to her Majesty that the Appeal be dismissed, with costs.

THE FRASER INSTITUTE CASE.

Judgment 26th November, 1874.

Present: Lord Justice James.
Sir Barnes Peacock.
Sir Montague Smith.
Sir Robert P. Collier.

The questions in this Appeal relate to the validity of a devise in the Will of Mr. Hugh Fraser, a merchant of Montreal, by

which he devoted the bulk of his property, moveable and immoveable, to the purpose of establishing at Montreal an Institution "to be called 'The Fraser Institute,' to be composed of a free public library, museum, and gallery."

The will bears date the 23rd April, 1870, and Mr. Fraser died on the 15th May in that year.

The devise in question is in the following terms:—

"I give, devise, and bequeath, the whole of the rest and residue of my estate, real and personal, moveable and immoveable, of every nature and kind whatsoever, to the said Honorable John J. C. Abbott, and to the said Honorable Frederick Torrance, hereby creating them my universal residuary fiduciary legatees; and it is my will and desire that they do hold the same in trust for the following intents and purposes, namely, to establish at Montreal, in Canada, an institution to be called the 'Fraser Institute,' to be composed of a free public library, museum, and gallery, to be open to all honest and respectable persons whomsoever, of every rank in life, without distinction, without fee or reward of any kind, but subject to such wholesome rules and regulations as may be made by the governing body thereof from time to time, for the preservation of the books and other matters and articles therein, and for the maintenance of order; and for that purpose to procure such charter or act of incorporation as my said trustees may deem appropriate to the purpose intended by me, namely, to the diffusion of useful knowledge by affording free access to all desiring it to books, to scientific objects and subjects, and to works of art; and to the procuring such books, subjects, and objects, as far as the revenue of my estate will serve, after acquiring the requisite property and erecting appropriate buildings, and after paying expenses of management, making always the acquisition and maintenance of a library the leading object to be kept in view. And it is my desire that three persons should be named by my said trustees, to compose with them the first Board of Governors of the 'Fraser Institute,' which it is my desire shall always be composed of five persons, professing some form of the Protestant faith, with power to them to supply any vacancy caused by death or resignation, or by crime or offence, the conviction whereof shall vacate the tenure of office of the offender. And it is further my will and desire that my friend the Honorable John J. C. Abbott shall be the first President of the 'Fraser Institute,' and shall

retain that position during his life. And so soon as the requisite charter shall have been obtained, containing all the powers necessary to carry out my design herein contained, I desire that the residue of my estate and effects, after deduction of the expenses of the management thereof, shall be forthwith conveyed over to the Corporation, to be thereby formed, to be called, the 'Fraser Institute,' for the purposes herein declared. In order to prevent any difficulty arising in the conduct of the business of the trust hereby created, it is my will and desire that Mr. Abbott, as the senior trustee, shall have a second or decisive voice, in the event of any difference of opinion, between him and his co-trustee; and in the event of a vacancy occurring in the said trust from any cause whatever, whereby the number of trustees is reduced from time to time to one, it shall be the duty of the other, and he is hereby authorized to name a trustee to fill the vacancy so occurring, by a notarial instrument to that effect, and thereafter the senior trustee shall have a second or decisive casting vote, in case of difference of opinion. And I hereby confer upon my executors hereinbefore named, full power to settle and adjust all matters connected with my moveable property, and upon my trustees hereinbefore named power to sell and realize such of my estate and effects as they shall deem expedient, to acquire property whereon to construct suitable buildings, and to construct such buildings, and to proceed in all respects with all diligence in the carrying out of my desires hereinbefore expressed up to such time as the property and estate hereby devised to them shall be conveyed over to the 'Fraser Institute.' I desire that the term of office of my executors be continued beyond the term limited by law, and until the duties hereby imposed upon them in the payment of special legacies be completed."

The suit which gives occasion to this Appeal was brought by the Respondents, as the heirs and representatives of the testator, to set aside the above bequest. The Judge of the Superior Court, Mr. Justice Beaudry, dismissed the suit, but his decree was by a majority of three judges to two, reversed on Appeal by the Court of Queen's Bench.

The principal objections to the validity of the gift, relied on at the bar, were:—

1. That dispositions by will made to found a Corporation were prohibited by law, and the whole devise, therefore, failed.

In support of this objection, the 2nd Article of an Edict of Louis XV, published in 1743, which, it was contended, has still the force of positive law, was relied on.

2. That if this were not so, the devise of the immoveable property was void, as being a gift in mortmain.

3. That the gift was to a society of persons, the "Fraser Institute," and that the Society not being in existence at the death of the testator, the whole gift failed.

The Civil Code, (which was promulgated before the date of Mr. Fraser's will) is the primary source from which the law of Lower Canada is now to be drawn. When this Code contains rules on any given subject complete in themselves, they alone are binding, and cannot be controlled by the pre-existing laws on the subject, which can then be properly referred to only to elucidate, in cases of doubtful construction, the language of the Code. On the other hand, when the Code refers to existing laws, not formulated in its Articles, or in so far as on any subject it is silent, inquiry is permissible into the old law, and it will in many cases become a question of construction what and how much of that law remains in force, or is abrogated as being contrary to or inconsistent with the Code. (See Article 2613.)

The general power of testamentary disposition is found in Article 831 of the Code.

"Every person of full age, of sound intellect, and capable of alienating his property, may dispose of it freely by will, without distinction as to its origin or nature, either in favour of his consort, or of one or more of his children, or of any other person capable of acquiring and possessing, and without reserve, restriction, or limitation, saving the prohibitions, restrictions, and causes of nullity mentioned in this Code, and all dispositions and conditions contrary to public order or good morals."

The restriction mentioned in the Code relating to Corporations is contained in Article 836.

"Corporations and persons in mortmain can only receive by will such property as they may legally possess."

The capacity of persons to acquire by testamentary disposition is subsequently defined in a series of Articles under the head, "Of the capacity to receive and give by Will." [Title 2, cap. 3, sect. 1]

The Code appears to embody the legislation, having for its object the freedom of testamentary disposition, which was con-

tained in the Quebec Act, 14 Geo. III, c. 83. and the Provincial Statute 41 Geo. III, c, 4. It was held by this tribunal in a late case (King v. Tunstall and others), that the combined effect of these statutes was to abrogate the old law which prohibited gifts by will to adulterine children.

Article 860 was also strongly relied on by the Appellants, as being specially designed to meet such a bequest as the present. It is as follows:—

"A testator may name legatees, who shall be merely fiduciary or simply trustees for charitable or other lawful purposes within the limits permitted by law. He may also deliver over his property for the same objects to his testamentary executors, or effect such purposes by means of charges imposed upon his heirs or legatees."

It could not be denied that the establishment of a public museum, library, and gallery, was in itself, and apart from the manner of its foundation, "a lawful purpose." But it was contended for the Respondents that. as the disposition of the property in favour of the Institution was ultimately to be carried into effect by means of a Corporation to be thereafter created, the purpose to be thus carried into effect was not "within the limits permitted by the law."

It is to be observed that the testator does not attempt to create or found a Corporation, but having devised his property to trustees to establish the Institute, directs them to procure for that purpose legal incorporation by means of a Charter or an Act of Parliament.

Now there is no express prohibition to be found in any Article of the Code against such a testamentary disposition; although there are express provisions defining the restrictions and disabilities to which Corporations are subject with regard to acquiring and holding immoveable property.

Thus Article 836, already cited, which is found in the chapter on Wills, allows Corporations to receive by will only such property as they may legally possess.

Then, under the head of "Disabilities of Corporations," is—

"Art. 366. The disabilities arising from the law are—

"1. Those which are imposed on each corporation by its title, or by any law applicable to the class to which such corporation belongs.

"2. Those comprised in the general laws of the country res-

pecting mortmains and bodies corporate, prohibiting them from acquiring immoveable property or property so reputed, without the permission of the Crown, except for certain purposes only, and to a fixed amount and value.

" 3. Those which result from the same general laws imposing, for the alienation or hypothecation of immoveable property held in mortmain, or belonging to corporate bodies, particular formalities, not required by the common law."

The Counsel for the Respondents, however, did not rely on this part of the case upon the provisions of the Code : but insisted, and this was their main contention, that the 2nd Article of the King's Edict of 1743 was still in force, and rendered the whole devise null.

That Article is as follows:—

" Défendons de faire aucunes dispositions par acte de dernière volonté pour fonder un nouvel établissement de la qualité de ceux qui sont mentionnés dans l'Article précédent, ou au profit des personnes qui seraient chargées de former le dit établissement, le tout à peine de nullité: ce qui sera observé quand même la disposition sera faite à la charge d'obtenir nos lettres patentes."

The establishments mentioned in the preceding Article are—

" Aucune fondation ou nouvel établissement de maisons ou communautés religieuses, hopitaux, hospices, congrégations, confréries, colléges, ou autres corps ou communautés ecclésiastiques ou laïques."

It was contended that, notwithstanding the Statutes relating to Wills already referred to and the Code, this Edict was still the governing law upon the subjects to which it relates, and in support of this contention, some decisions, in the Canadian Courts, and the case of " The Chaudière Gold Mining Company, *v.* Desbarats and others," recently before this Tribunal (see L. R. 5 Privy Council Appeals, 277) were referred to.

