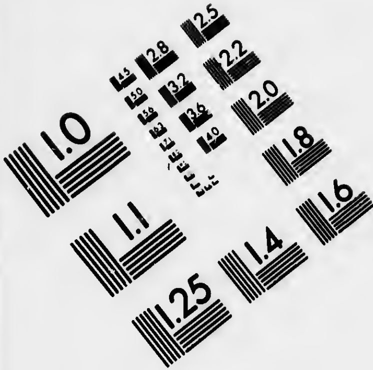

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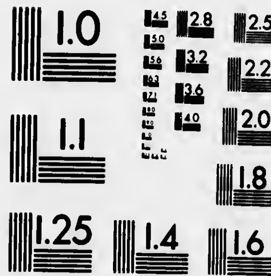
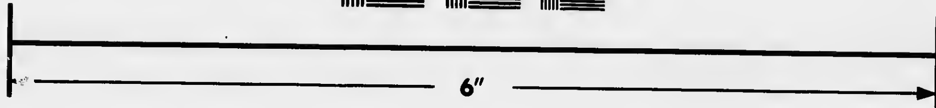

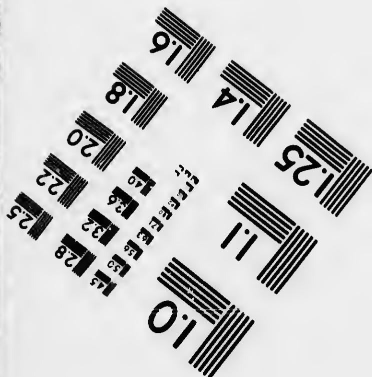
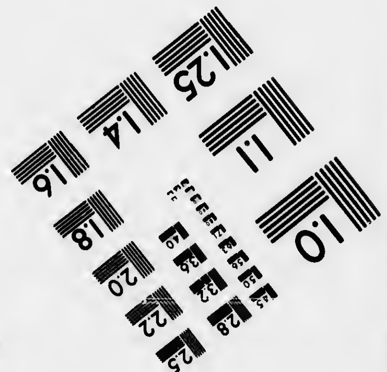

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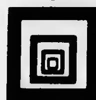

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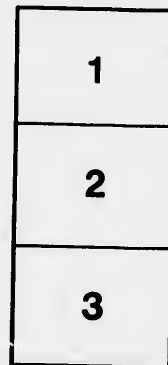

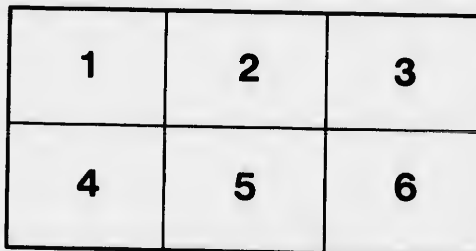

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CASE

(IN PART)

OF THE

SEIGNIORS OF LOWER CANADA,

SUBMITTED TO THE

JUDGES OF THE COURT OF QUEEN'S BENCH AND OF THE SUPERIOR COURT

FOR LOWER CANADA,

IN REFERENCE TO THE QUESTIONS AND COUNTER-QUESTIONS BEFORE THEM,

UNDER

"THE SEIGNIORIAL ACT OF 1854."

BY CHRISTOPHER DUNKIN, M. A.,
ADVOCATE

Montreal:
PRINTED BY JOHN LOVELL, ST. NICHOLAS STREET,
1855.

CASE.

§ 1.—In support of his declaratory Seigniorial Bill of 1851, the learned Attorney (then Solicitor) General for Lower Canada maintained, that the Seigniorial system, as introduced into Canada, "was regulated by special laws of the most "beneficial kind, which gave every man a vested right in every acre of wild "land throughout the Colony,"—that "the Lord held the land not for himself, "but for all comers, upon the strict condition of settlement,"—that "the first "condition of the tenure was that the Seignior not only should concede *à titre* "*de redevance*—for a small annual rent—but that he should make it his business "to obtain settlers for his lands,"—that "not only were the Seigniors bound to "concede lands on demand, but the Attorney General was especially required to "see that Seigniors did not abuse the rights given them for the purpose of "settling the country,"—that "thus everything makes it evident that the "Seigniors did not hold for themselves, but that they were looked on by the law "as trustees for the public." (*a*)

§ 2.—Indeed, this doctrine of the trustee-capacity of the Canadian Seignior had come to be so often asserted and so widely believed, and was so plainly the basis, not only of the Bills of 1851, but also of the Bill which followed them in 1852, that when called upon to oppose the latter measure at the Bar of the House in 1853, it was necessarily the main object of my argument to show its unsoundness, by such induction of facts as was then at my command.

§ 3.—Replying to what I then said, and admitting my facts as stated,(*b*) the Attorney General did not precisely re-affirm his doctrine of 1851. But he quoted approvingly, and so in effect adopted, from Garneau's History of Canada the passage in which that writer (exaggerating it a little) says :—

"La loi Canadienne n'a considéré d'abord le Seigneur que comme un fermier du gouvernement, chargé de distribuer des terres aux colons à des taux fixes."(*c*)

(*a*) *Speech of 18th August*, 1851, on second reading of Bill,—as reported in Montreal Herald of 23rd, and Pilot of 26th.

(*b*) "I admit that the history of Seigniorial grants in this country has been clearly * * given "by the learned Counsel who spoke at the Bar. I agree with him as to the facts he has "stated, but I differ from his conclusions."—*Speech of 22nd March*, 1853, on second reading of Bill,—as reported in Quebec Morning Chronicle of 13th April, and (French version) in pamphlet "*Débats*" from *Canadien* Office, p. 18.

(*c*) Garneau (2nd Edn.) Vol. I, p. 159, cited in same speech.—See Report *ubi suprà*, and in "*Débats*," p. 20.

It is observable as showing the loose way in which a statement of this sort can be hazarded

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And on the other hand, in the same speech, after asserting as fact that "the "Kings of France being determined upon effecting the settlement of these lands, "resolved upon granting them to companies or to individuals, subject to their "being sub-granted to actual settlers at certain low rates of *cens et rentes*, which "were well known in the Colony," he thus more guardedly laid down a new definition of his own:—

"I think the learned Counsel who was heard at the Bar wasted very much learning to "prove that the Canadian Seignior held a right of property in his Seigniory. Nobody ever "doubted that. He does hold a right of property; but it is jointly with the *censitaire*. The "Seignior and the *censitaire* are in truth the *joint* owners of the property. The former hold- "ing the dominal right over the property (*dominium directum*,) and the latter being alone "vested with the *dominium utile*, or the right of using the soil for his own benefit."

"I defy any man to shew that the Courts of Canada * * ever held that the Seignior had "the *dominium utile* in any land in his Seigniory not held *en roture* or as his private domain. "I never heard this doctrine before I heard it at the Bar the other evening," &c.

"I hold that it is impossible to take up the volumes of the Edicts and Ordinances, or any "law or history of the country, and avoid coming to the conclusion that these grants, although

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and the style of thing that, for want of better, may be pressed into service as an authority, —that this passage from Garneau occurs in the following connexion:—

"Le premier fief dont les registres du pays fassent mention est celui de * *. Le mon- "arque, dit Raynal, '*faisait à ses officiers, civils ou militaires, et à d'autres de ses sujets* "'*qu'il voulait recompenser ou enrichir, des concessions qui avaient depuis 2 jusqu'à 10 lieues* "'*en carré. Ces grands propriétaires, hors d'état par la médiocrité de leur fortune, ou par* "'*leur peu d'aptitude à la culture, de mettre en valeur de si vastes possessions, furent comme* "'*forcés de les distribuer à des soldats vétérans ou à d'autres colons pour une redevance per-* "'*pétuelle.*

"'*Chacun de ces vassaux recevait ordinairement 90 arpens de terre, et s'engageait à donner* "'*annuellement à son seigneur 1 ou 2 sols par arpent, et ½ minot de blé pour la concession* "'*entière; il s'engageait à moudre à son moulin, et à lui céder pour droit de mouture la* "'*quatorzième partie de la farine; il s'engageait à lui payer un douzième pour les lods et* "'*ventes, et restait soumis au droit de retrait.*' Quant aux lods et ventes, il est bon d'obser- "ver qu'il n'en devait pour les héritages recueillis par lui en ligne directe.

"La loi Canadienne n'a considéré d'abord le Seigneur que comme un fermier du gou- "vernement, chargé de distribuer des terres aux colons à des taux fixes. Cela est si vrai "que sur son refus, l'intendant pouvait concéder la terre demandée," &c.

The Attorney General's approving quotation strangely enough covered, not only the sentence cited in the text, but also Garneau's following blunder, obvious as it was, as to the power of the Intendant to concede,—and further (at second hand) his whole citation from Raynal, according to which the Seigniors were not *fermiers* charged by law with the mere distributing of land at fixed rates, as Garneau called them, but were *grands propriétaires* whom the King meant to enrich, and who only could not *de facto* keep all their land to themselves, because they were not such rich men and good managers as they might have been. On other points, Raynal can be as inaccurate as Garneau; in fact, he makes the amount of his *droit de mouture*, and his *lods et ventes*, matters of contract,—implies his *droit de retrait* not to have been so,—and, like most writers who have tried to state a usual rate, gives one of his own not squaring with other people's. Yet Raynal and Garneau are both cited, as if both were (or could be) right.—One blunder, fortunately, was omitted in the reading, and so is left unendorsed,—that by which Garneau implies it as his notion, that *lods et ventes* accrue on all mutations not *en ligne directe*.

"made to the Seigniors *en pleine propriété*, were, if granted *à titre de fief*, held subject to all "the conditions and incidents attached to that species of property by the laws of New France. "The Seignior held the *dominium directum* in his Seigniory, not the *dominium utile*."

"I can understand why some of them, who have purchased unsettled Seigniories for three "or four thousand pounds, and would wish to hold in addition to the *dominium directum*, the "*dominium utile*, of all the new lands, should oppose it [the Bill]—for if," &c. (*d*)

§ 4.—In the Attorney General's Propositions now maintained before this Court, even this definition is not re-affirmed; any more than the bolder trustee-doctrine of 1851. The nearest approach to either is to be found in the following answers to Questions 9 and 17 :—

"9.—Les anciennes lois du pays imposaient aux propriétaires de fiefs et seigneuries l'obligation de concéder leurs terres à titre de redevances, quand ils en étaient requis, et leurs "droits de propriété dans ces terres étaient restreints et limités par cette obligation de les "concéder."

"17.—Suivant les lois en force en Canada, avant la cession du pays, les personnes aux-"quelles des terres avaient été accordées par la Couronne de France en fief et seigneurie, "avaient dans ces terres un droit de propriété limité et restreint par l'obligation de les "concéder à titre de redevances annuelles, sans qu'elles pussent autrement les aliéner."

An omission the more striking, from the fact that Question 17 (*e*) reads thus,—

"*Seventeenth Question.*—According to the laws in force in Canada before the cession of "the country, had the persons to whom lands had been granted by the Crown of France, in "Fief or Seigniory, a full, entire and absolute right of property in those lands (*dominium* "*plenum et jus integrum*) free from any obligation to concede them at a rent payable perio-"dically, and with the right of alienating them? Did they possess the *dominium utile* (*do-* "*maine utile*) as well as the *dominium directum* (*domaine direct*) of those lands? If not, "how were they required to concede, or forbidden to sell them! How, and to what extent "was the right of alienating those lands restricted or limited?"

—and was plainly so drawn, on purpose that this very definition of 1853 might be called for from this Court in answer to it.—Add, that it follows Questions 3 and 4, which were thus drawn :—

"*Third Question.*—In what did the *dominium directum* consist? Did it consist in the right "to impose on the *censitaire* the payment of certain rents or dues, *reditus?*"

"*Fourth Question.*—In what did the *dominium utile* consist? Did it consist in the right "of occupying the soil and enjoying the produce thereof? And did this right of occupation "and enjoyment extend to the waters and woods, as well as to the land?"

—and which are now answered, or rather not answered, thus :—

"3.—Les profits du domaine direct consistaient dans les obligations ou redevances dont "le fendataire ou censitaire était tenu, comme la foi et hommage, le cens, les rentes, les lods, "etc."

"4.—Ceux du domaine utile consistaient dans les produits du sol, que le feudataire ou cen-"sitaire avait droit d'occuper à titre de propriétaire, et comprenaient l'usage des eaux non-"navigables et des forêts qui s'y trouvaient."

(*d*) Same speech.—See Report *ubi suprà*, and in "*Débats*," pp. 18, 20 and 22.

(*e*) Writing in English, I of course cite these questions as authoritatively printed in English. The Propositions fyled by the Attorney General in answer to them, I have to cite in French: from not having been able to obtain a copy of them in an authorized English form.

So that, in truth, the failure now to hazard before this Court the definition so boldly urged on the House of Assembly two years ago, has involved the allowing of no less than three of the Attorney General's Questions, to remain unanswered by himself.

§ 5.—And yet, it will be within the memory of the Court, that one at least of the learned Counsel on whom it devolved to support the Attorney General's Propositions before this Court, went the whole length of maintaining the Seigniors to be mere administrators, agents and trustees, ("*administrateurs, agens et fidéi-commissairer*,") and their tenure of what they call their property, to be truly a trust, though of a kind so peculiar as to call for the invention of a new name—"*fidéi-commis seigneurial*"—fittingly to designate it.

§ 6.—Hard, however, as it may be, under such circumstances, to say what is or is not the precise definition of this tenure, upon which the Propositions of the Attorney General at present in controversy, are intended to be based, it is at least comparatively easy to say what kind of definition they require, as matter of logical inference, in order to their being held good in law.

§ 7.—Practically, they call upon this Court to declare as law,—that all rates of charge upon *censitaires*, whether in kind or money, exceeding the present money value of 2 *sols* per superficial arpent, even though contracted for since the cession of Canada to the British Crown,—must be cut down to that value;(*f*) that the Seignior, no matter what his own title or the terms of his grants to others, can have no right whatever upon any navigable water, (*g*)or to any reserve, *redevance* or profit, in respect thereof,(*h*)—nor yet upon any other water traversing or bathing any land that he may have conceded, or by reason of any special concession, reservation or prohibition in respect thereof;(*i*) that his banality is nothing more than a conditional right to make his *censitaires* grind certain grain at his mill on certain terms; (*j*) that every reservation or prohibition of any real value to him, and all *corvées* in his favor, stipulated by any of his concession deeds, are absolutely null;(*k*) that his rights in his ungranted and in his granted lands are to be valued, in effect, by one and the same rule; (*l*) in a word,—that over and above his house and mills, and what in popular language is called his domain as contra-distinguished from the rest of his ungranted lands, he has

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(*f*) *Proposition* 25.—In terms, this demand relates to no grants but those made since the cession. But as matter of principle, it is obvious that the rule must apply to all or none. The fact seems to have been overlooked, that there were numbers of earlier grants so made as to come within its operation.

(*g*) *Proposition* 26.

(*h*) *Proposition* 27.

(*i*) *Propositions* 28, 29, 32, 39, 40, and 41.

(*j*) *Propositions* 33, 34, 35, and 36.—Proposition 36 defines the obligation of the *censitaires* as being "*celle d'y porter moudre leurs grains*," without limit of quantity or kind. But in argument it will be remembered that the learned Counsel limited the obligation, both as to kind and as to quantity.

(*k*) *Propositions* 39, 40, 41, and 42.

(*l*) *Propositions* 9, 17, 25, and 45

and can have no manner of right in, to or from any realty in his Seigniory, beyond the value, in the aggregate, of this rent of 2 *sols* or less per arpent, of the casual rights incident thereto, and of the profit (if any) of this limited banality.

§ 8.—If so, (looking back to the time of its first concession by the Crown,) whose was the Seigniory,—the *domaine utile*, in its large entirety, of the whole tract of land, then granted under reserve simply of the rights of the Crown, which formed the *domaine direct* of the Crown? (*m*)

§ 9.—Not the Seignior's own. For he had nothing like the power of doing as he would with it. All of it that he might take to his own use,—all of it that he could hold for himself,—all of it that, as Seignior, he had the right to make his own,—is supposed to be this house and these mills which he is to build, this so called domain which he may reserve, and these low rents, and contingent rights and profits, which he may realise if he can.

§ 10.—Nor his, subject to the mere charge or obligation towards his feudal lord, the Crown, that he should sub-grant from it on given terms, when thereto requested. For such charge or obligation could always be given up or relaxed by the Crown; could be enforced by the Crown alone, in its discretion, and in favor of such as might invoke its enforcement; could import no absolute nullity of every clause variant from such terms, which might find its way into his contracts with parties who either should not have cared to invoke, or should have invoked to no purpose, such enforcement.

§ 11.—Nor yet his, "jointly with the *censitaire*,"—he holding in it, or in some part of it, a mere imaginary *domaine direct*, and the *censitaire* an equally imaginary *domaine utile*. For, till such time as he shall have sub-granted from it, it is a mere undivided *domaine utile* in his hands, and there is no *censitaire* in being, to be holder of the less extensive *domaine utile*, which alone a *censitaire* can hold, and which can only be offset from the larger *domaine utile* of the Seignior by his contract of *accensement* with such *censitaire*. His

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(*m*) I resort to this long explanatory phrase, that I may (if possible) avoid being misunderstood or mis-stated, as to the fundamental idea involved in the proposition that the Seigniors are veritable proprietors of their Seigniories.

In 1853, speaking to a Parliamentary body, most of whose members were neither lawyers nor familiar with French law terms, I had to explain myself with as little reference to them as possible. With this view I made use of the expression "*holders of an estate in fee simple*," as an English law phrase conveying the idea of "*proprietors*" as contra-distinguished from "*trustees*." In the report of my speech, as first printed, this phrase was shortened into "*holders of freehold estate*." The gentleman who ably translated the report into French was naturally puzzled by this not quite accurate expression,—and (not being himself a lawyer) rendered it "*possesseurs de franc aleu*." I only saw the translation after it was published.

The tenor of the speech, as a whole, shows clearly enough that this could not have been my meaning. I refer thus to the matter, because it has been often said that my argument for the Seigniors tends to claim for them the quality of holders *en aleu*. It does no such thing; and never was by me so stated as to admit of such inference being drawn from what I said.

contract with the Crown could not possibly sub-divide his grant between him and an *être fictif*—so to speak—not party to the contract, not yet existent, perhaps never to exist.—The idea has been insisted on; or one might have thought it never could be.

§ 12.—Nor, again, can one say, that it was partly his, and partly held in trust by him for this *être fictif*, this contingent *censitaire* population, thereafter to be or not to be; that in so far as regarded whatever land or water he might take for his house, his mills and his so-called domain, he held it as his own,—and that in so far as regarded all the rest, he but held it in trust for distribution to all comers, with the right (as he should discharge his trust) to pay himself *pro rata*, with so much and no more of rents and profits out of the lands distributed. For if anything in law be certain, it is this; that a *fief* is essentially a whole,—one property, to be held under one tenure by one vassal, or by several co-vassals, as may be,—not an aggregate of properties, to be held, some as the vassal's own, and some in trust for others than co-vassals.

§ 13.—Nor will it even meet the case to say, that he held the whole Seigniory as a simple trust, for distribution, with the right to pay himself by taking so much for his house, mills and domain, and realising such and such rents and profits out of the rest as it should be distributed. For on that theory, the nullity attaching to whatever he might do in excess of such his right, would be only relative, not absolute. Supposing him to take too much or give up too little,—to bargain for excessive rents or take undue advantage of his position in any way, the matter would be one for redress at private suit, not one of public policy. The parties injured must complain; and it would be for him then to defend himself, if he could. Contracts fairly made *en connaissance de cause*,—after-dealings and recognitions,—prescription, even, as in other matters,—might make good his case. But the pretension here is, that without such complaint, as matter of public policy, treating every variance from the supposed terms of the supposed trust as an utter nullity,—contracts, dealings, possession, prescriptions, all set aside as immaterial,—the entire fabric of the relations of the parties is to be built up anew from the foundation.

§ 14.—In truth, there is but one theory large enough to cover this pretension,—the theory of a purely public trust,—the theory which would vest in the Seignior a mere trust estate, so absolutely regulated even in its details by public law, as to admit of no legal capacity in any one (Seignior, or *censitaire*, or intending *censitaire*) to transgress any of them. If the grant to the Seignior (so far from being to himself, of a property) was but of a public trust for the distribution of real estate, so much to himself, and so much on such and such terms to others,—he to be incapable of holding more, and they equally so of holding less, of the realty to be distributed,—all bargains, after-dealings, recognitions, possession and prescription, (if tending to give him more and them less, *but not otherwise*,) to be null and void, as contravening a fundamental law of public policy,—then, indeed, the practical conclusions now taken by the Attorney General may be maintained. On no other hypothesis can they be.

Either the Seignior's grant, as first made, must have meant all this, and nothing more than this. Or, if it did not, legislation must have brought it so to do.

§ 15.—The Seigniors on the other hand submit, that this abstract theory and these practical conclusions are alike preposterous.—The grant by the French Crown, of a Canadian Seigniory, involved no such extraordinary trust as this,—involved no trust at all,—was a simple grant of a property. Particular titles may have had in them one or another form of words importing more or less of requirement as to the matter of sub-granting. But such cases were the exception, not the rule. And even in such cases, this kind of clause could not possibly divide the property granted, between the Seignior and all the world,—or make him and all the world incapable of so dividing it so as to let him have more than a certain minute share of it,—or turn him into a trustee for every body,—or give every body a vested right in it,—or do more than lay on him an obligation towards the Crown, which the Crown alone could enforce, which it might enforce or not, which it has not enforced, which for the last ninety years and more it has had no machinery for enforcing,—or, in a word, at all affect his right of property, unless as this discretionary right of the Crown to hold him to his contract if it would, may be held to have formed part of its *domaine direct*, and so to have limited in theory the *domaine utile* which formed its grant to him. In every case, without exception, all manner of proprietary right in all real estate (land or water) covered by the grant, less only the reserved rights or *domaine direct* of the Crown, was made over by it *en domaine utile* to the grantee Seignior, for himself, and became his own. Such proprietary right was necessarily not less, but larger, than the proprietary right of the *censitaire;* made him not less, but more, of a proprietor then the *censitaire* was or could be.—And this state of things continued. In the days of the French Government, no doubt, under the police notions of that day, there were interferences in plenty with all sorts of rights, proprietary and personal, and sometimes interferences (or threats of interference) with his rights, as with other people's. But these could not specially abate his rights. They even touched him less than they did others; for his was the ruling and favored class. And they made no law. As before the law, they abated no right. They passed by with their time, —all of them, on whatever class they might have pressed,—leaving, as matter of law, no trace even of the fact that they ever were. Neither legislation nor quasi-legislation ever made the Canadian Seignior less a proprietor than his title made him, gave any one but himself a vested interest in his property, or, in a word, at all altered the real estate law of Canada to his disadvantage.

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§ 16.—Strange to say, the argument for the anti-seigniorial doctrine has been made to rest in part on an assumption of its antecedent probability.

It is said, that the colonization of Canada was begun after the French Crown had broken down the power of the great nobles, and when its policy (as this argument assumes) was consequently anti-aristocratic, and favorable to the development of the *tiers état;* that this development had even made considerable progress; that the Custom of Paris, which the Crown introduced into Canada, was distinguished among the Customs of France as favorable to the

censitaire,—serfdom, *mainmorte* and others of the more odious features of the older feudal system of Europe, forming no part of it; that the *roturier* element predominated in the whole system of the settlement of Canada,—nobles, from an early day, being there allowed to trade without derogation from their rank,—the two companies to which the country was first granted, having been trading companies, into which nobles could not have entered but for the special permission which was granted them to do so without loss of rank,—the direction of those companies having been, of necessity, in the main left to *roturier* hands,—and many of the grantees of Seigniories having from the first been *roturiers;* that it is, therefore, to be presumed that the Seigniors of Canada were not meant to be a body of landed lords, at all analogous to the Seignior class in France.

§ 17.—If all this were admitted, no great progress would be made towards the conclusion requiring to be reached.

§ 18.—But, excepting for the facts,—that the Crown had aggrandized itself at the cost of its greater feudatories,—that the *tiers état* was beginning to rise into notice,—that the Custom of Paris, socially considered, was an advance upon most of the many other Customs of France,—and that the *roturier* element, as was unavoidable, entered somewhat largely into the machinery of Canadian trade and colonization,—no such admission can be given.

§ 19.—The policy of the French Crown never was, in the true sense of the term, anti-aristocratic; never sought, as an end, the advancement of the *tiers état*,—much less, any real development of the popular element, properly so called, in the political or social system of the country. What it aimed at, was the consolidation and extension of its own prerogatives and power; and of this object it never lost sight for an hour. First breaking down the power (hostile and rival to its own) of the great nobles,—then undermining that of the nobles generally, so far as its one end required, and no further,—always drawing to the Crown every possible fragment of every power taken from the nobles of whatever class,—coquetting by turns with all orders, peasants, commonalty, lawyers, clergy and nobles,—it gradually resulted in a throne as despotic over aristocracy and people, an aristocracy as subservient to the throne and as oppressive to the people, and a people as odiously oppressed by throne and aristocracy alike, as could well exist with one another.

§ 20.—The terms "people" and "*tiers état*," it must be borne in mind, were far from meaning the same thing. Long before the end came, the *tiers état* proper—"*roturiers des villes*," as they have been called—a small class only, as compared with the great body of the nation—had relatively so far risen as to have become almost more a lower class of the aristocracy, than an upper class of what may be in the stricter sense called the people. The "*roturiers des campagnes*," who formed the mass of the rural population—the people proper—had by no means risen with them; were left almost where the redaction of the several Customs found them,—every where subjects of all manner of exactions, feudal,

justiciary and otherwise,—over a great part of the country, *mainmortables* even, or absolutely serfs. (*n*)

§ 21.—In fact, it was only in August, 1779, that the King by *Edit* abolished "*la mainmorte et condition servile*, ensemble tous les droits qui en sont des "suites et des dépendances," within the Seigniories of his own domain,—gave leave to other Seigniors to follow his example free of tax or indemnity to himself,—and suppressed the "*droit de suite sur les mainmortables*" throughout France. Till then, even within so much of the Crown domain as fell under the influence of the *coutumes mainmortables*, the state of the rural population was such as warranted this description, copied from this *Edit*:—

(*n*) CHAMPIONNIÈRE, describing the state of things on the eve of the Revolution, says:—

"408. Aux derniers états généraux du 15e siècle, le laboureur était représenté et ses inté-"rêts chaleureusement défendus: 'Quand le povre laboureur, disait l'organe du tiers état, a "'toute la journée travaillé à grand' peine et sueur de son corps, e qu'il a cueilli le fruit de "'son labeur, dont il s'attendait à vivre, on vieut lui ôter partie [illegible]uit de son labeur pour "'bailler à tel peut-être qui batera le povre laboureur avant la [illegible]u mois....et quand le "'povre homme laboureur a puyé à grand' peine la cote en quoi il était de sa taille pour la "'soulde des gendarmes et qu'il se cuide comforter à ce qui lui est demeuré, que ce sera "'pour vivre et passer son année ou pour semer, vient une espasse de gendarmes qui mangera "'et dégatera ce peu de bien que le povre homme aura reservé pour son vivre. Et encore "'y a peine. A la vérité, se n'était Dieu qui conseille les povres et leur donne patience, ils "'cherraient en désespoir.'—[Rathery, Hist. des Etats Généraux, p. 162.]

"A cette époque le roturier de la ville et le vilain des campagnes avaient des intérêts "communs, et n'en avaient point d'opposés.

"En 1789, les choses avaient changé. Le bourgeois était devenu riche, éclairé, puissant: "il était presque partout possesseur de fiefs et de censives; acquéreur de rédevances féodales "et de droits seigneuriaux; propriétaire ou officier de justice seigneuriale. La domination "des seigneurs avait disparu dans les villes. La position du vilain ne s'était guère améliorée "sous le rapport des obligations et des tributs; il n'avait pas cessé d'être écrasé sous le poids "des impôts: il payait, comme par le passé, les dîmes ecclésiastiques, les coutumes justicières "et les devoirs féodaux; il subissait encore les banalités et les privilèges, les corvées et la "mainmorte. Si les exigences qui causaient sa misère étaient moins brutales et moins humi-"liantes, elles n'étaient pas moins rigoureusement exercées. Souvent il avait plus perdu que "gagné à passer des mains d'un seigneur noble de race dans celles d'un seigneur bourgeois "ou anobli.

"Dans le nouvel état des choses, le roturier des villes et celui des campagnes, loin d'être "réunis par un intérêt commun, étaient divisés par des intérêts opposés. Le laboureur "haïssait son seigneur noble, comme seigneur et non comme noble, et cette antipathie n'était "ni moindre ni différente, quand le seigneur était bourgeois.

"Aussi trois mois s'étaient écoulés depuis que les états généraux de 1789 étaient réunis "pour organiser la révolution, * * et les députés du tiers état n'avaient encore rien dit des "souffrances de l'habitant des campagnes; aucune reclamation ne s'était élevée contre les "droits seigneuriaux; il semblait que le vilain ne dût pas prendre, encore cette fois, part au "banquet de la révolution qui s'effectuait, et que la sienne était remise à un autre temps.

"Le tiers état oubliait leur communauté d'origine, et ses députés croyaient ne representer "que les bourgeois qui l'avait élu. [Ce défaut de représentation des laboureurs était si "bien senti que plusieurs cahiers proposaient d'établir un ordre autre que celui des com-"munes, sous le titre d'ordre de campagnes.—V. l'Histoire parl. de *Boucher et Roux*, T. 2, "p. 176.] Les intérêts seuls de la bourgeoisie la préoccupait dans sa lutte avec la noblesse,

—"qu'un grand nombre de nos sujets, servilement attachés encore à la glèbe, sont regardés
" comme en faisant partie, et confondus, pour ainsi dire, avec elle; que, privés de la liberté
" de leurs personnes et des prérogatives de la propriété, ils sont mis eux-mêmes au nom-
" bre des possessions féodales; qu'ils n'ont pas la consolation de disposer de leurs biens après
" eux; et qu'excepté dans certains cas rigidement circonscrits, ils ne peuvent pas même
" transmettre à leur propres enfans le fruit de leurs travaux." (*o*)

—Even then, the Crown ventured upon no greater innovation upon this state of things, out of the limits of its own domain, than this:—

—"que le droit de suite sur les mainmortables demeurera éteint et supprimé dans tout
" notre royaume, dès que le serf ou mainmortable aura acquis un véritable domicile dans un
" lieu franc; voulons qu'alors il devienne franc au regard de sa personne, de ses meubles, et
" même de ses immeubles qui ne seraient pas mainmortables par leur situation ou par des
" titres particuliers." (*p*)

—And, according to the opinions of the enlightened of that day, even this was much. Ten years later, no less distinguished a writer than Henrion de Pansey commented upon this *Edit* (little, after all, as it sought to do in comparison with what in truth needed to be done) in terms of the highest eulogy,—evidently viewing it as an extraordinary monument of Royal statesmanship and benevolence. His words are not a little remarkable; published, as they are said to have been, almost if not literally, on the day of the sudden sweeping away of the whole system, of which serfdom thus to the very latest moment formed a part:—

"Tandis que les hommes travaillent avec une espèce de fureur à s'asservir les uns les autres,
" le beau spectacle qu'un monument élevé à la liberté par la main d'un roi.

" Puisse cette exemple être imitée par tous les seigneurs! Puisse cette loi devenir la loi
" d'Europe entière! Les Princes de l'Europe font tant de conventions inutiles; en feront-ils
" une enfin en faveur de la miséricorde et de la pitié?" (*q*)

" qu'elle ne cherchait qu'à mettre à son niveau ou à remplacer. Les cahiers avaient générale-
" ment posé en principe le respect des propriétés, * *

"404.—Les paysans n'avaient point ainsi compris la liberté qu'ils s'entendaient promettre
" de toutes parts; * * Les campagnes se soulevèrent de toutes parts, * * les laboureurs
" incendièrent encore une fois les châteaux, ravageant les domaines, détruisant les archives,
" brûlant les chartriers et les dépôts des rôles de redevance. * * Les villes effrayées in-
" voquèrent le secours de l'Assemblée Nationale. Un projet d'arrêté fut présenté, déclarant
" * * . Mais quand il s'agit de discuter cette déclaration, l'exigence devint plus manifeste.
" * * L'assemblée vota dans la nuit célèbre du 4 Aout, cette réforme, qui tout en comport-
" ant un immense sacrifice de la part des seigneurs, n'était cependant pas de nature à satis-
" faire pleinement aux reclamations de leurs sujets."—*Eaux Courantes*, pp. 706,—710.

Allowing for some measure of exaggeration as to the quasi-aristocratic attributes here ascribed to the *tiers état*, and under reserve as to the strange mistake made in the nine words which assert that "*la domination des seigneurs avait disparu dans les villes*," the marked distinction here drawn between the *tiers état* and the mass of the French people, is beyond controversy.

(*o*) Preamble of *Edit du mois d'Aout* 1779.—See Isambert, Vol. 26, p. 139, and Henrion de Pansey, Diss. Féod., Vol. 2, p. 183.

(*p*) Section 6 of same *Edit*.—See Isambert, Vol. 26, pp. 141, 2, and Henrion de Pansey, Diss. Féod., Vol. 2, p. 185.

(*q*) Henrion de Pansey.—*Diss. Féod.*, Vol. 2, p. 185.

§ 22.—The decree of that 4th of August, 1789, among other things enacted:—

"1.—L'Assemblée Nationale détruit entièrement le régime féodal, et décrète que, dans "les droits et devoirs tant féodaux que censuels, ceux qui tiennent à la mainmorte réelle ou "personnelle, et à la servitude personnelle, et ceux qui les représentent, sont abolis," etc.

"2.—Le droit exclusif des fuies et colombiers est aboli;" etc.

"3.—Le droit exclusif de la chasse et des garennes ouvertes est pareillement aboli;" etc.

"4.—Toutes les justices seigneuriales sont supprimées," etc.

"7.—La vénalité des offices de judicature et de municipalité est supprimée," etc.

"9.—Les priviléges pécuniaires personnels ou réels en matière de subsides sont abolis à "jamais. La perception se fera sur tous les citoyens et sur tous les biens, de la même ma- "nière et dans la même forme:" etc.

"11.—Tous les citoyens, sans distinction de naissance, pourront être admis à tous les em- "plois et dignités ecclésiastiques, civils et militaires, et nulle profession utile n'emportera "dérogeance."(r)

§ 23.—Till then, there had thus been maintained in France, a favored few, all but monopolizers of its higher and more lucrative callings and dignities, whose vast properties and wealth paid nothing or next to nothing in the way of taxation to the state; an unfavored many, whose pursuits were a degradation, but on whom almost every burthen of the state was made to press; the public trusts of municipal and judicial office, a property,—so held, brought, sold and dealt with; "*justices seigneuriales*," covering (besides the public trust of dispensing a so-called justice) the right, so called, of levying exactions without number,—a property also; exclusive rights (among others) of dove-house, warren and hunting; a country population, here held, there barely not held, in servitude or *mainmorte*,—every where branded, more or less, as having been so held.—And yet, the lower orders had been rising, however slowly; and from the days of the first settlement of Canada, rather less slowly than before.

§ 24.—But the anti-seigniorial doctrine requires one to believe, that before this time for more than a century, from 1628 and so on down to 1760, the policy of the King and Court of France had been steadily fashioning in Canada a state of things the precise antipodes of all that prevailed at home. In show, by way of farce, it kept up (so far as in a new country it possibly could keep up) the aristocratic system of the age; distinguished always the noble or quasi-noble class from the ignoble; entitled and qualified each, almost if not exactly, as at home; granted land, sometimes by noble tenure, sometimes by ignoble; even specially ennobled men, and their lands too, as the highest reward that it could give. In substance and sober earnest, it was all the while so postponing this higher class to the lower, as no democracy was ever known to do; where it granted by the lower tenure, giving a true property,—where by the higher, but the fiction of a property; making its *censitaire* to all intents a landlord, and its Seignior (*justicier*, *baron*, *comte* perhaps, in name) no landlord at all, but simply a holder of land for future *censitaires*, ("*roturiers de campagne*," men of the class lowest in the social scale, lower than the *tiers état*,) under a trust so in

(r) Rondonneau.—Collection Gén. des Lois, etc., Vol. 1, pp. 12—14.

their interest and so exorbitant of all rule as to make him and them incapable forever of determining it on terms any more favorable to him than those which it laid down, but quite free always to determine it on any terms more favorable to them.