The question in those cases, however, turned upon the capacity of existing corporations to acquire and hold immoveable property without the licence of the Crown. Article X of the Edict prohibited such acquisitions without the express permission of the King, signified in a particular manner, viz., by his letters patent registered in his " Conseils Supérieurs" of the Province. But in their Lordships' view it is not necessary to resort to this article of the Edict for the law on the point

decided in the cases referred to. Article 366 of the Code contains in itself a distinct rule on the subject. It no doubt refers to "the general law of the country respecting mortmain and bodies corporate;" but it at the same time interprets that law by the following words: "prohibiting them from acquiring immoveable property, or property so reputed, without the permission of the Crown." This general law may have been originally founded on the tenth Article of the Edict, but the law is now virtually contained in the Code itself, into which the article of the Edict has been transferred.

In the case of the Chaudière Gold Mining Company *v.* Desbarats, indeed, the counsel on both sides argued on the assumption that Article X of the Edict was still in force. But their Lordships were then much disposed to take the view that the Code was, on the question then under discussion, declaratory of the law.

It is said in the Judgment:—

"Their Lordships, however, cannot consider it to be their duty at this day to construe the edict as alone containing the law of Canada on the subject of mortmain, because a legislative declaration of that law is, in their opinion, contained in the Code, which is free from ambiguity."

It is true that Articles I and II of the Edict are not in like manner reproduced in the Code; but the question arises whether, even if they survived the cession of the Province to the English Crown, they continue to have, since the Statutes on Wills above referred to and the Code, the force of law.

It is open to considerable doubt whether the first nine articles of the Edict, which all relate to the foundation of corporations, retained the force of law after this cession; first, because the forms and regulations they prescribed then became out of place; and, secondly, for the substantial reason that the articles, which had for their object to put fetters on the King's own power, could not, it may fairly be contended, be of force to control the sovereign will of the English Crown, whose prerogative it would be, after the cession, to establish corporations. And it is to be observed that no instance has been shown where, since the cession, the law of these Articles has been put in force.

But however this may be, their Lordships cannot but think that the second Article of the Edict is abrogated by the Code, as being contrary to or inconsistent with its provisions.

The free testamentary power of disposition contained in Article 831, is given, "saving the prohibitions, restrictions, and causes of nullity *mentioned in this Code.*"

It has already been observed that no restriction directed against such bequests as the present is to be found in the Code, unless the prohibitions relating to gifts of immoveable property in mortmain (to be hereafter considered) can be held to apply to them. There is no such restriction with regard to moveable property.

Again, the introduction of the prohibitions with respect to immoveable property leads to the implication that no other restrictions relating to gifts to corporations, or for the purpose of founding them, beyond those expressly mentioned, were intended to be imposed or retained.

It is impossible to suppose that if the provision of the Edict in question was really in force at the time of the Code, and it was intended to preserve it, that the Code in dealing, as it does fully, with testamentary dispositions, and in a series of Articles under a distinct head with "the capacity to receive and give by will" [see Title 2, cap. 3, sect. 1], should have omitted all mention of it. Their Lordships, therefore, think they cannot treat the second Article of the Edict as a part of the existing law of the Province relating to wills, and if this be so, there is nothing in that law, so far as the objection now under consideration is concerned, to affect the validity of the bequest of the moveable property.

But it is contended, secondly, that as regards the immoveable property the devise falls within the direct prohibition contained in Articles 366 and 836 of the Code. Article 366 is limited by its terms to the acquisition of immoveable property only; and Article 836 must be limited by construction to such property. It is to be observed that Article 836 appears to be founded on cap. 34, sec. 3 of the Consolidated Statutes of Lower Canada, which section embodied the provision of the 41 George III, cap. 4, sec. 1.

Both Articles relate to gifts to corporations already formed. And the question is whether a devise like the present, by which the property is given to fiduciaries, and is to pass from them to a Corporation only in the event of its being lawfully created with permission to possess it, is within their scope. The devise in this case is to trustees for the primary purpose of

establishing an Institute, and for effecting that purpose, they are to obtain a Charter or Act of Incorporation.

It is said that this is, in effect, devising indirectly lands to a Corporation, having no license from the Crown or other legal power to hold them. But is this really the case? The devise is, in the first instance, to the trustees, and under it they are empowered, at least for a time, to hold and administer the property for the purpose of the trust, and until, in further execution of the trust, a corporation is created with authority to administer it. If a corporation with power to hold the property should be granted, the acquisition of it by such Corporation would, before it vested, be sanctioned by law: whilst it were not created, there could be no infraction of the law against holding in mortmain.

Apart, therefore, from the second Article of the Edict, there would seem to be nothing in principle or in positive law to render such a gift as the present illegal as a gift in mortmain. The direction to the trustees to procure a Charter or Act to incorporate a body empowered to hold the property and carry into effect the objects of the gift, necessarily implies a condition to be fulfilled previously to the vesting of the property; and the permission of the Crown to hold the lands would of necessity precede their acquision by the Corporation, and render it lawful.

Commentators of high authority on French law have treated such dispositions, apart from the Edict, as clearly good, and numerous passages from their treatises to this effect are collected in the judgment of Mr. Justice Badgley. It is sufficient to cite one, Ricard, "Traité des Donations," No. 613, says:—

"Lorsque les donations et les legs sont faits pour l'établissement d'un monastère, on ne pourrait pas opposer le défaut des lettres patentes; ce qui est juste, parce que ces sortes de dispositions sont présumées faites sous condition, et pour avoir lieu, au cas qu'il plaise au Roi d'agréer l'établissement."

The same doctrine was sanctioned, and the grounds on which it rests were very fully expounded by Lord Eldon in the case of Downing College, which in its circumstances bore some analogy to the present. [Attorney-General *v.* Bowyer, 3 Ves. 724.]

What the position of the trustees would be in case they failed to obtain a Charter or Act of Incorporation, was the subject of some dissussion at the Bar. If consistently with the intention of the testator they could carry into effect the purpose of the

devise, and establish and perpetuate the institute by means of a perpetual succession of trustees, which their Lordships are not satisfied could be done by the law of Canada, it might be a question whether in such case the trustees would not be "gens de main morte," and the devise, therefore, of the immoveable property *ab initio* void by virtue of Article 836 of the Code. In that case Article 869 might not avail to protect the devise. It is true that by this Article a testator is empowered to appoint fiduciary legatees for charitable or other lawful purposes, but only "within the limits permitted by law." Now the Code undoubtedly prohibits the devise of immoveables in mortmain, and if the will had created trustees with power of perpetual succession, it might, as already observed, have been questionable whether the devise of the lands to such trustees would not have infringed this prohibition, and be, therefore, beyond the limits permitted by law.

But their Lordships think that this is not the character of the devise. It appears to them that the devise to the trustees was meant to be limited and transitory, the property remaining in them only until they could execute the ultimate purpose of the devise. It is true the primary trust is to establish the Institute, but it is a cardinal part of the trust that, "for that purpose" the trustees are, to procure a Charter or Act of Incorporation, and as soon as it shall have been obtained, they are directed to convey the property to the Corporation. There is no direction to convey to new trustees. The trustees are, indeed, empowered to sell such of the property as they deem expedient to acquire property and to construct buildings, and to proceed to carry out the testator's designs but only "up to such time as the property hereby devised to them shall be conveyed over to the Fraser Institute." Article 964 of the Code provides for the case of a "Legatee who is charged as a mere trustee to administer the property and to employ it or give it over in accordance with the Will, in the event of the impossibility of applying such property to the purpose intended;" and directs that, in such a case the property, unless the testator has manifested an intention that it shall be retained by the trustee, shall pass to the heir. Their Lordships consider that an impossibility to apply the property in accordance with the Will would in this case arise, if the trustees failed, after the lapse of a reasonable time, to obtain a Charter or Act of Incorporation, and that in that event the property would pass to the heirs under the above Article.

It was suggested that new trustees might be appointed in succession so long as the execution of the Will should last under Article 923 of the Code, which is as follows :—

" The testator may provide for the replacing of testamentary executors and administrators, even successively and for as long a time as the execution of the will shall last, whether by directly naming and designating those who shall replace them himself, or by giving them power to appoint substitutes, or by indicating some other mode to be followed, not contrary to law."

But it was not in this manner the testator designed that the purpose of his Will should be permanently carried into execution. It is true that he directs that three persons to be named by his trustees should compose with them the first Board of Governors of the Institute, which he desired should always be composed of five persons, and of which Mr. Abbott was to be President for life, with power to them to supply any vacancy caused by death or resignation; but this is the scheme he provides for the governing body of the intended Corporation, as shown by the direction which immediately follows it, viz., " that so soon as the requisite Charter shall have been obtained containing all the powers necessary to carry out my designs herein contained," the property should be conveyed to the Corporation. Their Lordships having regard to the scheme of the Will, cannot think it was the intention of the testator to create, or attempt to create, a Board of Governors in perpetuity without the authority of a Charter or Statute, and so endanger his devise, at least as regards the immoveables, as being an unauthorized gift in mortmain.

The third and remaining objection is that the gift failed, being a gift to a Society not in existence at the testator's death.

If the devise had been to a Society or a Corporation to be afterwards called into existence or created without the interposition of fiduciary legatees or trustees, this objection might have given occasion to difficulties of great weight.

It was said by the Court of First Instance in Des Rivières *v.* Richardson, Stuart's Reports, 218 :—

" It may be admitted that, if by a will an immediate devise is made to a corporation not in existence, it will be void, as there is no such corporate body to receive, and it would be equally void even if the corporation were afterwards created without some special and express law to take the case out of the general principle."

But it was also said in the same case in the Court of Appeal :—

"The second ground of objection is also untenable, for although it is admitted that a legacy is lapsed (*i. e.*, 'caduque') when left to an individual, or to a body politic and corporate, not *in esse;* yet the principle does not apply to this case, inasmuch as the trustees were all alive when the testator made his will, and they received the bequest for the benefit of the Royal Institution, as soon as it should please the Provincial Government to give to airy nothing a 'local habitation and a name.'"

That case no doubt differed in some of its facts from the present, as the Royal Institution had been, in some sense, incorporated before the date of the Will; but the principle is asserted in it that the intervention of trustees will, in some cases at least, prevent a lapse.

Their Lordships on this point, having regard to Article 869, which permits the appointment of fiduciary legatees for charitable and other lawful purposes, and to Article 838, which, in the case of legacies suspended after the testator's death in consequence of a condition or substitution, declares that the capacity to receive is to be considered relatively to the time when the right comes into effect, are of opinion that there has been no lapse in this case, and that the trustees may carry the purpose of the testator into effect if and when the Corporation of the Fraser Institute is duly incorporated. The transfer of the property to the Corporation is directed to be made by conveyance from the trustees, who, in then making it, will execute the lawful purpose for which the property was entrusted to them.

It is evident that the charitable and lawful purposes mentioned in Article 869 were not meant to be confined to such trusts only as may be created for the benefit of some definite persons. The use of the word "purposes" indicates that bequests may be made to uses for general and indefinite recipients so long as the purpose be charitable or lawful, and the bequest be within the limits permitted by law.

Their Lordships, for the reasons given, think that the devise in question complies with these conditions and ought to be sustained; and they will humbly advise Her Majesty to reverse the Judgment of the Court of Queen's Bench, and direct the suit be dismissed. But, considering that the law of Canada on the questions arising upon this will was in an unsettled state, their

Lordships think that the heirs of the testator might reasonably dispute its validity, and that the parties, therefore, should pay their own costs of the litigation below and of this Appeal.

THE GUIBORD CASE.

Judgment 21st November, 1874.

Present: Lord Selborne.
Sir James W. Colville.
Sir Robert Phillimore.
Sir Barnes Peacock.
Sir Montague Smith.
Sir Robert P. Collier.

This is an Appeal from a Judgment of the Court of Queen's Bench for the Province of Quebec, in Canada, confirming a Judgment of the Court of Review, which latter reversed a Judgment of the Superior Court in First Instance.

The question which was the subject of these different Judgments related to the burial of the remains of Joseph Guibord, one of Her Majesty's Roman Catholic subjects, who died at Montreal on the 18th of November, 1869.

His widow and representative, Dame Henriette Brown, instituted and prosecuted the suit in the Canadian Courts, and was also the original Appellant before their Lordships. She died on the 24th of March, 1873, and by her will devised her property to the "Instiut Canadian," and also appointed them her universal legatees.

This Corporation, having accepted the appointment, applied for leave to continue this Appeal, which leave was granted by their Lordships on the 26th of June, 1873.

This leave was granted without prejudice to any question which might be raised as to the competency of the Institute to continue the Appeal. It appeared that the widow had been condemned in costs in the Canadian Courts, and her universal legatees were therefore, of course, interested in procuring the reversal of these sentences; and the objection to their competency, though mentioned in the "Reasons" of the Respondents, was not insisted upon in the arguments before us.

The suit on behalf of the representative of Guibord was for a *mandamus* to "Les Curé et Marguilliers de l'Œuvre et Fabrique de Montréal," upon receipt of the customary fees, to bury his body in the parochial cemetery of members of the Roman Catholic Church at Montreal, entitled the "Cemetery of La Côté des Neiges," conformably to usage and to law, and to enter such burial in the civil register.

"La Fabrique de Montréal" is a corporation consisting of the Curé and certain lay church officers called "Marguilliers," whose relation to the church and churchyard is analogous to that of churchwardens in an English parish. This corporation manage the temporalities of the church, which temporalities are also sometimes designated by the title of "La Fabrique."

"La Fabrique de Montréal" had the control of this particular cemetery.

The cemetery is divided into two parts, the smaller part being separated from the larger by a paling. In the smaller part are buried unbaptized infants and those who have died "sans les secours ou les sacrements de l'Eglise;" and (as appears from the evidence) persons who had committed suicide, and criminals who had suffered capital punishment without being reconciled to the Church. In the other and larger part are buried ordinary Roman Catholics in the usual way, and with the rites of the Church.

Neither portion of the cemetery is consecrated as a whole; but it is the custom to consecrate separately each grave in the larger part, never in the smaller or reserved part.

The cemetary is thus practically divided into a part in which graves are, and into a part in which they are not, consecrated.

The circumstances which led to this litigation were as follows:—

Guibord was a lay parishioner of Montreal. He appears to have been of unexceptionable moral character, and to have been, both by baptism and education, a Roman Catholic, which faith he retained up to the time of his death.

In the year 1844 a literary and scientific institution was formed at Montreal for the purpose of providing a library, reading-room, and other appliances for education. It was incorporated by a Provincial Statute (16 Vict., c. 261), under the name of the "Institut Canadien."

The preamble of this Statute recites:—

"Whereas several persons of different classes, ages, and professions, residing in the city of Montreal and elsewhere, have formed a literary and scientific association in the said city, under the name of the 'Institut Canadien,' for the purpose of establishing a library and reading room, and of organizing a system of mutual and public instruction by means of lectures and courses of instruction."

It then states that the number of members already exceeded 500, that they had a library of 2,000 volumes, and a reading-room provided with newspapers and periodical publications. Then follows a prayer to be constituted a legal corporation. The prayer was granted by the Legislature, and the statute incorporates the Association, and directs, among other provisions, that the corporation is to make an annual return to the Government of their estates real and personal.

Guibord was one of the original members of this Institute.

In the year 1858 certain members of the Institute proposed a Committee for the purpose of mading a list of books in the library, which in their opinion ought not to be allowed to remain therein.

An amendment, however, was carried by a considerable majority to the effect that the Institute contained no improper books, that it was the sole judge of the morality of its library, and that the existing Committee of Management was sufficient.

On the 13th of April in the same year the Roman Catholic Bishop of Montreal published a Pastoral which was read in all the Churches of his Diocese, in which he referred to what had taken place at the meeting of the Institution, and after praising the conduct of the minority, pointed out that the majority had fallen into two great errors: first, in declaring that they were the proper judges of the morality of the books in their library, whereas the Council of Trent had declared that this belonged to the office of the Bishop; secondly, in declaring that the library contained only moral books, whereas it contained books which were in the Index at Rome. The Bishop further cited a decision of the Council of Trent, that any one who read or kept heretical books would incur sentence of excommunication, and that any one who read or kept books forbidden on other grounds would be subject to severe punishment; and he concluded by making an appeal to the Institute to alter their resolution,

alleging that otherwise no Catholic would continue to belong to it. He says :—

"Car il est à bien remarquer ici que ce n'est pas nous qui prononçons cette terrible excommunication dont il est question, mais l'Eglise dont nous ne faisons que publier les salutaires décrets."

The resolution of the Institute was not rescinded.

In 1865 several of the Roman Catholic members of the Institute, including Guibord, appealed to Rome against this Pastoral.

They received no answer to their application. But in the year 1869, the Bishop of Montreal issued a Circular—

"Publiant la réponse du Saint Office concernant l'Institut Canadien et le Décret de la Sainte Congrégation de l'Index condamnant l'Annuaire du dit Institut pour 1868."

This Circular was dated from Rome, 16th July, 1869. He also sent a Pastoral letter from Rome dated in August of that year, which contained two inclosures; one the sentence or answer of the Holy Office, as printed in the case before us :—

"Illme. ac Rme. Dne.

"Cum in Generali Congregatione S. R. et U. I. habita feria IV. die 7 curr. Emi. ac Rmi. Generales Inquisitores jamdiu motam de Instituo Canadensi controversiam ad examen revocassent, singulis mature ac diligenter expensis, A : tuæ significandum voluerunt, rejiciendas omnino esse doctrinas in quodam annuario quo dicti Instituti acta recensentur, contentas, ipsasque doctrinas ab eodem Instituto traditas prorsus reprobandas. Animadvertantes insuper laudati Emi. ac. Rmi. Patres valde timendum esse ne per hujusmodi pravas doctrinas Christianæ juventutis institutio et educatio in discrimen adducatur, dum commendandum expresserunt zelum ac vigilantiam a te huc usque adhibitam excitandam eamdem [the next word is a misprint] jusserunt, ut una cum tuæ diœceseos clero omnem curam conferas, ut Catholici ac præsertim juventus a memorato Instituto, quousque perniciosas doctrinas in eo edoceri constiterit, arceantur. Dum vero laudibus prosequuti sunt alteram societàtem *Institutum Canadense Gallicum* nuncupatam, nec non ephemeridem dictam '*Courrier de St. Hyacinthe*,' utramque fovendam adjuvandam que mandarunt ut ita iis damnis ac malis remedia quærantur, quæ ex alio præfato Instituto haud dimanare non possunt.

Quod a tuæ pro mei muneris ratione communicans omni cum observantia maneo.