§ 25.—May there not be less of paradox, more of probability, in holding that words had a meaning,—that Seigniors and *censitaires* in Canada were meant to be, and were, as nearly as might be, what Seigniors and *censitaires* are known to have been in France?

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§ 26.—Be it said at once, however, that it is not meant here at all to rest the Seigniors' case upon this consideration. All that they care to infer from it is this,—and it is a conclusion too plain to need to be stated as an inference,—that the doctrine adverse to them, whether probable or not, is not quite to be taken upon trust; that something or other in the way of fact must be put forward and made good, for it to rest upon.

The Seignior, grantee of the French Crown,—proprietor (unless words are meaningless) of something,—presumably, to say the very least, as much proprietor, as truly holder for himself, as his co-grantee, *censitaire* of the same Crown, who never yet was called trustee or holder for another,—is not to be held for ousted of his *status* as such holder for himself, till there shall have been some cause shown why he should be.

§ 27.—Where, then, is such cause to be found?

There are but three quarters in which it can be looked for. All of limitation or qualification that can ever have attached, or can now attach, to the Seignior's holding, must be traceble to some feature or features of the purely French law of the tenure as first introduced into Canada,—or of what may be called its Franco-Canadian law, including under that phrase the terms of the grants, and all local laws, and all regulations, jurisprudence and usage having force of law in Canada, through the French period of its history,—or of what (in like manner) may be called its Anglo-Canadian law; must result, in other words, from something in the law of France as brought into Canada,—or from something done here, or by the authorities in France, while Canada was French,—or from something done since it became English. Unless such limitation or qualification can be made out by reference to some one or more of these three sources of authority, it cannot be made out at all.

§ 28.—The Seigniors submit, that no such limitation or qualification, tending ever so remotely to warrant either the anti-seigniorial doctrine developed in the Attorney General's Propositions now before this Court, or the practical conclusions by those Propositions taken, can be made out from any of these sources, or from all of them together. And they are so confident of their position, as to be well content to waive all trust in the mere weakness of the case tendered against them, and to go themselves at once into the whole history of their grants, and of the laws, regulations, jurisprudence and usages of the country in regard to them. A negative is said to be unprovable. But so far as history can prove anything, they will here prove the quasi-negative,—that they are not agents or

trustees in any sense whatever, but proprietors, holding by such a tenure as not to be subject to the disabilities nor liable to the pains and penalties now sought to be put in force against them.

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§ 29.—To begin, then, with the French law of the tenure, as first introduced into Canada.

§ 30.—The admission is indirectly implied by one of the Attorney General's Propositions, (the 6th, below cited,) and was besides expressly made in argument before this Court by the learned Counsel who sustained them,—that the obligation to sub-grant on certain terms, and the incapacity to sell or sub-grant on terms more favorable to himself, which are said to attach to the Seignior in Canada, did not at any time attach to the Seignior in France,—in other words, that the trustee-quality sought to be fastened upon the Canadian Seignior does not result from the law of France as it was introduced into Canada.

§ 31.—It would seem, however, that such law is held by the Attorney General to have had someting to do with it. Although, unless by citing the words of the Questions and Propositions themselves, there is risk in undertaking to say what that something is supposed to have been.

§ 32.—The Questions and Propositions bearing upon the point require indeed to be given in full, to make it clear that injustice is not done by any process of extract-making.—They read as follows :—

"Fifth Question.—Under the Custom of Paris, at the period above mentioned, [that of the "introduction of the Custom of Paris into Canada,] was the sub-infeudation of lands held "*en fief* an essential part of the feudal system, and was the alienation of the fief, or of the "lands composing it, forbidden?"

Proposition.—"Sous le régime de la Coutume de Paris, à l'époque ci-dessus mentionnée, "la sub-inféodation des terres tenues en fief était de l'essence du système féodal, et le pro-"priétaire du fief ne pouvait, sans le consentement de son seigneur dominant, disposer des "terres qui le composaient, autrement qu'au moyen de la sub-inféodation ou du bail à cens: "suivant les articles 51 et 52 de la Coutume de Paris, qui sont ainsi conçus :—

"Article 51.—'*Le vassal ne peut démembrer son fief au préjudice et sans le consentement de* "'*son seigneur : bien se peut jouer et disposer, et faire son profit des héritages, rentes ou cens* "'*étant du dit fief, sans payer profits au seigneur dominant, pourvû que l'aliénation n'ex-*"'*cède les deux-tiers, et qu'il en retienne la foi entière, et quelque droit seigneurial et doma-*"'*nial sur ce qu'il aliène.*'

"Article 52.—'*Et néanmoins, s'il y a ouverture du dit fief, le seigneur peut exploiter tout* "'*le dit fief, tant pour ce qui est retenu qu'aliéné, sinon que le seigneur féodal eût inféodé le* "'*droit domanial retenu en faisant la dite aliénation, ou bien qu'il l'eût reçu par aveu.*'"

"Sixth Question.—In order to transfer this feudal system, as it existed in a country where "the soil had been occupied and cultivated for ages, by a numerous population, to a new, "uninhabited and uncultivated region, was it necessary to render sub-infeudation, or in other "words, the granting of lands to settlers to put them into a state of cultivation, binding on "all proprietors of *fiefs*?"

Proposition.—"Pour transporter de la France au nouveau monde ce système féodal, il "était nécessaire de rendre la sub-inféodation, ou en d'autres mots la concession des terres à "des habitants pour les mettre en culture, obligatoire pour tous les propriétaires de fiefs; "et sous ce rapport le régime féodal, tel qu'introduit en Canada, a été considérablement

"modifié par des dispositions particulières qui se trouvent dans les arrêts, édits et ordon-
"nances royaux, les titres de concession, les ordonnances et jugements du conseil supérieur
"et des intendants."

"NINTH QUESTION.—Did the ancient laws of the country oblige the proprietors of
"*fiefs* and Seigniories in Canada to concede their lands at a rent, (*à titre de redevances*,) when
"thereto required; and was their right of property in those lands restricted and limited by
"such obligation to concede them?"

Proposition.—"Les anciennes lois du pays imposaient aux propriétaires de fiefs et sei-
"gneuries l'obligation de concéder leurs terres à titre de redevances, quand ils en étaient
"requis, et leurs droits de propriété dans ces terres étaient restreints et limités par cette
"obligation de les concéder."

"TENTH QUESTION.—If that obligation existed, had it its origin in the feudal rules? in the
"deed of infeudation? in custom? or in special laws? Did it extend to every *fief* and Sei-
"gniory without regard to the motives or the date of the concession? If not, to what Sei-
"gniories did it extend?"

Proposition.—"L'obligation de concéder les terres, soit en arrière-fief, soit en censive,
"avait son origine dans les règles féodales qui interdisaient le démembrement du fief. En
"Canada, la plupart des titres des seigneurs contiennent expressément cette obligation; elle
"est d'ailleurs établie par plusieurs arrêts et jugements, et paraît avoir été imposée à tous
"les seigneurs qui tenaient leurs propriétés à titre de fief."

§ 33.—Passing over everything here, but what is directly relevant to the one question of the influence of the feudal law of France upon that of Canada, in reference to this asserted quality of the Canadian Seignior, the doctrine of the above Propositions (exactly stated) seems to be this:—

FIRSTLY.—*According to French law as introduced into Canada, the sub-infeudation* [meaning of course, here, the sub-granting either en arrière fief or en censive] *of lands held en fief, was of the essence of the feudal system.* [First clause of Proposition 5.]

SECONDLY.—*According to such French law, the Seignior could not, without the consent of his Seignior Dominant, dispose of the lands which formed his Seigniory, otherwise than by means of sub-infeudation* [meaning, here, sub-granting en arrière fief only] *or bail à cens.* [Second clause of same Proposition.]

THIRDLY.—*According to Canadian law, sub-infeudation* [defined anew, as "the granting of lands to settlers to put them into a state of cultivation"] *was obligatory on all Seigniors.* [First clause of Proposition 6. (r)]

FOURTHLY.—*In this respect, Canadian law differed from French law,*—being "considerably modified" by local legislation or quasi-legislation. [Second clause of same Proposition.]

(r) To be perfectly exact, it should be noted, that besides the indications as to the nature and extent of this vexed obligation, which are to be gathered from these three quasi-definitions, (of Propositions 6, 9, and 10,) it is to be collected from Proposition 17 that such obligation is held to involve an incapacity of the Seignior to alienate land otherwise than by grant *à titre de redevances annuelles*,—and from Propositions 8, 13, 14, 15, 25, 32, 39, 40, 41, and 42, that it is held to involve concession at some rate not exceeding so much, and on conditions most restrictively fixed as against the Seignior.

Fifthly.—*According to such Canadian law, this obligation* [described now, as the obligation "to concede their lands at a rent (à titre de redevances) when thereunto required"] *restricted and limited the Seigniors' right of property in the lands forming their Seigniories.* [Proposition 9. (*r*)]

Sixthly.—*This obligation of the Canadian law,* [defined anew, however, as the obligation "to concede lands either en arrière fief or en censive,"] *while established by local legislation or quasi-legislation, had its origin in the provisions of the French law prohibitive of the démembrement du fief.* [Proposition 10. (*r*)]

§ 34.—What is of the essence of a system, according to the received meaning of words, is what must be in order to such system,—what the existence of the system involves as necessary. To say that by the law of France as introduced into Canada, sub-granting *en arrière fief* or *en censive* was of the essence of the feudal system, is to say that by that law such sub-granting was what the feudal system absolutely required as essential to its existence,—made obligatory, *ex necessitate rei*, on the Seignior. The contrary doctrine was no doubt in effect implied by the acknowledgment (whether inadvertently made or not, in the Attorney General's 6th Proposition) that as to the alleged obligation of the Canadian Seignior to sub-grant to settlers for cultivation, the law of Canada differed from that of France; and the admission has since been unequivocally made by the learned Counsel who here represent the Attorney General. In truth, the point could not have been argued. Before a Court, no one could pretend to say, that by the law of France, in any of its forms, sub-granting by any Seignior was ever obligatory on him,—that is to say, was ever of the essence of the feudal system, or anything but one of its merest accidents.

§ 35.—Looking back, however, to the Attorney General's Questions, it is impossible not to see that when they were drawn, another strange notion besides this of a fancied obligation on the French Seignior to sub-grant, was marked out by their author for suggestion to this Court. This fifth Question goes on to ask, (still in reference to this same French law of the seventeenth century,) "*and was the alienation of the fief, or of the lands composing it, forbidden?*"—The answer was not to have been—"No." That much is clear enough. But how could it be—"Yes?" If alienation of the *fief*, or of any part of the lands composing it, was forbidden, how could the sub-granting (or alienation in one certain manner) of such lands be enjoined as of the essence of the system? The writer must have thought that in the seventeenth century sub-granting was no alienation,—a view taken by no known authority on such matters; and so, must have meant to ask the Court to say this, that the alienation of the *fief*, or of the lands composing it, *otherwise than by sub-granting*, was forbidden,—a doctrine the precise counterpart and fitting complement of the other that was to go with it. The French Seignior was bound to alienate by sub-granting,—*and was forbidden to alienate either the fief or the lands composing it, in any other way.*

The former of these twin doctrines (as has been seen) was laid down in the Attorney General's Proposition, to be given up in argument. The latter, when

the time came for fyling his Propositions, could not be so much as printed. Accordingly, that clause of the Question is of the number of the unanswered; and the Court is called upon (as though the Question had been—"*and could* " *the proprietor of the fief, without the consent of his Seignior Dominant, dispose* " *of the lands composing it, otherwise than by means of sub-infeudation or bail à* " *cens?*") to declare this,—"*et le propriétaire du fief ne pouvait, sans le consente-* " *ment de son Seigneur Dominant, disposer des terres qui le composaient, autrement* " *qu'au moyen de la sub-inféodation ou bail à cens.*" Quite another thing. For here, the supposed prohibition of the law is not made to attach to any mode of alienation whatever of the whole *fief*, under any circumstances,—nor yet to any alienation, otherwise than by sub-granting, of the lands of the *fief*, if only the Seignior Dominant be a consenting party.

But again, what a man cannot do,—still taking the received meaning of words,—is what it is not possible for a man to do. To say that the Seignior could not, without the consent of his Seignior Dominant, alienate the lands of his Seigniory otherwise than by sub-granting them, is to say, that without such consent such alienation otherwise than by sub-grant was impossible, could not take effect,—if attempted, would be a nullity. Of course, Counsel could no more argue before this Court for this doctrine, than for that of the obligation to sub-grant which had been put into print with it. And therefore, though it may not have been in the same express terms given up, it must be enough here to have noted the strange fact, that two such theses could possibly have been so laid down as these have been.

§ 36.—Another point, however,—involved in the Attorney General's tenth Proposition,—remains to be noticed. It is there laid down, that the obligation alleged to attach to the Canadian Seignior, while established by local legislation or quasi-legislation, had its origin in the provisions of the French law prohibitive of the *démembrement du fief*. As there defined, this obligation merely is, " to concede lands either *en arrière fief* or *en censive*;" but from the tenor of the Propositions read together, this is obviously not all that is meant. The obligation alleged involves (as has been shown) concession on certain terms most restrictively fixed as against the Seignior, and which neither he nor any one else can vary in his favor. And this is held to have had its origin in the French law as to the "*démembrement du fief.*"

The text of that law is in these few words:—

"Le vassal ne peut démembrer son fief au préjudice et sans le consentement de son " Seigneur:"

—forming part of Article 51 of the Custom of Paris; which (by the way) with Article 52, is appended bodily to Proposition 5, as if the two doctrines of that Proposition were to be found in them. So that, at all events, they were under the eye of the writer of this tenth Proposition.

To any one who had never read a book on feudal law, or who had forgotten all that he might have ever read in such books, these words might seem to import a prohibition of the alienation of the lands of a *fief*, unless with the consent of the Seignior Dominant; and if so understood, the supposed trustee-

obligation of the Canadian Seignior might be thought to have had its origin in them.

But in argument before a Court of Law, no such idea could be suggested. There, of necessity, the learned Counsel charged with these Propositions had to speak of the *démembrement du fief* in quite another sense,—admitting the well understood distinction between the *corps* and the *titre* of the *fief*, granting that by *démembrement* was meant simply such disposition of a *fief*, or of a part of a *fief*, as went to affect the *titre* of the *fief*, and not any such disposition of either as affected merely the *corps* of the *fief*, in a word, recognizing, tacitly if not in so many words, the uncontested doctrine laid down by HENRION DE PANSEY, thus :—

"Le corps et le titre du fief sont également dans le commerce. Cependant le vassal ne peut pas en disposer également: il lui est libre d'aliéner le corps en totalité, ou de le diviser par parties. Il n'en est pas de même du titre ; la loi veille sur lui d'une manière bien plus spéciale ; une fois établi, il n'est plus susceptible, ni de modification, ni de division, et il n'est plus du pouvoir du vassal de le diviser que de l'éteindre. Il repose dans son intégrité, sur chacune des parties du corps du fief, *totus in qualibet parte* ; lors de leur désunion, il passe tout entier avec chacune d'elles, et c'est uniquement à lui que s'applique la prohibition de la Coutume, '*Le vassal ne peut démembrer son fief.*'

"Ainsi un vassal peut à son gré diviser le corps de son fief, pourvu que le titre demeure toujours un. Ainsi, des co-propriétaires, des co-héritiers, peuvent partager, comme ils le jugent à propos, le domaine du fief qui leur est commun, pourvu qu'ils reportent la foi entière au seigneur, et non comme propriétaires de fiefs distincts et séparés. En un mot, ce n'est que sur le titre du fief que porte la prohibition de la Coutume, et toutes les fois que ce titre n'est point altéré, divisé,—toutes les fois que d'un fief on ne prétend pas faire plusieurs tenures séparées, toutes les fois enfin, que chaque division est reportée comme partie intégrante du tout,—le Dominant n'a aucun droit de critiquer les arrangemens de son vassal, de quelque manière qu'il ait disposé du corps de son fief."(s)

Add, that this restriction, such as it is, in respect of the alteration of the *titre* of the *fief*, goes no further than to the protection of the Seignior Dominant ; says merely, that the thing cannot be done to his prejudice, unless by his consent ; in other words, simply gives him the right, if he likes, to say that it is not done, and shall not be. So that the contract, which (without his consent) should purport to effect it, is not null as between the parties, nor as between them and others, but only as against him the Seignior Dominant.

On the one hand, then, we have this French law of *démembrement*, which lets the Seignior deal as he will with the *corps* of his *fief*, and limits him as to the *titre* only, in the mere interest of his Dominant, but not as between himself and others. On the other hand, we have the alleged trustee-obligation of the Canadian Seignior, which is held to necessitate his dealing with the *corps* of his *fief* in one certain way, and to leave him no capacity of dealing with it in any other, and which has nothing to do with the *titre* of his *fief*.—This latter is said to have had its origin in the former. It is not easy to see, how.

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§ 37.—So much for the doctrine of the Attorney General's Propositions on this question of the influence of the feudal law of France upon that of Canada, as to the asserted trustee-quality of the Canadian Seignior.

(s) HENRION DE PANSEY, *sur Dumoulin*, pp. 475 & 6.

It remains, however, to examine the question itself, on its own merits, independently of all question as to the merits of the view taken of it, in the anti-seigniorial interest, before this Court. The case of the Seigniors is by far too strong for them to rest it ever so little on any mere weakness of what may have been offered as the case against them.

§ 38.—Was there, then, in the law of France as brought into Canada, any thing whatever that at all tended towards the fastening upon the Seignior, of this trustee-quality,—any thing that limited or qualified his holding, ever so little, in the sense thereby implied,—anything that can have been the germ, even, from which this alleged Canadian system of feudal law may have had its origin?

The more carefully the law and history of France are gone into, upon this head, the more clearly will the negative of this question become apparent; the more clearly will it be seen, not merely that the feudal law of France was not what that of Canada is said to have become in this respect, nor in the least like it, but that it was even, from first to last, in principle and detail, irreconcilably antagonist to it.

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§ 39.—At and before the time of the introduction of French law into Canada, there prevailed in France, as is well known,—and more particularly, within the territories of the Custom of Paris and other Customs of its class,—six principal varieties of tenure of real estate; only one of which, that *en franc aleu noble*, can be said to have involved the unlimited and unqualified ownership of it.

§ 40.—Indeed, in the very strictest use of words, exception may be taken to the proposition, that even this tenure involved this consequence. For the holder *en franc aleu noble*, equally with other people, was subject to the law, written and unwritten, and to the general authority of the State, in respect of such his property; and so, could not literally do with it anything and everything that he might be inclined to do.(*t*) In this sense, therefore, even his right of property had its limitations and qualifications, arising necessarily out of his position as the citizen of a State under law and government. Otherwise only, it had none. He could keep or he could alienate, by feudal sub-grant or otherwise, at pleasure, as against all the world; no one having any sort of lordship over or property in his land, superior to his; and he having that lordship over it,—that inherent nobility of title,—that *seigneurie honorifique de l'héritage*,—which qualified him and it (so to speak) for its being held of him, in whole or parts, as might be, by proprietors who should be in a position of feudal inferiority to himself.

§ 41.—The holder *en franc aleu roturier*, not having this *seigneurie honorifique* of his land, though holding it of no one, and bound to no duty for it, and therefore fully entitled to keep or alienate it, either wholly or by parts, as he might

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(*t*) So much so, that even Royalty and its Domain, the highest and noblest *aleu* possible, could not escape this influence. Indeed, in a variety of respects, as the larger and more political view of the Royal position gained ground, the kingly *aleu* came to be more hedged round with limitations and qualifications of this class, than any other.

please, could not by any form of contract cause his land, or any part of it, to be held of him by proprietors who should be feudally his dependants for it; and in so far, therefore, however absolutely proprietor to all other ends, had not a property that can be exactly characterized as unlimited and unqualified.

§ 42.—The position of the Ecclesiastical Body, holder *en franche aumône, noble* or *roturière*, (as might be,) differed from that of the holder by the corresponding *franc aleu* tenure, in this,—that such body held always of a Lord, or Seignior Dominant; for whom, by way of all feudal duty, it was simply bound to offer prayer;(*u*) and who, whenever the land so held, or any part of it, should have been alienated in any way by such holder, would become thereby seized of all such feudal rights over the land alienated, whether directly accruing from the alienation or to accrue thereafter, as should either have been stipulated by his grant, or be implied from it by the Custom,—according to the nature of the alienation, and the tenure (as *en fief* or *en censive*) thence resultant. Add, that if such lord again held of a higher Seignior Dominant, whatever of right such higher Dominant might have over or in the land, would also still attach to it,—in the hands even of its *franche aumône* holder, supposing such higher Dominant not to have sanctioned the grant *en franche aumône*,—or upon alienation, if he should have done so. And so on, for any number of Seigniors Dominant, in ascending series, to the highest, or Lord Paramount.—But, subject to these rights of the Seignior Dominant, or of the respective ascending Seigniors Dominant, as might be, (rights forming their several shares so to speak, of the entire property of the land,—the total of the *domaine direct* reserved by each of them therein,—and which each could always, in whole or part, either waive or not waive, as he pleased,) such body, holder by either of the *franche aumône* tenures, observing only the requirements of the law as to *gens de mainmorte*, was free to keep or to alienate, either wholly or by parts, precisely as it would. Its right of property (*domaine utile*) was simply limited by these rights (the *domaine direct*) of its Dominant or ascending Dominants, as might be. And this *domaine utile* was larger, where the tenure was *en franche aumône noble*, than where it was *en franche aumône roturière*, by this,—that by the former the grantee body took a *seigneurie honorifique* of the land granted, and so might have the land held in whole or part by proprietors its own feudal tenants, while by the latter it could not.

(*u*) *Indeterminately*, that is to say,—and not to the performance of any stated service or duty—however purely religious. Where such religious duty was determinate, the tenure became that *par service divin*, assimilating itself in some respects to that *en fief* or *en censive*, as might be. The nice distinctions between such tenure and *franche aumône* on the one hand, and between it and the *fief* or *censive* tenure on the other, are for present purposes immaterial.—See Henrion de Pansey, *Diss. Féod.*, Vol. 2, pp. 58 & 9, 141—4.

Where the grant, though *en aumône*, might have been so made as to leave the grantee body liable to any feudal claim on the part of its Seignior Dominant, other than for purely religious duty, the tenure retained the essential character, either of the *fief* or of the *censive*,—according as the *seigneurie honorifique* might or might not have been granted by it.—See Henrion de Pansey, *Diss. Féod.*, Vol. 2, pp. 57—9.

§ 43.—The vassal or holder *en fief* held also of a Seignior Dominant; who, again, might hold of a higher; and so on, indefinitely. And, like the holder *en franc aleu noble* or *en franche aumône noble*, he held a *seigneurie honorifique* inherent in his right of property, which admitted of the land (in whole or part) being again held of himself by proprietors his feudal inferiors. But his right of property, or *domaine utile*, was otherwise of a more restricted character; being limited by the aggregate of all the rights of his immediate lord, as well as by those of any higher lords in ascending series to the Lord Paramount,—as the same, at each step might have been reserved by each grant, or might be implied therefrom by the Custom. Among these rights of the immediate lord, there was generally that of exacting so much of mutation fine or profit upon alienations, when effected under certain circumstances. But subject to such fine, wherever accruing, and to whatever else in the premises might be the rights of the lord or lords above him, he was entirely free to keep or to alienate, as he might see fit.

§ 44.—And lastly, the *censitaire*, or holder *en censive* (limited as to his right of property in like manner with the holder *en fief*, but to a greater extent) held his land subject to all rights of his own lord and of any higher lords,—and without any *seigneurie honorifique* inherent in such his right of property therein. He, therefore, could not alienate by feudal sub-grant. And, as a general rule, he was besides much more pressed upon than the vassal, by the reserved rights of his lord. His right of property, or *domaine utile*, was altogether less than the vassal's; his tenure, the most restricted, and—unless under very peculiar circumstances—by far the least desirable of the six.(v)

§ 45.—Under the three *roturier* tenures,—from the essential want in all of them, of the *seigneurie honorifique*, and the consequent incapacity of the holder to sub-grant feudally, the entire property held had always of necessity one and the same apparent character, as an *immeuble corporel*; consisted of certain visible real estate, no matter how much, which was said to belong to such holder, but of which, where holding *en franche aumône* or *en censive*, he was really no more than a part owner,—the reserved rights of his lord or lords forming a part of the entire property of the soil, which (in the shape of an *immeuble incorporel*) remained in other hands than his.

§ 46.—Under the three noble tenures, on the other hand,—from the essential quality of *seigneurie honorifique* common to all of them,—the property held might or might not have this character. Each holding (no matter how small) might be wholly an *immeuble incorporel*, or wholly an *immeuble corporel*, or might be an *immeuble* partly *incorporel* and partly *corporel*; might or might not consist, in whole or part, of any number of sub-holdings, *en franche aumône*, *noble*

(v) As matter of general rule, and at the time here in question. In special cases, and more especially at a later period the *censive* tenure, though the most restricted in its nature, might not be the least desirable. Where its fixed dues and reservations were light, it might be more advantageous than the tenure *en fief*, in a merely pecuniary point of view,—but not otherwise.

or *roturière*, *en fief* or *en censive*; might not or might consist, in whole or part, of real estate not sub-granted, whether land or water, improved or unimproved, contiguous or not contiguous. Each sub-holding, again, either *en franche aumône noble* or *en fief*, whether large or small, might equally be an *immeuble incorporel*, or *corporel*, or both; and so on, for ever.—And the distinction between the three noble tenures, answering to that between the three non-noble, lay in this,—that the *aleutier* owned by himself,—the holder *en franche aumône*, jointly with a superior or superiors whose share (an *immeuble incorporel*) made no great matter,—and the vassal, Seignior (*w*) or holder *en fief*, jointly with a superior or superiors who held an incorporeal share of more importance, though by no means of so large extent as that held by the superior or superiors of the *censitaire*.

§ 47.—But, besides the primary and essential distinction of the *roturier* from the noble tenures, that the one necessarily imported the holding, and the other the not holding, of the *seigneurie honorifique de l'héritage*, there was another, which may be called secondary or accidental; namely, that what was termed "*justice*" might also be held by the one, but could not be by the other. What this *justice* was, it is not easy in very few words to state exactly. It imported in the *justicier* a proprietary right (more or less extensive, according as it was *haute*, *moyenne* or *basse*) to administer justice and exercise police authority in his own name and by his own officers,—liability to some charges more or less incidental to his exercise of such right,—the ownership of all profits thence accruing, whether from his *greffes*, from fines or otherwise,—the ownership of a variety of other revenues or sources of revenue, exactions mostly, of anomalous and odious character,—and, in some parts of France at least, if not (as some writers held) generally, the ownership also of certain waters, a trifle of *immeuble corporel* superadded (so to speak) to the complex *immeuble incorporel* which formed the basis, if not the whole, of his property as a *justicier*. This most peculiar kind of property, like the *seigneurie honorifique*, could only be held by noble tenure; but, unlike the *seigneurie honorifique*, formed no necessary adjunct of such noble tenure. The land-holder *en franc aleu noble*, or *en franche aumône noble*, or *en fief*, might hold it, or might not. Its territorial limits had no fixed reference to those of any description of landed properties. Particular lands, classes of people, and persons, were unaffected by it; or were affected by it in very different degrees. And in particular cases, it was even held *en franc aleu noble*, or *en franche aumône noble*, or *en fief*, as might be, by parties having no *seigneurie honorifique de l'héritage*,

(*w*) Properly, of course, this word Seignior applies as much to the holder *en franc aleu noble* or *en franche aumône noble* as to the holder *en fief*. In these pages, dealing especially with the rights of Seigniors holding *en fief*, it is necessarily almost always used in this latter and more restricted sense.

It is an odd illustration of the completeness of the revolution which a short time may work in men's ideas and modes of speech, that this word "*Seigneur*," ("*Senior*," "*Potens*," in Latin,—"Lord," in English,) which to the days of the French Revolution—though sometimes by a sort of licence used to mean a mere proprietor—always of right meant in France a proprietor of the higher class, one who held as well as the "*seigneurie*" as the mere "*propriété*" of the thing owned, should by this time have come to be associated in Canada with the notion of a somebody not so much as a proprietor at all.

or other right than that of mere *justice*, in or over the territory that fell within its influence.

§ 48.—The country, then, was covered in great part with *fiefs* of all descriptions and dimensions, in every degree of feudal remove from the Crown, or other *aleu* of which (originally) they depended; some of vast extent, consisting,—firstly, of numbers of scattered tracts of ungranted land, large and small, improved and unimproved, forests, *landes*, manors, *châteaux*, mills, gardens, parks, farms, lakes, streams and what not, collectively forming their domain,—secondly, of a strange variety of real rights over numbers of other tracts as variant in dimension and as irregularly situate, held of them nobly *en franche aumône* or *en fief*, and themselves again more or less sub-granted, or not at all, as might be,—and thirdly, of a variety not less strange, of other real rights over numbers of other tracts in like manner variant and scattered, held of them *en franche aumône roturière* or *en censive*, as might be; others, of smaller extent, but almost if not quite as heterogeneous in their composition; others, so small as to make the idea of their being sub-granted from, the next thing to a farce,(x)—yet, perhaps, with their *arrière fief* or *fiefs*, or their *censive*, still smaller than themselves; others, some large, some small, having no *censives*,—or no dependency of the noble class,—or no dependency at all,—or no ungranted territory or domain whatever, mere incorporeal rights over some one or more sub-granted territories, *fiefs en l'air*.—Of all these *fiefs*, again, irrespectively of every other quality, some had *justice* in one degree; others, in another; and others, none. Here, with a small *fief*, the Seignior might be a *haut justicier*; there, with a large one, no *justicier* at all. Here a *justice* (perhaps held with a landed *fief* or other property, or perhaps held as a property *per se*, *en fief* or otherwise) extended over a number of *fiefs* and other landed properties, *aleux* among the number; there, a *fief* fell part into one *justice*, and part into another,—or was, partly or in whole, exempt from all *justice* but that of the Crown.

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§ 40.—Fully to comprehend this anomalous state of things, one must refer back to its origin; bearing in mind, always, that however quietly the theory of the law, as laid down by the feudists generally, traced the relation of feudal

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(x) So common were these small *fiefs*, that even the text of the Custom of Paris contain three incidental references to them.

In Art. 13, referring to the *préciput* of the eldest son, it is said:—

—" Et outre luy appartient un arpent de terre de l'enclos ou jardin joignant le dit manoir, " si tant y en a; et si le dit enclos contient davantage, l'ainé peut retenir le tout en baillant " récompense aux puisnez de ce qui est outre le dit arpent en terres de même fief, si tant y " en a, sinon," etc.

Again, in Art. 17, on the same subject:—

" Si esdites successions de père et mère, ayeul et ayeule, y a un seul fief consistant seule- " ment en un manoir, basse court et enclos d'un arpent, sans autre appartenance," etc.

And in Art. 58, speaking of the *relief* of the Seignior Dominant:—

—" Et si le fief consiste en une maison seule, si elle est louée par le vassal, se doit le " seigneur contenter du loüage; et si elle n'est loüée, il prendra le loyer au dire de gens à " ce connaissans."

dependance (whether as affecting the noble or the non-noble tenures) with all its incidents, to the assumed fact of a direct grant in every case by the superior to the inferior, such assumed fact in a large proportion of cases was far from being historically true.

§ 50.—In the first days of the feudal system,—when the grant of the *beneficium* or *fief* passed to the vassal, not a property, but a mere temporary usufruct, and when *fiefs* (at least, generally) were the rewards of a sovereign or quasi-sovereign leader, to his most powerful chiefs, and were of an extent fitted to serve us such rewards,—the lands so granted were neither given nor taken with any view to their improvement, nor even to their regular settlement, by sub-grant or otherwise. The grant was temporary; any sub-grant could be nothing more. The grantee was no agriculturist, or peaceful settler, but a soldier, full of hearty contempt for all manner of peaceful men. The men he brought with him were in this like himself; hunters, when not fighters; apter at turning farms into forest, than forest into farms. *Fiefs*, large or little, to be tilled by him or them, would have been what neither he nor they would have taken at a gift. The worth of the *fief* of those days was not in the land, though that was generally, in great part at least, in an improved state,—so much as in the resident population that went with it. That population, the accumulated result of the history of the Roman Empire and of the earlier irruptions of the Barbarians, was of different classes; a remnant of ex-proprietors, Roman and Barbarian, degraded by successive conquests from their rank as owners of the soil;(*y*) a larger class, never proprietors, and yet (for some time past, at least) not slaves,—*colons*, or by whatever other name they might be called, tillers of the soil at once for others and for themselves; and a third class, often the most numerous, the serfs and slaves of the older time, some bound to the soil and owned with it, others not,—the property, perhaps of men who themselves did not own the soil. It was upon the means and industry of all these people, upon the rents and exactions of all kinds that could be made good out of them, that the grantee of the *fief* of this old time and his followers maintained themselves; and not upon any productive industry or enterprise of their own.

§ 51.—But, so to maintain themselves, it would never have done for them at once to frame among themselves a feudal hierarchy, (of the fashion fancied by some writers,) the leaders, picked men and privates of the band becoming their lord's sub-vassals in descending degrees, and the older population, his and their *censitaires*, serfs and so forth. With the *fief* a usufruct, determinable any day, sub-infeudation could not have been carried far. The usufruct of a fraction of a usufruct might be something, though not much. But, carrying the process on

(*y*) Few, no doubt, in number; more especially in so far as ex-proprietors of the Roman class may be in question. For the Roman system was one that kept the land in vast estates, public and private, cultivated by *colons* and slaves, who seldom toiled under the eye of a resident proprietor. Nor indeed, is it even likely that the earlier Barbarian incomers settled down in any great number, as petty land-owners. Their tendencies and those of the age were hardly that way.

another step or two, one would come at a result sufficiently absurd. Re-distribution of the territory would have become the endless business of its lords; for with every change of master of every *fief*, whatever its grade, every sub-grant would have lapsed, leaving it to every new lord, with new followers presumably, to re-parcel out the whole. Besides, this imagined regularity of system formed no part of the style of thought of these semi-savage lords of *fiefs*, or of their followers; nor was it in the least suited to their position in other respects. The population upon whom they were to live, were not moulded to their hand a well ordered body of *censitaires* and serfs; but were a population, more or less completely conquered, of variant origins and classes, some easy enough to deal with, others far enough from being so. And the rule to be imposed on them was not the easiest in the world. The feudal usufructuary and his retainers were not too strictly bound down to the wholesome rule of *exploitation en bon père de famille*. They were for making all they could, of a possession that was not to be theirs for long. If doing so did cost more or less of violence, it only cost a price that they rather liked to pay. Fighting for the Seignior Dominant, grantor of the *fief*, when he wanted them, they had no thought of any little by-fighting on their own score for the realising of their revenues, as unwelcome to any one, unless to the resistant payers of such revenues. In or out of the *fief*, fighting could seldom come amiss, and could seldom for any long time be done without. But, for this, they had to live together, as fighting men in a hostile country. The lord of the *fief* had to garrison his stronghold. If his *fief* was large, he might have to garrison many. Wherever any of his people had to live, they must be together, or near, in such numbers as to be safe. If he allotted any part of his *fief* to a dependant, such dependant must garrison his place in turn. The bulk of the lord's following had to be mere retainers; could not be let go from garrison; could not be sub-vassals, each playing lord by himself in a canton of his own.