"Romæ ex Æd. S. C. de P. F. die 14 Julii, 1869, &c."

The other inclosure was a *Decretum* of the "Congregatio," to whom the care of the Index was committed, it was as follows:

"Decretum.

"Feria II, die 12 Julii, 1869.

"Sacra Congregatio Eminentissimorum ac Reverendissimorum Sanctæ Romanæ Ecclesiæ Cardinalium a sanctissmo domino nostro Pio Papa IX sanctaque Sede Apostolica Indici librorum pravæ doctrinæ, eorumdemque proscriptioni, expurgationi, ac permissioni in universa Christiana republica præpositorum et delegatorum, habita in Palatio Apostolico Vaticano, die 12 Julii 1869 damnavit et damnat, proscribit proscribitique, vel alias damnata atque proscripta in Indicem Librorum Prohibitorum referri mandavit et mandat opera quæ sequuntur."

Then the names of several works unconnected with the Institute are mentioned. And then—

"Annuaire de l'Institut Canadien pour 1868, célébration du 24ème anniversaire de l'Institut Canadien le 17 Décembre, 1868 (Decr. S. Officii Feria IV. die 7 Julii, 1869.)

"Itaque nemo cujuscumque gradus et conditionis prædictæ opera damnata atque proscripta, quocumque loco, et quocumque idiomate, aut in posterum edere, aut edita legere vel retinere audeat, sed locorum ordinariis, aut hæreticæ pravitatis Inquisitoribus ea tradere teneatur, sub pœnis in Indice librorum vetitorum indictis.

"Quibus sanctissimo domino nostro Pio Papæ IX. per me infrascriptum S. I. C. a Secretis relatis sanctitas sua decretum probavit, et promulgari præcepit. In quorum fidem, &c.

"Datum Romæ, die 16 Julii, 1869."

The pastoral letter containing this inclosure drew attention to the fact that two things were especially forbidden by this Decretum:—1. To belong to the Institute while it taught pernicious doctrines. 2. To publish, retain, keep, or read the "Annuaire" of 1868. And the Bishop also pointed out that any person who persisted in keeping or reading the "Annuaire," or in remaining a member of the Institute, would be deprived of the Sacrament, "même à l'article de la mort."

The Insfitute held a meeting on the 23rd September, 1869, and resolved:—

"1. Que l'Institut Canadien, fonné dans un but purement littéraire et sceintifique, n'a aucune espéce d'enseignement doctrinaire, et exclut avec soin tout enseignement de doctrines pernicieuses dans son sein.

"2. Que les membres Catholiques de l'Institut Canadien, ayant appris la condamnation de l'Annuaire de 1868 de l'Institut Canadien par décret de l'autorité Romaine, declarent en soumettre purement et simplement à ce décret."

These concessions produced no effect.

The Bishop in a letter, the last which appears in the case, dated Rome, 30th October 1869, to the Administrator of the Diocese at Montreal (which that officer received, he says, on the 17th November, the day before Guibord's death), denounces these concessions as hypocritical, and gives five reasons why they are insufficient, the third of which is—

"3. Parceque cet acte de soumission fait partie d'un rapport du comité approuvé à l'unanimité par le corps de l'Institut, dans lequel est proclamée une résolution tenue jusqu'alors secrète, qui établit en principe la tolérance religieuse qui a été la principale cause de la condamnation de l'Institut."

The letter concludes—

"Tous comprendront qu'én matière si grave il n'y a pas d'absolution à dônner, pas même à l'article de la mort, à ceux qui ne voudraient pas renoncer à l'Institut, qui n'a fait qu'un acte d'hypocrisie, en feignant de se soumettre au Saint Siége."

It is right to observe here that this "principal ground of condemnation" of the Institute, viz., that it had passed a resolution which established the principle of religious toleration, was entirely new, does not appear in any former document, and further, it would seem, could not have been known by Guibord.

It should also be mentioned, in order to complete the necessary history of the case, that Guibord, about six years before his death, being dangerously ill, was attended by a priest, who administered unction to him, but refused to administer the Holy Communion unless he resigned his membership of the Institute, which Guibord declined to do.

Guibord having died, as has been stated, on the 18th of November, 1869, suddenly of an attack of paralysis, on the 20th of November the widow caused a request to be made on her behalf to the Curé and to the Clerk of the Fabrique, to bury Guibord in the cemetery, and tendered the usual fees.

Previously to this application M. Rousselot, the Curé, having heard of the death of Guibord, and knowing that he was a member of the Institute, had applied to the administrator of the diocese for his directions. He replied that he had yesterday received a letter from the Bishop of Montreal, directing him to refuse absolution "même à l'article de la mort" to members of the Institute; he could not, therefore, permit "la sépulture ecclésiastique" to Guibord. The Curé, having received this letter, refused to bury Guibord in the larger part of the cemetery, where Roman Catholics were ordinarily buried, but offered to allow him interment in the other part, without the performance of any religious rites.

It seems that the agent of the widow offered to accept burial in the larger part without religious services; but this offer was rejected.

On the 23rd of November the widow presented a petition to the Superior Court setting out the facts, and prayed that a mandamus might issue as above stated.

On the 24th one of the Judges of the Superior Court ordered a writ of mandamus to issue; but it must be observed that the writ was issued a writ of summons calling upon the Defendants to appear and answer the demand which should be made against them by the Plaintiff for the causes mentioned in the said petition thereto annexed. The proceding was in substance the same as a rule to show cause why a writ of madamus should not be issued. The Defendants appeared and filed a petition praying that the writ might be annulled for irregularity, upon the ground that it was a writ of summons and not of mandamus, and also upon other technical objections. The Defendants, at the same time, filed a traverse of the Plaintiff's petition and three pleas. The first plea was to the same effect as the petition of the Defendants, and set up the same alleged grounds of irregularity, and pointed out the same defects as those mentioned in that petition.

The second plea in substance denied that the Respondents had refused to bury the deceased, and alleged that they were entitled to point out the place in the cemetery were he should be buried, and that they were ready to do so, and to give him such burial as he was entitled to.

The third plea averred that the service (*culte*) of the Roman Catholic religion in Canada is free, and the exercise of its

religious ceremonies of whatever nature is independent of all civil interference or control; that, for the purpose of assuring the freedom of that religion, the law recognizes the Respondents as proprietors of the Roman Catholic parish church of Montreal, and of its parsonage, cemeteries, and other dependencies, which are all Roman Catholic property devoted to the exclusive use and exercise of that religion, and subject to the exclusive control and management of the Respondents, and of the superior Roman Catholic ecclesiastical authority; that the Respondents, in such capacity, had for more than ten years been proprietors and in possession of the Roman Catholic cemetery in question, and are empowered by law to point out the precise spot in the cemetery where each burial is to be made; that besides their above mentioned capacity the Respondents are also civil officers within certain limits, having to fulfil certain duties defined by law, and are legally responsible in that capacity and sphere only; that the Respondents, in their double capacity thus existing, are, by the Roman Catholic religious authority and by the law, set over the burial of persons of Roman Catholic denomination dying in the parish of Montreal, and are responsible to the religious and civil authorities respectively for the religious and civil portions of such functions: that the Respondents for the execution of their double duty, and in accordance with the immemorial custom of the Roman Catholic parishes throughout the country, have assigned one part of the cemetery for the burial of persons of Catholic denomination and belief who are buried with Roman Catholic religious ceremonies, and another part for the burial of those who are deprived of ecclesiastical burial; that Joseph Guibord was a member of a literary society at Montreal, called the Canadian Institute, and as such was at the time of his death, and had beeen for about ten years previous, notoriously and publicly subject to canonial penalties resulting from such membership and involving deprivation of ecclesiastical burial; that immediately after the death of Joseph Guibord, the Rev. Victor Rousselot, Roman Catholic priest, and curate of the parish of Montreal, submitted the question of his religious burial to the Rev. Alexis Frédéric Truteau, Vicar General of the Roman Catholic diocese of Montreal, and administrator of the diocese with supreme ecclesiatical authority therein, in the absence of the Bishop, by virtue of the rescript of the Pope, dated 4th October, 1868: and that the said administrator replied by a

decree declaring that, since Joseph Guibord was a member of the Canadian Institute at the time of his death, ecclesiastical burial could not be granted to him; that the Plaintiff, by her agents, having required M. Rousselot and the Respondents to give to the body both religious and civil burial in the cemetery in question they repeatedly informed the said agents of such decree of the administrator of the diocese, and that in consequence thereof ecclesiastical burial could not be granted and was refused, but that they were ready as civil officers to bury the remains civilly, and authenticate the death according to law, which offer was never accepted by the Plaintiff or her agents, and that, having regard to the above facts, the Plaintiff could not claim from the Respondents for the remains of her late husband more than civil burial, and that under the conditions laid down by the ecclesiastical laws of the Roman Catholic Church, which the Respondents had never refused. The plea then concluded by saying that the Respondents had refused nothing but ecclesiastical burial for the reusal of which they were responsible only before the religious and not before the civil authority.

The widow filed several answers to these pleas, some in the nature of demurrers, some of traverses of the facts alleged, and to the third plea also a special answer, setting out the facts with respect to the dispute between the Institute, the Bishop, and the Court of Rome,—which have been already mentioned.

The Respondents joined issue on these answers, and also, by leave of the Court, filed a special replication to the Petitioner's third answer to the Respondent's third plea; in which, after repeating that the Civil Courts were incompetent to question a decision of the ecclesiastical authorities on ecclesiastical matters, and could not inquire into the grounds upon which ecclesiastical burial had been refused to Guibord, they, nevertheless, cited the decrees of the Council of Trent with regard to the Index and the proceedings relating to the Institute, and concluded by an averment that, in consequence of the premises, Guibord at the time of his death must be considered as "un pécheur public," and, as such, obnoxious to the canonical penalties imposed by the Roman Catholic ritual, among which was privation of sepulture.

That the members of the Institute having refused to obey the pastoral, and persisted in their refusal, "le jugement de l'Evêque imposant la peine canonique sus-mentionnée est démeurée en pleine force et effet."

It then avers, after stating the proceeding relating to an appeal to Rome, that the Administrator-General, taking into consideration all the facts relating to Guibord, "comme membre du dit Institut," had "justement rendu le décret qui l'a privé de la sépulture ecclésiastique," and further, "que ce décret rendu dans la forme où il se trouve, est d'ailleurs un décret nominal."

Issue was joined on this special replication.

It is to be noticed that in this replication it is for the first time alleged that, on the ground of his being "pécheur public," Guibord was disentitled to ecclesiastical burial.

The case was argued before Mr. Justice Mondelet in the Superior Court, on the demurrers and on the merits.

The Court gave judgment for the widow on the merits, and on the demurrers to the first and third pleas, and ordered a peremptory writ of mandamus to issue; but declared that it did not pay any regard either to the widow's special answer to the third plea or the special replication, which it seems to have considered as improperly pleaded.

There was an Appeal to the Court of Revision, before three Judges, who reversed the Judgment of the Court below, quashed the writ originally issued, and dismissed the writ of mandamus with costs.

From this Judgment the widow appealed to the Court of Queen's Bench, and presented petitions of recusation against four of the Judges, which the Judges refused to admit. It is unnecessary to enter upon this part of the case, as in the course of the argument their Lordships fully expressed their opinion that these petitions could not be sustained.

The Court of Queen's Bench affirmed the Judgment of the Court of Revision; but the Judges did not agree as to the grounds upon which their decision was founded. They discussed at some length the matters raised upon the third plea; but they decided against the Appellant upon the questions as to the form of the writ and the regularity of the proceedings.

The questions of form, which are not unimportant, may be disposed of before the graver questions which arise out of the third plea are considered.

And first, is the mandamus bad upon the ground of uncertainty, or upon any other ground?

Their Lordships are of opinion that the writ was in proper

form according to the Code of Procedure for Lower Canada; the procedure therein pointed out, though called a mandamus, was not a writ of mandamus in the first instance, but, in effect, a summons to answer a petition praying for an order upon the Defendants to do certain specified acts. The first thing to be done by the Defendants was not, as in the case of a writ of mandamus in England, to make a return to the writ, but to appear to the summons, and plead to the petition. The sections of the Code of Procedure bearing upon this point are 1023, 1024, and 1025. Article 1023 evidently contemplates a writ of summons. It says the application is made by petition, supported by affidavits setting forth the facts of the case presented to the Court or a Judge, who may thereupon order the writ to issue, clearly meaning a writ of summons, for it goes on, "and such writ is served in the same manner *as any other writ of summons.*" This is rendered more clear by Article 1024, which directs the subsequent proceedings to be had in accordance with the provisions of the first chapter of that section. That refers to Articles from 997 to 1002, both inclusive; which, in cases similar to our *quo warranto*, require an information to be presented to the Court or a Judge, supported by affidavits, upon which the issue of a writ of summons may be ordered. The writ of summons commands appearance upon a day fixed, and is to be served in the manner pointed out. The Defendants are to appear on the day fixed (Article 1011), and to plead specially to the information (Article 1012). In the case of mandamus under the Code, therefore, the parties are not to make a return to the summons; the pleadings are to commence with a plea to the petition, and not a plea to the return to the writ. In our opinion, therefore, the objection to the writ, so far as it related to its being a mere writ of summons, and not a writ of mandamus, was untenable, and the practice of the Court in this respect, which has always been adopted, is in compliance with the directions of the code. The other technical objections to the writ have no substantial foundation. Three of the Judges of the Court of Queen's Bench held that the writ was correct in point of form, although one of them, Mr. Justice Badgley, being of opinion that the writ asked for too much, held that a peremptory writ could not issue commanding the Defendants to do the one thing only, viz., to bury, which, according to his view, they were legally bound to do. The procedure therefore requiring

a petition and plea to the petition, it appears to follow that the applicant for the writ is not so strictly bound by the prayer of his petition as he is in this country to the command contained in the first writ of mandamus, and that the Court may mould the order for the peremptory writ in the same manner as the Court here may mould the rule for a mandamus. There being no rule which requires a peremptory writ of mandamus to be granted in the precise terms of the first writ, it seems to follow that the general rule applicable to pleadings, either in equity or at common law, may be acted upon. According to them, a Plaintiff may generally obtain a decree for less than that for which he asks, and for relief in a more distinct and specific form than that for which he has prayed, provided it is within the scope of the prayer.

In the present case the prayer of the petition was—that the Defendants might be commanded to bury or cause to be buried the body of the deceased Joseph Guibord, in the Roman Catholic Cemetery, conformably to usage and to law. That was, doubtless, as pointed out by the Court of Review, extremely vague.

The objection to issuing a peremptory writ in that form was clearly stated by Mr. Justice Mackay (Record, pp. 570, 271)

"Under such vague conclusion," he observes, "the point really meant to be tried is hidden. That the Defendants are bound to bury Guibord in the Roman Catholic Cemetery, according to the usages and the law, is indisputable, and is not disputed. Peremptory mandamus to do this would nevertheless leave things just as unsettled between Plaintiff and Defendants as they were the day before the Plaintiff presented the requêt."

But if the principle above laid down be acted upon, the Court may in a peremptory writ, specify distinctly what they consider the Defendants are bound to do according to usage and law, and may peremptorily command the Defendants to do it. If they consider that the Defendants are bound to provide ecclesiastical burial with the rites and ceremonies of the Roman Catholic Church, they may say so. If they consider that the Defendants are bound to bury the body in that part of the cemetery in which bodies of those interred with ecclesiastical burial are usually buried, the peremptory writ may be worded accordingly. If they think the Defendants are bound to register the burial, the writ may go on to order such registration; or, if they think that the Defendants are not bound to register the burial, they can order the burial alone.

The next point of form relates to the question who are the Defendants to this writ. Are they the Curé and "Marguilliers" personally, or in their corporate capacity? The name used in the conveyance of the land for the cemetery, and that used in the plaint and writ of summons are identical. And their Lordships upon the whole are clearly of opinion that the writ was against "les Curé et Marguilliers," for the time being, in their corporate capacity as holders of the land and administrators of the cemetery and that the Curé in his individual or spiritual capacity is not a party to this suit.

It now becomes necessary to determine the merits of the case, and the grave questions of public and constitutional law which are raised by the third plea, and the subsequent pleadings.

In order to do this, it is desirable to consider shortly the status of the Roman Catholic Church in Lower Canada, both before and after the cession of the Province of Quebec in 1762.

It is certain that before the cession the Established Church of that Province, as in the Kingdom of France itself, was the Roman Catholic Church; its law, however, being modified by what were known as "les libertés de l'Eglise Gallicane." There seem also to have been regular Ecclesiastical Courts, and besides them there was vested in the Superior Council of Canada the jurisdiction recognized in French jurisprudence and enforced by the Parliaments of France as the "appallatio tanquam ab abusu," or the "appel comme d'abus." In Dupin's "Manuel du Droit Public Ecclésiatique Francais," ed. 1845, the celebrated work of Pithou is set forth, with notes of the learned editor, in the 79th Article. Pithou's treatise defines the "appel comme d'abus" as that--

"Appellation précise que nos pères ont dit estre quand il y a entreprise de jurisdiction ou attentat contre les saincts décrets et canons receux en ce royaume, droits, franchises, libertez, et priviléges de l'Eglise Gallicane, concordats, édits, et ordonnances du Roy, arrests ne son Parlement: bref, contre ce qui est non-seulement de droict commun, divin ou naturel, mais aussi des prerogative de ce royaume et de l'Eglise d'iceluy."

The following are the public documents which show how the Roman Catholic Church in Lower Canada was dealt with on the conquest and cession of the province:—

The 27th Article of the Instrument of Cession is in these terms:—

"Le libre exercice de la religion Catholique Apostolique et Romaine subsistera en son entier, ensorte que tous les états et le peuple des villes et des campagnes, lieux et postes éloignés, pourront continuer de s'assembler dans les églises et de fréquenter les sacrements comme ci-devant, sans être inquietés d'aucune maniére, directement ou indirectement. Ces peuples seront obligés par le Gouvernement Anglais à payer aux prêtres qui en prendront soin les dîmes et tous les droits qu'ils avaient contume de payer sous le Gouvernement de Sa Majesté Très Chretienne. Accordé pour le libre exercice de leur religion l'obligation de payer les dîmes aux prêtres dependra de la volonté du Roi."—(Page 15, "Actes Publics.")

Again, in the Treaty of 1763 it is said:—

"Sa Majesté Britannique consent d'accorder la liberté de la religion Catholique aux habitans du Canada, et leur permet de professer le culte de leur religion, autant que les lois de l'Angleterre le permettent."