§ 52.—The *franc aleu noble* of those days, or rather what may now so be called, (for the idea of giving one generic designation to that kind of property was not of those days,) was sometimes the wide territory, with its conquered population of ex-proprietors, *colons*, serfs and slaves, from which the *fief* proper of the earlier age may be said to have been the natural off-set; or, in other words, the lot or portion of land, fallen in property, as a spoil of conquest, to the leader of mark, who afterwards perhaps found it large enough (after retaining what he would) to admit of his making over parts of it *en fief* to some few or more of his favorite dependants. Sometimes, it was a territory, or the *débris* of a territory, that one or other local ruler or functionary of the fallen Empire, charged properly with its mere administration as land belonging to the fisc, had in the later days of the Empire succeeded in passing off for his own, and had not lost at the hands of its conquerors. And sometimes, it was veritably the territory (or *débris* of territory) of one or another of the *latifundia*,—princely possessions, once, of the grandees of the Empire,—in the hand of some representative of its old owners, not dispossessed by conquest. The lords of all these kinds of property, whatever their origin or that of their respective properties, at

least vied with one another in the eagerness of their appropriation to themselves and their higher dependants, of all sorts of titles of honor, Roman and Barbarian,—in the number and military organisation of their retainers,—in the rapacity of their exactions from their unfortunate dependants of the lower grades, the serf and *colon* population of their estates,—and in the contempt with which they viewed that population, and all those industrial pursuits by which it had to maintain at once its own poverty and their wealth. Not, of course, that every property of this class was exactly a property of the first magnitude; so as to admit of its owner taking high title,—as Emperor, King, Duke or Count. They were of many grades; and often far below such mark. Only, as a distinguishing characteristic, their owners (assuming all they could of rank and consequence) maintained themselves upon their dependants, and not by industry of their own; were lords of the land and of those who tilled it,—not simply land-owners who tilled or saw to the tilling of their land themselves.

§ 53.—Of *franc aleu roturier* properties, there may equally be said to have been more than one description; some, small estates or fragments of estates of the Roman period, in the hands of undispossessed representatives of their old proprietors; others, fragments of such estates, in the hands of ex-slaves or *colons*, whom here and there the chances of the times might have raised instead of lowering; others, fragments of free Barbarian allotments; and others, perhaps, Barbarian allotments, from the first, of small extent. Many, perhaps most, of such properties, like the larger *aleux*, may have been cultivated by the actual labor of a class of men almost or quite in the condition of slaves or *mainmortables*. But their owners, whether laboring themselves or not, had at least to live either by their own industry or by an industry that they personally superintended. Though proprietors, they were tillers of the soil. As contra-distinguished from the larger proprietors, and from the holders of *fiefs*, who all, surrounded by dependants, ranked as *seniores*, they were *ruptuarii, roturiers;* as much so as the *colon*, serf, *mainmortable*, or other *vilain* however styled, who otherwise in the social scale ranked far below them.

§ 54.—For what afterwards became the *censive*, it is enough to say that it then bore no semblance to a property in the hands of the *vilains*, of all styles and grades, whose labor and degradation were the wealth of the great proprietor or of the vassal. Some below others, all were too low, because too weak, to have any defined rights, as against their lord. Their payments to him, of all amounts and kinds and names, measured as often by his rapacity as by any other rule, did not more resemble the *census* of the later Roman period, in their variety of form and oppressiveness, than in their essential character of impost as opposed to rent properly so called. They were a price paid for living on his land; not for any ownership or even regulated usufruct of land that was in any sense not his.

§ 55.—So far, then, the *aleu* in one or other of its forms was the rule; the *fief*, not as yet a true property, the exception; the *arrière-fief*, hardly if at all known; the *censive*, considered as at all a property, unknown.

§ 56.—With the growing disorganisation of the social system, which by degrees changed the *fief*, first into a usufruct for life, then into an estate of inheritance, and at last, into a property alienable even *inter vivos*, there came into operation new influences, and consequently upon them extensive changes.

§ 57.—As authority decayed, the mutual relations of the proprietor class (including now under that term, as well the vassal or holder *en fief*, as the *aleutier* whether noble or *roturier*) became more and more what the relations of that class had before been towards the classes below them,—relations, not of law and right, but of power and wrong. All men's resource, if anywhere, was in the strong arm; their own, or their neighbours'. If not strong enough himself, each must buy help. And the feudal tie, as developing itself in the organisation of the *fief*, offered everywhere to the proprietor, the means. The weak appeased one, and armed himself against others, by becoming vassal of a stronger than himself; who in turn not only strengthened himself by every vassal he could get, but if not thereby strong enough, sought further help by making himself vassal of some one stronger. Nor was interest the only motive. A man's rank was raised, and his vanity gratified, by the number and importance of his vassals. Violence even became common, for the mere purpose of forcing men of means into vassalage. *Fiefs* in great numbers, of all grades, thus came to be created by a process quite other than that of concession.—Besides which, the same considerations all added to the inducements for the creation of *fiefs* by concession, in favor of men already holding other properties and therefore eligible as vassals, but whom for any reason it might be thought better to tempt, than to try to force, into that position. (*z*)—With the growing prevalence of the *fief*, came even the maxim of "*nulle terre sans seigneur*;" over the greater part of France, reversing the true presumption as to tenure, and converting all land into the *fief* or dependency of the *fief*, unless shown by title to be free.—In many localities, the very process of sub-division of the *fief* between co-proprietors, tended to sub-infeudation; the younger sons or other holders of the smaller shares submitting themselves to hold of the eldest son or other holder of the chief share, instead of claiming to hold with him of their common lord.—Everywhere, the *franc aleu* and large *fief* were fast resolving themselves into an endless complexity of *fiefs* and *arrière fiefs*. The smallest properties came to be so qualified,—and as such to be held divisible in the way of sub-grant to sub-vassals. Properties that by the process of sub-granting had lost substance and become converted into mere rights, were yet granted in their incorporeal state as *fiefs en l'air*. Incorporeal rights, not so much as savoring of realty, immoveables by mere fiction,—*rentes foncières*, *rentes constituées*, pensions, offices of profit, trust and honor, in the service even of the state, were even granted as properties *en fief*, and so owned and dealt with, for the consideration of vassalage to the giver. (*a*)

(*z*) "Enfin, ils achetèrent des vassaux en donnant une certaine somme d'argent, ou en payant une pension annuelle."—Hervé, Vol. 1, p. 125.

(*a*) See Hervé, Vol. 1, pp. 123 *et seq.*; also Brussel, pp. 41 *et seq.*; and 396 *et seq.*

§ 58.—The terms of such vassalage must have been as variant as the circumstances which in different cases led to it; sometimes in the vassal's interest, sometimes in the lord's; sometimes formally settled, oftener hardly at all settled, sometimes not at all; sometimes the fair contract of the parties, sometimes the half-yielding of a beaten man to a yoke that he means to throw off the instant he can; often not faithfully recorded; often, on one side or other, or on both, not faithfully adhered to. There was always, of course, recognition by the vassal, of his lord; but the manner and extent of it might be anything. Through the age of anarchy, and disappearing with it, there was, almost of course, some measure of military obligation; but it, too, might be anything. Commonly, there would be casual rights of the lucrative kind upon mutations, by way of *souvenir* of the usufructuary character traditionally attaching to the tenure; but what mutations, what rights, and how to be taken, were open questions. In general, there would hardly be fixed dues in kind or money; but there always might be, without limit of amount or otherwise. However all this might be, or at first might have been meant to be, one result was uniform,—that sooner or later, often and long, lord and vassal must have their controversies of every kind as to what it was or should be. Everywhere, those controversies were settled somehow,—but not always by the same means, nor yet to the same end; sometimes, by fighting and defeat of the weaker; sometimes, by compromise before defeat; sometimes, without fighting, by the fears of one or other, or of both in turn; sometimes, by such show of judicial decision as the times allowed; sometimes, by interference (invited or not) of friends, enemies, neighbours or feudal superior; sometimes,—on grand occasions, or where numbers were interested in a like way,—by vote of bodies of lords and vassals, and promulgation thereon of assise, charter or other rule, by baron, count, duke, king or emperor, to be carried into practice afterwards, or not, as might be; in the one interest or the other, on this principle or that, with show of right or without; no two neighbourhoods alike, no one neighbourhood uniform, in usage; every thing so mobile as to make it impossible to say that there was fixed rule or usage any where at all. When at last the attempt was made, the result was found to match the process. The confusion of the French Customs, labyrinthine everywhere, was past tracing here. Record of the *bizarreries* of the tenure *en fief* could not be made. Here and there, as if for fear even negation of rule might itself be a sort of rule, particular Customs stereotyped as absolute some one or other unaccountable restriction. But such Customs were the exception. The conclusion had to be,—and the Custom of Paris fully recognized it,—that the conditions of the tenure in each case were what the contract of the parties in each case might have made them; that the parties could always remodel their contract as they would; that in default of better proof, their after-admissions (if ascertainable) settled the question of what they had made it; that in its silence, Custom merely showed what they had presumably meant to make it; in a word, that it had no reference to public or general law, but was a purely private contract.—It grew into form in times when the idea of a public or general law was unknown.

§ 59.—Another change incident to these times of disorder and after transition, was that which brought the *censive* into existence as a property in the

hands of the *censitaire*.—Usage, the influence of the church, and the growing insecurity of their position, all combined to make the proprietor class relax something of their hold upon those beneath them. From living on his lord's land *à titre de précaire*, and paying his lord's exactions whatever they might be, himself all but his lord's property, or quite so,—the *vilain* came by degrees to be looked upon as a man who was to pay so much, and on that condition was not to be dispossessed, whose possession (such as it was) might be inherited or even alienated, as a vested right. Imperceptibly, the slave became a serf; the serf, a *mainmortable*; the *mainmortable*, a *colon*; the *colon*, a *censitaire*; the *censitaire*, a quasi-member of the feudal confederacy.—And while one class thus rose to this position, others fell into it (so to speak) without rising, or even with loss of rank. *Accensement* once viewed as a quasi-feudal contract, men of whatever class took land upon that tenure; the Seignior and they freely contracting as they would. Poorer men of the *aleutier* class were forced to become *censitaires*; or bought protection by so becoming; or, under the influence of the "*nulle terre sans seigneur*" doctrine, found themselves held so to be. The grade of *censitaire*, equally with that of vassal, was recruited for in all sorts of ways.

§ 60.—And of course, the terms of the contract, real or supposed, as might be, were as variant as the circumstances under which it had been made, or had come to be held for made. Essentially, it was not the contract of honorable recognition, distinctive of the vassal,—but one of subjection, distinctive of a rank below the vassal's. Otherwise, it might be almost anything. It had, presumably, its casual rights; and these might be carried up to any limit. Fixed dues and services (of the ignoble kind) it imported, and all but required, though they might be light,—or again might be heavy, as indeed they generally were,(*b*) and various also,—money payments, renders in kind, labor, observance, subjection to monopoly,—anything whatever tending to the Seignior's profit or gratification. And it admitted of any amount of reserved right on the Seignior's part,—and even (unlike that of vassalage) implied much; for, unless by special contract, there was always much of the ordinary right of a proprietor,—in respect especially of water, fishing, hunting and so forth,—which the *censitaire* did not enjoy.—No rule put the *censive* holdings of any two Seigniories, or even of any single Seigniory, on one and the same footing. The parties were free to make all the anomalies they would; and made them without stint. In process and result, the history of the development of the two tenures corresponded. The chapter of the *censive*, in the Customs, was as irreducible to rule or order as that of the *fief*. Equally clear of influence from general or public law, the contract of *accensement* differed from that of vassalage, only in the lower quality and more limited extent of the proprietary right which it created and conferred.

(*b*) That is to say, when first fixed. So far as they were fixed in money, they of course became greatly lighter. Indeed even for what were fixed in kind, the rule was always at work, which makes a nominally fixed rent really almost always a falling rent, by reason of the increasing value of the rented property.

§ 61.—Strictly speaking, indeed, the feudal system may be almost called a pure negation of all idea of public authority and law. It was of anarchy, anarchical; an endless struggle of private power and will; not more essentially and inveterately aristocratic, than it was anomalous. The influence of the Roman law, as it brought into recognition the principles of contractual right and obligation, checked it to some extent. French royalty (once feudal, afterwards so nearly despotic as in that respect to have become anti-feudal) in the course of centuries built up over it an authority that seemed absolute. A more public power at last suddenly destroyed it. But to the last, as from the first, it carried with it no character of public authority or law,—was all irregular, contractual and private.

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§ 62.—There is always a difficulty in choosing citations to prove what every thing ever written on a subject by any author of mark combines to prove. All cannot be given; and one is apt to think none need be. In this case, but that the Propositions of the Attorney General so rest upon the postulate, that in Canada the feudal system was all iron uniformity and public law, none would here be given. As it is, the plain fact, as to what the system was always well known to be in France, may require to be stated in the words of a very few of those whose names, on the subject, are of the first authority.

§ 63.—Of the essential freedom of the parties, to contract as they would for the grant of the *fief*, (and, by necessary inference, for that of the *censive* also,—the two, in this respect, never having been distinguished,) and of the immutability—unless by their joint action—of every such contract, whatever its terms might have been,—DUMOULIN thus wrote:—

"Sicut fundus constituitur solius patris familias destinatione à quâ dependet, *l. quid in rerum* "§ 1 *ff. de leg.* 1, ita feudum constituitur destinatione patroni et clientis simul, et non "alterius eorum tantum, quia non dependet à voluntate unius, sed duorum, et à vero con-"tractu ultro citroque obligatorio. *l. Labeo, §. contractum. ff. de ver. sign.* * * constitutio "et titulus feudi non dependet à voluntate et potestate unius, sed duorum, vel plurium, et "omnium dominorum dominantis et servientis feudi. * * Et ita debet declarari quod dicit "Andr. Iser. in *c. unico col. I. quali. vasal. jura deb.*, quòd potest Rex, vel alius dominus "qui constituit feuda sicut vult, dare mihi feudum in pluribus terris et locis, sive distantibus "sive cohœrentibus, quia destinatione voluntatis domini hoc fit, sicut et fundi fiunt: hoc "enim est intelligendum ratione principii dispositionis quæ incipit à domino, qui potest "concessioni suæ ab initio adhibere quem vult modum, *l. in traditionibus, ff. de pact. l. legem.* "*C. eo.*, sed non respectu perfectionis et substantiæ dispositionis, quæ non inducitur adesse, "nisi secuto consensu vasalli; quo facto, non licet ulterutri quicquam immutare aut derogare. § 3, Gl. 4, No. 30: Vol 1. pp. 137, 8.

—and D'ARGENTRÉ, thus:—

"Tenor investituræ derogat omni naturæ feudorum. * * Sed quia rarum est ut in tantâ "rerum antiquitate et casibus reperiri investituræ queant, si de his non docetur, potissima "habenda ratio possessionum, in quibus quisquam reperitur dominus feudi, quæ ex recogni-"tionibus et actualibus præstationibus et apochis probantur, quia ubi titulus non ostenditur, "is determinatur à possessionibus, ut è contrà cum apparet titulus, possessiones ab eo legem "accipiunt. * *

"Nam infeudationum cum instrumenta apparent, tanta vis est, ut possint etiam naturalia
" feudorum immutare et alterare. * *

"Quòd si horum nihil est, id est neque concessio feudi apparet, nec justa est probatio pos-
" sessionum, quid, quale, quantumve debentur, tum servanda est consuetudo, à quâ regularis,
" ordinaria et fixa feudorum natura in quâque regione determinatur. Est enim natura feu-
" dorum quærenda in consuetudine. Ideoque Bald, *l. liberi libertæque. C. de op. lib*, scribit,
" quòd si clarè non constat de certo modo usûs et possessionis, judicandum est de eo secun-
" dum regularem naturam feudi: et ubi non invenitur conventio, aut determinatio hominis,
" querenda est ab lege, quæ idem valet in casu dubio quod pactum et conventio in casu
" certo."—Art. 277, Gl. 1, Nos. 5, 6: Col. 1185.

Guyot is at least a good authority for the fact that, to his day, this doctrine had never been called in question:—

" Un premier principe, vrai et immuable, que Dumoulin nous donne, § 2, *hodiè 3, glos. 4,*
" *nomb.* 30, et qu'aucun docteur n'a désavouée, est que le seigneur *potest concessioni suæ*
" *adhibere modum quem vult;* le seigneur concède sous telles conditions qu'il lui plaît; c'est
" au vassal, disons mieux à celui qui demande la concession, à accepter ou à refuser. Le
" contrat une fois fait, il est irrévocable par l'un ou par l'autre seul."—Vol. 5, p. 6.

Fonmaur brings down the doctrine to a later date:—

" Comme le seigneur a pu, lors de la concession du fief, imposer au bail de son bien, telle
'loi qu'il trouverait bon, et que l'acceptation qu'a fait le preneur du susdit bail l'oblige de
remplir les conditions, il en résulte que le bail est la suprème loi vis-à-vis des parties con-
tractantes, et de leurs ayant cause, et qu'il prévaut même sur le statut municipal, en vertu
de la règle *semper in contractibus id sequimur quod actum est*, quand même il contiendrait
des droits extraordinaires, et contraires tout à la fois à la coutume écrite et au droit général;
'" de là vient que les rédactions des coutumes portent la clause 'sans préjudice des conven-
" 'tions anciennes des fiefs.' "—No. 124, p. 104.

Hervé, after full discussion and appreciation of all that could be said upon the matter in the way of general principle,—in the last days of the system, reduced his exact definition of the two contracts to the following terms:—

" Il [le contrat du fief] doit donc être défini une concession faite à la charge d'une recon-
" naissance toujours subsistante, qui doit se manifester *de la manière convenue.*"—Vol. 1,
p. 372.

" Je conclus de tous ces caractères distinctifs du contrat de cens, que c'est le bail d'une
" portion de fief ou d'aleu, à la charge par le preneur de conserver et de reconnoître, *de la*
" *manière convenue*, un rapport de sujetion toujours subsistant entre la portion concédée et
" celle qui ne l'est pas,—et de jouir roturièrement."—Vol. 5, p. 152.

And Championnière, as elaborately reviewing the system since its destruction, and referring (as the context shews) equally to the two contracts, thus characterizes them:—

" Entre le seigneur féodal, de quelque degré qu'il fût, et ses vassaux, quelque fût leur titre,
" il n'exista jamais d'autre lien que le lien contractuel; ce fut le contrat féodal, c'est-à-dire la
" stipulation, assise sur la concession de la propriété foncière, qui constitua la supériorité et
" l'infériorité relatives du premier et des seconds. Entre eux, il n'y eut rien de politique;
" tout fut conventuel et privé."—*Eaux Courantes*, p. 150.

§ 64.—So completely so, that their mere contract not only made the law, in the first instance, of the *fief* or *censive*, as might be; but (under reserve only of the private right of any superior lord) might always afterwards be changed by them at will,—to the extent, even, if they so pleased, of converting the *fief* into a *censive*, or the *censive* into a *fief*. To cite again, from Dumoulin:—

"Quandoque quis rem suam censualem recognoscit ab codem domino in feudum, vel è
" converso rem suam feudalem in censum, et tunc siquidem sit simplex recognitio, tanquam
" de re tali qualis recognoscitur, non immutatur qualitas rei, nec respectu domini, nec res-
" pectu onerum, nec respectu possessionis. * * Unde, probatâ primâ investiturâ vel conces-
" sione, ei statur, et recognitio sequens, quatenus contraria est, tanquam erronea rejicitur. * *
"Si vero hujusmodi recognitio fiat tanquam de re alterius qualitatis, animo novum statutum
" rei inducendi, tunc est nova dispositio, per quam status rei mutatur, dummodo fiat ab
" habentibus protestatem et non prohibitis. Numquid igitur mutuo consensu domini directi
" et domini utilis fieri potest, ut res feudalis sit censualis, vel contrà res censualis in feudum
" erigatur? Breviter dicendum, quòd sic inter eosdem, et respectu aliorum qui ab istis
" habituri sunt jus vel causam, sed non respectu superioris habentis interesse, nisi is etiam
" consentiat."—§ 51, Gl. 1, Nos. 10, 11: Vol. 1, p. 569.

" Quòd si in renovatione de certà scientiâ et animo disponendi sit apposita nova qualitas
" aut novum onus vel forma, crebriùs tenent, ut Bald. * *, esse novam concessionem. Sed
" non est ita; imò remanet vetus feudum vel census; nec dicitur novum, nisi in qualitate
" mutatâ dumtaxat."—§ 74, Gl. 2, No. 5: Vol. 1, p. 714.

—or from Pocquet de Livonière :—

" Si c'est avec connaissance de cause et sciemment, que le seigneur et le sujet ont voulu se
" départir des premiers titres, pour changer la qualité de la mouvance, il faut en ce cas se
" tenir au dernier état."—*Des Fiefs*, Liv. 6, ch. 1: p. 527.

" Il en est de même du surcens, et de toute autre prestation ajoutée par le seigneur de fief
" à la première constitution du cens; qui n'a pas le même faveur que le cens; mais pour
" faire cette distinction du cens et du surcens, il faut examiner la forme de son institution;
" car si le surcens a été établi par une espèce de reformation du premier cens, ou pour com-
" pensation d'autres devoirs seigneuriaux dont le sujet a été déchargé, il a les mêmes avan-
" tages que le cens. Si au contraire le surcens a été ajouté comme une nouvelle charge
" distincte du premier cens, il n'est plus considéré que comme une rente bien moins favorable
" que le cens."—*Ibid*, pp. 534, 5.

—or again, from Hervé :—

"Je suppose qu'on ne trouve pas dans les dénombremens les plus récents, la preuve précise
" qu'on a eu intention de déroger à l'état ancien: si cette preuve s'y trouvait, alors les der-
" niers dénombremens ne seroient pas de simples titres recognitifs; ils seroient en même temps
" des titres constitutifs, quant au changement convenu; ou plutôt, celui qui porteroit la stip-
" ulation de changement deviendroit titre constitutif quant à cet objet, et les suivants le
" confirmeroient."—Vol. 1, p. 411.

" Le croist de cens pourroit bien être aussi un supplément de cens, stipulé entre le seigneur
" et le censitaire, pour des raisons particulières survenues depuis le bail à cens; par exemple,
" pour tenir lieu de certains devoirs dont le censitaire auroit demandé à être déchargé en
" payant un cens plus fort. Rien n'empêcheroit que ce supplément de cens ne fût de même
" nature que le premier cens: la convention auroit pu lui imprimer le même caractère et la
" même qualité qu'au chef-cens."—Vol. 5, p. 131.

§ 65.—Again, for the general comparison of the two tenures,—a matter too elementary for citation upon it to be excusable, were it not that the Propositions of the Attorney General suppose the conveyance, in Canada, of so much more by the grant *en censive*, than by the grant *en fief*. So elementary a citation cannot be more fittingly taken than from Pothier :—

—" il n'y a que le propriétaire de l'héritage, dont le droit de propriété renferme quelque
" seigneurie honorifique de l'héritage, qui puisse le donner à cens. * * Le propriétaire de
" l'héritage qui le tient à titre de fief, peut aussi le donner à cens; car, quoiqu'il ne soi

"lui-même qu'un seigneur utile vis-à-vis de celui de qui il tient son héritage en fief, néan-
"moins cette seigneurie utile qu'il a, n'est pas bornée à ce qu'il y a de purement utile dans
"la seigneurie; elle renferme aussi une seigneurie honorifique de l'héritage, quoique subor-
"donnée à celle du seigneur de qui il relève en fief."—*Des Cens*, Chap. Prel.

"La seigneurie utile de celui qui tient un héritage à titre de fief a quelque chose de plus
"que celle de celui qui le tient à titre de cens: celui-ci n'a que l'utilité pécuniaire de sa chose,
"et ne peut se rien arroger de ce qui consiste plus en honneur qu'en utilité pécuniaire. * *
"De là naît cette autre différence entre celui qui tient un héritage en fief et celui qui le tient
"à cens; savoir, que celui qui le tient à cens ne peut pas sous-bailler à cens. * * Au con-
"traire, celui qui tient un héritage à titre de fief peut le donner, soit à pareil titre de fief,
"soit à titre de cens."—*Des Fiefs*, Part 1, § 3.

CHAMPIONNIÈRE's comparison, more historically stated, may be added:—

"En général,—le droit du possesseur des censives fut toujours plus précaire et moins
"puissant que celui du possesseur d'un fief; ce fait se rattache à plusieurs causes: d'abord,
"l'infériorité des personnes; le feudataire fut originairement un militaire, par conséquent un
"noble; souvent le vassal fut l'égal du seigneur, et parfois plus puissant que lui; mais le
"censitaire occupa toujours une position plus humble, quoiqu'il pût le disputer parfois à son
"seigneur par ses richesses acquises ou héréditaires: il lui fut toujours inférieur à raison de
"son rang, et plus encore parce qu'il n'était pas armé comme lui. Lorsque le régime féodal
"n'exista plus qu'à l'état de souvenir, dont la loi des possessions fut un vestige, le possesseur
"de tenures roturières devint parfois, dans la société, l'égal ou même le supérieur du propri-
"étaire de la directe. Mais les principes étaient posés, la terre était imbue de la qualité
"qu'elle avait eue pendant plusieurs siècles, et sa nature légale resta toujours inférieure à
"celle du fief. Aussi, la directe seigneuriale affecta-t-elle toujours plus immédiatement
"les terres en censive; le caractère des possessions corrélatives conserva plus efficacement
"la trace de son origine."—*Eaux Courantes*, p. 270.

§ 66.—Further, for the more special matter of the non-existence of the notion of a limit of any kind, as to the conventional dues and burthens of the *censive* tenure.—The postulate of the Attorney General's Canadian system, creates, as part of its public law, such limit—inexorably laid down, as to every possible particular. Were it not so, there could be no excuse for citing on such a point,—as from a writer of the age of the settlement of Canada, the following from GALLAND:—

"Les charges et redevances ordinaires et annuelles d'héritages tenues en censive (outre les
"lods et ventes, et autres payables à changement) n'ont d'autres règles que la volonté des
"seigneurs: souvent rudes, pénibles, peu convenables à des conditions libres; prestations
"annuelles d'argent, volailles, grains, oublies, hostizes, chevages, *manoperæ*, manœuvres,
"*carroperæ*, bians, *bidunnæ*, *biannia*, arbans, oyances, hayes, faucher les prez, porter les
"grains au sauf du seigneur, curer les fossez, et autres semblables, qui se justifient par
"nombre de titres."—*Du Franc Aleu*, p. 91.

—or the later express conclusions as to it, of HERVÉ:—

"Je conclus, en un mot, d'après tout le développement qui précède, que toujours le cens
"a été proportionné au véritable produit de la chose accensée, lorsqu'on a fait de véritables
"baux à cens, et non pas des ventes sous le nom de baux à cens."—Vol. 5, pp. 121, 2.

"Concluons donc qu'aucune redevance grosse ou menue, n'est de l'essence du bail à cens, et
"que la définition de ce bail ne peut se tirer de la redevance censuelle plus ou moins forte,
"presque toujours stipulée par ce même bail, ou attribuée par la coutume et par l'usage. * *
"Toute autre prestation qu'une redevance fixe, tout autre devoir, toute autre manière de
"marquer sa sujétion et de reconnoître de qui l'on tient la chose censuelle, peut également

"s'appeler cens. On peut aussi appeller de ce nom, l'ensemble des prestations, des devoirs, "et de profits quelconques, que le bailleur stipule et se retient par le bail."—*Ibid*, pp. 144, 5.

—or of Henrion de Pansey:—

"Lorsque Dumoulin dit que le cens est une prestation modique, *modicum canon*, on sent "bien qu'il parle suivant l'acception commune, et sûrement on ne le soupçonne pas d'avoir "ignoré que le cens peut être plus au moins considérable: * *

"Le mot cens, en effet, est une dénomination générique qui comprend tous les droits récog- "nitifs de la seigneurie directe, tous les droits imposés *in recognitionem domini directi*.

"Quelque soit la nature et la quotité de la prestation réservée, de quelque manière que "l'on juge à propos de la qualifier, toutes les fois qu'elle est établie comme droit récognitif de "la directe, qu'elle est la première de toutes les charges dont l'immeuble est grevée, et "qu'elle se paie au seigneur territorial, elle tient lieu de cens, ou plutôt elle forme un véri- "table cens; elle en a tous les attributs, toutes les prérogatives.

"Tel est donc le principe. Une redevance première, sous quelque dénomination qu'elle "soit désignée, de quelque manière que s'en fasse le paiement, soit en argent, soit en nature, "lorsqu'elle est due au seigneur de l'héritage, est un véritable cens, en a tous les attributs, "tous les privilèges. * *

"Celui qui accense un héritage peut donc le grever de tel droit seigneurial qu'il juge à "propos, et ce droit aura les prérogatives du cens, formera le véritable cens de l'héritage, "quelle que soit sa dénomination."—*Diss. Féod.*, Vol. 1, pp. 265, 6.

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§ 67.—So far, there is contrast certainly, between what is known to have been the feudal system of France, and what is said to have been that of Canada. Is there anything else? Can so much as a germ of the one be found in the other,—in that part of it (that is to say) which related to the matters of the *démembrement* and *jeu de fief?* For, at all events, it must be there, or no-where.

§ 68.—As has been observed, it is clear that through the first age of the *fief*, while it was yet a usufruct, more or less uncertain, sub-infeudation could not have been practically carried to any great extent, and *accensement* (as a special contract of the vassal, or of his sub-vassals, with individual grantees of the laboring class) must have been pretty much out of the question. On the other hand, however, it is equally clear that the Dominant could then have had no interest adverse to either. The vassal could not give more than he had got. With the expiry or revocation of the grant to himself, all his grants to others must fall too. So that the Dominant had always the same means of securing service from a new vassal as from the old.

§ 69.—But as the usage slowly grew up, of treating the *fief* as a something more,—of letting the grantee hold for life, and then of suffering the grant to pass (for compensation or without) to the heir, direct or even collateral,—and still more, as the *fief* came to be held a property that might be sold with leave, and at last for a fine without leave,—this state of things was changed entirely. Sub-infeudation grew into a usage also; the vassal, the sub-vassal and his sub-vassal,—every one in the chain of descent,—presuming upon and exaggerating his own property in the grant made to him, and seeking to secure by means of it a body of immediate dependants of his own. The Dominant, who had granted a tract of land for military service in proportion, thus found himself with a vassal who had let go much of it to others, under like promise of service to

such vassal, and not to him the Dominant. These other persons, holders of such land and of course not admitting his right to dispossess them, might be particularly obnoxious to him, would seldom have been chosen as not being so, and would always be more his vassal's men than his. When he wanted service, they might be backward, whether the vassal, their chief, was so or not. The vassal's own direct ability to serve would be the less. If threatened, for want of service, with a forfeiture that should affect himself only, his liability would be the less also; though his power to resist might not be. And on the other hand, if threatened with a forfeiture that should affect his sub-vassals, his power of resistance would presumably be even greater than it would have been if the whole *fief* had remained in his own hands. The Dominant had thus a strong interest of the military or political kind, against sub-infeudation by his vassal.

§ 70.—As time wore on, he came to feel that he had another,—which by degrees became even more pressing than this. With the patrimoniality of the *fief*, and the recognition of the *censive* as a tenure of property, there grew up also the system of casual profits, from mutations and otherwise, which outlived that of military service and may almost be said to have superseded it. But every conversion of territory within the *fief*, into *arrière fief* or *censive*, brought with it a diminution of these profits. The vassal would claim to pay, not so much of the revenue, price or value, of the *fief* in its form as granted, but only so much of the revenue, price or value, of the *fief* in its form as held,—his mere profits thereafter to accrue from whatever he might have created of *arrière fief* or *censive*, taking the place of the territory thereby covered; a deduction, the more notable from the consideration, that he was of course master, when sub-granting, and even afterwards, so to contract as to make such profits as trifling as he pleased.

§ 71.—The *fief* thus dealt with, was therefore likely not to yield the military service, and sure not to yield the profits, which together were its price. But the obvious claim (and indeed right) of the Dominant would be, to have the *fief* so held by the vassal as that it should be full security for both. The older contracts of infeudation, made while the transition was in progress, could not have provided as to this; and the newer, in the natural course of things, would not often do so satisfactorily. Hence a long conflict between Dominant and vassal, sometimes settled in one way, sometimes in another; and as its consequence, that chaos of varying local usages, which has been called the law of the feudal tenure as to this matter of the *démembrement* and *jeu de fief*.

§ 72.—The Assises de Jérusalem form one of the oldest of the historical documents, notable in this connexion. The usage which they laid down for the Kingdom of Jerusalem, was presumably one more or less prevalent in France, before and about the time of their date,—A. D. 1099. (*c*) It is thus stated:—

(*c*) "Ces assises, comme on le voit par un avertissement qui est à la fin, sont *les loix, sta-* "*tuts et coutumes accordés au royaume de Jérusalem par Godefroi de Bouillon, l'an* 1099, *par*

"Nul ne peut desmembrer fié, par l'assise ou l'usage dou reiaume de Jerusalem, se le fié
" ne deit servise de plus d'une chevalerie. Et qui viaut desmembrer fié qui deit servise de
" pluisors chevaleries, il deit doner partie de son fié por partie de son servise que le fié deit;
" et ensi que le plus dou fié demorre au seignor qui le desmembre." * * —Chap. 182. (*d*)

By this usage, then, there were three restrictive conditions to the *démembrement par l'assise ou l'usage du royaume*, or sub-infeudation which the Dominant might not call in question,—viz:—

1stly.—That the *fief* must owe more than one knight's service.

2ndly.—That the sub-infeudation must not extend to the half of it.

3rdly.—That it must be made for part of the service.

Under these conditions, the vassal had the right, as against his lord, to sub-infeud; otherwise, he had not.

As to the second of these conditions, it should be remarked, that though clearly enough expressed in the text as above given by Jean d'Ibelin, and (if possible) yet more clearly by Le Tort and Jacques d'Ibelin (*e*), its true sense became matter of controversy. Jean d'Ibelin (*f*) tells us that in his day (about or before the middle of the 13th Century) it was a grave question, and one which he was not prepared to answer, whether it meant that all the *arrière fiefs* together must be less than the half of the original *fief*, or merely, that the first *arrière*

"*Paris des patriarches et des barons.*

" Comme ces barons étoient presque tous des chevaliers françois, et de toutes les parties " du royaume de France, il faut regarder ces assises comme le recueil des usages qui reg- " noient en France vers le milieu du 11e siècle."—Henrion de Pansey, *Diss. Féod.*, Vol. 2, pp. 366, 7.

Beugnot, in his notes on the passages cited in the text from the *assises*, takes another view; holding the rule which they embody, to have been an innovation upon French usage, consequent upon the fact of the Crusaders having been in such pressing need of reliable military service. But in the 11th Century, good military service was almost everywhere throughout feudal Europe, in nearly if not quite as urgent demand as in Palestine. Beugnot's references (to Beaumanoir and the Grand Coustumier) in support of his view, are of too late date, by a century and a half, or more; besides that they fail to bear out his position even for such later date. To say nothing of the close analogy between this rule of the Kingdom of Jerusalem, and that of the Italian portion of the German Empire, presently to be noticed; which, of itself, is fatal to Beugnot's theory.

(*d*) Assises de Jérusalem, Vol. 1, p. 284; *Edn. par* Beugnot, 1841.
This text is from the *Livre de* Jean d'Ibelin, who died about 1266. (See note on pp. 21 & 2.)

The same doctrine is laid down in other words on p. 553, from the *Livre de* Philippe de Navarre, a cotemporary of Jean d'Ibelin, but who wrote before him. (See note on pp. 475 & 6; and Intr. p. l.)

Also on pp. 436 and 439, from the *Livre de* Geoffroy le Tort, another cotemporary, who wrote after Jean d'Ibelin. (See note on p. 435; and Intr., p. lxv.)

Also on p. 464, from the *Livre de* Jacques d'Ibelin, another cotemporary, who wrote after Jean d'Ibelin. (See note on p. 453; and Intr., p. lxiv.)

And on p. 596, from Le Clef des Assises, a later compilation. (See Intr., p. lxv.)

(*e*) —" et si en doit mains doner de la moitié."—*Le Tort*, p. 449.
—" et si en deit l'on doner mains de la meitié."—*Jacques d'Ibelin*, p. 464.

(*f*) *Ibid*, p. 285.

fief must be less than the half of the whole, the second less than the half of the remainder, and so on, leaving a final remainder of more than one knight's fee. And Navarre (*g*) states in effect the same question, adding that he inclined to the latter solution.—This latter doctrine, in fact, seeming pretty clearly to have been a vassal encroachment upon what in the first instance the Seigniors Dominant had laid down as their right.

Even in the 11th Century, the *fief* was at least generally patrimonial;(*h*) and the usage of mutation fines as a substitute for the express assent of the Dominant to each alienation, must have been in process of establishment. In Palestine, according to the *Assises*, the *fief* was patrimonial; but the right to sell was admitted, only under a good deal of restriction :—

"Home ou feme qui a fié ne puet, par l'assise ou l'usage dou reiaume de Jerusalem, "vendre partie de son fié; mais tot son fié puet l'on bien vendre, par la dite assise. Et l'as- "sise de la vente dou fié est tel que l'on peut et deit fié vendre por dette coneue ou provée "en Court, se celui de qui est le fié, n'en a autre de quei il puisse la dette paier fors que de "la vente dou fié."—Chap. 185. (*i*)

Upon such *vente par l'assise*, necessarily judicial and public, the Dominant could no more interpose restraint or exact a mutation fine, than he could upon a *démembrement par l'assise*. For any other sale, his consent was necessary, so that he could charge what fine he would.

The consequence of a vassal's violation of the rule, either as to sale or sub-grant, is doubly stated; first, as it would seem, with reference to the case of a *fief* the *propre* of the delinquent; and then, with reference to a *fief acquêt*. In the former case, it is said :—

—"chose que il en face n'est valable ni estable, * * sece n'est à aucun de ses heirs, et par "l'otrei dou seignor * *. Et qui autrement le fera, son heir l'en peut apeler, ce [si] il viaut; "et ce [si] il l'en apele, la chose que il fait ne vaudra ni ne sera tenue. Et si le fié vient en "la main dou seignor par escheete ou par defaut de servise ou autrement, le seignor peut "apeler et avoir ce qui en sera fait sans assise et sans usage, se le seignor ne l'a otreié en "court, ou se il ne li a doné en court, poeir [pouvoir] de faire le."—Chap. 142. (*k*).

(*g*) *Ibid*, pp. 553, 4.

(*h*) Hugues Capet's accession was in 987; and that of Conrad the 2nd, who followed his example in declaring the *fiefs* of Germany hereditary, was in 1024. Still, there were non-hereditary *fiefs* till much later.—See HERVÉ, Vol. 1, pp. 71, 91, 2, &c.; also LIB. FEUD., Lib. 1, Tit. 1,—in *Corp. Jur. Civ.*, Vol. 2, p. 1357, Edn. of 1759.

(*i*) ASSISES DE JÉRUSALEM, Vol. 1, pp. 288, 9; *Livre de Jean d'Ibelin*; where the procedure for such *vente par l'assise* is very fully stated.—See also pp. 449 and 464, where the same is more briefly stated by Le Tort and Jacques d'Ibelin, respectively.

(*k*) ASSISES DE JÉRUSALEM, Vol. 1, pp. 216 and 217 respectively; *Livre de Jean d'Ibelin*. Beugnot suggests in his note *in loc.*, that the distinction between these two cases is probably that adopted in the text.—Another, however, admits of suggestion by way of note. Chapter 142 expressly refers to the two cases of sale and sub-grant; but in chapter 143 the only word used is *aliéner*,—a word which may or may not have been meant to cover both. If this word be here taken in the narrower sense, one may perhaps suppose that the penalty of what may be called illicit *démembrement*, as opposed to sale, was the lighter forfeit of

—In the latter case, the more summary decision is:—

—"le seignor de qui il tient cel fié peut prendre ce que il a aliéné, et tenir et user come la "soe chose; car le seignior dou fié qui a tot ou partie aliéné sanz assise et sanz usage et "sanz otrei dou seignor de qui il tient le fié, est por le fait que il en a fait encheu vers son "seignor de perdre à tozjors, lui et ces heirs, ce que il a dou dit fié aliéné sanz assise et sanz "usage et sanz otrei dou seignor; et le peut et deit aveir le seignor de qui il le teneit en "fié, à lui et à ces heirs, come de la soe preupre chose, et faire ent totes ces volentés, come "dou sien."—Chap. 143. (*k*)

—That is to say,—in the latter case, where the question lay merely between the vassal and himself, the Dominant was at once entitled to an escheat; but in the former, where the vassal's heirs were presumably the parties first entitled to make good their rights, it was to be left for them to do so.—Possibly enough, in default of their doing so, the Dominant would have been allowed his remedy of escheat.

However this may have been, it is at least clear that these restrictions upon sub-infeudation or other alienation were merely in private interest, and could be waived to any extent. The heir was the judge how far he would insist upon his rights over the *propre*; the Dominant equally so, as to his rights over *propre* or *acquêt*. With their assent, anything could be done and would be held good. Without it, anything could be done as between the parties, but might be undone in another interest. The law, such as it was, was private and particular; not public or general. And its practical enforcement must have been irregular.

From the distinction drawn between *démembrement* and *vente*, it may be inferred that through this period sub-infeudation was not apt to be otherwise than quasi-gratuitous. Perhaps, indeed, the use of the word "*donner*" in connexion with it, may even imply that the taking of any other consideration than the promise of future service would have exposed the parties to the consequences of a *vente sans assise*. The Dominant, at least, would have so contended. But there is nothing to shew that the precise point was decided.

There is no hint at the possibility of a sub-grant otherwise than *en fief*, and for military service. In fact, the *Assises* are silent, alike as to any tenure of the *roturier* kind, and as to any class of *roturiers* above the rank of serfs or slaves. They are of the military period of the feudal system; and even the measure of protection which, in this matter of sub-granting, they afford to the Dominant, was essentially a protection of his military right,—to which every other was deemed secondary.

§ 73.—Another usage, of about the age of the first promulgation of the *Assises*, or somewhat earlier, (*l*) is thus given in the LIBER FEUDORUM, as prevalent in Lombardy :—

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chapter 142. It seems, however, more reasonable to give the word here its larger sense.

Although giving the substance of a set of rules of the 11th Century, D'Ibelin wrote in the 13th, and may be supposed to have used words rather in the sense of his own time than in that of a century or two before,—especially, where the contact seems to require such supposition.

(*l*) The first sentence of the extract in the text is referred to (by its context) as taken from a "*lex Corradi*." It is evidently of earlier date than the Constitution of Lothaire, of the year

"Similiter nec vasallus feudum sine voluntate domini alienabit: in feudum tamen rectò 'dabit, si secunda persona sit talis quæ feudo servire possit, ut si dans miles est et ille qui "accepit feudum inveniatur miles, ad hoc ut feudum, si contigerit, domino similiter servire "ut et prior possit; et hoc ut dare liceat in infinitum.

"In quibusdam tamen curiis, ultrà tertiam personam feudi concessio non extenditur: ut "cum feudum pervenit in quartam personam, ei auferre dominus possit.

"Profecto ille, qui suum beneficium alii dat in feudum, non debet aliâ lege dare nisi quâ "ipse habeat: ut, si habent sibi suisque hæredibus, (quod intelligi debet de solis masculis,) "non debet alii dare, ut habeat ipse et sui hœredes masculi et fœminæ. Unde quibusdam "placet, quòd qui taliter dedit, eo ipso beneficium amittit. Gerardus et alii dicunt quòd "qui dedit, et cui datum est beneficium, perdit. Secundum alios vero tunc domino "aperitur, cum masculi defecerint."—Lib. 2, Tit. 34. (*m*)

In Lombardy, then, to this time, the usage of allowing the sale of a *fief*, under any circumstances whatever, upon mere payment of a fine to the Dominant, or without his express leave, was not established; and as a consequence, the granting *en arrière fief* was not called an alienation. In fact, the idea of antagonism between Dominant and vassal, in the matter of sub-infeudation, was hardly developed. Sub-infeudation, accordingly, it was generally held, might go on to any extent, and through any number of degrees, without regard to objection by the Dominant, upon two conditions only :—

1*stly.*—That the sub-vassal must be of a class to be as capable of feudal service as the vassal,—as, for instance, that the sub-vassal of the soldier must be a soldier.

2*ndly.*—That the sub-vassal must hold by a title analogous to that of the vassal,—as for instance, that if the *fief* descended only to heirs male, the *arrière fief* must not be granted with descent to females.

Both of them, conditions having obvious reference to the Dominant's military right, more than to any other.—As to the latter, it is observable that there were three conflicting doctrines held; one, in the Dominant's interest, making the sub-grant with descent to females (in the case supposed) a cause of immediate forfeiture by the grantor only, to the Dominant; a second, still more in his interest, making it a cause of forfeiture by grantor and grantee both; a third, in the vassal's interest, merely regarding the enlargement of the title as inoperative against the Dominant,—so that, in default of male heirs, he would come in for the reversion.

It is observable also, that the inconvenience of this lax rule as to sub-infeudation was evidently beginning to be felt; some Courts holding, that the right to sub-infeud ceased with the third holder, or sub-vassal of the first sub-vassal,—so as to give the Dominant the right of taking away land from any one to whom such third holder should have sought to make a further sub-grant.

The distinctions between this rule and that of the *Assises* are obvious. By the *Assises*, it was distinctly stated, instead of being left matter of implication, that the *arrière fief* was to be burthened with its share of military service. And

1136, presently to be noted; and must therefore presumably date back to the reign of Conrad the 2nd, from 1024 to 1039. But the remaining sentences, forming the gloss upon this first sentence, are as evidently of later date,—though presumably, earlier than Lothaire's Constitution of 1136.

(*m*) See Corp. Jur. Civ., Vol. 2, p. 1382.—Edn. of 1759.

although sub-infeudation might go on for any number of degrees, as under the original form of this Milan rule, there was an indirect limit set to it, by the non-allowance of sub-grant from any *fief* of less than a certain extent, and by the requirement that every grantee in succession should retain more than the half of his *fief*. The *fief en l'air*, and indeed even the inconveniently small *fief*, were thus impossible in Palestine, unless by the consent or connivance of the Dominant. But there was nothing in the Lombard rule, to prevent either.

§ 74.—Nor was it long before this evil was felt to require remedy. In 1136, the Emperor Lothaire, at the instance of the chief feudatories and nobles of the Empire, promulgated as a Constitution—also to be found in the LIBER FEUDORUM —the following:—

> —"Permultas enim interpellationes ad nos factas comperimus, milites sua beneficia passim "distrahere, ac ita omnibus exhaustis, suorum seniorum servitia subterfugere; per quod vires "imperii maximè attenuatas cognovimus, dum proceres nostri milites suos omnibus benefi-"ciis suis exutos ad fœliciss. nostri numinis expeditionem nullo modo transducere valeant. "Hortatu itaque et consilio archiepiscoporum, episcoporum, ducum, comitum, marchionum, "palatinorum, cœterorumque nobilium, similiter etiam judicum, hâc edictali lege in omne "œvum, Deo propitio, valiturâ, decernimus:—
>
> "Nemini licere beneficia quæ à suis senioribus habent, sine ipsorum permissione distrahere, "vel aliquod commercium adversus tenorem nostræ constitutionis excogitare, per quod "imperii vel dominorum minuatur utilitas. Siquis vero contra hœc nostræ legis saluberri-"mæ præcepta ad hujusmodi illicitum commercium accesserit, vel aliquid in fraudem hujus "legis machinari tentaverit, pretio ac beneficio se cariturum agnoscat. Notarium vero, qui "super hoc tali contractu libellum vel aliud instrumentum conscripserit, post amissionem "officii, ipsum infamiæ periculum sustinere sancimus."—Lib. 2, Tit. 52.(*n*)

The word "*distrahere*" must have been used here, as of wider sense than the "*alienare*" of the older rule,—as covering sub-infeudation equally with sale. (*o*) The prohibition (by general consent) went to all distraction from *mouvance*, whether with price paid or without, unless by consent of the immediate Dominant, interested against it. And it is remarkable, that though a reason of state is recited, and the law (in so far) bears the color of a public law, its effect was still left to depend wholly on private will, and the remedy provided by it was of private application and in private interest. Each Dominant could permit sub-infeudation, or distraction from his own *mouvance*, with price paid or without, to any extent, and could always waive (whether by inaction or otherwise) his right to the penalty threatened in his favor.

§ 75.—In fact, it is certain that they must commonly have done so, or else must have found themselves in the position of not being able to enforce their asserted right. For in the earlier half of the next century (the 13th) we meet with the following further Constitution of Frederic the Second (*p*),—also in the LIBER FEUDORUM:—

(*n*) See CORP. JUR. CIV., Vol. 2. p. 1387.—Edn. of 1759.

(*o*) If the mere reading of this one Constitution could leave a doubt as to this, the terms of the Constitution of Frederic the 2nd, next cited in the text [*vid. infrà*, § 75], would remove it.

(*p*) Who reigned from 1212 to 1249.

—"à principibus Italicis, tam rectoribus ecclesiarum quam aliis fidelibus regni, non modi-
"cas accepimus querelas, quòd beneficia eorum et feuda, quæ vasalli ab eis retinebant, siue
"dominorum licentiâ pignori obligaverant, et quâdam collusione nomine libelli vendiderant,
"unde debita servitia amittebant; et honor imperii, et nostræ felicis expeditionis comple-
"mentum minuebatur: Habito ergo consilio episcoporum, ducum, marchionum et comitum,
"simul etiam et palatinorum judicum, et aliorum procerum, hâc edictali, Deo propitio,
"perpetuo valiturâ lege, sancimus;—

"Ut nulli liceat feudum totum vel partem aliquam vendere vel pignorare, vel quocuuque
"modo distrahere seu alienare, vel pro animâ judicare, sine permissione illius domini, ad
"quem feudum spectare dignoscitur.

"Unde Imperator Lotharius tantùm in futurum præcavens ne fieret, legem promulgavit.(q)
"Nos autem ad pleniorem regni utilitatem providentes, non solùm in posterum, sed etiam
"hujusmodi alienationes illicitas hactenus perpetratas, hâc præsenti sanctione cassamus, et
"in irritum deducimus, nullius temporis præscriptione impediente: quia quod ab initio de
"jure non valuit, tractu temporis convalescere non debet: emptori bonæ fidei ex empto
"actione de pretio contra venditorem competente.

"Callidis insuper machinationibus quorundam obviantes, qui pretio accepto, quasi sub
"colore investituræ, quam sibi licere dicunt, feudum vendunt, et in alios transferunt,—ne
"tale figmentum vel aliud ulterius in fraudem hujus nostræ constitutionis excogitetur, modis
"omnibus prohibemus:—

"Pœnâ auctoritate nostrâ imminente, ut venditor et emptor, qui tam illicitas alienationes
"reperti fuerint contraxisse, feudum amittant; et ad dominum liberè revertatur. Scriba
"vero, qui hoc instrumentum sciens conscripserit, post amissionem officii, cum infamiæ
"periculo manum amittat."—Lib. 2, Tit. 55.(r)

Several considerations here present themselves.

"*Alienare*" is in this document used as a synonym of "*distrahere;*" and not, as in the 11th Century, in contra-distinction to the phrase "*in feudum dare.*" At that time, as we have seen, sub-infeudation was thought a something short of alienation. And, such as it was, conveying an estate that still savored of the usufruct, it was naturally quasi-gratuitous. Men would not commonly pay for it, unless by promise of future service. The phrase "*in feudum dare,*" was the correct one. But as the *fief* became in public estimation more and more of a property, and the fancy for sub-infeudation grew upon the public mind, sales naturally tended to take that form, and payment in other value as well as by future service, to become common. Add to these influences, that of the old rule which coupled the right to sub-infeud at will, with the want of right to sell unless by special leave of the Dominant,—and it is easy to understand the fact, that there had grown up what may be called a double abuse. The bulk of the *fief*, if not withdrawn, was in rapid process of withdrawal from the direct *mouvance* of the Dominant, without his leave, or in other words without suitable compensation to him,—not merely by sub-infeudation of the quasi-gratuitous kind, where the grant had no other consideration than that of service to be rendered, —but also by sub-infeudation savoring of sale, distraction of *mouvance* effected for a price paid to the vassal. It was natural, that in the 12th Century, the Dominants, with the Emperor at their head, should denounce this, and declare

(q) The Constitution of 1136, above cited, § 74.

(r) See Corp. Jur. Civ., Vol. 2, p. 1390.—Edn. of 1759.

that they would thereafter hold every distraction of *mouvance*, attempted without leave of the Dominant, to be a matter involving forfeiture in favor of such Dominant, and punishment of the Notary; and that in the 13th Century,—this having failed,—they should repeat their threat with increased emphasis, and as applying alike to the past and to the future.

Nor was it strange, considering the spirit of the times, and of the feudal system as their result, that while again reciting a public interest, this Constitution (like that which preceded it) should have stopped short at a merely private remedy; each Dominant in turn having power to allow any amount of sub-infeudation at pleasure; and indeed, all sub-infeudation that the immediate Dominant might not have at once the will and the power to set aside, remaining practically operative.

It is rather strange, however, that in the anxiety of the parties to give energy to their threat, such as it was, they should have used language calculated to admit of a doubt as to their meaning with regard to sub-infeudation veritably effected for mere promise of service and with no price paid. After declaring that no sale, pledging, or distraction or alienation of any sort, even *pro animâ*, should be good unless by permission of the immediate Dominant,—a prohibition clearly large enough to cover all sub-infeudation whatever,—there follows a special prohibition of colorable sub-infeudation *pretio accepto*, as if the threatened forfeiture were meant to attach to it only, and not to *bona-fide* sub-infeudation where no price should have been taken. Henrion de Pansey (s) gives to this Constitution the wider application, and no doubt, rightly. But it is not to be supposed that the *équivoque* failed to add to the uncertainty of its execution. In fact, it obviously could not have had any general or large effect. Practically, sub-infeudation (sometimes assented to, sometimes not efficiently dissented from, by the Dominant) must have gone on, much as before.

§ 76.—In England, again, events took quite another course.

The clause of Magna Charta, first promulgated in 1215, in reference to this matter, reads thus:—

§ "Nullus liber homo det de cætero amplius alicui, vel vendat, de terrâ suâ, quam ut de "residuo terræ suæ sufficienter possit fieri domino feodi servitium ei debitum, quod pertinet "ad feodum illud."(t)

A rule analogous to those of the *Assises de Jérusalem* and *Liber Feudorum*, in these respects,—that it also went only to the protection of the immediate Seignior Dominant,—that it referred more especially to his military right,—and that its enforcement in each case depended on his will and power to assert his right. But so much more vague, as really to amount to a mere assertion of the principle that he was entitled to have his grant so held and dealt with by his vassal, as that his security for the services which were his due should not be destroyed. In fact, for any practical purpose, no real rule at all.

(s) *Diss. Féod.*, Vol. 2, p. 366.

(t) *Statutes at Large*, Vol. 1, p. 8.

Incidentally, it shows that sub-infeudation savoring of sale had by this time become common in England, as elsewhere. "*Det*" "*vel vendat*" were the alternative expressions used for the two styles of sub-infeuding contract. In England and Italy, like causes had been at work, and in this respect with like effect.

§ 77.—But in England the matter was soon dealt with by veritable legislation. The Statute of Quia Emptores, in 1290, enacted thus:—

"Quia emptores terrarum et tenementorum de feodis magnatum et aliorum, in prejudi-"cium eorundem, temporibus retroactis multoties in feodis suis sint ingressi,—quibus liberè "tenentes eorundem magnatum et aliorum terras et tenementa sua vendiderunt, tenenda in "feodo sibi et hœredibus suis, de feoffatoribus suis, et non de capitalibus dominis feodorum; "per quod iidem capitales domini escaetas, maritagia et custodias terrarum et tenementorum "de feodis suis existentium sœpiùs amiserunt; quod eisdem magnatibus et aliis dominis "quam plurimis durum et difficile videbatur, et similiter in hoc casu exheredatio manifesta; "Dominus Rex in parliamento suo * * ad instantiam magnatum regni sui concessit, providit "et statuit:—

"Quòd de cœtero liceat unicuique libero homini terram suam seu tenementum, seu partem "inde, pro voluntate suâ vendere,—ita tamen, quod feoffatus teneat terram illam seu tene-"mentum de capitali domino per eadem servitia et consuetudines per quæ feoffator suus illa "prius tenuit.

"Et si partem aliquam earundem terrarum et tenementorum alicui vendiderit, feoffatus "illam teneat immediatè de capitali domino, et oneretur statim de servitio quantum pertinet "sive pertinere debet eidem capitali domino pro particulâ illâ, secundum quantitatem terræ "seu tenementi venditi:" * *.—*18th Edw. I, Stat. 1, Cap. 1 & 2.*(u)

Making, therefore, this radical innovation; that instead of the vassal's being liable to restraint on the part of his Dominant in this matter, and more or less dependant on his assent in order to the sub-granting of more than some uncertain fraction of his *fief*,—he was now made free to alienate as he would, but practically unable in so doing to sub-infeud at all; the right of the Dominant being protected by the simple expedient of making the new holder hold of him and not of the vassal, and for his fair share of the vassal's service and dues.—Such protection was, of course. not perfect; because it left him exposed to the inconvenience of having his grant cut up into smaller holdings,—unable to insist upon it that it should remain in name one *fief*. But it saved his substantial rights in a simpler and more effectual way than any regulation of the sub-infeuding practice could possibly have done.—The freedom of the vassal, also, was not perfect; as all further sub-infeudation was made impossible. But he, too, had the substantials of the right, as he could alienate at will, on what terms he pleased, under reserve only, that he could not make himself a Seignior Dominant over the land alienated.

It is, by the way, a further indication of what has already been shown to have long been the tendency of the system,—that the word "*vendere*" alone is here used, as the equivalent of the "*distrahere*" or "*alienare*" of the somewhat earlier Italian texts. The quasi-gratuitous form of sub-infeudation must have become the exception, and the form of quasi-sale the rule,—at least in England.

(u) *Statutes at Large*, Vol. 1., p. 123.

Nor is it altogether uninteresting, in the same historical point of view, to note the contrast between the curt requirement of Magna Charta, seemingly for the mere protection of the Dominants' military right, and the emphatic recital of the Statute of *Quia Emptores*, as to "escheats, marriages and wardships," and the "manifest disheritance" which their loss involved.—In England, at least, the military value of the *fief* had become the secondary consideration.

§ 78.—In Scotland, the same remedy was thought of; and a Statute, as nearly as possible in the same words, promulgated, not many years later,—that of the 2nd Robert I, cap. 25. Though it does not seem to have been carried into practical effect, as that of *Quia Emptores* was in England.(*v*)

§ 79.—It has been suggested, that the idea of the English Statute of *Quia Emptores* was probably taken from an *Ordonnance* of Philip Augustus, commonly cited as of the date of 1210, but apparently promulgated in 1209.(*w*) Such may have been the case; but the lapse of more than 80 years between them (independently of the fact, presently to be noticed, of the non-enforcement of the *Ordonnance*) renders it hardly probable.—The like grievance might well have suggested, in the two cases, a like remedy.

The text of the material clauses of this *Ordonnance* of Philip Augustus, is thus given in Isambert's *Recueil*:—

"Philippus, Dei gratiâ, Francorum rex,—

"O. dux Burgundiæ, Her. comes Nivernensis, R. comes Boloniæ, G. comes Sancti-Pauli, "G. de Domnâ Petrâ, et plures alii magnates de regno Franciæ, unanimiter convenerunt, et "assensu publico firmaverunt, ut à primo die maii in posterum ita sit de feodalibus tene-"mentis.

"Quicquid tenetur de domino ligiè, vel alio modo, si contigerit per successionem heredum "vel quocunque alio modo divisionem inde fieri, quocunque modo fiat, omnis qui de illo "feodo tenebit, de domino feodi principaliter et nullo medio tenebit, sicut unus antea tenebat "priusquam divisio facta esset.

"Et quandocunque contigerit pro illo totali feodo servitium domino fieri, quilibet eorum, "secundùm quod de feodo illo tenebit, servitium tenebitur exhibere, et illo domino deservire "et reddere rachatum et omnem justitiam." * * —Vol. 1, pp. 203, 4.

Referring inaccurately, to a reference by Hervé (itself, again, inaccurately made through the medium of Brussel) to this *Ordonnance*, Cruise treats it as if it had put an end to sub-infeudation in France;(*x*) as, no doubt the Statute of "*Quia Emptores*" did in England. But it is certain that it had no such effect.

(*v*) See Houard, Traités sur les Coutumes Anglo-Normandes, Vol. 2, pp. 642, 3; where this Statute is given *au long*; also Henrion de Pansey, *Diss. Féod.*, Vol. 2, p. 366.

It is not alluded to by Erskine or Bell, when treating of this subject; and the law of Scotland is by them stated in a manner inconsistent with the idea of its having been effectively acted upon.—See Erskine, Inst., Bk. 2, Tit. 3, No. 13; p. 233 of Edn. of 1838;—also Bell, Princ. of Law of Scotland, Nos. 675—9; pp. 260, 1, of Edn. of 1839.

(*w*) See Cruise's *Digest*, ch. 2, sec. 12, *note*; Vol. 1, p. 22 (old paging) 28 (new) of Greenleaf's Edn. of 1849.

(*x*) See Cruise's *Digest*, ch. 1, s. 53; Vol. 1, p. 13 (old) 16, 7 (new) of Greenleaf's Edn. of 1849.

Brussel, besides citing this *Ordonnance au long*, on pages 873 & 4 of the 2nd Volume of his *Usage des Fiefs*, refers to it twice on pages 15 and 64 of his 1st Volume; on page 64

In fact, it purported to be nothing more than an agreement between the King and some five or more of his great feudatories, that they would respectively enforce this rule,—each, of course, in his own domains. It is not probable that any one of the contracting parties found himself really strong enough to do so. They may some of them have made the effort; and in particular instances, or as regarded particular territories, may have more or less succeeded. Some of the Customs of France indicate the influence of some such effort on the part of the greater lords. But most of them rest upon principles altogether different,—not pretending to make sub-infeudation impossible, but merely to regulate it, and that in all manner of ways. Had this *Ordonnance* been a general law, and as such enforced, it would no doubt have done for France what the Statute of *Quia Emptores* did for England. Having no such character, and not having been enforced,(*y*) it left matters to take their course in France in a manner altogether different.

§ 80.—Beaumanoir, writing of the *Coutumes du Beauvoisis*, about the year 1270, shows the course which matters took in this respect, in part of France, down to that date. His words are:—

"Selonc le Coustume de Biavoisis, je puis bien fere du tiers de mon fief, arrière fief, et "retenir ent l'ommage, si comme se je marie aucun de mes enfans. Mais se j'en oste plus du "tiers, l'hommage du tiers et du sorplus vient au segueur.

"Et en tel manière le poroie je fere que je porroie plus perdre; si comme se je retenoie "les hommages de plus du tiers, que je querroie en l'amende de mon seigneur de soixante "livres por le meffet.

"Et se convenroit que je garantesisse à mes enfans ce que je lor aroie doné, ou le vaillant, "se li sires voloit tenir autant sans home, come mi enfant l'aroient tenu sans estre en son "hommage: le quele coze il porroit fere s'il le plesait."—Chap. 14, No. 25. (*z*)

"Je ne vois pas que nus fiés puist estre mis en arrière fief du segneur, sans l'assentement "du segueur, fors par reson de partie qui vient en descendant," * *.—Chap. 47, No. 7. (*a*)

The conditions, then, under which by this usage, the vassal had the right to sub-infeud, in spite of his Dominant, were two in number:—

1stly.—That the sub-grant must have in view the transmission or division of the *fief*, in the direct line.(*b*)

2ndly.—That it must not extend to more than the third part of the *fief*.

So far, we may be said to have a modification of the older rules of the *Assises de Jérusalem*, *Liber Feudorum* and *Magna Charta*. The limitation of the extent

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paraphrasing it loosely. Hervé, on page 101 of his 1st Volume, refers loosely to Brussel, repeating the inaccurate paraphrase. And Cruise as loosely bases his remark on Hervé; who, however, though inaccurate, did not push the error to Cruise's length.

(*y*) See the notes on this *Ordonnance*, in Isambert, Vol. 1, pp. 203, 4.

(*z*) Vol. 1, pp. 238, 9; Edn. of 1842.

(*a*) Vol. 2, p. 249.

(*b*) Henrion de Pansey (*Diss. Féod.*, Vol. 2, p. 367) cites only the first of the paragraphs above cited in the text; and omits from it the words "*si comme se je marie aucun de mes enfans.*" Of course, therefore, he overlooks this condition. But the entire context of the 47th chapter of *Beaumanoir*, shows clearly that it was only by division *en parage*, or by marriage or other gift in the direct line, that this sub-infeudation *malgré le dominant* was allowed.

of the *fief* from which one may sub-grant,—that, as to service to be stipulated or fitness of the grantee for service,—and that, as to the sufficiency of the retained remainder for the service of the *fief*,—are abandoned. That, as to the extent sub-grantable, is fixed at "not more than the third." And the new element is introduced of limiting the sub-grant to the immediate family of the vassal.

Besides this, however, there is perhaps traceable in this usage a something of the influence of the policy involved in the *Ordonnance* of Philip Augustus. The case of any attempted sub-infeudation beyond the limit of the one third, is met by the expedient of saving the immediate *mouvance* to the Dominant, notwithstanding the contrary agreement of the vassal and sub-vassal. The Dominant might assume such *mouvance* to himself, and so reduce the attempted sub-infeudation into a mere alienation of property, with no other change as to *mouvance* than was implied in the breaking up of the *fief* into two or more parts. But he was not obliged—as the principle of the *Ordonnance* of Philip Augustus, and of the Statutes of "*Quia Emptores*," would have obliged him—to content himself with this. In the first place, he might exact from his delinquent vassal a fine of 60 *livres*. And in the next, it would seem that, in case of his not choosing to take the homage of the delinquent sub-vassal, he might annoy the parties by the *saisie féodale*, and thereby (presumably) force them to rescind their contract, or so modify it as to keep the *mouvance* of the one *fief* unbroken.—In these respects, the old notion of an escheat, or forfeiture of land or price or both, to the Dominant, as for a grave breach of feudal duty,—which was embodied in the *Assises de Jérusalem* and in the Constitutions of Lothaire and Frederic, and indeed followed naturally from the principles of the feudal system in its older state,—may still be traced, though materially modified to suit the altered relations of the parties.

Another peculiarity of the explanation left us as to this usage, as contrasted with the earlier usages above noticed, lay in this. Beaumanoir adds:—

"Se li sires soufroit à son home qu'il feist grengnor [plus grande] partie à ses mains-nés "que ce qu'il devroient avoir eu çascun fief, sans perdre l'ommage,—ou s'il souffroit les fiés "à abregier, ou à amortir, ou aucune autre coze par quoi li fiés seroient empiriés,—li tiers "sires ne l'est pas por ce tenus à souffrir, ançois y pot geter le main, par la forfeture de son "souget qui le soufri. Et combien qu'il y eust de segneurs, l'un desor de l'autre, dusques "au conte [comte] si le soufroient tuit [tous],—ne l'est pas tenus li quens [comte] à soufrir "se il ne li plest, anchois y pot geter le main, se li souget n'en ont fet lor devoir."—Cap. 47, No. 15.(c)

—In other words, the right to put a check upon excessive sub-infeudation was not left altogether to the immediate Dominant. Supposing him to waive his right, the Dominant next above him in the scale would not be bound by his waiver, but whenever any default on his part should give such higher Dominant the right of *saisie féodale*, might seize such excessive sub-grant as if it were still in his vassal's hands,—and so on, up to the Count, or highest lord known to the Custom—at least in this connexion.

The older usages of Palestine and Italy, which threatened absolute escheat,—as recorded,—are silent as to any right of the Dominants higher than the one

(c) Vol. 2, p. 253.

immediately interested in the forfeiture. But they probably in fact admitted a right closely analogous to this; a right, that is to say,—whenever the *fief* of the immediate Dominant should be escheated to, or become seizable by, the lord next above him,—on the part of such higher lord, to enforce in his own behalf any escheat which he the immediate Dominant might have failed to enforce.

But there was nothing in such probable feature of the older usage, nor yet in the corresponding feature which is recorded as appertaining to the later usage of the Beauvoisis, which partook at all of the character of a public and general law. The parties interested were all in turn masters of their own course, as to their respective rights. There was no fixing of such rights, irrespectively of their own will, such as was absolutely undertaken by the Statutes of "*Quia Emptores*," such as would have been effected by the *Ordonnance* of Philip Augustus, had it been put into execution as a law of France.

§ 81.—Another rule, of earlier date as regards redaction, probably, than this of the Beauvoisis, indeed apparently antecedent to the Anglo-Norman rule laid down by *Magna Charta*,—is presented in a recent French work (*d*), as extant in Normandy. It reads thus:—

"Chascun peut doner jusqu'à la tierce part de som franc tenement en asmone, et por service, "si que li sires del fieu ni oit damage; quar il fera torjorz sa justice en son fieu,—ne il n'est "pas tenuz à oir [oyer] celui à qui la terre est donnée, se il ne donne pleges d'avoir son "garant à jor, por fere vers lui ce que il devra,—e cil qui li donna est tenuz à venir et à "delivrer le, ou il est contrainz par la justice le roi.

"Se cil qui donna la terre muert sanz oir [heir], ou il forfet terre, toz li fiez revandra au "segneur, jà ne remaindra por le don, s'il ne s'i assenti; ce pueit estre fet malgré as oirs."—p. 78.

Following this passage, are provisions as to the sale and as to the *fief̣ment* (this latter term answering nearly to the *arrentement* or *bail à rente* of the Custom of Paris) of land. Either of these contracts, it is stated, might be carried out to any extent,—subject always to the same saving of the Dominant's rights as is here provided for the case of the two contracts of "*don en asmone et por service*."

In other words, a third part of the *fief* could be granted either *en aumône* or *en arrière fief*, or the *fief* might be sold or *arrenté* without limit; but not to the prejudice of the Dominant, unless indeed he should have given his assent. The Dominant need not recognize any one claiming from his vassal, might still hold his vassal to the full service of the *fief*, and, upon failure of the vassal's heirs, or forfeiture by him or them, might take the whole *fief* to himself, to the exclusion of all claimants under title from the vassal; in fact, was free wholly to ignore such claim.

These *Etablissements* are given as a compilation of old Norman usages, apparently made under Philip Augustus, about the time of the loss of Normandy by King John; (*e*) and they certainly show a state of matters, such as (modified, perhaps, more or less by local Anglo-Norman usage) may very well be supposed to have led to the rule laid down by *Magna Charta*. They show the vassal free to sell

(*d*) Marnier; *Etablissements, &c., de Normandie*, Paris, 1839.

(*e*) See Marnier, p. xviii.

or irredeemably to rent his land, without limit, and to sub-infeud it to the extent of the one third part, without regard to objection on the part of his Dominant; and the Dominant, with no other means of giving force to his objection, than that of holding the contract for *non-avenu* as against himself. In such a state of things one can understand that even the declaration of the lax rule of *Magna Charta* may have been a serious object with the great lords who then insisted on it.