And lastly, by an Act of Parliament passed in 1774 (14 Geo. III, c. 83), intituled, "An Act for making more Effectual Provision for the Government of Quebec, in North America," it was declared by section 5 that, for the more perfect security and ease of the minds of the inhabitants of the said province, His Majesty's subjects professing the religion of the Church of Rome of and in the said province of Quebec might have, hold and enjoy the free exercise of the religion of the Church of Rome, subject to the King's supremacy, declared and established by an Act made in the first year of the reign of Her Majesty Queen Elizabeth, over all the dominions and countries which then did, or should thereafter belong to the Imperial Crown of this realm, and that the clergy of the said Church might hold, receive, and enjoy their accustomed dues and rights with respect to such persons only as should profess the said religion.

And by the 8th section it is enacted:—

"That all His Majesty's Canadian subjects within the province of Quebec, the religious orders and communities only excepted, may also hold and enjoy their property and possessions, together with all customs and usages relative thereto, and all other their civil rights, in as large, ample, and beneficial manner as if the said Proclamation, Commissions, Ordinances, and other Acts and Instruments had not been made, and as may consist with their allegiance to His Majesty, and subjection to the Crown and Par-

liament of Great Britain; and that in all matters of controversy, relative to property and civil rights, resort shall be had to the laws of Canada as the rule for the decision of the same." &c.

From these documents it would follow that although the Roman Catholic Church in Canada may on the conquest have ceased to be an Established Church in the full sense of the term, it nevertheless continued to be a Church recognized by the State, retaining its endowments, and continuing to have certain rights (*e. g.* the perception of "dimes" from its members) enforceable at law.

It has been contended on behalf of the Appellants that the effect of the Act of Cession, the Treaty, and subsequent legislation, has been to leave the law of the Roman Catholic Church as it existed and was in force before the Cession, to secure to the Roman Catholic inhabitants of Lower Canada all the privileges which their fathers, as French subjects, then enjoyed under the head of the liberties of the Gallican Church; and further, that the Court of Queen's Bench, created in 1794, possessed, and that the existing Superior Court now possesses, as the Superior Council heretofore possessed, the power of enforcing these privileges by proceedings in the nature of "appel comme d'abus." Considering the altered circumstances of the Roman Catholic Church in Canada, the non-existence of any recognized ecclesiastical Courts in that Province, such as those in France which it was the office of an "appel comme d'abus" to control and keep within their jurisdiction: and the absence of any mention in the recent Code of Procedure for Lower Canada of such a proceeding, their Lordships would feel considerable difficulty in affirming the latter of the above propositions. Mr. Justice Mondelet, indeed, (Record 227–236) refers in his judgment to various cases of a mixed character in which the Civil Courts appear at first sight to have recently exercised a jurisdiction somewhat analogous to that exercised in the "appel comme d'abus." But on examination these cases prove to be suits of a different character, actions for damages against spiritual persons for wrongs done by them in their spiritual capacities.

Their Lordships do not, however, think it necessary to express any opinion as to the competence of the Civil Courts to entertain a suit in the nature of the "appel comme d'abus," as they agree with Mr. Justice Mackay and other Judges of the Court of Revision, that in such a suit the procedure must be different from

the present, and that at least it would be necessary to bring the proper ecclesiastical authorities before the Court as Defendants.

It is another and a different question, to be considered hereafter, whether the jurisprudence and precedents relating to the "appel comme d'abus" may not be considered by their Lordships as evidencing the law of the Church in Canada, by the maladministration of which the Appellant complains that he has been wronged.

Nor do their Lordships think it necessary to pronounce any opinion upon the difficult questions which were raised in the argument before them touching the precise *status*, at the present time, of the Roman Catholic Church in Canada. It has, on the one hand, undoubtedly, since the cession, wanted some of the characteristics of an Established Church; whilst, on the other hand, it differs materially in several important particulars from such voluntary religious societies as the Anglican Church in the Colonies, or the Roman Catholic Church in England. The payment of "dimes" to the clergy of the Roman Catholic Church by its lay members; and the rateability of the latter to the maintenance of parochial cemeteries, are secured by law and statutes. These rights of the Church must beget corresponding obligations, and it is obvious that this state of things may give rise to questions between the laity and clergy which can only be determined by the Municipal Courts. It seems, however, to their Lordships to be unnecessary to pursue this question, because even if this Church were to be regarded merely as a private and voluntary religious society resting only upon a consensual basis, Courts of Justice are still bound, when due complaint is made that a member of the society has been injured as to his rights, in any matter of a mixed spiritual and temporal character, to inquire into the laws or rules of the tribunal or authority which has inflicted the alleged injury.

In the case of "Long *v.* the Bishop of Cape-Town," their Lordships said:—

"The Church of England, in places where there is no church established by law, is in the same situation with any other religious body—in no better, but in no worse position; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who, expressly or by implication, have assented to them. It may be further laid down that, where any

religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation; the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and, if not, has proceeded in a manner consonant with the principles of justice."—(1 Moore, N. S., 461.)

Their Lordships will bear in mind these principles in the judgment which they are about to pronounce.

Now, what is the question to be here decided? It is the right of Guibord to interment in the ordinary way in the cemetery of his parish, a right enforceable by his representative. It may be observed that the Curé and Marguilliers are only proprietors of the parochial cemetery, in the sense in which a Parson in England is the owner of the freehold of the churchyard, that is to say, subject to the right of the parishioner to be buried therein. The Respondents do not contest that Guibord had that right, but say that they have refused nothing but ecclesiastical burial, for the refusal of which they are responsible only to the religious, and not to the civil authority. They admit, however, that the consequence of the refusal of ecclesiastical burial is that the remains of the deceased can be interred only in the smaller or reserved portion of the cemetery. It cannot be doubted on the evidence that this qualification of the general right of interment, this separation of the grave from the ordinary place of sepulture, implies degradation, not to say infamy.

That forfeiture of the right to ecclesiastical burial, involving these consequences, may be legally incurred, is not denied by the Appellants. Their contention is, that it was not so incurred by Guibord; that, according to the law of the religious community to which he belonged, he retained at the time of his death his right to be buried in the larger portion of the cemetery in the usual manner.

Their Lordships are disposed to concur, with one qualification, in the opinion expressed by Mr. Justice Berthelot as to the mixed character of these questions. He says:—

"Le baptême, le mariage, et la sépulture sont de matière mixte, et les ecclésiastiques ne peuvent se refuser de les administrer à ceux de leur paroissiens qui y ont droit, comme résidants

dans l'enclave de sa paroisse, à moins cependant qu'il n'y ait des peines ecclésiastiques prononcées contre eux par l'evêque ou autre authorité ecclésiastique compétente."

If this passage is to be taken to imply that it is competent to the Bishop to deprive a Roman Catholic subject of his rights by pronouncing against him *ex mero motu* ecclesiastical penalties, their Lordships are of opinion that the proposition is too wide. They conceive that, if the act be questioned in a Court of Justice, that Court has a right to inquire, and is bound to inquire, whether that act was in accordance with the law and rules of discipline of the Roman Catholic Church which obtain in Lower Canada, and whether the sentence, if any, by which it is sought, to be justified, was regularly pronounced by an authority competent to pronounce it.

It is worthy of observation, as bearing both upon the question of the *status* of the Roman Catholic Church in Lower Canada, and the manner of ascertaining the law by which it is governed, that in the Courts below, it was ruled, apparently at the instance of the Respondents, that the law, including the ritual of the Church, could not be proved by witnesses, but that the Courts were bound to take judicial notice of its provisions.

The application of this ruling would be difficult, unless it be conceded that the ecclesiastical law which now governs Roman Catholics in Lower Canada is identical with that which governed the French province of Quebec. If modifications of that law have been introduced since the cession, they have not been introduced by any legislative authority. They must have been the subject of something tantamount to a consensual contract binding the members of that religious community, and, as such, ought, if invoked in a civil Court, to be regularly proved.

It seems, however, to be admitted on both sides that the law upon the point in dispute is to be found in the Quebec ritual, which was certainly accepted as law in Canada before the cession of the province, and does not differ in any material particular fram the Roman ritual also cited in the courts below. The Quebec ritual is as follows:

"On doit refuser la sépulture ecclésiastique,—1o, aux Juifs, aux infidèles, aux hérétiques, aux apostats, aux schismatiques, et enfin à tous ceux qui ne font pas profession de la religion catholique. 2o. Aux enfants morts sans baptême. 3o. A ceux qui auraient été *nommément* excommuniés ou interdits, si ci n'est

qu'avant de mourir ils aient donné des marques de douleur, auquel cas on pourra leur accorder la sépulture ecclésiastique, après que la censure aura été levée par nos ordres. 4o. A ceux qui se seraient tués par colère ou par désespoir, s'ils n'ont donné avant leur mort des marques de contrition; il n'en est pas de même de ceux qui se seraient tués par frénésie ou accident, auxquels cas on la doit accorder. 5o. A ceux qui ont été tués en duel, quand même ils auraient donné des marques de repentir avant leur mort. 6o. A ceux qui, sans excuse légitime, n'auront pas satisfait à leur devoir pascal, à moins qu'ils n'ayent donné des marques de contrition. 7o. A ceux qui sont morts notoirement coupables de quelque péché mortel, comme si un fidèle avait refusé de se confesser, et de recevoir les autres sacrements avant que de mourir, s'il était mort sans vouloir pardonner à ses ennemis, s'il avait été assez impie pour blasphémer sciemment et volontairement sans avoir donné aucun signe de pénitence. Il ne faudrait pas user de la même rigueur envers celui qui aurait blasphémé par folie ou par la violence du mal, car en ce cas les blasphèmes ne seraient pas volontaires, ni par conséquent des péchés. 8o. Aux pécheurs publics qui seraient morts dans l'impénitence; tels sont les concubinaires, les filles ou femmes prostituées, les sorciers et les farceurs, usuriers, etc. A l'égard de ceux dont les crimes seraient secrets, comme on ne leur refuse pas les sacrements, on ne doit pas aussi leur refuser la sépulture ecclésiastique. Pour ce qui est des criminels qui auront été condamnés à mort et exécutés par ordre de la justice, s'ils sont morts pénitens, on peut leur accorder la sépulture ecclésiastique, mais sans cérémonie. Le curé ou vicaire y assiste sans surplis, et disent les prières à voix basse. Quand il y aura quelque doute sur ces sortes de choses, les curés nous consulteront ou nos grands vicaires.