However this may have been, there is at least evidence of the early prevalence of a Norman usage, like that of the Beauvoisis in its character of mere private law, and in its rule of quantitative limitation of the feudal sub-grant, but not otherwise; a usage, which laid down as its conditions the two maxims:—

1*stly*.—That the sub grant must not extend to more than the third part of the *fief*:

2*ndly*.—That unless assented to by the Dominant, it should not be operative as against him:—

—and as to which, we are without the means of saying to what extent or by what procedure it held the Dominant to be authorized to proceed against his vassal, in case of his transgressing its limit.

§ 82.—But, as if to show that in those days the irregular litigation (so to speak) of Dominant and vassal could hardly by any chance arrive at a result that one may cite as the fixed rule, even of a particular locality, we find in the Grand Coustumier du pays et duché de Normendie, a compilation of probably not much later date, (*f*) the following:—

"Aulcun ne peut vendre ne engager, se n'est du consentement au seigneur, la terre que "tient de luy par hommage. Non pourtant aulcuns ont accoustumé à vendre ou engager le "tiers ou moins, pourtant qu'il remaine du fief tant que les droictures et les faisances des "seigneurs et dignitez puissent estre faictes et payées aux seigneurs."—Chap. 29, *in fin.* (*g*)

—A mode of stating the case, considerably more in the Dominants' interest; and not indicative of a general acquiescence on their part, in what may be called the vassal-doctrine of the *Etablissemens*.

(*f*) It has been ascribed to a date very much earlier,—that of St. Edward, King of England, or of Raoul, Duke of Normandy, or of William the Conqueror.—See Coutumier Général, Vol. 4, p. 1, note *a*.

Basnage, however, assigns it to the reign of Philip the 3rd, which ended in 1285; Klimrath, to that of St. Louis, from 1226 to 1270; and Maruier, to some date in one or other of these reigns.—See Basnage, Vol. 1, p. 7; Klimrath, Vol. 2, p. 33; Marnier, *Etablissements, &c. de Normandie*, p. xvii.

Whenever compiled, one is tempted to suggest, that at least the first sentence of the extract given in the text, reads as if taken from some authority of quite early date,—earlier, even, than the *Etablissemens* brought to light by Marnier. The broad doctrine that the vassal could neither sell nor hypothecate without his lord's consent, is of an age anterior to that of the qualified doctrine that if he does the lord shall simply not be affected by his act.—On the other hand, however, the second sentence reads rather as of a date later than that of Magna Charta.

(*g*) Coutumier Général, Vol. 4, p. 15.

§ 83.—The old Coustumes de Champaigne et de Brie, near in point of time to those of the Beauvoisis as recorded by Beaumanoir,—being of date somewhere from 1224 to 1299, (*h*)—also resemble them in the one respect of their non-public character, but hardly in any other. Their tenor is as follows:—

"Coustume est en Champaigne, que li chastellains et li barons de Champaigne donnent bien "en fié et en hommage, de lor héritage, aus gentishons, et les en puent reprenre à hommes, "en recompensation de leur services. Et ainsis en ont ilz usé de tousjours. Mais se il lor "vendoient, ou en prenoient argent, il ne le pourroint faire.

"Item, li vavassour ne puent faire de fié, refié [arrière fief], se il n'est enfin que il marient "de lor enfens, et qui lor donnent de lor heritages: de ce les puent il bien reprenre à "hommes, puisqu'il tiegnent encor du demainne [domaine] qui tient du seigneur."—Art. 14.(*i*)

There were here in fact two rules; one for the titled vassal,—another, for the untitled.

The latter could only claim to sub-infeud, on two conditions:—

1*stly.*—That the grant should be in favor, and for the marriage, of his child.

2*ndly.*—That it should extent only to part of his *fief.*

The former (*châtelain* or *baron*) had the larger right to sub-infeud, on the three conditions:—

1*stly.*—That the grant should be to a "*gentilhomme.*"

2*ndly.*—That it should be of the quasi-gratuitous kind,—for service only, and not for other price.

3*rdly.*—That it should extend only to part of the *fief.*

The limit of extent, common to both these rules, had the strange peculiarity of fixing no proportion,—not even the vague measure of *Magna Charta*, reservation of a sufficiency by the vassal for the securing of his own service to be rendered to the Dominant.

The requirement that the sub-grant of the titled vassal must be to a *gentilhomme*, was perhaps a matter of course consequence of what, to that time, was still the general rule as to competency for the holding of a grant *en fief.*

But that which assumed to disallow sub-infeudation by sale, as distinguished from that for service only, was precisely the reverse. The German Constitutions which forbade it, unless with consent of the Dominant, equally forbade the quasi-gratuitous, unless with the like consent. In fact, Henrion de Pansey (*k*) recognizes this as the first instance of its class.

It is of course obvious, that all these restrictions, equally with every other yet remarked upon, (the statute of *Quia Emptores* excepted,) were merely potestative in favor of the Dominant; though it is not so clear what was the measure of his remedy,—whether he had to be content with the mere taking to himself of the

(*h*) See Coutumier Général, Vol. 3, p. 209, note *a*; and Klimrath, Vol. 2, p. 15.

(*i*) Coutumier Général, Vol. 3, p. 212. Also Henrion de Pansey, *Diss. Féod.*, Vol. 2, p. 368.

(*k*) "C'est pour la première fois que nous voyons une défense de sous-inféoder à prix d'ar- "gent; et malheureusement cette défense, si nuisible à l'agriculture, et si préjudiciable au "commerce, se trouve aujourd'hui dans dix-huit ou vingt coutumes."—*Diss. Féod.*, Vol. 2, p. 368.

mouvance of the alienated land, or could go further and exact a mutation fine, or further still, by *saisie féodale*, to force the parties to rescind or change their contract. Probably, as in the Beauvoisis, he had this last right, if he chose to resort to it.

§ 84.—Not long after the time of the compilation of this *Coutumier*, this state of things seems to have been brought into question. An *Ordonnance* of Louis the Tenth, of the year 1315, addressed "aux nobles, et aux autres personnes de "nostre comté de Champagne," in answer to complaints on their part, contains the following:—

"Sur ce qu'ils disoient qu'ils ont usé, et accoustumé de donner à leurs serviteurs nobles ou "autres, en recompensation de lor servises, tant de lor terre comme il leur plaisoit, et retenir "devers aux le fié et l'homage, sur quoy ils avoient esté et estoient empechié, si comme il "disoient:—

"Nous voullons et leur avons octroyé, que il ce puissent faire, si comme dessus est dit, aux "personnes nobles tant seulement, mais que le fié ne soit trop amenuisié."—Art. 1.(*l*)

The claim, therefore, of the *châtelain* or *baron* to sub-infeud, had come to be resisted; and it would seem that the untitled holders of *fiefs* had come also to advance the claim.(*m*) The King, upon appeal, assumed to recognize the claim, as of a right *ex antiquo;* on the one hand, apparently, putting them all on the same footing;(*m*) but on the other, guarding as to two points,—that is to say, repeating that sub-grants must be to nobles, and adding that the part of the *fief* retained must be enough to secure the service due to the Dominant,—and overlooking a third, the prohibition of the sub-grant, *mêlé de vente*, by the titled vassal.

§ 85.—Henrion de Pansey cites, as analogous to this provision of the old *Coustumes de Champaigne*, the following, from the ANCIENNES CONSTITUTIONS DU CHATELET,—a compilation supposed to be of date of about the end of the 13th Century (*n*):—

"Il puet bien être que un comte et un baron puet tenir son fié du roi, nu à nu, ligement "et icelui bailler d'icelui fié à autre, s'il veut."—Art. 12. (*o*)

A citation which sufficiently imports the fact, that it was then held, under the Custom of Paris, that the *comte* or *baron* holding directly of the Crown, might sub-grant *en fief* at will, and without restraint or hindrance from the Crown,—

(*l*) See ISAMBERT, Vol. 3, p. 87; ORDONNANCES DES ROIS, Vol. 1, p. 574.

(*m*) The terms of the *Ordonnance* clearly enough import this. But however this may have been, the result shows the *Ordonnance* to have had little or no real effect. The *Coutume de Vitry* (the official redaction of the old *Coustume de Champaigne* here in question) in 1509, maintained the distinctions, almost in the words of the old *Coustumes*, between the titled and the untitled vassal, and applied the requirement as to retention of a sufficient part of the *fief*, only to the latter.—See Art. 24 and 25; COUTUMIER GENERAL, Vol. 3, pp. 310 and 311: and HENRION DE PANSEY, *Diss. Féod.*, Vol. 2, p. 417.

(*n*) See KLIMRATH, Vol. 2, p. 15.

(*o*) HENRION DE PANSEY, *Diss. Féod.*, Vol. 2, p. 368.

but (as Henrion de Pansey observes, remarking on the expression "*bailler d'icelui fié*") not to the extent of granting it away altogether, and reducing his own holding to a mere *fief en l'air.*

§ 86.—He cites also, in the same connexion, the following from the *Somme Rurale* of Bouteillier, of about the same date (*p*) :—

"Quand icelui qui tient le fié, en vend partie pour son profit, et pour l'accroissement du "dit fié arrenter [arrente ?] un bonnier ou deux, ou manoir ou aucune chose, faire le peut à "vie ou à toujours, sous son seel taut seulement, et sans son seigneur de qui il tient le fié "appeller; et en ce faisant, il n'ébranche pas le fié, mais il l'accroît."—Tit. 82.(*q*)

A mode of expression, indicative of an increasing laxity of opinion and practice on this subject; but which implies, by the use of the word "*arrenter*" a quasi-recognition of the non-noble equally with the noble tenure,—and also, by the terms "*partie*" and "*un bonnier ou deux, ou manoir ou aucune chose,*" the existence of some limit (however uncertain) to the vassal's right of alienation "*sans son seigneur appeller.*"

§ 87.—Reverting, for further illustration, to a somewhat earlier date, we find that the Très Ancienne Coustume de Bretaone, probably of date of about 1330,(*r*) shows, yet again, an entirely different state of things to have grown up in that Province, in every respect but that of the non-public character of the rule laid down. After recital to the effect that the Dominant may acquire the *fief* held by his vassal, and convert it into *domaine* of his own, and that the Seignior may do the same with land held of himself *roturièrement*, this Custom adds:—

—"Et puisque celuy est seigneur du demaine [domaine] il en peut féager en heritaige autre ou autres, par certaines conditions rentes, comme il voira que bon sera; mais que "celuy qui prendra le féage ne fasse autre bonté, ne autre personne pour luy, dont il peut "issir ventes au seigneur: il en peut retenir l'obéissance à soy, pource que celuy fief se "gouvernege selon l'assise au Comte Geffroy; * * et si le seigneur qui auroit fait le féage "en auroit prins aucune bonté pour faire le féage, dont ventes pussent issir à seigneur,—car "pour * * n'en issiroit nulles ventes à seigneur,—mais, s'il y avoit autre bonté faite, ventes "en devroient issir à seigneur, * *, si" etc.—Art. 262, *in med.*(*s*)

That is to say, the Seignior of any *fief* held under the *Assise au Comte Geffroy*,(*t*) (or, in other words, held nobly,—for in the law language of Bre-

(*p*) Taisand, *Vies des Jurisconsultes*, p. 84.

(*q*) Henrion de Pansey, *Diss. Féod.*, Vol. 2, p. 369.

(*r*) See Henrion de Pansey, *Diss. Féod.*, Vol. 2, p. 443: Grand Coutumier, Vol. 4, p. 199, note *a*: and Hevin, *sur Frain*, Vol. 2, ch. 98, No. 21, pp. 558, 9, where the reasons are given for preferring this date to the later one assigned by d'Argentré.

(*s*) See Coutumier Général, Vol. 4, p. 262; and Henrion de Pansey, *Diss. Féod.*, Vol. 2, p. 443, where, however, the citation is obviously inexact, and is besides not long enough to give the full sense of the passage.

See also Hevin, *sur Frain*, Vol. 2, ch. 86, No. 25, p. 382; where, however, the citation begins,—"Celuy qui est seigneur de domaine, il en peut féager et héritager à autre, et "autres, par certaines conditions et rentes," &c.

(*t*) The *Assise au Comte Geffroy* was a Charter granted in 1185 by Geoffry, Duke of Brittany, at the instance (as recited) of the Bishops and of all the Barons of the Province,

tagne the words *fief*, *fieager* and *féage* were used with reference as well to non-noble as to noble tenure,) having ungranted land (*u*) of his *fief*, may grant it on such conditions and for such rents as he pleases, retaining always feudal superiority over the land so granted; provided he take no such payment as to entitle the Dominant to a mutation fine. But if there should have been such payment made, beyond the limit allowed by usage, the Dominant may exact his mutation fine upon such excess.

The most marked peculiarity of this case lies in the fact, that the style of sub-granting contemplated is not necessarily sub-infeudation or granting *en fief*, using these terms in their proper or stricter sense. Indeed, it is not even clear, that the rule had in view any other than the *féage* or *fief* of the *roturier* class, or what would generally have been called the *censive*. A rent, (elsewhere the usual characteristic of this latter form of grant, as opposed to the *fief* proper,) is presumed as of course. And although it is not likely that it was intended to say, that the non-noble mode of feudal sub-grant was allowed to the exclusion of the noble, it is at least tolerably clear that the *rédacteur* meant to characterize it as usual and allowed.—The older texts as to this matter, so far as I have been able to trace them, neither refer to any other form of feudal sub-grant than the noble, nor yet to the idea of a rent as naturally connected with it.(*v*)

Noble or non-noble, however, there is no suggestion of limit to the allowed extent of the alienation. It does not seem that the vassal need keep any land in his own hands. Certainly, he was not limited as to the rents or other conditions that he might stipulate. In a word, there are but two restrictions :—

1*stly*.—That some limitative condition or conditions ("*obéissance*," as the term is, certainly,—and a "*rente*," no matter what, presumably) should go with the grant.

2*ndly*.—That there should not be more than a certain moderate amount of other—or, as it may be called, cash—payment for the grant.

And lastly, the rule was express, that the one penalty for the infraction of this latter requirement, was in the liability of the parties to the payment of a muta-

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establishing a rule of succession for the baronies and military *fiefs* (*in baroniis et feudis militum*) of Brittany.—See COUTUMIER GÉNÉRAL, Vol 4, pp. 289, 290, where it is given *au long*; and HEVIN, *sur Frain*, Vol. 2, ch. 98, No. 17, pp. 518 *et seq.*, where it is given with a commentary.

(*u*) It is possible to interpret the passage as referring only to such land as the Seignior may have re-acquired from a vassal, or from a grantee *en roture*. But it is not reasonable so to limit its meaning; and the terms of the Ordonnance of 1420, presently to be noticed, clearly show that the usage then existing recognized no such limitation.

(*v*) The only earlier reference to a *rente*, which I have been able to find, having any appearance of connexion with this matter, is in MARNIER's *Etablissements*, &c., *de Normandie*, p. 148.—But it really has not such connexion. The matter there treated of, is the *retrait lignager*, not the *jeu de fief*; and the "*rente*" must be referred, not to the cases of the "*don por service* [infeudation proper] *ou por deniers*" [sale or infeudation savoring of sale,] but to the case of the "*fievemenz*" [*fieffement*] which was a mere *bail à rente*, importing no feudal burthens, and in fact having no proper feudal character.—See HOUARD, *Dic. de Droit Normand*, Vol. 2, p. 320.

tion fine to the Dominant,—and that too, as it would seem, without loss by the vassal, of the future *mouvance* of the land. The other of the two requirements was so little likely to be transgressed, that probably no one in those days thought of providing against its transgression. But it is not easy to see how the penalty could have been heavier than that of liability to a mutation fine with loss of the future *mouvance* of the land alienated, if the Dominant so chose,—or to a *saisie féodale*, by which he might bring about a rescinding or modification of the contract, if he preferred that remedy. In any case, the matter was one of private controversy with the interested Dominant.

§ 88.—In 1420, we arrive at an unequivocal recognition, by authority and of certain date, of this right (in Brittany) to sub-grant indefinitely,—to be found in an *Ordonnance* of Duke Jean the Fifth, as follows:—

"Comme par coutumé générale toute personne noble puisse faire de son domaine noble "son fief, et de son fief son domaine,—et soit ainsi que plusieurs en aucuns endroits de "notre pays, de ainsi le faire fassent difficulté, de doubte d'en perdre l'obéissance,—

"Voulons et ordonnons que doresnavant chacun qui aura domaine noble, quiconque il soit, "le pourra bailler par héritage, et en faire son fief à le tenir de luy roturièrement, et en "retenir à soy l'obéissance."—Art. 19.(w)

It would seem that the *Très Ancienne Coustume* above quoted (and which was but an unauthorized compilation) was either not then sufficiently known, or—which is more likely—was not thought a decisive authority on the point; or, perhaps, that it was doubted whether every *fief noble* was a *fief selon l'assise au comte Geffroy*.(x) For whatever reason, the usage had come to be uncertain. There was an apprehension, that where the vassal granted *en fief roturier*, (or, to use the phrase of the Custom of Paris, *en censive*,) the Dominant might be entitled to claim the immediate *mouvance* as forfeited to himself. This *Ordonnance* removed that doubt; and made it clear (so far as the authority of the Duke could make it—and in his Courts that authority would of course go far) that every holder of a *fief* proper in Brittany had the right to sub-grant *en censive* the whole of his *fief*, or in other words, could convert it into a *fief en l'air* by *accensement*; the Dominant having no right, pecuniary or otherwise, in the case, unless there should be an excessive "*bonté*" paid.—The *Ordonnance* is silent as to sub-infeudation proper. *Accensement* may have been the contract then most affected by the Breton vassal. Or, his fear as to loss of *mouvance* may have been felt with reference to it only. Or, the Dominants may have been strong enough, by way of compromise, to confine him to it.(y)

§ 89.—Henrion de Pansey, after remarking on this *Ordonnance*, as decisive proof of the recognition of an unlimited *jeu de fief* in Brittany as early as 1420, proceeds:—

(w) See Henrion de Pansey, *Diss. Féod.*, Vol. 2, pp. 369 and 443; and Hevin, *sur Frain*, Vol. 2, ch. 86, No. 25, p. 382.

(x) This last is Hevin's explanation,—p. 382.

(y) Against this last supposition, however, is the fact, that both the official redactions of the Custom of Brittany (in 1539 and 1580, respectively) allow the *jeu de fief* by either of the two forms of contract.—See Henrion de Pansey, *Diss. Féod.*, Vol. 2, p. 447; and Poullain du Parc, *Principes du Dr. Fr.*, Vol. 2, p. 85.

"La Normandie adopta le même usage; et l'auteur du *Grand Coutumier* mit en maxime, "que le vassal peut se jouer de son fief, jusqu'à la démission de foi. 'Un noble ou non noble "'vend son fief.... le seigneur de qui il est tenu ne peut rien demander jusqu'au démettre "'de la foi.' *Liv.* 2, *ch.* 29. Voilà le jeu de fief indéfini.

"A la vérité cet auteur s'empresse d'ajouter, 'mais qu'il n'y ait point de fraude contre "'le seigneur.' Ces derniers mots limitent sans doute la faculté de sous-inféoder; mais une "restriction aussi vague ne donnant aucune borne sensible au jeu de fief, les vassaux, sur la "foi de cet auteur, devoient naturellement se persuader qu'il étoit indéfiniment permis." (*z*)

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§ 90.—By the beginning of the 16th Century, when the official redaction of the Customs was carried out, this idea of the unlimited *jeu de fief* had so gained ground,(*a*) that in 1509 the Custom of Orleans was thus worded:—

"Un vassal peut bailler à rente, cens, ferme ou pension, son domaine, à vie, temps ou à "tousjours, mais en retenant à luy les foy et hommage. Et n'y a en ce faisant le seigneur "de fief aucun profit. Toutefois quand le dit fief cherra en profit, le seigneur qui n'aura "consenti et inféodé le dit bail, pourra exploicter entièrement son dit fief."—Art. 4. (*b*)

"Quand le vassal baille à cens ou rente perpétuelle son héritage qu'il tient en fief, retenu "à luy les foy et hommage, celuy qui prend le dit héritage à cens ou rente ne doit aucuns "profits."—Art. 57. (*b*)

(*z*) Henrion de Pansey, *Diss. Féod.*, Vol. 2, pp. 369, 370.

I have endeavored to verify the citation here made from the *Grand Coutumier*, but without success.

The Grand Coustumier du pays et duché de Normendie, as printed in the *Coutumier Général*, is not divided into books; but in Chapter 29 contains a passage which I have elsewhere quoted, [*supra*, § 82,] the only one I can find in it at all bearing upon this subject, but which is not to this effect. To say nothing of the fact, that it must have been of a much earlier date than the passage here referred to.

Presumably, the quotation is made, either from some commentator on this work, who was writing of the 15th Century; or else from the very rare *Grand Coutumier de France*, commonly known as that of Charles the Sixth, which was of this later date.—See Klimrath, Vol. 2, p. 15; and Dupin, *Bibl. de Dr.*, No. 1174.

(*a*) Not, however, that there had come to be anything like an approach to uniformity or general agreement, as to any matter connected with the *jeu de fief*. On the contrary—to cite Henrion de Pansey:—

"Tel était donc l'état des choses à l'époque de la redaction des Coutumes. Rien d'uni- "forme; presqu'autant d'usages différens que de provinces, et même de grandes seigneurie "Ici le vassal pouvoit se jouer de la totalité du domaine; ailleurs il ne pouvoit en aliéner "par cette voie qu'une partie plus ou moins considérable. Dans telle seigneurie, le jeu de "fief par inféodation étoit défendu; dans telle autre, il étoit permis. Même variété, rela- "tivement à la faculté de recevoir des deniers d'entrée. Dans certains cantons, la portion "détachée du fief ne relevoit plus qu'en arrière-mouvance du seigneur dominant; dans "d'autres, il conservoit sur cette portion les mêmes droits que si elle fût demeurée dans les "mains de son vassal. Enfin, dans telle province, le vassal étoit obligé d'imposer un droit "seigneurial sur la partie aliénée; et dans la province voisine il jouissoit, à cet égard, de la "liberté la plus indéfinie."—*Diss. Féod.*, Vol. 2, pp. 372, 3.

(*b*) Coutumier Général, Vol. 3, pp. 736 and 739.

—And in 1510, the Custom of Paris, drawing in terms the distinction between the *démembrement du fief*, strictly so called, and the *jeu de fief*, followed in these terms,—larger still, as regarded the scope given by them to the latter:—

"Le vassal ne peut démembrer son fief, au préjudice et sans le consentement de son sei-
"gneur.—Art. 35.(c)

"Un vassal se peut jouer de son fief, jusques à démission de foy, sans que le seigneur luy
"en puisse demander profit."—Art. 41.(c)

—The former of these Customs laying it down, that the vassal might dispose of his property by certain specified forms of contact, keeping always to himself the *seigneurie honorifique*,—without thereby giving his Dominant any right to profit upon the transaction, but always without prejudice to the Dominant's right (whenever occasion should offer) to treat it in his own interest as *non avenu*. The latter in effect saying the same thing, but withal extending the vassal's right to make profit out of his *fief* (*se jouer de son fief*) to all other forms of contract. Neither of them imposing any limit as to the extent or value of what should be so disposed of, or requiring the actual retention by the vassal, of anything more than the *foy et hommage*, or mere *seigneurie honorifique* or lordship over the *fief*. In a word, both of them admitting of the unrestricted conversion of the landed *fief* into the *fief en l'air*.

§ 91.—Many other Customs were drawn in the like sense, in this respect; but by no means all in the same terms. Some nearly followed the Paris model; others, the Orleans. Others, again, were more restrictive as to the form or forms of contract to be favored,—to the length even, in some cases, of not allowing the exemption from dues to the Dominant, except upon the *bail à cens sans deniers d'entrée*.(d) Elsewhere, again, where the unlimited *jeu de fief* was allowed, quite another system was recognized for the protection of the Dominant's rights. As in Brittany, for example; where, carrying out the principle of the *Très Ancienne Coustume* above remarked upon, (*supra*, § 87,) the rule was declared to be, that the vassal might avail himself of the contract of *féagement*, noble or *roturier*, but might not give up or lower any *rente* ever established, or take more than so much of *deniers d'entrée*, under pain of liability in such case to the Dominant.(e)

§ 92.—In other cases, the extent of the privileged *jeu de fief* was limited; sometimes to one or other fixed proportion; sometimes, not. The Norman rule, for instance, was stated nearly in the terms of *Magna Charta* and the *Grand Coustumier*, thus:—

"Le vassal se peut esjouir des terres, rentes et autres appartenances de son fief, sans payer
"treizième à son seigneur féodal, jusques à démission de foy et hommage exclusivement,

(c) Coutumier Général, Vol. 3, p. 3.

(d) See Henrion de Pansey, *Diss. Féod.*, Vol. 2, pp. 370 and 377.

(e) See Art. 346 and 347 of the Old, and Art. 358 and 359 of the New Custom of Brittany, under dates of 1539 and 1580; in Coutumier Général, Vol. 4, pp. 310 and 383; also Henrion de Pansey, *Diss. Féod.*, Vol. 2, pp. 443 *et seq.*

" pourveu qu'il demeure assez pour satisfaire aux rentes et redevances deuës au seigneur." —Art. 204.(*f*)

§ 93.—The arguments of Dumoulin, against the system of the unlimited *jeu de fief*, led to an important change in the redaction of the Custom of Paris, when revised in 1580. As revised, it was then made to read—in the words appended to the Attorney General's Fifth Proposition :—

" Le vassal ne peut démembrer son fief au préjudice et sans le consentement de son sei-" gneur : bien se peut jouer et disposer et faire son profit des héritages, rentes ou cens étant " du dit fief, sans payer profits au seigneur dominant, pourvu que l'aliénation n'excède les " deux-tiers, et qu'il en retienne la foi entière, et quelque droit seigneurial et domanial sur " ce qu'il aliène."—*Art.* 51.

" Et néanmoins, s'il y a ouverture du dit fief, le seigneur peut exploiter tout le dit fief, " tant pour ce qui est retenu qu'aliéné, sinon que le seigneur féodal eût inféodé le droit " domanial retenu en faisant la dite aliénation, ou bien qu'il l'eût reçu par aveu."—*Art.* 52.

The addition of this 52nd Article ought, perhaps, hardly to be called a change. The principle involved in it, besides being obvious and of old date,(*g*) was clearly stated in the old Custom of Orleans in the year 1509, and may fairly be presumed to have been taken for granted in the redaction of the old Custom of Paris, the year following.

The amplification of the phrase "*se peut jouer de son fief*" into "*se peut jouer " et disposer et faire son profit des héritages, rentes ou cens étant du dit fief*," was also perhaps meant as a mere change of expression,—a fuller and more precise statement of what was originally intended.

But the omission of the words "*jusques à démission de foy*," and the addition in lieu of them, of the proviso of Art. 51,—"*pourvû que l'aliénation n'excède " les deux tiers, et qu'il en retienne la foi entière et quelque droit seigneurial et " domanial sur ce qu'il aliène*," formed a change of great importance; as the Custom of Paris was thereby brought into the class of Customs definitively restrictive as to the extent and character of the privileged *jeu de fief*.

§ 94.—The influence of this change was felt in some others of the later redactions of Customs in France, but not in all; as, for instance, it did not affect the second redaction of the Custom of Orleans, in 1583, which in this respect was worded substantially as in 1509.(*h*) In an indirect way it gradually made itself felt, as affecting the interpretation given to those Customs which, without being wholly unlike that of Paris, were silent on this point. But otherwise, it was of course inoperative, beyond the territory of the Custom of Paris.—On the whole, indeed, the redaction of the Customs probably did not do very much to lessen the varieties and anomalies of usage everywhere prevalent as to this matter.

(*f*) Coutumier Général, Vol. 4, p. 69.—A restriction, latterly at least, of very small practical value.—See Henrion de Pansey, *Diss. Féod.*, Vol. 2, pp. 439 *et seq.*

(*g*) *Vid. suprà*, § 81.

(*h*) See Coutumier Général, Vol. 3, p. 776; Art. 7—11, inclusive,—compared with Art. 4 and 57, cited above, § 90.

§ 95.—In a certain sense, this change of the Custom of Paris may be said to have partaken of the character of an act of legislation. It was an authoritative declaration by all the parties interested, that so far as the territory of that Custom was concerned, the rule to which the name of Custom had been given seventy years before, was admitted by them to have been wrongly so named; and that, failing proof of the terms of any special contract on the point, the true rule of local usage was, and thereafter should be held to be,—not that the vassal had the all but unrestricted license of the old Custom,—but that he had the more restricted license of the new. But, except in this sense, it had not the character even of a local enactment. Above all, it had nothing of the character of a public, state enactment. It fixed no right irrespectively of private contract; laid down no rule that was not to be derogated from; left all parties to do as they pleased for the regulating, enforcing or waiving, of what it admitted to be their purely private right.—A closer criticism of its provisions will show this, only the more clearly.

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§ 96.—And first, for the matter of the *jeu de fief.*

The privileged *jeu de fief* of the Custom of Paris, is simply a declared customary or presúmable right of the vassal to do certain acts for his own advantage, "*sans payer profit au seigneur dominant.*" He need not do any of such acts, unless he likes. The Dominant may always let him do other acts on the same terms, if he will. He may give such leave tacitly, o. by express contract; or he may have given it by express contract already.(*i*) Or, again, the vassal, by the special terms of his contract of infeudation, may have renounced, or by contract thereafter may renounce, to what would otherwise have been his right under the Custom in reference to these acts or any of them.(*i*)

§ 97.—Further, as to the nature of these acts, presumably privileged to this extent, of not giving rise to *profit* thereon to the Seignior Dominant.—There are to be found passages, in authors of repute, from which one might infer that they held the property alienated thereby to be necessarily *arroturé,*—or in fact, that they admitted but one such form of act, the contract of *accensement.* For instance, from the writings of Henrion de Pansey may be cited,—"le jeu "transforme en roture une partie du fief, (*k*)"—"la voie du jeu de fief ou bail à "cens,(*l*)"—and other expressions of the same kind. But it is certain that the fact was not so; that other forms of contract were just as much privileged; and that such authors could not have so written, but for the accident of their happening at the moment to have had in mind the common contract of *accensement,* and not to have had occasion to add the remark, that other kinds of contract (then less common) fell equally within the purview of the *jeu de fief* rule of which they wrote.

(*i*) *Vide suprà,* §§ 63 and 64, and authorities there cited; also *infrà,* § 110.

(*k*) *Sur Dumoulin,* p. 477.

(*l*) *Diss. Féod.,* Vol. 1, p. 268.

In fact, no writer can admit this truth more unhesitatingly, than HENRION DE PANSEY does, when the question is more precisely before him. As to sub-infeudation proper, for instance,—writing of the Custom of Paris and the other Customs of its class, he says:—

"Dans ces coutumes, le jeu de fief est regulier, toutes les fois qu'il y a retention de la "fidélité, et réserve d'un droit seigneurial et domanial; or, cette double condition se trouve "remplie dans le bail à fief, comme dans le bail à cens. Aussi Dumoulin, dit-il, très-affirma-"tivement, que dans la Coutume de Paris, il est libre aux vassaux de se jouer de leurs fiefs "par inféodation."(m)

—Again, as to *bail à rente*, still speaking of the Custom of Paris:—

"Le propriétaire d'un domaine féodal peut également s'en jouer par bail à cens, ou par "bail à rente · * * cependant il y a cette différence entre ces deux espèces d'aliénations, que "dans la premiére, l'imposition du cens suffit, sans qu'il soit nécessaire que le vassal stipule "qu'il retient la foi, parce que le cens emporte par lui-même la réserve du domaine direct. "Mais la chose est différente, lorsque le vassal n'a pas donné la qualification de cens à la "prestation qu'il a imposé sur la partie aliénée; * * pour que le bail à rente forme l'équi-"valent d'un bail à cens, en un mot, pour qu'il y ait un véritable jeu de fief [c.-à-d., sans "profit], il faut une réserve expresse de la foi."(n)

—Not to say, that he treats specially of the *jeu de fief* by grant *en franche aumône*,(o) *par échange*,(p) *par partage*,(q) etc.

§ 98.—A sort of *équivoque*, or show of difference of opinion among authors, may be said to arise from the fact, that the contracts in question are sometimes designated according to their true character, and sometimes according to their mere form.

HERVÉ follows the former of these rules, when he says:—

"Ainsi le jeu de fief peut s'opérer par bail à cens, par bail à rente, par donation, par legs, "par échange, par vente, par sous-inféodation; en un mot, par tous les contrats qui trans-"portent la propriété; mais il ne faut détacher de pas un de ces contrats, aucune des con-"ditions requises pour la validité du jeu de fief."(r)

—A form of expression exactly covered by POTHIER's paraphrase of Dumoulin,—

—"ces termes, *se jouer*, comme nous l'avons observé après Dumoulin, signifient disposer "avec une liberté aussi étendue qu'on puisse concevoir qu'ont des joueurs de disposer à "quelque titre que ce soit, pourvû que le vassal ne se démette pas la foi, et qu'il retienne "dans l'héritage dont il dispose, quelque droit qui puisse être représentatif d'un *dominium* "*civile* par lui retenu, et auquel soit attachée la charge de la foi et des devoirs féodaux."(s)

(m) *Diss. Féod.*, Vol, 2, p. 388.

(n) *Diss. Féod.* Vol. 2, p. 374.

(o) *Diss. Féod.*, Vol. 2, p. 62 *et seq.*

(p) *Diss. Féod.*, Vol. 2, p. 388 *et seq.*

(q) *Diss. Féod.*, Vol. 2, p. 393 *et seq.*

(r) Vol. 3, p. 375.

(s) *Des Fiefs*, part 2, chap. 3, Art. 2.

Following the other rule, the nomenclature would be different. The form has to be observed, of retaining "*la foi entière, et quelque droit seigneurial et domanial*" *sur ce qu'on aliène;* and therefore, in form the contract must admit of being characterised as one or other of the feudal contracts of sub-grant. It may be the contract of *bail à fief*, or infeudation proper, with or without *rente* or fixed dues of any kind, or with any arrangement that may suit the parties as to their casual dues.(*t*) Or, it may be the *bail à cens*,—the amount of the *cens* just as high or just as low, and every stipulation as to other dues or charges just so drawn, as the parties please.(*u*) Or, it may be the *bail à rente*, assimilated indefinitely to the *bail à cens* by the express reserve of the *foi* on the part of the grantor,—where, of course, there can be no casual dues.(*v*) Or it may be the grant *en franche aumône* or *par service divin*, whether noble or *en roture*;(*w*) for by all

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(*t*) Hervé (Vol. 3, pp. 372, 3) writes as though he held that the retention of some *rente* or *redevance*, other than the natural charges of the *fief*, was necessary in order to the privileged *jeu de fief* by sub-infeudation. Henrion de Pansey (*Diss. Féod.*, Vol. 2, p. 386) does not. But in truth, the idea more or less shared by both of them, that the words of the Custom imported more than what the idea of the *bail à fief* or *à cens* necessarily imported, in the matter of reserved right to the grantor, was evidently a modern refinement, unsustained by any older authority of weight. The *bail à fief* or *à cens*, whatever its terms, always retained "*la foi entière, et quelque droit seigneurial et domanial*" *sur la chose aliénée;* even with all the license allowed (*vide suprà*, § 63) as to such terms.

As to the right to throw the contract into the form of the *bail à fief*, it is enough to say that even under the Custom of Orleans,—where the words of the old redaction were "*peut bailler à rente, cens, ferme ou pension*" (Art. 4), and those of the new "*peut bailler à cens, rente, ferme ou pension*" (Art. 7), words apparently exclusive of the *bail à fief*,—it was admitted.—Lalande, Art. 7, No. 15; Vol 1, p. 28.

In one case only, that of Normandy, where the Custom does not seem to have disallowed it (*vide suprà*, § 92), it yet was not allowed. But the reason of this was to be found in certain peculiarities of that Custom as to *justice*, &c.; which simply go to show the excessive irregularity of everything connected with the feudal system.—See Henrion de Pansey, *Diss. Féod.* Vol. 2, p. 388.

(*u*) Hervé and Henrion de Pansey, in the passages referred to in the foregoing note, treat the reservation of some amount of "*cens*" or "*rente*" as requisite; but of course admit that it might be a nominal amount. It is hard to see why fixed dues (as opposed to casual) should be more *necessary* to the *censive* grant than to that *en fief;* though, no doubt, there is the distinction between the two cases,—that in the one they are natural or usual, and in the other not. Henrion de Pansey, elsewhere, expressly admits this:—

"Tels sont donc les principes à cet égard. Point de bail à cens sans une prestation recognitive de la directe: *Et hoc ita recipitur et usitatur in toto hoc regno;* voilà la règle: voici la modification. Deux prestations généralement recognitives de la directe, le cens et les lods. Le seigneur, maître de les cumuler, peut se contenter de l'une d'elles; il peut stipuler que le cens ne sera pas productif de lods et ventes, ou renonçant au cens annuel, se contenter des lods; mais, quelque parti qu'il prenne, c'est à la prestation qu'il impose qu'est attachée la seigneurie qui demeure entre ses mains. Cette seigneurie est attachée au cens, s'il a stipulé un cens annuel; aux lods, s'il a jugé à propos de renoncer au cens."—*Diss. Féod.*, Vol. 1, p. 268.

Hervé, too, in effect, says the same thing.—Vol. 5, p. 156. See also *suprà*, §§ 63 and 66.

(*v*) See Henrion de Pansey, *Diss. Féod.*, Vol. 2, p. 374, cited *suprà*, § 97.

(*w*) See Henrion de Pansey, *Diss. Féod.*, Vol. 2. pp. 56 *et seq.*

these forms of grant there is the reserve of the *foi*,—and the obligation to religious service, whether definite or indefinite, and the right to other and (in the money sense) larger dues whenever the property may pass to other hands, form always in the grantor's hand the "*aliquod jus*" of Dumoulin, the "*quelque droit seigneurial et domanial*" of the Custom, the "*quelque droit représentatif d'un dominium civile*" of Pothier, which is required in order to the due indication of the unbroken unity of the grantor's *fief*.

§ 99.—What is practically important, however, in this connexion is this,—that this required feudality of form may either be a mere form, or may give real character to the act. The vassal, whether his object be veritably to sub-infeud or grant as to a *censitaire*, or (under color of sub-infeudation, or of *accensement*) to sell, give, bequeath, exchange, grant for rent, or in any other way alienate, can always do so without difficulty, under the form and within the limit allowed by the Custom, without thereby entitling the Dominant to a mutation fine.—At the time of the redaction of the Customs, indeed, this was so perfectly understood, that even under the Custom of Orleans, the terms of which (specifying only the *cens, rente, ferme* and *pension*) have been already noted,(*x*) it was adjudged at the instance of Dumoulin himself, that a *bail à cens* made for a money payment gave no occasion for the Dominant to interfere;(*y*) and the jurisprudence so inaugurated was defended by POTHIER,(*z*) and maintained by the Courts until 1775 and 1780, when a stricter view was taken of the sense of that Custom, and the claim of the Dominant in such case was allowed.(*a*) About the same time a like change of jurisprudence was made in some other Customs worded like that of Orleans.(*a*) But no one ever pretended that there could be a doubt of the vassal's right, under the Custom of Paris,—with its "*peut se jouer et faire son profit*,"—to sell or otherwise alienate on any terms whatever, under cover of any feudal form of contract, without hindrance from or profit to his Dominant. The Customs favorable to the Dominant on this point, were always held to be exorbitant of the common rule.(*b*)

§ 100.—The limit as to extent, of these privileged alienations,—"*les deux tiers*,"—was obvious enough; but not so obvious as to prevent controversy. *Fiefs* being commonly of complex composition, the Custom spoke of alienations of "*héritages*," "*rentes*" and "*cens*," as all contemplated. The question arose, whether the reserved third part of the *fief* must include within it the third part of the "*héritages*" or corporeal realty of the *fief*, as it stood at whatever may have been the time of the real or supposed ascertainment of its condition as

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(*x*) *Vide suprà*, § 98, Note (*t*).

(*y*) POTHIER, *Cout. d'Orléans*, Art. 7.—HENRION DE PANSEY, *sur Dumoulin*, pp. 500 and 501.

(*z*) *Cout. d'Orléans*, Art. 7.

(*a*) HERVÉ, Vol. 3, pp. 377 and 378.—HENRION DE PANSEY, *Diss. Féod.*, Vol., 2, pp. 379 *et seq.*

(*b*) HENRION DE PANSEY, *Diss. Féod.*, Vol. 2, p. 368; cited *suprà*, § 83, note (*k*).

partly corporeal and partly incorporeal, or whether it was enough that a third of its value in land, rents and *cens* together, should be reserved. The weight of authority, however, went decidedly with what must be presumed to have been the meaning and intent of the Custom when promulgated,—that the reserved third was to comprise a third part of the corporeal realty of the *fief*.(c)

§ 101.—Intimately connected with this question, there arose another; but apparently, not until quite a late date. I find it, indeed, discussed only by HENRION DE PANSEY.(d) It is this; whether, in reckoning the extent of the corporeal third part which the vassal might not alienate except at the cost of entitling his Dominant to a mutation fine, the "*landes et terres incultes*" within the *fief* were to be reckoned,—or whether, with a view to the interest of agriculture and public improvement, the vassal might not claim to alienate these without interference from his lord. This question Henrion de Pansey inclines to answer in the latter sense; perhaps, with more of leaning to the vassal side of the controversy than would have characterized the 16th Century, had the question been raised and answered then. Indeed, the fact of its not having been then raised, nor for so long afterwards, is among the indications of the little regard paid, in respect of these controversies, to considerations of mere public interest. The matter was not, it is true, whether these *landes et terres incultes* could be alienated with a view to their improvement. Of course, they could be. It was merely as to one of the incidental results of their being so alienated. Was the Dominant to have a mutation fine on the occasion? Upon such lands, the vassal could have made little profit, and the Dominant (by his mutation fines) still less. But no one appears to have thought of postponing even this small interest, for what would then probably have seemed an interest yet smaller.—At a date somewhat earlier, authority set a special value on the forest. In the 16th Century, and for long after, it still failed to realize the special value of the farm.

§ 102.—The proviso, again, of the 52nd Article of the Custom formed a material part of the system. For, the privileged alienations which on the one hand gave the Dominant no immediate mutation fine, on the other hand were not allowed (unless by his own consent) to tell against him in the matter of mutation fines otherwise to accrue upon the *fief*. At least, such was the case, for what was then pecuniarily the more important of them,—the *relief*. As regarded the *quint* or fifth part of the price of the *fief* whenever sold, the precaution was not so easy to take, and was not taken. But as regarded the *relief*, or year's revenue of the *fief* whenever such mutation of the *fief* occurred as gave rise to it, it was to be taken upon the *fief* without deduction for such privileged alienations,—unless, indeed, in the case of the Dominant's having expressly assented to and infeuded them. The vassal and those with whom he dealt in the way of the *jeu de fief*, enjoying immunity from immediate mutation fine, (*relief* or *quint*, as

(c) See discussion of the question, and a review of the authorities, in HENRION DE PANSEY, *Diss. Féod.*, Vol. 2, pp. 398 *et seq.*

(d) *Diss. Féod.*, Vol. 2, pp. 390 and 391.

might be,) yet contracted subject to this ulterior right of the Seignior Dominant,—a right that (sooner or later) one or other of them was pretty sure to have to recognize, either by submitting from time to time to its enforcement, or by redeeming it,—but which, whether left over for enforcement or redeemed, was always essentially a mere matter of private interest, to be settled between all the parties interested, precisely as they would.

§ 103.—The question of the penalty consequent upon what may be called the unprivileged *jeu de fief*,—or alienation by the vassal, of too much, or without due retention of a *directe* to himself in what was alienated,—was one that has given rise to discussion.

§ 104.—In argument before this Court, it was contended by one of the learned Counsel who sustained the Attorney General's Propositions, that such act was a *démembrement de fief*, involving *commise* on the part of the vassal, or confiscation of the *fief* in favor of the Dominant.

If it were so, the forfeiture would still be only private,—a potestative right of the Dominant, which he could always waive, tacitly or expressly, for the past or for the future.

But in truth, it was not so. Between the unprivileged *jeu de fief*, and the *démembrement de fief*, there was a marked distinction, as will presently be shown.(e) Add, that the *commise* being an extreme penalty, was always *strictissimi juris*, the pain of nothing short of *désaveu* or *félonie*.

§ 105.—Under the oldest of the known rules as to the matter of the *démembrement* and *jeu de fief*,—those of the Assises de Jérusalem and Liber Feudorum,—as has been above shown, (f) there was (it is true) a species of *quasi-commise*, or forfeiture of the alienated part of the *fief*, threatened in favor of the Dominant, for enforcement of what were then held to be his rights.

But under the later rule of the *Coutumes du Beauvoisis*,(g) the Dominant of the 13th Century had no larger right than that of the *saisie féodale*, by which to force the parties to rescind their bargain.

And elsewhere in France, from the 13th to the 16th Century, there is no trace of the larger right; and it may be a question whether even that of the *saisie féodale* was universally available.(h)

§ 106.—For the period since the redaction of the Custom of Paris, HENRION DE PANSEY (i) cites Auzanet as the one writer who would attach to the *jeu de fief*, when carried beyond limit, the penalty of a *quasi-commise*, or forfeiture of

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(e) *Vide infrà*, §§118 *et seq.*

(f) *Vide suprà*, §§72—75, inclusive

(g) *Vide suprà*, §80.

(h) *Vide suprà*, §§81—89, inclusive.

(i) *Sur Dumoulin*, p. 516.

the property alienated. But on reference to AUZANET's works,(k) it will be found,—not that he interpreted the Custom as meaning this,—but on the contrary, that he suggested (among other changes) the propriety of amending it somewhat in this sense. A comparison of his suggestions with the *Arrêtés de* LAMOIGNON,(l) will show that his recommendation on this head was not adopted by the jurisconsults to whom it was addessed. LE CAMUS(m) characterized it as "*trop rude;*" and it does not seem to have found favor with any known writer.

DUPLESSIS, in the case of alienation *avec démission de foi*, (one, only, of the two modes of going beyond the limits of the privileged *jeu de fief*,) holds to the doctrine of the *saisie féodale* of the alienated part of the *fief*, as a means in the hand of the Dominant, of forcing the parties to rescind their contract.(n)

GUYOT, dissenting from Duplessis, would give the Dominant in such case an action to compel the parties "*à se départir du contrat.*"(o)

BOURJON, without distinguishing apparently between this case and that of the mere alienation of more than the two thirds, takes up Duplessis' idea of the *saisie féodale*.(p)

§ 107.—With these exceptions, it would seem from the summary given by HENRION DE PANSEY,(q) that every writer of mark, from Dumoulin downwards, has adopted the simpler conclusion, that as the *jeu de fief* is a mere privilege of the vassal in respect of the alienation of so much of his *fief* under such or such form, without fine paid to the Dominant, the penalty consequent on his alienating more or in other form, is merely the loss or non-enjoyment of such privilege,—the exigibility, on the part of the Dominant, (by resort to *saisie féodale* as a means, or otherwise,) of his rights accruing on the alienation, and to accrue thereafter in ordinary course. Indeed, as to this, there may be said to have been really no controversy; for all dissent was completely borne down by the weight of authority, to say nothing of usage. The only question at all open, was as to the extent of this loss of privilege,—whether, in the case of successive alienations in the whole excessive, or wholly or in part irregular, it affected all or only such as were themselves irregular, or excessive, or made after the limit of extent had been reached. That question has no interest here.

(k) On Art. 51 of Custom of Paris; p. 40 of Edn. of 1708.

(l) Vol. 1, pp. 98 and 99; Edn. of 1783.

(m) GRANDE COUTUME, Vol. 1, Col. 817, 8; Obs. on Art, 51

(n) Liv. 9, chap. 1 *in fin;* p. 70, of Edn. of 1726; cited by HENRION DE PANSEY, *sur Dumoulin*, p. 510.

(o) *Des Fiefs;* Démembrement, ch. 3, No 22, &c.; Vol. 1, pp. 105, &c.—Cited also by same, pp. 510 and 511.

(p) Fiefs, 2nd part, ch. 3, sec. 3; Vol. 1, p. 239.—Cited also by same, p. 511

(q) *Sur Dumoulin*, pp. 511 *et seq.*

§ 108.—The point that is of interest, though so certain as otherwise hardly to warrant its being again here alluded to, is this,—that, as between the parties themselves, or as between them and all others than the Dominant, there never was entertained at any period in the history of the feudal system, any notion that the contract (however it might transcend the limits of the privileged *jeu de fief*) was to be held for null. Even the ASSISES DE JÉRUSALEM, as we have seen,(*r*) left matters to their course till such time as the Dominant should see fit to interfere,—and indeed did not quite always suffer him to interfere to the prejudice of others than the parties contractant.—BEAUMANOIR,(*s*) too, expressly treats the contract, however the Dominant might destroy its efficiency, as a licit and valid contract; for he notes the practical inconvenience to the grantor, in the case of his having guaranteed to his grantee the grant which the Dominant should call in question and set aside.—The state of the case was clear. The vassal has alienated on certain terms, engaging to make the party acquiring from him, his vassal, *censitaire*, vendee, donee, or what not, on certain terms,—liability to the Dominant for a present mutation fine, and for future dues, as on a part of a *fief* to be holden of such Dominant as the immediate lord thereof, forming no part of such terms. But, the *jeu* proving to have been excessive or irregular, the Dominant has asserted his right, has exacted his *relief* or *quint* as the case may have been, and has reduced such acquirer to the position of a vassal of himself the Dominant, for the property, as being a part of the *fief* in the *mouvance* of him the Dominant. The acquirer, of course, has his remedy over, against the vassal, his *auteur*. In the words of HERVÉ,—repeating here, the idea of every one of his predecessors :—

"Quand le preneur ou l'acquéreur souffre de l'excès ou de l'irrégularité du jeu de fief, il doit "être garanti et indemnisé par le bailleur ou vendeur, ainsi que je l'ai déjà observé, parce "que ce bailleur ou vendeur ne le fait point jouir de la manière convenu."—Vol. 3, p. 387.

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§ 109.—Of the *démembrement de fief*, in contra-distinction to the *jeu de fief*, there does not require to be much said.

In the days of the redaction of the *Assises de Jérusalem*, the phrase was used in a sense quite other than that in which alone it was afterwards used by writers on feudal law under the Custom of Paris. There was then, as has been shown,(*t*) the "*démembrement par l'assise ou par l'usage,*" which was nearly analogous to what under the Custom of Paris was known as the "*jeu de fief sans profit ;*" and, opposed to it there was the "*démembrement sans assise et sans usage,*" answering to what under the Custom of Paris became the "*jeu de fief excessif ou irrégulier, ou avec profit,*"—by some writers sometimes characterised as a "*démembrement de fief.*"

According to this, its old and literal sense, it meant, of course, any and every dismemberment or breaking up of the realty or body of the *fief*. Within certain

(*r*) *Vide suprà*, §72.

(*s*) *Vide suprà*, §80.

(*t*) *Vide suprà*, § 72.—Also HENRION DE PANSEY, *Diss. Féod.*, Vol. 2, p. 367.

limits, the Dominant (it was said) could not object to this. Beyond them, he could.

§ 110.—But when in 1510,(*u*) the authors of the old Custom of Paris laid down, by its 35th Article, the maxim, that the vassal could not at all dismember (*démembrer*) his *fief*, to the prejudice and without the consent of his Dominant,—and followed this up, in the 41st Article, by the counter-maxim, that the vassal might play off (*se jouer de*) his *fief* as he would, without reference to his Dominant or payment to him, if only he reserved to himself the *foi* or mere title of the *fief*,—they evidently meant by "*démembrer*" something quite different from the breaking up of the realty or body of the *fief*. This latter process had become an ordinary matter of course affair, and was precisely what they allowed to any extent, irrespectively of the Dominant's interests or will. The breaking of the *foi*, title, or nominal unity of the *fief*, was all that they could be supposed to intend to forbid; and this they forbade, only under the limitation that it was not to be done to the prejudice and without the consent of the Dominant. As against any one else, or with his consent, (however given, whether tacitly or expressly, for past or future, by the contract of infeudation or by agreement afterwards,)(*v*) it might be, to any length.

§ 111.—Dumoulin, accordingly, writing under this old Custom, stated this doctrine, and followed it to its conclusions, fully and exactly. His words are:—

"Itaque non possunt sive unus et idem vasallus, sive plures, ab initio investiti aut ex post
"facto, heredes vel emptores (non refert) ejusdem feudi, multiplicare feudum in plura feuda:
"quod est propriè dividere ipsum feudum in se, seu titulum ipsum et formam feudi, sine
"consensu domini.

"Sed bene possunt feudum dividere inter se, in partes singulis assignandas, pro diviso,
"non tamen tanquam feuda separata, sed tanquam partes feudi, et sub denominatione, for-
"mâ et titulo ejusdem feudi, sicut ab initio unum constitutum fuit. Et istud propriè non est
"divisio feudi, sed distributio partium feudi pro portione et jure cujuslibet vasallorum, sive
"sint partes quotæ, sive partes integrales. Et hoc modo potest sine consensu patroni feu-
"dum, sive constet in re corporali, sive in re incorporali, dividi, tam pro diviso quàm pro
"indiviso, tam œqualiter quàm inœqualiter. * *

"Sic è diverso, si ab initio unus vasallus aut plures fuerint investiti de pluribus fundis,
"tanquam diversis et separatis per se feudis, non poterunt illos fundos unire, nec confundere
"in unum feudum, sed debebunt possidere tanquam diversa et separata feuda,—nisi in his
"omnibus, tam uniendo quàm separando titulum feudi, domini consensus et auctoritas inter-
"venerit; multum enim interest domini" &c.

"Manente uno et eodem titulo feudi, potest pro parte aperiri vel etiam in totum committi
"domino, pro parte non,—puta, vasallo partem feudi à domino teneri denegante * *,—pro
"parte prehendi, pro parte à manu dominicâ relaxari, recognosci et investiturâ renovari, et
"pro parte non."—§3, Gl. 4, No. 31.(*w*)

In all manner of ways, by sale or otherwise, the mere body of the *fief* could be broken up. The 35th Article of the old Custom went no further than to

(*u*) *Vide suprà*, §90.

(*v*) Vide *suprà*, §§63 and 64, and authorities there cited; also §§95 and 96.

(*w*) Vol. 1, p. 138.

recognize the right of the Dominant to insist on the maintenance of the title or nominal unity of the *fief*. He could not prevent himself from having any number of co-vassals, for any number of parts (divided or undivided) of the *fief*. And he could not help treating them, for most purposes, almost exactly as though each owned a separate *fief*. His interests, in truth, were deferred to, far more in form than in substance.

§ 112.—The new Custom, repeating as to this matter the words of the old, meant of course the same thing. And notwithstanding some laxity of phrase on the part of some writers,—arising probably, in the main, out of the fact, that the new Custom (by the way in which it linked together the *démembrement* and *jeu de fief*, and at the same time limited the latter) made this peculiar sense given to the former term somewhat less obvious,—Dumoulin's rendering of it was always followed. It was never held that this clause meant more than he made it mean. The words of HENRION DE PANSEY(*x*) embody what may be called a unanimous finding of the authorities:—

—" C'est uniquement à lui [*au titre*] que s'applique la prohibition de la coutume, '*Le vas-*" '*sal ne peut démember son fief.*' * * Toutes les fois, enfin, que chaque division [du fief] est " reportée comme partie intégrante du tout, le Dominant n'a aucun droit de critiquer les " arrangemens de son vassal, de quelque manière qu'il ait disposé du corps de son fief."

§ 113.—It is not denied that a certain degree of ambiguity has been made to attach to the term "*démembrement*," under the Custom of Paris, by some writers; who have applied it also to the excessive or irregular *jeu de fief*.(*y*) But it is a manifest confusion of terms to do so. The two things are not alike, and have even no necessary connexion with each other.

§ 114.—There may be *démembrement*, without any *jeu de fief* at all. As for instance, in the case of co-vassals, who (with consent of the Dominant) convert their parts of a *fief* into separate *fiefs*; or of the vassal, who (with the like consent) breaks the title of his *fief* into two or more which he still holds himself, —or combines the titles of two or more *fiefs* into one,—or transfers his *foi*, wholly or for part of his holding, to another Dominant.

Or there may ensue *démembrement* upon a *jeu de fief* neither excessive nor irregular; if, for instance, the parties, after breaking up the body of the *fief* within the privileged limit and in privileged form, should agree with the Dominant for the like breaking up of the title, so as to make of each part a separate *fief* to be held otherwise than of the vassal.

§ 115.—And there may be *jeu de fief*, of any kind or degree, no matter how excessive or irregular, without any *démembrement* thence resulting.

For example, the *jeu de fief* may be merely irregular, in any one of three degrees. The vassal, alienating a property from his *fief* without retention of the

(*x*) Cited *suprà*, §36; *sur Dumoulin*, p. 475.

(*y*) Though without drawing from such use of the term, the inference as to *commise*, which has been suggested in argument to this Court by the learned Counsel retained against the Seigniors.—Vide *suprà*, §104.

required *directe*, may either alienate it as being part of such *fief*, assuming to make the acquirer his co-vassal,—or as though it were a *fief* of itself, assuming to make the acquirer the vassal for it, of his Dominant,—or as though it were a *fief* holding of some other Dominant, or an *aleu* holding of none.

In the first case, though the parties cannot claim exemption from the *relief* or *quint*, as the case may be, not having kept within the terms of the *jeu sans profit*,—there can clearly no *démembrement* result from what they have done. They have sub-divided the body of the *fief*, and added to the number of the co-vassals holding it; but they have left the title untouched.

In the second case, they have done what they could to effect a *démembrement*, having assumed to divide as well the title as the body of the *fief*; but, without the co-operation or assent of the Dominant, they cannot gain their end. He can exact his *relief* or *quint*, as may be, but need not acknowledge the acquirer as a vassal holding a separate *fief*, unless he pleases. Whoever assumes to hold the property, he can force him to hold it as part of the old *fief*,—all *démembrement* dissallowed. As against him, without his own consent, the change of title simply cannot be.

In the third case, also, the parties would have tried to effect a *démembrement*; and the vassal would besides have been guilty of the high feudal crime of the *désaveu* of his lord, excusable or inexcusable according to the circumstances. For such *désaveu*, if inexcusable, the Dominant might enforce against him the *commise* or confiscation of the property.—But the attempted *démembrement* cannot result, unless by the consent (express or tacit) of the Dominant. The parties have so contracted; but their contract can have no avail against his right, if he chooses to insist upon it. Supposing the *commise* not enforced, whether from the act being excused or from any other cause, he can exact his mutation fine, and force the holder (whoever he may be) to acknowledge himself his vassal,—and that, as for a part of the *fief*, under its old title.

Or again, the *jeu de fief* may be merely excessive. If so, the parties have not attempted a *démembrement*. And the Dominant, by enforcing his rights, will not bring things to that result. He can compel the acquirer to pay and hold, as a co-vassal, for such and such part of the *fief*, and not as for a *fief* by a new title. There can ensue no *démembrement*, otherwise than by consent of Dominant and vassal both.

The case remains, of the *jeu de fief* at once irregular and excessive. But the principle of distinction applies to it, no less than to the others.—The *jeu de fief* is no *démembrement*. *Démembrement*, as a final result, there cannot be, unless by the co-operation, consent or sufferance of the Dominant.

§ 116.—Some writers, not clearly seeing this, have made it a question, what penalty was attached to the forbidden *démembrement* of the *fief*. The meaning of the word once seized, that question is at rest.—To borrow the words of Pothier:—

" Il est donc inutile de rechercher quelle est la peine de ce démembrement fait sans le gré
" du Seigneur; il suffit de dire qu'il ne se peut faire,—qu'il est impossible de le faire sans
" le gré du Seigneur."(z)

(z) *Des fiefs*; part 2, chap. 3, Art. 1.

—or those of Hervé:—

"Enfin il suit que les commentateurs de la Coutume se sont mis l'esprit à la torture en "pure perte, pour rechercher quelle est la peine du démembrement de fief fait sans l'aveu "du Seigneur. Il n'y en a aucune, à moins qu'on ne veuille regarder comme une peine "l'inutilité absolue d'un tel démembrement, qui, vis à vis du Seigneur, est regardé comme "non existant, et ne change rien à sa mouvance ni à ses droits."(a)

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§ 117.—Reverting for the moment, to the analogy between the *fief* and *censive* tenures. It has been remarked already, in effect, that the *censive*, equally with the *fief*, passed through what may be called its merely quasi-property phase of being, during which it could not be alienated or hypothecated,—that indeed it was later in passing through it, than the *fief*,—that as matter of history, the result of the process was as irreducible to rule in the one case as in the other,—and that generally speaking, the process was not after all as completely gone through, with the *censive*, as with the *fief*.(b)

Under the Custom of Paris, the usually smaller value of the *censive* made it not worth while to apply to it an express and formal rule as to its *démembrement*. But for all practical purpose, the rule subsisted notwithstanding. The *censitaire* could no more throw off or at all change the *mouvance* that constituted the title of his *censive*, than the vassal could that which made the title of his *fief*. He could not, to the prejudice and without the consent of his Seignior, break his one holding into separate holdings, or turn several holdings or parts of holdings into one, any more than the vassal could. Do what he might, he would find that his Seignior *Censier* could keep just as firm hold—for the matters of *solidarité* for dues,(c) the wording of recognitions, and so forth, in fact for all practical purposes—of the *titre* of the *censive* in its form as originally constituted, as the Seignior Dominant in the like case could, of that of the *fief*.

There was no mention of a *jeu de censive*,—for another and stronger reason. There was no such thing. The *censive*, it is true, being liable to no mutation fine except upon sales, and then only to the amount of a twelfth in place of a fifth, required it less than the *fief* did. But it is not the less true, as matter of comparison between the two tenures, that the privilege here accorded to the one was not accorded to the other. The *censitaire*, when he sold, could not help incurring *lods et ventes* on the sale; the vassal, within certain limits, by observance of a certain form, could avoid the *quint*. Both could sell,—wholly or by piecemeal; the one must incur the fine, the other need not always do so. The vassal had a privilege, which the *censitaire* had not; in this, as in so many other respects, had more of property in his land than the *censitaire* had.

§ 118.—In all this, need one ask what there is, that by any amount of ingenuity—short of that which should invent all the facts wanted to make good its

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(a) Vol. 3, p. 360.

(b) *Vide suprà*, §§ 54, 59, 60 and 65.

(c) Perhaps, indeed, so far as regarded this matter of *solidarité* for certain of its dues,—a somewhat firmer hold than the Dominant had over the *fief*.

theories—can be made to look as though it possibly could have been the germ, out of which the pretended system of Canadian feudal law, in the Attorney General's Propositions set forth, may have been developed?

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§ 119.—Not to complicate matters more than could be helped, the subject of the *justice seigneuriale*, as contra-distinguished from the *fief*, has been, so far, as much as possible kept out of view. But a few words in reference to it are unavoidable.

§ 120.—CHAMPIONNIERE, in his work "*De la propriété des Eaux Courantes*," has expended an immense amount of learning and ingenuity upon an argument (necessary to the support of his thesis as to such property) for the entire separation—as matter of history—between the origin of the *fief* and that of the *justice*. The *fief* he holds to have had reference, from the earliest times, (as all writers admit it to have had,) to the soil or very realty of the territory covered by it. The *justice* he holds to have had no such reference; but on the contrary, to be traceable back to the anomalous and oppressive fiscal exactions of the Roman Empire,—degraded into private property,—as such held by Roman or Barbarian, according as either might be strong enough to appropriate and keep them,—drawing to themselves gradually, in greater or less degree, the *droit de juger*, of course with its attendant profits, direct and indirect,—alienated in all sorts of combinations, and under all sorts of strange restrictions, sometimes by infeudation and sub-infeudation, sometimes without reserve of feudal superiority,—here, broken down into fractions, locally, personally and in every other way,—there, built up out of any number of fractions into one or other nondescript form of whole,—after a time, often so mixed up and confounded with the *fief* proper, or territorial, as in some respects to have become all but inseparable from it, even by the most careful historical investigation.

§ 121.—In maintaining this theory, however, Championnière stands alone.

§ 122.—To a considerable extent he rests it upon a distinction which he draws between the words *honor*, *proprium* and *beneficium*, as used down to and during the 9th Century. The first, according to him, meant simply this supposed property of tribute, as contra-distinguished from property or possession of the territorial kind; the second, that entire property of the soil which was afterwards known as the *aleu;* the third, that holding of territory which afterwards became the *fief*.(d)—LAFERRIERE, contesting his conclusions, cites passages from documents of that age, to show that this distinction does not hold,—that the word *honor* had more than one sense, was used sometimes as meaning a mere dignity, charge or office, and sometimes as an equivalent for *beneficium*, if not perhaps even more loosely still.(e) And unless these citations (contrary to appearance)

(d) CHAMPIONNIÈRE, *Eaux Courantes*, pp. 161 *et seq.*

(e) LAFERRIÈRE, *Histoire du Droit François*, Vol. 4, pp. 88 *et seq.*

are untruly made,—a point which one has here no sufficient means of ascertaining,—the inference drawn from them is unavoidable.(*f*)

§ 123.—Independently of this consideration, however, it is hard (not to say impossible) to defend Championnière from the charge of exaggerating the import of his favorite maxim, "*fief et justice n'ont rien de commun*," much as the feudists of the fiscal school are shown by him to have exaggerated the other maxim of "*nulle terre sans seigneur*." This latter, as he has shown, and as every one now admits, was a mere statement of the result of the long process by which (over a great part of France) the *fief* encroached upon the *aleu*; and not a reliable statement of the historical doctrine that, for such part of France, the *aleu* originally was an unknown or even exceptional form of holding,—as the feudists of the fiscal school long pretended that it was. The former adage, he holds for a correct expression of a great historical truth.—It would be more consistent to interpret the two on the same principle; to take both as being a mere proverbial record of popularly known results,(*g*) not as making proof in reference

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(*f*) In truth, no line of argument can well be more hazardous than that of relying on the constant use of words by different people at different times, in the same precise sense; especially, when it is carried back to a remote and illiterate age, and to the case of people using an almost dead language in place of an unsettled vernacular tongue.

As a later illustration.—According to Championnière's theory of the essential antagonism, in idea, between the *justice* and the *fief*, the distinction between the words *justitia* and *feudum* ought not to have been lost sight of in the 13th Century. It certainly was not, always; and perhaps, even in some documents of that time, it may not have been. But in one, of considerable interest, it as certainly was. The *Ordonnance* of Philip Augustus, of the year 1209, (cited *suprà*, §79,) uses *justitia* as meaning the whole of the profits of the *feudum* or territorial *fief*,—evidently, with no idea of distinguishing between the profits of the *justice* proper and the rest of the profits of the *fief*. And there is abundance of other proof of the prevalence, at least at that period, over great part of France, of the idea that *fief* and *justice*, so far from being antagonist expressions, were insepara[ble]. —*Vide infrà*, §127.

(*g*) And those, by the way, no more universal in the one case than in the other. To match the allodial Customs, and the exceptional *aleux* existing under the Customs not allodial, we have Customs that even inseparably connected the *fief* and the *justice*, and cases (under Customs not of that class) where the *fief* and the *justice*, by reason of their being held, or presumed to be held, under one and the same title, formed one and the same holding or seigniory. Henrion de Pansey says of these cases, speaking with as much reference to the Custom of Paris as to any other:—

"Lorsque d'ancienneté la justice est unie au fief, et relève du même Seigneur que le fief, "elle ne forme avec lui qu'une seule et même seigneurie."—*Diss. Féod.*, Vol. 2, p. 491.

Laferrière's historical appreciation of the adage, is this:—

—"Les faits, en se développant, ont produit ainsi sur plusieurs points de la France des "résultats contraires à l'ancien droit féodal sur l'union de la justice et du fief; et ces résul-"tats ont donné lieu à la formule trop générale, que Loysel a mise dans ses *Institutes Cou-*"*tumières*, et que nous avons rappelée, 'fief, ressort et justice n'ont rien de commun ensem-"'ble.' * * Charondas disait, avec plus de justice et de précision que Loysel dans sa formule "trop absolue, 'le fief ne fait pas le territoire de justice.' Toutefois, l'ancien usage avait "laissé, dans ces régions coutumières des traces si profondes, qu'il suffisait d'une possession "immémoriale, sans preuve par écrit, pour établir le droit de justice en faveur du Seigneur "de fief; et chose bien remarquable, la séparation de la justice et du fief n'avait lieu, dans

to a process of historical developement that was popularly unknown; in a word, to treat them as one absolutely must treat a number of other proverbial sayings of the same class,—that, for example, of the "*toute justice émane du roi,*" which in the hands of the Crown feudists bore much the same relation to the *justice*, that its "*nulle terre sans seigneur*" counterpart bore to the *fief*.(h)

§ 124.—Admitting that there are strong analogies between the profitable *droits de justice* and the fiscal exactions of the Roman Empire, and that these latter may well have come to be regarded as a property independently of the property of the soil, and so to be more or less extensively dealt with, and developed into the *justice seigneuriale* of a later age, much as Championnière supposes,—it would only follow that such *justice* may well be supposed in some cases to have had this origin. It is no more a sound inference from the known history of those times,—and no one has done more than Championnière towards showing this,—to suppose that all the *justices* in France had one and the same historical origin, than to suppose that all the *fiefs* had. Indeed, the *justice* was actually the more unsystematic property of the two,—that as to which the greater number of utterly unaccountable varieties, anomalies and contradictions, everywhere prevailed,—the harder of the two to be traced back to the exclusive operation of any one set of causes.

§ 125.—Looking book, indeed, to the early days of the *fief*, to the time when it was a usufruct, seldom of small extent, generally quite large and in powerful hands, and little (if at all) cut up into *arrière fiefs*, (i) it is out of the question to fancy that this supposed entire separation of the *fief* and *justice* can then have been universal, or so much as common; that as a general rule, the great men (*potentes*) holders of *aleux nobles* and of *fiefs*, held them subject to the ownership by other men of their class, of a multitude of vexatious exactions to be collected from their people, and of rights more or less extensive of administering justice for profit, at their cost. Such great men may have enforced acquiescence in their own claim to such exactions and rights, upon poorer and weaker neighbours, whom they may yet not have assumed to deprive altogether of their quality as petty proprietors, holders of *aleux* of the inferior or *roturier* kind; and may so have extended a *justice* of their own (originating much as Championnière supposes) beyond the territorial limits of their own *aleu* or *fief*. But they cannot generally have submitted to such pretension themselves, on the part of others.—For the raising of their revenues, whether within or beyond the territory

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"ces provinces même, qu'à l'égard de simples fiefs; la jurisdiction était toujours attachée de "plein droit, aux fiefs qu'on appelait de dignité, savoir aux duchés, comtés, marquisats, vi- "comtés, baronnies et châtellenies. Ainsi, le parlement de Paris jugea en 1664, que le droit "de justice ne pouvait être vendu séparément du Duché de la Valette * *. On voit par "là combien la maxime de Loysel, entendue dans un sens trop absolu, s'éloignerait de la "vérité historique et juridique."—*Histoire du Droit François*, Vol. 4, pp. 99—101. See also, *infrà*, §127, Note (q).

(h) *Vide infrà*, §§130 *et seq.*

(i) *Vide suprà*, §§ 50 *et seq.*

of their own *aleu* or *fief*, they may also have followed in some measure the ingenious precedents of exaction established for them by the Roman tax-gatherer. But nothing is more unlikely than that they should have followed them exactly. The strong dealing with the weak, are not apt to follow precedent exactly. What they wanted they would get, if they could. By the time that their exactions were coming to be more regular and their people to rise towards the position of *censitaire* proprietors, the usages as to such matters would have varied often and widely,—and the tradition as to what were or were not the old exactions of the Roman fisc, would have pretty well died out.