The refusal of ecclesiastical burial to Guibord is not justified, and could not have been justified by either the 1st, 2nd, 4th, 5th, or 7th of the above rules.

To bring him within the 3rd rule it would be necessary to show that he was excommunicated by name. That such a sentence of excommunication might be passed against a Roman Catholic in Canada and that it might be the duty of the Civil Courts to respect and give effect to it their Lordships do not deny. It is no doubt true, as has already been observed, that there are now in Canada no regular ecclesiastical Courts, such as

existed and were recognized by the State when the province formed part of the dominions of France. It must, however, be remembered that a Bishop is always a *judex ordinarius*, according to the canon law; and, according to the general canon law, may hold a Court and deliver judgment if he has not appointed an official to act for him. And it must further be remembered that, unless such sentences were recognized, there would exist no means of determining amongst the Roman Catholics of Canada the many questions touching faith and discipline which, upon the admitted canons of their Church, may arise amongst them. There is, however, no proof that any sentence of excommunication was ever passed against Guibord *nominatim* by the Bishop or any other ecclesiastical authority. Indeed, it was admitted at the Bar that there was none: their Lordships are therefore relieved from the necessity of considering how far such a sentence, if passed, might have been examinable by the Temporal Court, when a question touching its legal effect and validity was brought before that Court.

It should be borne in mind that an issue was distinctly raised by the pleadings upon the fact of such a sentence; and the necessity of such a sentence to justify the refusal seems to be, to some extent, admitted by the allegation in the Defendant's pleading that *le décret*, as it is there called, of the Administrator-General, was *un décret nominal*.

In the course of the argument it was suggested, rather than argued, that the refusal of ecclesiastical burial in Guibord's case might be brought within the 6th of the above rules, and justified on the ground that, without legitimate reason, he had failed to communicate at Easter. But upon this their Lordships have to observe that this failure was not the ground on which ecclesiastical burial was denied to him; and that, so far from wilfully abstaining from receiving the sacraments of the Church, those sacraments were refused to him when he desired to receive them simply because he continued to be a member of the Institute.

The cause of refusal finally insisted upon was that Guibord was "un pécheur public" within the meaning of the 8th rule.

This defence was set up for the first time in the republication.

The Administrator-General's evidence on the point should be noticed:—

"*Question.*—Pour quelle raison feu Joseph Guibord, comme

membre de l'Institut Canadien, ne pouvait-il pas être admis aux sacrements de l'Eglise ?

" *Réponse.*—Parce que, comme tel, il est considéré comme pécheur public. On entend par pécheur public celui qui, pour une raison connue publiquement, ne peut participer aux sacrements de l'Eglise. M. Joseph Guibord, en appartenant à l'Institut Canadien, appartenait à un Institut qui se trouvait, comme il se trouve encore, sous les censures de l'Eglise par la raison qu'il possède une bibliothèque contenant des livres défendus par l'Eglise sous peine d'excommunication, *latæ sententiæ* encourue *ispo facto*, et réservée au Pape, par le fait de la posession des dits livres. Cette espèce d'excommunication s'encourt par le fait même, dès que l'on connaît la loi de l'Eglise qui en défend la lecture et la retenue, dès que cela parvient à la connaissance de ceux qui les possèdent. Cette excommunication a atteint M. Guibord par le fait même qu'il était membre de l'Institut. Lorsqu'on est sous l'effet de la dite excommunication, quoique l'on puisse continuer à être membre de l'Eglise Catholique, et que, de fait, l'on continue à en être membre, l'on est privé de la participation aux sacrements, ce qui entraîne la privation de la sépulture ecclésiastique. Voilà porquoi cette espèce de sépulture a été refusée à M. Guibord."

The evidence continues—

" *Question.*—Le dit feu Joseph Guibord, comme membre de l'Institut Canadien, était-il sous l'effet de l'excommunication, en vertu de quelque règle générale de l'Eglise seulement, ou en conséquence de quelque décret particulier ?

" *Réponse.*—Il y était d'abord en vertu de la loi générale de l'Eglise, et en vertu de l'application qu'en a faite l'Evêque de Montréal par son mandement."

The evidence further continues—

" *Question.*—A quel mandement faites-vous allusion ?

" *Réponse.*—C'est à celui produit en cette cause comme l'Exhibit B. de la Demanderesse.

" *Question.*—Est-il déclaré quelque part dans aucun mandement ou lettre pastorale émanant de l'Evêque de Montréal que le fait d'appartenir à l'Institut Canadien entraîne l'excommunication ; et si vous répondez affirmativement, veuillez indiquer les tremes qui décrètent telle chose ?

" *Réponse.*—Ceci est déclaré dans l'annonce de Monseigneur de Montréal, que, en ma qualité d'administrateur, j'ai fait publier

le quatorze Août mil huit cent soixante-et-neuf, laquelle annonce est produite comme pièce D. de la Demanderesse. Voici dans quels termes ceci est déclaré : Ainsi, nos très chers frères, deux choses sont ici spécialement et strictement défendues, savoir : 1, de faire partie de l'Institut Canadien tant qu'il enseigneur des doctrines pernicieuses ; et 2, de publier, retenir, garder, lire l'*Annuaire* du dit Institut pour 1868. Ces deux commandements de l'Eglise sont en matière grave, et il y a par conséquent un grand péché à les violer sciemment. En conséquence celui qui persiste à vouloir demeurer dans le dit Institut, ou à lire ou seulement garder le sus-dit *Annuaire*, sans y être autorisé par l'Eglise, se prive lui-même des sacrements, même à l'article de la mort, parceque, pour être digne d'en approcher, il faut détester le péché, qui donne la mort à l'âme, et être disposé à ne plus le commettre.'

" *Question.*—Etre privé des sacrements et être excommunié, est-ce la même chose ?

" *Réponse.*—Dans le cas présent c'est la même chose.

" *Question.*—L'excommunication, peut-elle être prononcée sans qu'il soit même fait usage du mot ?

" *Réponse.*—Je ne suis pas prêt à répondre à cette question." —(Record, 146, 7.)

It is impossible wholly to avoid a suspicion that it had originally been intended to rely on an *ispo facto* excommunication, and that this subsequent defence of " pécheur public " was resorted to when it became manifest that a sentence of excommunication was necessary, and that none had been pronounced.

What is this category of " pécheur public " to include ? Is the category capable of indefinite extension by means of the use of an *et cætera* in the Quebec Ritual ? Or if the force of an *et cætera* is to be allowed to bring a man within the category of persons liable to what in ecclesiastical law is a criminal penalty, must it not be confined to offences *ejusdem generis* as those specified ? Guibord's case did not come within any of the enumerated classes.

Some argument was raised as to the effect of the words, "quand il y aura quelque doute sur ces sortes de chose les Curés nous consulteront ou notre grand Vicaire ; " but their Lordships are of opinion that these words can at most imply a duty on the part of the Curé to consult the Ordinary as to the application of the law in doubtful cases, not a power on the part of the Or-

dinary to enlarge the law in giving those directions, or to create a new category of offenders.

To allow a discretionary addition to, or an enlargement of, the categories specified in the Ritual, would be fraught with the most startling consequences. For instance, the *et cœtera* might be, according to the supposed exigency of the particular case, expanded so as to include within its bann any person being in habits of intimacy or conversing with a member of a literary society containing a prohibited book; any person visiting a friend who possessed such a book; any person sending his son to school in the library of which there was such a book: going to a shop where such books were sold; and many other instances might be added. Moreover, the Index, which already forbids Grotius, Pascal, Pothier, Thuanus, and Sismondi, might be made to include all the writings of jurists and all legal reports of judgments supposed to be hostile to the Church of Rome; and the Roman Catholic lawyer might find it difficult to pursue the studies of his profession.

Their Lordships are satisfied that such a discretionary enlargement of the categories in the Ritual would not have been deemed to be within the authority of the Bishop by the law of the Gallican Church as it existed in Canada before the cession; and, in their opinion, it is not established that there has been such an alteration in the *status* or law of that Church founded on the consent of its members, as would warrant such an interpretation of the Ritual, and that the true and just conclusion of law on this point is, that the fact of being a member of this Institute does not bring a man within the category of a public sinner to whom Christian burial can be legally refused.

It would further appear that, according to the ecclesiastical law of France, a personal sentence was in most cases required in order to constitute a man a public sinner.

Jean de Pontas (Article 2, des Cas de Conscience, vo. Sépulture, A.D., 1715, Record 245) says:—

"Un homme en France n'est point censé pécheur public, et ne peut être traité comme tel, à moins qu'il n'y ait une sentence déclaratoire rendue par le jugement ecclésiastique contre le coupable.

"A propos d'un concubinaire public, pendant près de dix ans, mort endurci dans le crime, sans avoir voulu se confesser, Pontas décide que 'le curé doit enterrer cet homme en observant toutes

les formalités pratiquées par l'Eglise, sans pouvoir ni s'absenter, ni feindre de refuser la sépulture ecclésiastique, sous prétexte d'intimider les autres pécheurs semblables, ni enfin ordonner à un autre prêtre de l'enterrer sans observer les cérémonies ordinaires."

Durand de Maillane. (Droit Canonique, t. 5, p. 442) says :—

"On ne reconnaît pour véritables excommuniés à fuir, que les Païens et les Juifs, ou les hérétiques condamnés et séparés ainsi totalement du corps des fidèles. Les autres coupables de différents crimes qu'ils n'expient point avant leur mort ne sont privés de la sépulture que lorsqu'ils sont dénoncés excommuniés, ou que leur impénitence finale est tellement notoire qu'on ne peut absolument s'en déguiser la connaissance. Le moindre doute tire le défunt hors du cas de privation, parce que chacun est présumé penser à son salut.

"Suivant les maximes du royaume, on ne prive de la sépulture ecclésiastique que les hérétiques séparés de la communion de l'Eglise, et les excommuniés dénoncés. La notoriété sur cette matière n'est pas absolument requise, parce qu'il y a des cas où il est très nécessaire de faire respecter à cet égard les saintes lois de l'Eglise; mais elle n'est pas aisément reçue, à cause des inconvénients qui pourraient en résulter : car le refus de la sépulture est regardé parmi nous comme une telle injure, ou même comme un tel crime, que chaque fidèle, pour l'honneur de la religion, et la mémoire ou même le bien de son frère en Jésus-Christ, est recevable à s'en plaindre. Cette plainte se porte devant des juges séculiers, parce qu'elle intéresse en quelque sorte le bon ordre dans la société, et l'honneur même de ses membres."

Héricourt (Lois Ecclésiastiques, p. 174) :—

"Avant de dénoncer excommunié celui qui a encouru une excommunication *lata sententia*, il faut le citer devant le juge ecclésiastique, afin de justifier le crime qui a donné lieu à la censure et d'examiner s'il n'y aurait pas quelque moyen de défense légitime à proposer."

No personal sentence, such as is contemplated by these authorities, was, as already pointed out, ever passed against Guibord.

It is also to be borne in mind that no sentence, whatever might have been its value, was passed even after Guibord's death. There is indeed a letter called a *décret* of the Adminis-

trator-General to the Curé, which, after referring to a letter of the Bishop, written before Guibord's death, refuses ecclesiastical sepulture to him as a member of the Institute. The representatives of Guibord were neither summoned nor heard. This so-called *décret* had none of the essential elements of a judicial sentence.

It remains for their Lordships to consider what is the substantive law upon which the Respondents rely in support of their contention that Guibord is to be considered a public sinner within the terms of the Quebec ritual.

They appear to place their principal reliance on Rule X of the Council of Trent:—

"Omnibus fidelibus præcipitur ne quis audeat contra harum regularum præscriptum, aut hujus Indicis prohibitionem libros aliquos legere aut habere.

"Quod si quis libros hereticorum vel cujusvis auctoris scripta ob heresim vel ob falsi dogmatis suspicionem damnata, atque prohibita legerit vel habuerit, statim in excommunicationis sententiam incurrat."

Various observations arise on this citation, which seem to deprive it of all authority in the present case.

In the first place it is a matter almost of common knowledge, certainly of historical and legal fact, that the decrees of this Council, both those that relate to faith, were never admitted to have effect *proprio vigore*, though a great portion of them has been incorporated into French Ordinances. In the second place France has never acknowledged nor received, but has expressly repudiated, the decrees of the Congregation of the Index.

Gibert, in his Institutes, says that the *ispo facto* excommunication inflicted by the Council of Trent as the punishment of reading or possessing prohibited books would have no effect in France *dans le for extérieur*. *Dupin*, a jurist already mentioned denies the authority in France of the decrees of the Congregation. He says:—

"En effet, en consultant les précédents, on trouve un célèbre arrêt du Parlement de Paris qui l'a jugé ainsi en 1647, après un éloquent plaidoyer de l'Avocat-Général Omer Talon:—

"'*Nous ne reconnoissons point en France*, dit ce Magistrat, 'l'autorité, la puissance, ni la juridiction des congrégations qui se tiennent à Rome; le pape peut les établir comme bon lui semble dans ses Etats; *mais les décrets de ces congrégations n'ont*

point d'autorité ni d'exécution dans le royaume . . . . Il est vrai que dans ces congrégations se censurent les livres défendus, et dans icelles se fait l'*index expurgatorius*, lequel s'augmente tous les ans; et c'est là où autrefois ont été censurés les arrêts de cette cour rendus contre Chastel, les œuvres de M. le Président de Thou, les libertés de l'Eglise Gallicane, et les autres livres qui concernent la conservation de la personne de nos rois et l'exercice de la justice royale.'" &c.—(Dupin, Droit Public Ecclésiastique, avertissement sur la 4ème édition.)

No evidence has been produced before their Lordships to establish the very grave proposition that Her Majesty's Roman Catholic subjects in Lower Canada have consented, since the cession, to be bound by such a rule as it is now sought to enforce, which in truth, involves the recognition of the authority of the Inquisition, an authority never admitted but always repudiated by the old law of France. It is not, therefore, necessary to enquire whether since the passing of the 14 Geo. III, c. 83, which incorporates (s. 5) the 1st of Elizabeth, already mentioned, the Roman Catholic subjects of the Queen could or could not legally consent to be bound by such a rule.

The conclusion, therefore, to which their Lordships have come upon this difficult and important case is that the Respondents have failed to show that Guibord was, at the time of his death, under any such valid ecclesiastical sentence or censure as would, according to the Quebec ritual, or any law binding upon Roman Catholics in Canada, justify the denial of ecclesiastical sepulture to his remains.

It is, however, suggested that the denial took place, in fact, by the order of the Bishop or his Vicar-General; that the Respondents are bound to obey the orders of their ecclesiastical superior; and, therefore, that no mandamus ought to issue against them. Their Lordships cannot accede to this argument. They apprehend that it is a general rule of law in almost every system of jurisprudence that an inferior officer can justify his act or omission by the order of his superior only when that order has been regularly issued by competent authority.

The argument would, in fact, amount to this: that even if it were clearly established that Guibord was not disentitled by the law of the Roman Catholic Church to ecclesiastical burial, nevertheless the mere order of the Bishop would be sufficient to justify the Curé and "Marguilliers" in refusing to bury him in that part

of the parochial cemetery in which he ought on this hypothesis to be interred; or, in other words, the Bishop, by his own absolute power in any individual case, might dispense with the application of the general ecclesiastical law, and prohibit upon any grounds, revealed or not revealed, satisfactory to himself, the ecclesiastical burial of any parishioner. There is no evidence before their Lordships that the Roman Catholics of Lower Canada have consented to be placed in such a condition.

Their Lordships do not think it necessary to consider whether, if the parties and circumstances of the suit had been different, they would or would not have had power to order the interment of Guibord to be accompanied by the usual religious rites, because the widow finally forewent this demand, and Counsel at their Lordship's bar have not asked for it, and also because the Curé is not before them in his individual capacity; but they will humbly advise Her Majesty that the Decrees of the Court of Queen's Bench and of the Court of Review be reversed. That the original Decree of the Superior Court be varied, and that, instead of the order made by that Court, it should be ordered that a peremptory writ of mandamus be issued, directed to "Les Curé et Marguilliers de l'Œuvre et Fabrique de Notre Dame de Montréal," commanding them, upon application being made to them by or on behalf of the Institut Canadien, and upon tender or payment to them of the usual and accustomed fees, to prepare, or permit to be prepared, a grave in that part of the cemetery in which the remains of Roman Catholics, who receive ecclesiastical burial, are usually interred, for the burial of the remains of the said Joseph Guibord; and that, upon such remains being brought to the said cemetery for that purpose at a reasonable and proper time, they do bury the said remains in the said part of the said cemetery, or permit them to be buried there. And that the Defendants do pay to the Canadian Institute all the costs of the widow in all the lower Courts, and of this Appeal, except such costs as were occasioned by the plea of *recusatio judicis*, which should be borne by the Appellants.

Their Lordships cannot conclude their Judgment without expressing their regret that any conflict should have arisen between the ecclesiastical members of the Roman Catholic Church in Montreal, and the lay members belonging to the Canadian Institute.

It has been their Lordships' duty to determine the questions

submitted to them in accordance with what has appeared to them to be the law of the Roman Catholic Church in Lower Canada.

If as was suggested, difficulties should arise by reason of an interment without religious ceremonies in the part of the ground to which the mandamus applies, it will be in the power of the Ecclesiastical authorities to obviate them by permitting the performance of such ceremonies as are sufficient for that purpose, and their Lordships hope that the question of burial, with such ceremonies, will be reconsidered by them, and further litigation avoided.

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