However all this may have been, it at least seems pretty clear that the *justice* of this early time,—viewing it, as Championnière does, in the light of what one may call an appropriated right of exaction,—must in the nature of things have been held generally by men who would be holders also of *aleux nobles* or of *fiefs*, or of both, and who within their own territory would not commonly submit to much interference at their own expense; in a word, that such *justice* could not often, if ever, have been a property wholly disconnected from, and independent of the territorial holding of the *aleu* or *fief*.

§ 126.—Indeed, it is even certain as matter of historical induction, that many *justices* had quite another origin than this, for which Championnière contends, —and one, too, intimately connected with a territorial holding on the part of the grandee *justicier*. KLIMRATH succinctly states two such origins, thus :—

"Dès les Carlovingiens, on voit successivement des évêques, des abbés, et bientôt aussi des "Seigneurs laïques, exemptés par privilège de la puissance du comte et de ses délégués. "Une fois que les officiers ne purent plus venir sur les terres de ces seigneurs, pour y faire "exploit de justice, tous les hommes, même libres de leurs corps, qui y habitaient, tombèrent sous la puissance privée des Seigneurs et se trouvèrent leurs justiciables. On appelait cela *immunitas:* c'est le premier cas (*k*) de l'origine des justices seigneuriales.

"Plus tard, mais toujours sous les Carlovingiens, un changement plus grave encore, parce-"qu'il ne fut plus seulement une exception, mais la règle, s'opéra dans la nature même des "pouvoirs que le comte et les autres officiers publics exerçaient dans leurs territoires, dé-"membrés et dépecés par les immunités ecclésiastiques et laïques. Profitant de l'avilisse-"ment du pouvoir royal pour se rendre héréditaires et indépendants, ils exercèrent en leur "propre nom, et comme une propriété privée, la même autorité judiciaire qu'ils avaient "exercé jusque là au nom du roi et comme fonction publique. Tel est le second cas de l'ori-"gine des justices seigneuriales."(*l*)

And he might, probably, have given them a still earlier date; or at any rate might have added to them another, of earlier date. For, with the unsettled ideas and practices as well of the Merovingian as of the Carlovingian era, there can be no serious doubt of the real existence (under some form or other) of these *immunités*, and of the real exercise of public justiciary functions for private profit, and as though they formed a private property, long before the days of the second dynasty; and under both dynasties, beyond question,—without reference to special grants of *immunité*, or to downright usurpations of a justiciary power that

(*k*) Klimrath, therefore, not recognizing the Championnière idea, even as matter of local or exceptional application.

(*l*) Vol. 1, pp. 136 and 137.

had been specially delegated by a central authority,—the great landholder, whether *aleutier* or *feudataire*, must have practically exercised a large measure of justiciary power over his inferiors, in his own territory if not beyond it, taking care of course to make such exercise profitable to himself,—and this, by the mere law of the strongest.

§ 127.—But, however the *justice seigneuriale* may have originated, it cannot admit of serious doubt that at a very early date and for a considerable time,—as early at any rate as the 11th Century, and probably for some two or three centuries later,—the usages very generally prevailing throughout feudal Europe connected the profits and powers of the *justice*, in larger or smaller measure according to circumstances, with the *fief*, (*m*) as being its natural and presumed incidents. Laferrière cites (among other proofs of this) from the *Somme Rurale* of Bouteiller, the maxim :—

"Sitôt qu'un seigneur vient nouvellement à terre, il a justice, haute, moyenne et basse:"(*n*)

—and from Masuer, attesting the old Custom of Auvergne, somewhat later—in the earlier half of the 15th Century :—

"Item omnia quœ sunt in territorio seu districtu alicujus domini, censentur esse de suo "feudo et dominio, et etiam de suâ jurisdictione:"(*o*)

—a doctrine which, within Auvergne, was only formally abandonned in 1510, when the official redaction of its Custom placed of record the substance of the counter-doctrine, so magnified by Championnière; in these words :—

"Le ressort peut estre à un, et le fief à autre; car par la Coustume, fief et ressort n'ont "rien commun:" (*p*)

—but apparently, not with any idea of doing more by the latter of these clauses, than to repeat in more striking and proverbial phrase, the substantive fact set forth in the former.(*q*)

(*m*) See Laferrière, *Hist. du Droit François*, Vol. 4, pp. 96, 7; and the authorities there cited.

(*n*) Tit. 3, § 3; cited *ubi supra*.

(*o*) P. 63; cited *ubi supra*.

(*p*) Chap. 2, Art. 4.—See Coutumier Général, Vol. 4, p. 1161.

(*q*) Championnière's favorite maxim, given by Loysel in the form "*fief, ressort et justice n'ont "rien de commun ensemble*," is in fact traced by DeLaurière, no further back than to this clause of the Custom of Auvergne, of 1510,—and to like clauses in the Customs of Bourbonnais (of 1521; see Cout. Gen., Vol. 3, p. 945), LaMarche (same year; *Ibid.*, Vol. 4, pp. 1102 and 1115), Blois (of 1523; *Ibid.*, Vol., 3, p. 1052), Berry (of 1539; *Ibid.*, Vol. 3, p. 1231), and Touraine (of 1559; *Ibid.*, Vol. 4, p. 675.)

Of these, one only—that of Blois—states the proposition *per se*. The rest all qualify it, much as that of Auvergne does. One—the Custom of Touraine—states it only as an exceptional rule for some particular Seigniories.

Dupin and Laboulaye, in their additions to DeLaurière's Notes on Loysel, give as an equivalent expression, the maxim "*plerumque alius est dominus jurisdictionis, alius dominus beneficii*;" and characterize the Customs which held in effect that "*fief et justice est tout un*," as being "*plus fidèles aux origines féodales.*"

See Loysel, *Inst. Cout.*; *Ed. par* Dupin *et* Laboulaye, 1846; Vol. 1, p. 274, No. 271.—Also, *suprà*, § 123, and Note (*g*) to same.

In a number of other Customs, there was no such change. Some, to the last, assigned more or less of *justice*, either to certain classes of *fiefs*, or to all, as their natural and presumed attribute. And some went the length of maintaining it as inseparable from them.

§ 128.—Nor is there any difficulty, upon the supposition of there having been an original connexion, in one form or another (at least as a usual thing) between the *justice seigneuriale* on the one hand, and the territorial *aleu* or *fief* on the other,—in accounting for the fact of their having come to be in practice so far disunited over a great part of France, as to have made the later maxim, "*fief et justice n'ont rien de commun*," seem like the expression of the true usage of Customary France.

It is certain that in very early times, for the exercise of all feudal jurisdiction of the higher order, it was usual, and came to be held necessary, for the Seignior to form his Court of at least three or four persons holding land *en fief*. Failing such Court, the vassal had the right to carry his cause to the Court of the Dominant. The holders of the smaller class of *fiefs*, or of parts only of *fiefs*,—and their number was constantly on the increase,—must have continually found themselves unable or indisposed to form such Courts, and so have lost at least this particular jurisdiction.(*r*)

Independently of this, again, (and whether one adopt Championnière's view or not, to the extent of referring the early *justice seigneuriale* in some measure to the process of appropriation of a mere right of exacting tribute,) it is to be presumed, that as the realisation of justiciary profits and the exercise of justiciary power required for some centuries the constant maintenance of a respectable armed force, different Seigniors must have claimed this power and these profits in very variant degrees,—and that some either never could have claimed them, or if they did, must soon have had to give up the claim. The matter was at once one of pride and profit; and this, in an age of violence. The more powerful Seigniors must have been continually interfering with the less powerful; sometimes, merely checking their pretensions,—often going further, and subjecting them to pretensions of their own.

Besides all which, in the natural course of sub-infeudation, and of the *partages* of Seigniories (however occasioned, and whether with or without the *parage* reserve in favor of the eldest son), all sorts of reserves of *justice*, partial or entire, qualified or unqualified, were continually made; and, once accustomed to the idea of the alienation of the *fief* separately from the *justice*, people went further,—and as matter of fair contract (of sale or otherwise) learned also to alienate, on all sorts of terms, the *justice* separately from the *fief*.(*s*)

Under all the circumstances, one might perhaps rather wonder that the maxim "*fief et justice est tout un*" should have held its ground anywhere, than that the counter-maxim, as matter of fact, should have so far prevailed as in fact it did.

(*r*) See Laferrière, *Hist. du Droit François*, Vol. 4, pp. 97–99, and authorities there cited.

(*s*) See Laferrière, *Hist. du Droit François*, Vol. 4, pp. 99 and 100.

§ 129.—Developed, then, presumably, from a variety of originating causes, and in a variety of ways, the *justice seigneuriale* (one hardly need repeat) assumed, if possible, a still greater variety of forms than even the *fief* did.

§ 130.—After a time, no doubt, the royal authority, as it gained strength under the third race, made its encroachments more felt, from the necessity of the case, upon the *justice* than upon the *fief*; and so, did more to bring it into something like connexion with public rules of law. The Crown could not rule without administering justice, and could not administer justice without checking and bringing into more or less of subjection to itself, all administration of justice by other authority than its own.

By slow degrees, accordingly, the Crown Courts were made to assume a constantly enlarging jurisdiction, appellate and original; and their general superiority over the Seiguiorial Courts, as regarded the character and capacity of their judges, and the efficiency of the machinery for the carrying out of their judgments, gave them a constantly increasing advantage in their rivalry with those Courts; an advantage that became still more decisive, as the royal power went on gradually to extend its interference to the very administration by the Seigniors, of their justiciary prerogatives,—prescribing rules for them, as well of procedure as of law, and eventually making them defer to its sanction, in a great measure, even in the matter of the appointment of their officers of justice. And thus, at length, men's minds became familiarised to the idea, that of right, all judicial authority should emanate or be held to have emanated from the Crown.

§ 131.—From this revolution in opinion, it naturally resulted, that—while the "*nulle terre sans seigneur*" dogma never so far prevailed as to destroy the territorial *aleu*, and reduce all land to the position of *fief* or *censive* under the Crown as its ultimate feudal Dominant,—the justiciary *aleu* may be said to have been got rid of, under cover of the more public maxim "*toute justice émane du roi*." Although, even as to this, by the way, strongly as the point was maintained by the feudists of the fiscal school, the language of Henrion de Pansey went only to this length :—

"L'opinion commune est qu'il n'y a point de justice allodiale :"—(*t*)

—words guarded enough to indicate the fact, that he was not prepared so far to ignore history, as quite to call the opinion his own.

§ 132.—Again, as part of its policy for the bringing of litigation, by appeal and otherwise, with ever increasing facility, within the *ressort* of its own Courts, the Crown of course set itself against all such distraction of Seigniorial *justices* from their feudal *mouvance*, as should tend to remove them in any degree from the *ressort* of such Courts. By about the middle of the 16th Century, or rather later, it had made good the rule that such distraction of *ressort* could not take effect,—that is to say, that division of or sub-infeudation from a *justice* could

(*t*) *Diss. Féod.*, Vol. 2, p. 490.

not validly be so made as to interpose a new appeal before reaching the Royal Courts,—unless, indeed, it were confirmed by letters-patent of the Crown.(u)

§ 133.—With the assumed feudal dependance of all Seigniorial *justice* from the Crown, and the gradual recognition of the essentially public character of whatever was related to the judiciary or police system of the country, the further conclusion followed, that the *démembrement de justice*, properly so called, or division of it into distinct and separate *justices*,—even though without distraction of *ressort*,—was also a matter subject to royal disallowance.(u)

§ 134.—According to HENRION DE PANSEY, this principle had come to be carried so far, by his time, as (in his opinion) to make any sub-infeudation of a *justice*, otherwise than in its entirety, an act equally subject to royal disallowance, with that of the *démembrement* of such *justice;* a doctrine, as to which one may at least presume with some confidence, that it was even then not established for law.(v) His argument is this:—

"Que le propriétaire d'une seigneurie en aliène moitié, avec moitié du droit de justice;
"une pareille aliénation n'opère ni division ni multiplication du droit de justice,—tout son
"effet est de rendre le vendeur et l'acquéreur co-propriétaires de la justice; et pour appar-
"tenir à deux personnes différentes, cette justice n'en est pas moins une justice seule et
"unique: le titre n'éprouve ni division ni multiplication.

"Mais l'effet de la sous-inféodation est bien différent: la partie que le propriétaire inféode
"est subalternée à celle qu'il se réserve; l'une forme un fief dominant, l'autre un fief
"servant: après l'inféodation ce n'est pas une portion intégrante de la justice que le feuda-
"taire possède, mais une justice très-séparée, très-distincte de la portion demeurée dans les
"mains du seigneur inféodant; il y a donc division de la justice ainsi aliénée, il y a donc
"multiplication de justice.

"A la vérité,—le seigneur inféodant, se réservant la mouvance de cette portion de justice,
"la couvrant sous son hommage, et reportant la justice entière à son seigneur immédiat,—il
"n'y a pas de démembrement, proprement dit, et dans le sens des loix féodales. Mais la loi
"publique, plus sévère que la loi des fiefs, voit deux justices, où précédemment elle n'en
"voyoit qu'une seule; et cette multiplication, elle la reprouve."(w)

§ 135.—Not, however, that the doctrine of this royal *veto* (so to call it) on the distraction of *ressort*, or on the *démembrement* or partial sub-infeudation of a *justice*, though essentially based on a principle of public law, was held to involve as a consequence, the nullity of whatever might be done in defiance or disregard of it. On this point, HENRION DE PANSEY expresses himself without any doubt, thus:—

"Quelque irrégulière que soit la convention par laquelle le seigneur a concédé un droit de
"justice et s'en est réservé le ressort, cependant, comme cette irrégularité résulte uniquement

(u) See HENRION DE PANSEY, *Diss. Féod.*, Vol. 2., pp. 490 *et seq.;* and pp. 558 *et seq.* Before this period, (about 1558 or 1563,) says this author, "les seigneurs jouissoient de "la manière la plus libre et la plus indéfinie, du droit de démembrer leurs justices, et de se "réserver le ressort de celles qu'ils concédoient."—p. 558.

(v) Indeed, he introduces it as constituting a restriction on the *jeu de justice*, after mention of two restrictions, (the first, that *justice* could not be *accensée*, and the second, that the *ressort* must not be affected,) with this preamble, "*il nous semble qu'il faut en admettre une troisième*," etc., words significant of his feeling, that the point was quite open to argument.

(w) *Diss. Féod.*, Vol., 2, pp. 491, 2.

"de l'ordre publique et de l'intérêt des justiciables, et que personne ne peut se prévaloir du "droit d'autrui, le seigneur lié par l'acte qu'il a souscrit, est non-recevable à l'attaquer; le ministère public, et les justiciables grevés d'un nouveau degré de juridiction, peuvent seuls "en demander en faire prononcer la nullité."(x)

The mere opposition of the *justiciables* might of course fail; because,—independently of the rules of usage of the French Courts as to the part to be played in such matters by the *ministère public*, and the almost certainty of such opposition failing unless the *ministère public* supported it,—the Crown, at any stage of the proceedings might grant the required sanction. Practically, therefore, it was the Crown alone that could here act. Unless it saw fit to act, the contract held.

§ 136.—Of course, besides being subject to these facultative restrictions on the part of the Crown, the *démembrement* and *jeu de justice* were also everywhere subject to the same facultative restrictions on the part of the Seignior Dominant,(y) as prevailed in reference to the *démembrement* and *jeu de fief*, strictly so called.(z)

§ 137.—Added to which, there was another of quite a different kind, in reference to the *jeu de justice*,—arising out of the essentially noble quality of the *justice*; that it could not be alienated by *accensement*. Whatever *rente* or *prestation* might be stipulated for it (however qualified) must be such as could be paid for a noble property; could not be a *cens*.(a)

§ 138.—Henrion de Pansey suggested, besides this, one more,—of the class of restrictions facultative to the Dominant,—as peculiar to a certain class of Customs, the Custom of Paris being one of them. His words are:—

"Les dispositions des Coutumes sur ce point ne sont pas, à beaucoup près, conçues dans les "mêmes termes: les unes disent en termes indéfinis que le vassal peut se jouer des "droits et des domaines de son fief: des expressions aussi générales autorisent les vassaux "à se jouer de leurs justices comme de leurs domaines; parceque la justice n'est autre chose "qu'un droit seigneurial et féodal.

"Mais toutes les Coutumes ne sont pas rédigées dans des termes aussi absolus. Celle de "Paris, par exemple, permet et rien de plus, un vassal, de *se jouer des héritages, rentes ou "cens étant du dit fief.* Il n'est aucune de ces expressions qui ait trait à la justice: on peut "donc raisonnablement soutenir que cette Coutume et les semblables ne permettent que le "*jeu des fiefs* proprement dit, et non celui des justices."(b)

From the terms of this suggestion, one may infer that the point was not one that had been practically raised and determined. Of course, it could only have been raised by a Seignior Dominant, who upon alienation of *justice* by his vassal made within the terms of the Custom (that is to say, under the form of sub-in-

(x) *Diss. Féod.*, Vol. 2, p. 561.

(y) The Crown would itself often be such Seignior Dominant; and in that case, would be master of both classes of restrictions.

(z) Vide suprà, §§ 96—118 inclusive.

(a) Henrion de Pansey, *Diss. Féod.*, Vol. 2, p. 491.

(b) *Diss. Féod.*, Vol. 2, p. 492.

feudation, and for a part only), and with claim of exemption from feudal dues,—should assert his right to such dues, and insist on having the alienated *justice* held directly of himself, and not through his vassal; in which case, it is hard to see on what principle his demand could have been resisted. Such a case, however, was not likely to come up for fair adjudication, after the Crown had once begun to claim the right of super-adding its disallowance to that of the direct Seignior Dominant, as a practical obstacle in the way of the distraction of *ressort*, or of the *démembrement* of a *justice;* much less, after it had become a question whether partial sub-infeudation of a *justice* might not always be prevented by the Crown. The Dominant's claim would be apt to yield precedence to the Crown's pretension. If the vassal could not get the royal letters-patent, the Crown disallowance would settle the matter. If he could and did, the Dominant's claim might be thought too late, as seeking to undo, in a lower interest, what the highest authority, if it had not quite helped to do, had at least said might be done.

§ 139.—To what, then,—in a practical point of view, and looking to the Custom of Paris,—do we find all these restrictions to amount?

Justice could not be *accensée*. Any *rente* stipulated for it (however designated) would not have the legal attributes of a *cens*.

If sub-infeuded, within the limit of the Custom and without distraction of *ressort*,—the Dominant might probably have been entitled to claim a mutation fine, and oblige the acquirer to hold directly of him as a co-vassal, instead of holding as a sub-vassal,—and the Crown, possibly, (or—if speaking of a time later than that of the settlement of Canada—one should perhaps say, probably,) might have obliged him either to obtain its letters-patent, or submit (should such letters-patent be refused) to hold of the Dominant, as a co-vassal.

If sub-infeuded in part, but beyond such limit, though without distraction of *ressort*,—there could have been no question as to this claim of the Dominant,—and that of the Crown would have stood as in the case of sub-infeudation within limit.

If sub-infeuded as a whole, still without distraction of *ressort*,—the Dominant could clearly make good his claim,—and the Crown, as clearly, would have been without pretension to interfere.

If alienated, no matter how, with distraction of *ressort*,—the Crown might require the taking out of its letters-patent, or (should they be refused) the annulling of such distraction of *ressort*.

If assumed to be *démembré*,—the Dominant could not be made to recognize the change unless he chose, and without his recognition it would not have been effected,—and the Crown might besides require the taking out of its letters-patent, or (should they be refused) the annulling of such *démembrement*.

§ 140.—But in all cases, as between the parties and their representatives, the contract (whatever its terms) was a good contract; alienating the property parted with; fixing the terms of alienation; giving right to *garantie*, if (by action of Dominant or Crown) such terms should come to be at all altered.

And as against all others, Dominant and Crown excepted, it was equally good,—if not so altered, or until such alteration should have been required.

There was the same absence of the absolute nullity, as in the case of the territorial *fief*; and this, even though the Crown, upon an admitted consideration of public policy (*d'ordre public*), had established—as with the *fief* proper it had not—a certain measured right of facultative interference in the premises.

§ 141.—In a word, subject to this incapacity (so to speak) for being held *en censive*,—to the risk of these royal disallowances of *démembrement*, distraction of *ressort*, and (perhaps) partial sub-infeudation,—and to the risk of the Dominant's disallowance of *démembrement*, and exaction of a mutation fine as from a co-vassal,—this property called *justice* could be kept by its proprietor if he would, or could be alienated whenever he pleased, in whole or part, by any imaginable description of contract, and on any imaginable terms.

Involving, it is true, in so far as the exercise of the *droit de juger* and of the powers thence resulting may be in question, what our modern view of public law would regard as a purely public trust, it was essentially a private property, held by the Seignior-vassal for his own profit,—subject (like the territorial *fief* proper) to reservation of the feudal share known as the *directe*, in favor of his Seignior or Seigniors Dominant,—and subject further (as the territorial *fief* was not) to some degree of Crown regulation as to such mere powers,—by no means in trust for the profit of any one but himself, least of all in trust for those whose ill fortune it was, as subjects of his *justice*, to have to be always contributing by fees, fines, forfeitures and otherwise, to the making up of his revenues as *justicier*.

Whether, with Championnière, we trace back these revenues, and this *droit de juger* and these powers arising out of it, to an original appropriation of tribute as opposed to appropriation of soil,—or, with other writers, regard them as originally accessory, in one way or other, to an ownership of territory,—or adopt both views in part, and conclude that they may have partaken of both origins, and at first have been accessories, sometimes of the one kind of property, and sometimes of the other,—the case is not in the least altered. The fact remains, that contrary to what every one would now hold for sound public principle, they were a property, the property of a privileged class, and not a trust.

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§ 142.—In 1853, the argument was authoritatively urged, on the floor of the House of Assembly, (*i*) that the feudal system in some way implied the constant normal existence of some kind of general controlling power, over each grade of feudal land-holders in turn,—vested, of course, pre-eminently in the Crown, as head of the feudal hierarchy; that this feature of the system made it natural and fitting, that in Canada the Crown should have controlled matters, as the theory of the Attorney General's Propositions holds it to have done; that the control so held to have been exercised, was thus a feudal control; and that its

(*i*) The speech that most insisted on it, was not reported; and the argument was not repeated, in terms, before this Court. So that it cannot well be referred to here, otherwise than impersonally.—Still, in its time so much was made of it,—and the important question of the power of the French King to do as he is said to have done in Canada, is so closely connected with it,—that it perhaps ought not to be passed by

non-exercise since Canada became a British Province, has been a sort of abandonment by the Crown, of a feudal duty.—If this were so, one might regard such feature of the feudal system as the germ, out of which the alleged new Canadian system may have been developed.

§ 143.—But, that the feudal system had no such feature, is a proposition almost too certain and too plain to admit of being argued, or so much as stated. So far from supposing a general controlling power, in ascending degrees, up to the one head of the confederacy, in whom therefore it should centre,—the feudal system rested on a supposition as nearly as possible the precise opposite.—It had no one head, even in theory, till after other than feudal influences had been long at work over the fashioning of what became the Crown theory on this point. It never had such one head *in fact*, even in France. Indeed, it may be said never quite to have had it in theory; for not even the Crown theory, to the last, could deny the existence of the *aleu*—noble, as well as *roturier*—or its prevalence as the rule of tenure over much of France.—And, at every step downwards, from the *aleu noble*, whether kingly or not kingly, to the *censive*, it expressly precluded all normal exercise of general controlling power by grantor over grantee; referring, as it did on all points, for the ascertaining of their relations towards each other, to the mere terms of their contract. The higher contracting party had no more legal control over the contract, when once established, than the lower had. HERVÉ puts this so strongly and so clearly, that, at the risk of almost repeating what other citations (*k*) may be thought to have fully established, one cannot help recurring to his words:—

—"la concession en fief est un contrat parfaitement synallagmatique ou bilatéral. En
" effet, l'obligation que le seigneur a contractée au moment de la concession, de laisser jouir
" le vassal de la chose concédée, en la manière convenue, et l'obligation que le vassal a con-
" tractée de son côté, de conserver une reconnaissance toujours subsistante, sont deux obliga-
" tions essentiellement correlatives et également principales, qui ne peuvent subsister l'une
" sans l'autre, et desquelles résulte de part et d'autre, une action directe. * *
—"le seigneur et le vassal ne peuvent ni l'un ni l'autre, rien changer au contrat sans un
" consentement commun; mais ils peuvent, de concert, y apporter tel changement et telle
" modification qu'ils jugeront à propos, en ce qui ne touche point à son essence. *Nihil*
" *enim tàm naturale est, quàm eo genere quodque dissolvi quo colligatum est.* * *
" Quelqu'onéreuses que soient les charges du vassal, il ne peut s'y soustraire, les modifier,
" en substituer d'autres, ni changer le temps, le lieu et la manière de s'acquitter; car ce seroit
" perdre de vue la condition présumée de l'inféodation.
"Le seigneur, de son côté, ne peut étendre ses droits sous prétexte d'interprétation et de
" présomption de la volonté des parties, lorsqu'elles ont contracté: ce seroit ajouter au titre
" primitif. *Non oportet ab extraneo jure suppleri, quod spontanea omissio repudiavit,*"(*l*)

The King was as much bound by these rules, as any other Seignior—*aleutier* or vassal. It was never claimed for him as matter of feudal law, or indeed as

(*k*) *Suprà*, §§ 63 and 64.

(*l*) Vol. 1, pp. 386—393.

matter of law generally,(*m*) that he was not. If in practice he broke through any of them, he as much did wrong—a wrong that his own Courts, according to law, would have been bound to set right—as any other member of the feudal confederacy so acting would have done. There may be no doubt that such wrongs were done, and not by the King only; and that they were not always righted, even where redress was called for. All that has nothing to do with what should have been.

§ 144.—Supposing the French King to have undertaken in Canada, of his sole authority, to set aside his feudal contracts after they were made, or (which is the same thing) to engraft upon them conditions that formed no part of them as made,—he exercised no normal power known to the feudal system, but a prerogative utterly alien and antagonist to it.

We shall see presently what he really did or pretended to do in this way; and how far short it falls, of what the anti-seigniorial theory assumes him to have done. But in the mean time, it is impossible to avoid the remark, that such violation of contract by the Crown is not more contrary to the feudal system than to law in general; and that, whatever theories may be broached as to the extent of the arbitrary prerogatives of the French Crown in the 17th and 18th Centuries, there can happily be no doubt as to the measure of the non-arbitrary prerogative of the British Crown, since that time, and still.

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§ 145.—If, then, the feudal system of Canada under the French Crown was what the Attorney General's Propositions make it to have been, it was the antipodes of that of France, as then extant, in (at least) some not unimportant particulars. It made the King master of his contracts after they were made, instead of being bound by them; insisted on all but uniformity (except, of course, as against him), in place of endless variety; hedged everything round with rules of public law and absolute nullities thence resulting, in place of leaving everything to the operation of the relative nullities of private law; substituted control in the interest of the *censitaire*, for protection of the interest of the Dominant; postponed the privileged class, so called in mockery, to the non-privileged; converted the feudal sub-grant, from a prized right, into an onerous obligation; made property a public trust, instead of leaving public trusts for property. Yet the King professed to bind himself to formal contracts of infeudation,—and these anything but uniform; and men called things as in France, to the extent even of treating the partly public trust involved in the peculiar property called *justice*, as though it was the same property in Canada as in France. Granted, readily, that things in Canada are not to be supposed to have been placed on exactly the footing of things in France. A new country and an old have their differences, of necessity. Have they nothing else? Using the words, do not people think the thoughts of their country and time?

(*m*) See discussion and authorities as to this, in the factums of Messrs. Cherrier and **Mackay.**

§ 146.—But the argument here offered need rest nothing on probabilities. It is enough, that as yet we have not found what is said to have been the feudal system of Canada; nor anything in the feudal system of France, that, by any process of natural development, could have been fashioned into it.

If it is to be found in any thing that one can call Canadian legislation or quasi-legislation, let it be. Only,—and this inference one surely has a right to draw,—to be admitted as so found, it must be somewhere stated, in terms that one can take for reasonably explicit,—and on some authority that one can take for competent. Doubtful words and doubtful authority, one must have the right to try by a standard not doubtful.

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§ 147.—We advance, then, from the consideration of French antecedent law, to that of Canadian legislation or quasi-legislation. And first,—for the French period of Canadian history.

Is the doctrine of the Attorney General's Propositions to be found in what may be called the Franco-Canadian law of Canada, including under that phrase the terms of the grants, and all local laws, and all regulations, jurisprudence and usage having force of law in Canada, through this French period of its history? Does it result from anything done here, or by the authorities in France, while Canada was French?

§ 148.—It is one of the hardships of which the Seigniors have to complain, that they are left by the Attorney General's Propositions (for all practical purposes) so entirely in the dark, as to what it is, in the shape of alleged authoritative document or documents, that the anti-seigniorial system in those Propositions developed, is thereby made or meant to rest upon.

The sixth Proposition lays it down, that in respect of the rendering of sub-infeudation, defined as "*la concession des terres à des habitants pour les mettre* "*en culture*," obligatory on all proprietors of fiefs, "le régime féodal, tel qu'in-"troduit en Canada, a été considérablement modifié *par des dispositions parti-*"*culières qui se trouvent dans les arrêts, édits et ordonnances royaux, les titres de* "*concessions, les ordonnances et jugements du conseil supérieur et des intendants.*"

The seventh Proposition declares, that the intention of the King to impose this obligation, "s'est manifesté *d'une manière claire et explicite.*"

The eighth adds, that this intention "s'est manifestée *par des lois spéciales,* "ET DE DIVERSES AUTRES MANIÈRES *dont les tribunaux doivent prendre connais-*"*sance*, lorsqu'ils sont appelés à statuer sur les matières qui concernent la con-"cession des terres tenues en fief ou en roture dans ce pays."

The ninth curtly has it [illegible]t "*les anciennes lois du pays*" obliged Seigniors to concede their land "*[illegible]re de redevances, quand ils en étaient requis,*" and in that behalf restricted and limited their right of property therein.

The tenth, speaking of an obligation to concede "*soit en arrière fief, soit en* "*censive*," after referring its origin to the feudal rules prohibitory of the "démem-"brement du fief," proceeds,—"En Canada, *la plupart des titres des seigneurs*

"*contiennent expressément cette obligation ; elle est d'ailleurs établie par plusieurs* "*arrêts et jugemens*, et paraît avoir été imposée à tous les seigneurs qui tenaient "leurs propriétés à titre de fief."

The thirteenth, going a step further, and speaking of "*le taux et les conditions* "des concessions de terres dans les seigneuries en Canada," holds them to have been "soumis à des dispositions spéciales *qui se trouvent dans plusieurs édits et* "*ordonnances royaux*, TELS QU'INTERPRÉTÉS PAR *l'usage*, PAR *les jugements des* "*intendants*, ET PAR *un grand nombre des concessions en fief*, OU PAR *les brevets* "*de confirmation de ces concessions*."

The fourteenth speaks of a "montant des redevances accoutumées, dont parlent "*les arrêts, édits et ordonnances, et entr'autres l'Arrêt du* 6 *Juillet* 1711."

The fifteenth, after admitting the variety of the rates prevalent before 1711, lays it down that by this "*Arrêt du* 6 *Juillet* 1711" "le taux en fut irrévocable-"ment fixé à celui [!] alors usité et établi dans le pays,"—and adds, that such *taux* is proved not to have exceeded the 2 *sols* maximum, "*par les contrats de* "*concession produits en cette cause*."

The sixteenth refers generally to "*les anciennes lois du pays, concernant la* "*concession des terres seigneuriales, et nommément cet Arrêt du* 6 *Juillet* 1711, "*l'Arrêt du* 15 *Mars* 1732, *et la Déclaration Royale du* 17 *Juillet* 1743."

The seventeenth and following Propositions fall back on the cautious generality, "*les lois en force en Canada avant la cession du pays*."

And lastly,—the thirty-fourth and following Propositions refer to the "*Arrêt* "*du Conseil d'Etat du* 4 *Juin* 1686," as constitutive of a special "droit de "banalité" in Canada; the thirty-ninth and fortieth refer to "*usage*," as seeming to have sanctioned such reservations by the Seignior, as that of "bois pour la "construction du manoir, des moulins et des églises, sans indemnité," but apparently no others; and the forty-second refers to an "*Arrêt de l'intendant* "*Hocquart en date du* 22 *Janvier* 1716," as prohibitive of "corvées."

Otherwise than by aid of these expressions, which they surely are entitled to characterize as inexplicit, and therefore unfair, the Seigniors have no means of ascertaining from these Propositions, by what process of legislation or quasi-legislation the great change, said to have been wrought as to feudal law in Canada, is held by the author of these Propositions, to have been so wrought.

§ 149.—It may be, that this is not much to be wondered at; considering the fact, that the nature and extent of the change itself, and even its result as extant in the supposed present system of Canadian feudal law,—instead of being all clearly and succinctly stated, as one would think they should have been,—are left for matter of not quite obvious inference, from a comparison of the Propositions with each other, and even with some other *ex-cathedrâ* utterances of the anti-seigniorial faith, besides.(*n*)

(*n*) *Vide supra*, §§ 1—15, and specially § 7, and Notes thereto; also § 33, and Note (*r*) thereto.

§ 150.—Only, with all this difficulty that there seems to be, in the way of a clear statement as to where these laws are to be read, and as to what is to be read in them, it is noticeable that no difficulty is found in stating most clearly, —by the eighteenth Proposition, that they are "*lois d'ordre public*,"—by the nineteenth, that "*les particuliers ne pouvaient déroger à ces lois dans les conven-* "*tions faites entre eux*,"—by the twentieth, that "*les conventions faites entre* "*seigneurs et censitaires en contravention de ces lois d'ordre public étaient absolu-* "*ment nulles*,"—by the twenty-first, that they remain unrepealed,—and by the twenty-fifth and others, that rents stipulated since the cession of Canada to Great Britain(o) are to be cut down, and rights of all sorts (reservations, prohibitions, *corvées* and so forth) disallowed—complaint or no complaint—accordingly.

§ 151.—For fitting complement to all this, the sixth Proposition,—while it admits that as to the obligation to concede, therein asserted, the feudal system of Canada differed materially from that of France,—gravely puts it as an argument, that in order to introduce the French system into Canada it was necessary to introduce—not it, but something else—this other Canadian system thus materially differing from it. The words of the Proposition are:—

"Pour transporter de la France au nouveau monde ce système féodal [c.-à.-d. le système "féodal de la France] il était nécessaire de rendre la sub-inféodation, ou en d'autres mots la "concession des terres à des habitants pour les mettre en culture, 'obligatoire pour tous les "propriétaires de fiefs; et sous ce rapport le régime féodal, tel qu'introduit en Canada, a été "considérablement modifié," etc.

As though it were not too plain for agument, that as the feudal system had grown up in France without such obligation as part of it, so it almost must be held for *possible*, that it should grow up or be introduced elsewhere *also*, without such obligation being super-added to it.

Or, as though the whole of the anti-seigniorial argument did not in fact rest upon the assumption, that it was not the feudal system of France, but a something quite different, that was sought to be introduced into Canada, after all.

§ 152.—Hardly less of *naïveté* is there, in the inquiry addressed to this Court, by the latter part of the Attorney General's eighth Question,—and in the answer to it, forming the latter clause of his eighth Proposition:—

—"Would it have been possible to carry out that intention [the alleged intention of the "King to impose this obligation] otherwise than by limiting the rents, *redevances*, for which "the lands held *en fief* should be conceded?"

—"Et il n'eût pas été possible de mettre cette intention à effet, autrement qu'en limitant "les redevances auxquelles les terres tenues en fief devaient être concédées."

Perhaps so.—But, to have first helped out an argument for the existence of this intention, by asserting its abstract necessity in order to the carrying out of an assumed ulterior end,—and then to have helped out an argument for the existence of a fixed rate of rent, by asserting its abstract necessity in order to the carrying out of this intention,—may be thought to look like the boldness of the weak cause, rather than of the strong.

(o) Overlooking those stipulated before.—*Vide suprà*, § 7, Note (*f*).

Both arguments are as to fact. Both conclusions are to be proved for fact, against the Seigniors; the case against them being no-where, till both are proved. If the fact be so, it must be readily proveable, by citation of documents of some sort. The documents of the time are not lost. And unless evidenced at the time by documents, the fact was not so. State intentions, constitutive of laws of state policy, *d'ordre public*, for the regulating of all the real estate of a country under sanction of absolute nullities against all contravention,—are not to be taken upon trust, or as matter of guess or hearsay. To have existed, they must have been authoritatively put in writing and promulgated. Suppose it to have been ever so necessary, in a logical point of view, that in order to intend to introduce the French feudal system into Canada, the King should have intended not to introduce it but something else very different,—if the very fact of his intention to introduce that something else be otherwise doubtful,—this doubt is not got rid of by the supposition, but is merely reflected back and made to cover both intentions. Suppose it, further, to have been logically impossible to carry out the intention of introducing this something else, unless by expressly limiting a rate of rent, (and indeed, one may say, a great deal more besides,) and add the further supposition that in very fact this express limitation of a rate of rent, and of these other matters besides, is not to be found,—the doubt is only changed into a certainty adverse to the theory of the existence of this intention. What must have been done in order to give effect to it, the King did not do. He did not give effect to it. For any legislative or state purpose, he did not entertain it.

The Seigniors need not trouble themselves with the logic of either argument. They join issue as to the fact.

§ 153.—The number of state documents cited in argument before this Court by the learned Counsel in the anti-seigniorial interest, as bearing upon this issue, though considerable, was not very great. And it would be comparatively easy, by a mere criticism of them, to show not only that they fail of making out the required case against the Seigniors, but even, that the Seigniors might without danger rest their whole case upon them. But the Seigniors have undertaken to do more than this; as well from their confidence in the strength of their cause, as from the certainty that any mere criticism of documents cited against them would be unsatisfactory, on these accounts,—that other citations may always be made in the printed factums to be submitted to this Court against them,—that all such citations, whether put forward at the argument or merely printed, are always made illustratively, and not as being all that can be made,—and that, therefore, however they may be dealt with, it might still seem a possible thing for others to be brought forward, which should be harder, if not impossible, to answer.

They enter, accordingly, without fear, upon the discussion of the actual history of the feudal tenure, in Canada, through the French period of Canadian history.

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§ 154.—This period, however, obviously requires sub-division.
It is proposed to divide it into four periods:—

FIRSTLY.—That ending with the surrender of the Charter of the Company of New France, in 1663.

SECONDLY.—The following period, ending with the surrender of the Charter of the Company of the West Indies, in 1674.

THIRDLY.—The following period, ending with the enregistration in Canada, of the *Arrêts* of Marly, in 1712.

AND FOURTHLY.—The concluding period, ending with the cession of Canada to the British Crown, in 1759—1763.

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§ 155.—For the earlier part of the First Period, the materials for a history of the tenure of land in Canada are not abundant.

§ 156.—It may perhaps be doubted whether or not it was at first the intention of the King of France to effect a *bona fide* settlement of Canada by emigrants from France who should take title to land there from himself. The Commission from Francis the First to Jacques Cartier in 1540 (Oct. 17), as Captain General and Master Pilot of the expedition then on foot, without hinting at any appropriation of the soil, merely sets forth that he is sent—

—"avec bon nombre de navires, et de toutes qualités, arts èt industrie, pour plus avant
"entrer ès dits pays, converser avec les peuples d'iceux, et avec eux habiter si besoin est."(p)

But on the other hand, the Commission to the Marquis de la Roche, presently to be noted, refers to the issue of a previous Commission to the Sieur de Roberval, under date of 1540, Jan. 15; presumably, as Lieutenant General and Governor in Chief, and in the same terms as that to de la Roche. If it was so, the large powers for land-granting vested in the latter, date back to the time of this earlier expedition.

§ 157.—The Commission to de la Roche, of 1598 (Jan. 12), sets forth those powers thus:—

"Et afin d'augmenter et accroître le bon vouloir, courage et affection de ceux qui serviront
"à l'exécution et expédition de la dite entreprise, et même de ceux qui demeureront ès dites
"terres:—

"Nous lui avons donné pouvoir, d'icelles terres qu'il nous pourrait avoir acquises au dit
"voyage, faire bail, pour en jouir par ceux à qui elles seront affectées, et leurs successeurs,
"en tous droits de propriété:—

"A savoir, aux gentilshommes et ceux qu'il jugera gens de mérite, en fiefs, seigneuries,
"châtellenies, comtés, vicomtés, baronnies et autres dignités relevant de nous, telles qu'il
"jugera convenir à leurs services,—à la charge qu'ils serviront à la tuition et défense du dit
"pays,—

"Et aux autres de moindre condition, à telles charges et redevances annuelles qu'il avisera,
"dont nous consentons qu'ils en demeurent quittes pour les six premières années, ou tel autre
"temps que notre dit Lieutenant avisera bon être et connoîtra leur être nécessaire,—excepté
"toutefois du devoir et service pour la guerre."(q)

(p) EDITS ET ORDONNANCES, 4°. Edn. of 1803-6; Vol. 2, pp. 1—4: and COMMISSIONS DES GOUVERNEURS ET INTENDANTS, 8°. Edn. of 1854; pp. 4—7.

(q) EDITS ET ORD., 4°, Vol. 2, pp. 4—7; and COM. DES GOUV. ET INT., pp. 7-10.

§ 158.—The Commissions given in 1612 by the Comte de Soissons, and in 1625 by the Duc de Ventadour, to Champlain as Commandant under them respectively, depute to him no power of disposal of land.(r)

§ 159.—To what extent the Marquis de la Roche, and his several successors as Lieutenant General, the Comte de Soissons, the Prince de Condé, the Duc de Montmorenci and the Duc de Ventadour, (whose powers as to land-granting were presumably much the same as his,) actually made grants of land,—and more especially, grants importing dignity,—does not appear. Their grants, if they made many, could not generally have been taken effective possession of by the grantees; and, with the two or three exceptions presently to be noticed,(s) seem all to have lapsed.

§ 160.—But at least one grant made during the period covered by their successive names, was either made as a Barony, or else erected into one, in favor of Guillaume de Caen. In letters-patent of the King, of the year 1640, erecting a grant made to him of several islands in the West Indies, into a Barony, it is recited as a motive, that he had been—

—" déposśédé de la Baronnie du Cap de Tourmente située en notre pays de la Nouvelle " France, laquelle lui avoit été donnée et érigée par des titres illustres d'honneur, et en " considération des grands périls, hasards et aventures qu'il a courus, tant pour prendre " entrée et habitudes en notre dit pays de la N. F., que pour la conservation et défense d'ice- " lui * *, et des grands frais et dépenses qu'il a été obligé faire," etc.(t)

§ 161.—Another grant of the same period is known to have been made by the Duc de Montmorenci in 1622 or 1623, being the first grant of the seigniory now known as the Sault-au-Matelot,(u)—presumably, much in the same terms in which the second or confirmatory grant of it was made in 1626 by the Duc de Ventadour.

(r) Edits et Ord., 4°, Vol. 2, pp. 8—13; and Com. des Gouv. et Int., pp. 11—14.

(s) Vide *infra*, §§ 161—3 inclusive.

(t) Moreau de St. Méry, Vol. 1, pp. 48 *et seq.*

The dispossession of which de Caen had complained, was no doubt a consequence of the grant to the Company of New France in 1627; whereby the "*articles*" that had been granted to him and his associates were revoked.—*Vide* Documents Seigneuriaux, 1852, Vol. 2, p. 4; also *infra*, §§ 166, 169 and 187.

(u) Numbered †a1 in Abstract of Titles.

For the sake of convenience, I propose to refer for these Titles, to my Abstract compiled for this purpose and laid before this Court, instead of referring to the Seigniorial Documents or other source from which they have been carried into the Abstract.—In the Abstract, I have indicated those sources with extreme care; to that there can be no difficulty in testing the sufficiency and correctness of its extracts, or in ascertaining the tenor of the context, there omitted as unimportant. And I have done my utmost to facilitate reference from every Title to all others at all connected with it.

It contains all the Titles which I had been able to bring together, down to the time when I had to send it to press, shortly before the meeting of this Court. Some have been ascertained since; and for these I must of course refer specially to the M. S. or other authority, on which my citations may rest.

§ 162.—This second grant(*v*) covered, besides the Sault-au-Matelot, the seigniory on the St. Charles, near Quebec, known as St. Joseph or Lepinay. It was made to one Louis Hebert; and after recital of his claims as head of the first family settled in the country, and as having inclosed, cleared and built upon certain lands of which he had obtained from the Duc de Montmorenci "*le don* "*et octroy à perpétuité*," being the grant last referred to,—it proceeds first to confirm that grant thus:—

—"pour les considérations sus-alleguées et pour encourager ceux qui desireront cy apres "peupler et habiter le dit pais de Canada, avons donné, ratiffié et confirmé, donnons, ratiffions "et confirmons au susdit Louis Hebert et ses successeurs et heritiers, et suivant le pouvoir à "nous octroyé par Sa Majesté, toutes les susdites terres labourables deffrichées et comprises "dans l'enclos du dit Hebert, ensemble la maison et batimens, ainsy que le tout s'estend et "comporte au dit lieu de Québec sur la grande rivière ou fleuve de St. Laurens, pour en jouir "en fief noble par luy ses heritiers et ayant cause a l'avenir comme de son propre et loyal "acquest et en disposer pleinement et paisiblement comme il verra bon estre, le tout relevant "du fort et chateau de Québec aux charges et conditions qui luy seront cy apres par nous "imposées,"—

—and then to add the grant of St. Joseph or Lepinay, thus:—

—"et pour les memes considérations, avons de plus fait don au dit Hebert et à ses succes-"seurs, hoirs et héritiers, de l'estendue d'une lieue françoise de terre située proche le dit "Québec sur la rivière Saint Charles, qui a esté bornée et limitée par les sieurs de Champlain "et de Caen, pour les posséder, deffricher, cultiver et habiter, ainsy qu'il jugera bon estre, "aux mémes conditions de la première donation."

One of the manuscript documents laid before this Court by Government (No. 42, Second Series) is an instrument, by which Champlain, as Lieutenant of the Duke in Canada, granted *acte* to Hebert, of the deposit in his hands of an authentic copy of the above document, and certified that he had accordingly put him in possession of the lands newly granted to him by it,—in these words,—

—"à ces causes sur le commandement qui nous a été fait par les d. patentes de mon d. "Seigneur, je me suis transporté ce 8 Août 1626, à une petite lieue de Québec sur la rivière "St. Charles, devant la maison des Perès Récolets, de l'autre costé de la rivière au nord, "pour mettre le dit Hebert en possession de ces terres, lesquelles (consistant en bois, patura-"ges et ruisseaux) étoient séparées d'un costé d'un petit ruisseau qui appartient au dit Hebert, "et de l'autre costé à l'orient des bornes que j'y ai mises sur les lieux, qui séparent la d. terre "de ce qu'il y a à donner à ceux qui se présenteront."

§ 163.—The third, and only other known grant of this class,(*w*) was also by the Duc de Ventadour, and of the year 1626; and was the first grant made of Notre Dame des Anges, to the Jesuit Fathers. After a recital, setting forth the zeal of the grantees in sending out missionaries to settle, build and teach in Canada, the grant is thus made:—

—"pour ces causes, et afin de leur donner plus de moyens de le faire, * *, avons aux susdits "Pères de la Compagnie de Jesus donné, et donnons par ces présentes, en don irrévocable et "perpétuel, près de l'habitation du Fort de Québec en la dite N. F., la quantité de quatre

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(*v*) No. 1 of Abstract.

(*w*) No. 2 of Abstract.

"lieues de terres tirant vers * *; item, nous leur avons donné et donnons comme une pointe "de terre avec tous les bois et prairies et touttes autres choses contenues dans la dite pointe "scittuée * *: Notre volonté estant qu'ils jouissent paisiblement de tous les bois, lacs, étangs, "rivières, ruisseaux, prairies, carières, pairières et autres choses qui se rencontreront dans "le contenu de ces dites terres, esquelles terres ils pourront bâtir si bon leur semble une "habitation, demeure, noviciat ou séminaire, pour eux et pour y eslever et instruire les enfants "des sauvages."

§ 104.—It can scarcely be thought an over-bold inference from these documents,—all that one can bring together for the period anterior to the creation of the Company of New France,—that thus far we find no trace of any intention to make the tenure of land different in Canada from what it was in France; that looking back to the two classes of grants of land (both of them, "*en tous droits* "*de propriété*") which the King contemplated, it could not have been in the Kings' mind to cause the "*gentilshommes*" and "*gens de mérite*" whose lands should be granted "*en fiefs, seigneuries, châtellenies, vicomtés, baronnies et autres dignités,*" to take a less estate in their lands, than the "*autres de moindre condition*" who were to have land "*à charges et redevances,*"—but the contrary; that the Barony of Cap de Tourmente, given to Guillaume de Caen, the head man of the then trading projects for New France, was given and taken as a property in which he was to have the same sort of proprietary right as he would have had in a like property at home; and that Hebert's (*x*) grant "*en fief noble,*" and the Jesuits' grant of Notre Dame des Anges—called neither *fief* nor *aumône*, and reading rather as if it had been meant for an *alcu*—were veritable grants of land, and conveyed to the grantees nothing less than the entire corporeal realty comprised within their limits,—the Sault-au-Matelot, with its clearances and buildings even then upon it (*y*) "*ainsi que le tout s'estend et comporte,*"—St. Joseph, with its "*bois, pâturages et ruisseaux,*"—and Notre Dame des Anges, with all its "*bois, lacs, étangs, rivières, ruisseaux, prairies, carières, pairières et* "*autres choses qui se rencontreront dans le contenu de ces dites terres.*"

(*x*) It was strangely made an argument before this Court, that Hebert was a *roturier*; as if the unstated social rank of the grantee could have anything to do with the interpretation of the distinctly stated terms of his grant.

Hebert's was not the first case—and we have not yet seen the last—of the emigrant seeking more abroad than he could have claimed at home. According to this argument, he got less. If he had taken *en censive*, he would have had a property; taking *en fief noble*, he only got a public trust.

It might be in keeping with other consequences of the anti-seigniorial theory, to suggest that Hebert's *roturier* quality should be held to show that the grant to him was meant to have the high qualities of the grant *en censive*, in spite of its unlucky reference to the *fief noble*.

(*y*) It is sad earnest, however much it may seem like joke to say it,—that the Propositions of the Attorney General require this Court to declare, as to this same property of Sault-au-Matelot, which the French King's Vice-Roy for Canada certified for enclosed, cleared and built upon in 1626, and which he granted as such to the first settler of Canada, who had so improved it, to be forever "*son propre et loyal acquest et en disposer pleinement et paisible-* "*ment comme il verra bon estre,*" that under that grant it was held after all, and is still held

The "*fidéi-commis seigneurial*" was no thought of that time.

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§ 165.—An attempt was made in argument before this Court, to find some trace of it in the *Acte* or Instrument by which, in 1627, the Country was granted to the Company of New France.(z)—That instrument is important enough to require the most careful examination. But no amount of examination will detect in it this idea.

§ 166.—Its preamble recites, truly or untruly, that those to whom the King had confided the duty of making such settlement of French Catholics in the country, as should dispose the natives to the Christian faith and to civilization, and establish there the royal authority,—the King's successive Lieutenants Gen-

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à titre de fidei-commis seigneurial, for sub-grant *en censive at* 2 *sols* or less per arpent, unconditionally, to all comers !

To this day it is held under this title of 1626, *enlarged by two later titles ;* one of the year 1674 (No. 134*a* of Abstract) by the Company of the West Indies, confirmed by *Edit* of the King upon the surrender of that Company's Charter,—by which the "*charges et conditions*" originally left an open question were restricted (upon the prayer of the then proprietor, Bishop Laval) to these three :—

1.—" pareillement * * de rendre la foy et hommage à la dite Compagnie de 20 ans en 20 " ans,—

2.—" avec une pièce d'or évaluée à 6 livres tournois,—

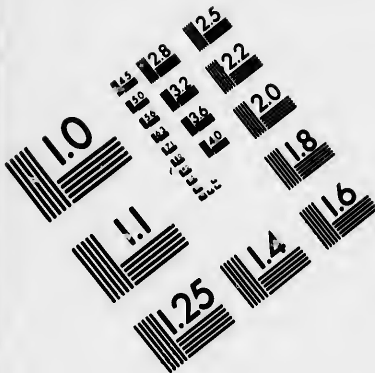
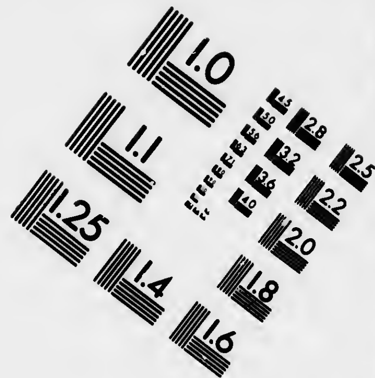
3.—" et bien qu'ils perçoivent les lods et ventes et autres droits seigneuriaux pour les em- " placements, ils ne pourront néanmoins avoir aucune justice dans la ville de Québec ou " ailleurs en vertu du dit fief, et se pourvoiront immédiatement au dit conseil souverain,"— —the other, of the year 1687, confirmed by the King in 1688, (Nos. 188 and 195 of Abstract,) by which the beaches in front of it and of all the other seigniorial properties of its then holders, the Seminary of Quebec, were added to, and incorporated with, such respective properties, in these words :—

—" avons accordé, donné et concédé, accordons, donnons et concédons au dit Séminaire de " cette ville les grèves qui sont sur l'étendue et au-devant de toutes les terres à luy appar- " tenantes à titre de fief, pour en jouir aux mesmes titres de fief et droits portés par les dits " titres de concession des dites terres, et sans autres charges que celles portées par les dits " titres, ny que personne les puisse troubler ou empescher en la jouissance des dites grèves, " tant du Sault au Matelot qu'autres lieux à luy appartenant au dit titre de fief; pour en " jouir par les sieurs Ecclésiastiques d'iceluy, leurs successeurs et ayans cause à perpétuité, " comme de chose appartenante au dit Séminaire."

Of course, there is no exception of these properties,—or of any others tainted by Seigniorial title,—from the sweeping sentence of the Attorney General's 26th and 27th Propositions :— —" les seigneurs, comme tels, n'avaient aucuns droits sur les fleuves et rivières navigables dans " le Bas-Canada ;"

" Dans les seigneuries bornées par un fleuve, ou une rivière navigable, les seigneurs ne " pouvaient pas légalement réserver le droit d'y faire la pêche, ou imposer des redevances " à leurs censitaires pour l'exercice de ce droit; ils n'avaient aucun droit sur les grèves des " fleuves et rivières navigables, qui sont du domaine public; et nommément, ils n'avaient " pas le droit de percevoir des profits de lods et ventes sur les mutations de grèves situées " entre haute et basse marée dans le fleuve St. Laurent."

(z) Doc. Seign., Vol. 2, pp. 3—8; Also Ed. et Ord., 4°, Vol. 1, pp. 1 *et seq.;* and 8°, Vol. 1, pp. 5 *et seq.*

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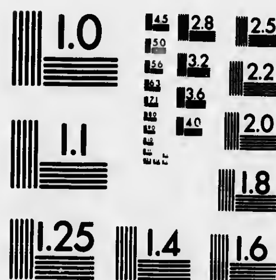
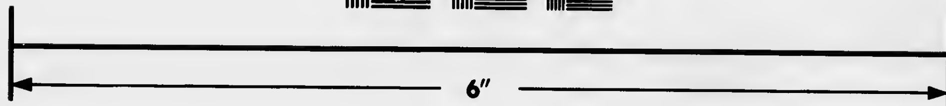

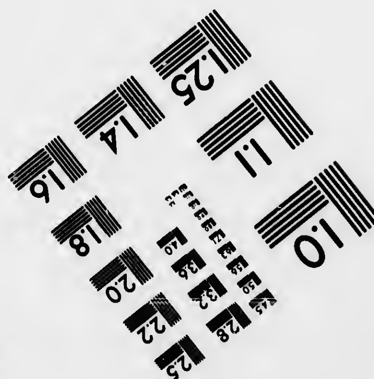

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eral and Vice-Roys being apparently the parties here meant,—had been so negligent, that there was still but one settlement, with some 40 or 50 French inhabitants, in the interest of the merchants rather than of the King, and where agriculture was so neglected that a month's delay in the arrival of the ships reduced them to famine; that those also who had obtained a monopoly of the trade (Guillaume de Caen and his associates, presumably) had only undertaken to send out 18 men in the course of the 15 years of their monopoly, but had done nothing towards the discharge of that slight obligation during the 7 years of their term then past,—and, though bound to give passage to New France at 36 *livres* a head, to all comers, made such difficulties about it, and so worried Frenchmen when there, as practically to keep every thing in the country in their own hands;(a) and that in consequence, the Cardinal de Richelieu, after examination of a variety of projects, had determined on the revocation of the "*articles*" granted to de Caen and his associates, and on the formation of a powerful Company of 100 associates on the terms therein set forth.

§ 167.—The first, second and third sections, read in connexion with the tenth, state exactly the obligations imposed upon this new Company.

They were to send out from 200 to 300 men of all trades in the year 1628, and to raise the number so sent to 4000 persons, both sexes counted, within the 15 years to end in 1643; as many as 1500 of the whole number, being sent out (according to Section 10) within the first 10 years of such term. They were to

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(a) These recitals are so strange, as to seem to require citation, in the words of the original:—

"Néanmoins ceux auxquels on avoit confié ce soin," ["de peupler les dits pays de naturels "François catholiques, pour, par leur exemple, disposer ces nations à la religion chrétienne, "à la vie civile, et même y établissant l'autorité royale, tirer des dites terres nouvellement "découvertes, quelque avantageux commerce pour l'utilité des sujets du roi,"] "avoient été "si peu curieux d'y pourvoir, qu'encore à présent il ne s'y est fait qu'une habitation, en "laquelle, bien que pour l'ordinaire on y entretienne 40 ou 50 François, plutôt pour l'intérêt "des marchands que pour le bien et l'avancement du service du roi au dit pays,—si est-ce "qu'ils ont été mal assistés jusqu'à ce jour, que le roi a reçu diverses plaintes en son conseil, "et la culture du pays y a été si peu avancée, que si on avoit manqué à y porter une année "les farines et autres choses nécessaires pour ce petit nombre d'hommes, ils seroient con- "traints d'y périr de faim, n'ayant pas de quoi se nourrir un mois après le temps auquel les "vaisseaux ont accoutumé d'arriver tous les ans.

"Ceux aussi qui avoient jusqu'à présent obtenu par eux seuls tout le commerce ès dits "pays, ont eu si peu de pouvoir ou de volonté de le peupler et cultiver, qu'en 15 années que "devoit durer leur traite, ils ne se sont proposés d'y faire conduire au plus que 18 hommes; "et encore jusqu'à présent qu'il y a 7 ans que les articles en furent dressés, ils ne se sont "mis en aucun devoir, ni commencé de satisfaire à ce dont ils s'étoient obligés. Car bien "qu'ils soient tenus de passer pour 36 livres chacun de ceux qui voudroient aller au dit pays "de la N. F., ils se sont rendus si difficiles, et ont tellement effarouché les François qui vou- "droient aller habiter, que bien qu'il semble que l'on leur permette pour leur usage le com- "merce avec les sauvages, néanmoins c'est une telle restriction, que s'ils ont un boisseau de "blé par leur travail plus qu'il ne leur faut pour vivre, il leur est défendu d'en secourir les "François et autres qui en pourroient avoir besoin, et sont contraints de l'abandonner à ceux "qui ont la traite, leur étant de plus la liberté ôtée de le donner à qui leur pourroit apporter "de France les commodités nécessaires pour la vie."

provide these their colonists with shelter, food and all other necessaries, for three years; after which, they might discharge themselves of further obligation in that behalf,—either by assigning them enough cleared land for their maintenance, with grain enough for one sowing and for their subsistence till harvest,—or by enabling them in any other way to subsist upon their own industry and labor.

They were not to send out any but French-born Catholics.

In every settlement, they were to maintain at least 3 ecclesiastics, with every thing needful for their ministry, for 15 years,—unless, indeed, they should prefer to assign them enough cleared land for such their maintenance. And lastly, they were to send out more ecclesiastics, *if* they thought fit,—maintaining them always for the 15 years. After which, the King would leave the matter to the devotion of the Company and of the settlers.(*b*)

§ 168.—The fourth, fifth and sixth sections state, with the same exactness, the terms of the King's grant to them of the whole country, for ever, *en toute propriété, justice et seigneurie*,—as part of the consideration agreed upon for these undertakings on their part:—

"4.—Et pour aucunement récompenser la dite compagnie, des grands frais et avances
"qu'il lui conviendra faire pour parvenir à la dite peuplade, entretien et conservation d'icelle,

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(*b*) 1.—"les dits * * associés promettront faire passer au dit pays de la N. F., 200 à 300
"hommes de tous métiers dès l'année prochaine 1628, et pendant les années suivantes en
"augmenter le nombre jusqu'à 4000 de l'un et de l'autre sexe, dans 15 ans prochainement
"venans, et qui finiront en déc., que l'on comptera 1643, les y loger, nourrir et entretenir
"de toutes choses généralement quelconques, nécessaires à la vie pendant 3 ans seulement;
"lesquels expirés, les dits associés seront déchargés, si bon leur semble, de leur nourriture
"et entretenement, en leur assignant la quantité de terres défrichées suffisantes pour leur
"subvenir, avec le blé nécessaire pour les ensemencer la première fois, et pour vivre jusqu'à
"la récolte lors prochaine, ou autrement leur pourvoir en telle sorte qu'ils puissent de leur
"industrie et travail subsister au dit pays, et s'y entretenir par eux-mêmes.

"2.—Sans toute fois qu'il soit loisible aux dits associés et autres, faire passer aucun
"étranger ès dits lieux, ains peupler la colonie de naturels François catholiques; et sera
"enjoint à ceux qui commanderont en la N. F., de tenir la main à ce qu'exactement le pré-
"sent article soit exécuté selon sa forme et teneur, ne souffrant qu'il y soit contrevenu pour
"quelque cause ou occasion que ce soit, à peine d'en répondre en leur propre et privé nom.

"3.—En chacune habitation qui sera construite par les dits associés, afin de vaquer à la
"conversion des sauvages et consolation des François qui seront en la dite N. F., y aura
"trois ecclésiastiques au moins, lesquels les dits associés seront tenus loger, fournir de vivres
"ornemens, et généralement les entretenir de toutes choses nécessaires, tant pour leur vie,
"que fonction de leur ministère, pendant les dits 15 années, si mieux n'aiment les dits asso-
"ciés, pour se décharger de la dite dépense, distribuer aux dits ecclésiastiques des terres
"défrichées, suffisantes pour leur entretien. Même sera envoyé en la dite N. F. plus grand
"nombre d'ecclésiastiques, si métier est, et que la compagnie le juge expédient, soit pour les
"dites habitations, soit pour les missions; le tout aux dépens des dits associés durant le
"temps des dites 15 années; et icelles expirées, remettra S. M. le surplus à la dévotion et
"charité tant de ceux de la dite compagnie, que des François qui seront sur les lieux, lesquels
"seront exhortés de subvenir abondamment, tant aux dits ecclésiastiques, qu'à tous autres
"qui passeront en la N. F. pour travailler au salut des âmes."

For Section 10, see *infrà*, § 172, Note(*c*)

"S. M. donnera à perpétuité aux dits cent associés, leurs hoirs et ayans cause, en toute pro-"priété, justice et seigneurie, le fort et habitation de Québec, avec tout le dit pays de la N. "F., dito Canada,—tant le long des côtes depuis la Floride, (que les prédécesseurs rois de S. "M. ont fait habiter,) en rangeant les côtes de la mer jusqu'au cercle Arctique pour latitude, "et de longitude depuis l'Isle de Terre-Neuve, tirant à l'ouest, jusqu'au grand lac, dit la mer "douce, et au-delà, que dedans les terres,—et le long des rivières qui y passent et se déchar-"gent dans le fleuve appelé St. Laurent, autrement la grande rivière de Canada,—et dans "tous les autres fleuves qui les portent à la mer,—terres, mines, minières, (pour jouir toutefois "des dites mines conformément à l'ordonnance,) ports et hâvres, fleuves, rivières, étangs, "isles, islots, et généralement toute l'étendue du dit pays au long et au large et par de là, "tant et si avant qu'ils pourront étendre et faire connoître le nom de S. M.; ne se réservant "S. dite M. que le ressort de la foi et hommage qui lui sera portée, et à ses successeurs rois, "par les dits associés ou l'un d'eux,—avec une couronne d'or du poids de 8 marcs à chaque "mutation de rois,—et la provision des officiers de la justice souveraine, qui lui seront nom-"més et présentés par les dits associés lorsqu'il sera jugé à propos d'y en établir: Permettant "aux dits associés faire fondre canons, boulets, forger toutes sortes d'armes offensives, et "défensives, faire poudre à canon, bâtir et fortifier places, et faire généralement ès dits lieux "toutes choses nécessaires, soit pour la sûreté du dit pays, soit pour la conservation du com-"merce.

"5.—Pourront les dits associés améliorer et aménager les dites terres, ainsi qu'ils verront "être à faire, et icelles distribuer à ceux qui habiteront le dit pays et autres, en telle quantité "et ainsi qu'ils jugeront à propos; leur donner et attribuer tels titres et honneurs, droits, "pouvoirs et facultés qu'ils jugeront être bons, besoin ou nécessaires, selon les qualités, con-"ditions et mérites des personnes, et généralement à telles charges, réserves et conditions "qu'ils verront bon être. Et néanmoins, en cas d'érection de duchés, marquisats, comtés et "baronnies, seront prises lettres de confirmation de S. M. sur la présentation de mon dit "seigneur grand-maître, chef et surintendant général de la navigation et commerce de France.

"6.—Et afin que les dits associés puissent jouir pleinement et paisiblement de ce qui leur "sera donné et accordé, S. M. révoquera tous dons faits des dites terres, parts ou portions "d'icelles."

§ 169.—Besides which, the seventh section sets forth the following large grant of commercial monopoly,—as a further consideration for these same undertakings:—

"7.—Davantage S. M. accordera aux dits associés, pour toujours, le trafic de tous cuirs "peaux et pelleteries de la dite N. F.; et pour 15 années seulement, * * finissant au dernier "déc. que l'on comptera 1643, tout autre commerce, soit terrestre ou naval, qui se pourra "faire, tirer, traiter et trafiquer, en quelque sorte et manière que ce soit, en l'étendue du dit "pays, et autant qu'il se pourra étendre; A la réserve de la pêche des morues et baleines "seulement, que S. M. veut être libre à tous ses sujets, révoquant à cet effet toutes autres "concessions contraires à l'effet que dessus, même les articles ci-devant accordés à Guillaume "de Caen et ses associés; Et à ces fins interdira S. dite M., pour le dit temps, tout le dit "commerce, tant au dit de Caen qu'à ses autres sujets, à peine de confiscation de vaisseaux et "marchandises, laquelle confiscation appartiendra à la dite compagnie; et mon dit seigneur le "grand-maître ne baillera aucun congé, passe-port ou permission, à autres qu'aux dits associés "pour les voyages et commerces sus-dits en tout ou partie des dits lieux."

§ 170.—By the eighth section, this monopoly was so far limited as this, in the interest of such French residents of the country as should not be receiving support from the Company,—and no further; that such residents might deal for peltry with the Indians, but must give over all beaver skins so procured, to the Company at 40 *sols tournois* apiece, on pain of confiscation,—the Company,

however, not to be bound to give that price for any skin not "*bonne, loyale et* "*marchande.*"

§ 171.—The ninth section provided for further compensation to the Company, in the shape of two vessels of war to be given them by the King, fully equipped, but not victualled; which the Company were to maintain,—and to replace, if lost, unless indeed such loss should have been caused in open war by the King's enemies.

§ 172.—The contingency of failure on the part of the Company to fulfil their obligations, was carefully provided against by the tenth section.

If they should fail,—within the first 10 of their 15 years, to send out 1500 souls, both sexes counted,—or within the remaining 5 years, to send out the remainder of the 4000,—they were, in full of all damages, to pay over to the King the value of these two vessels; saving always, in the case of their having the loss of these vessels by the hands of the King's enemies, to plead as their excuse. Such payment was to be made from their Company funds; or, failing them, by the associates, each for his own share. And the Company was further to lose its commercial privileges.(c)

§ 173.—By the eleventh and twelfth sections it was provided, that the Company was to man and officer these vessels as it saw fit; but that the Captains of them, and also the officers who should command in New France and in all its fortified posts, were to take the King's Commission,—which, however, he was to give, for terms of 3 years, according to selection by the Cardinal, from lists to be submitted by the Company.

For any other vessels, the Company were to name their own Captains.

And the King was to give them four specified pieces of artillery.

§ 174.—From the thirteenth to the seventeenth sections, inclusively, provision was made for certain incidental inducements to the settlement of the country, and to the formation of the Company.

Artisans sent out by the Company, after exercise of their calling in New France for 6 years, should they wish to return to France, were to be "*reputés* "*pour maîtres de chef-d'œuvre,*" and to be entitled to keep "*boutique ouverte*" in Paris or in any other town of France.

(c) "10.–Davantage a été stipulé qu'en cas que les dits associés manquent à faire passer dans
"les 10 années des 15, jusqu'à 1500 François de l'un et de l'autre sexe,—pour tout dédom-
"magement de la dite inexécution, ils restitueront à S. M. la somme à laquelle la prisée des
"dits vaisseaux se trouvera monter,—comme aussi si dans les 5 années restantes des 15, ils
"manquoient à faire passer le reste des hommes et femmes stipulé ci-dessus,—sauf si (comme
"dit est) les dits vaisseaux étoient pris par les ennemis de S. M.; et sera la restitution de la
"prisée des dits vaisseaux prise sur le fonds de la dite société, si tant se peut monter; et
"s'il ne suffit, ce qui en restera sera levé au sol la livre sur chacun des dits associés, sans
"aucune solidité, en telle sorte qu'un chacun n'en payera qu'un centième; et seront privés
"de la jouissance du commerce à eux accordée par les présents articles."

All kinds of merchandize from New France were to be free of impost or toll, in France, for 15 years; as also all military and other stores destined for New France.

All persons, ecclesiastics, nobles, officers and others, were to be privileged to join the Company without derogation from th r rank. A second hundred of partners might be admitted. As many as twelve of the first hundred partners, should there be so many not noble, were to be ennobled,—the King placing that number of blank letters of nobility, at the disposal of the Cardinal, for distribution to those members of the Company whom it might select for that honor.

And lastly, all descendants of French settlers of the country, and all converted Indians, were to be taken for French-born subjects.

§ 175.—The remaining Sections provided that in case of war, civil or foreign, due delays should be granted to the Company; and that all needful further documents were to issue as of right, in order to the giving of full effect to all these arrangements.

§ 176.—Under authority of this instrument, which was executed by the Cardinal of the one part, and by six members of the Company of the other, the Company immediately proceeded to organise itself by the adoption of certain "*Articles* " *et conventions de Société et Compagnie;*"(d) in some clauses of which, again, the ingenuity of the learned Counsel here retained against the Seigniors, has thought to detect a something favorable to the anti-seigniorial theory.

§ 177.—By these, they formed the required Company, under the name of "*La Compagnie de la Nouvelle France,*" with a certain amount of capital to be raised on certain terms,—its affairs to be conducted by 12 Directors, to be chosen from time to time, one third of whom at least were to be merchants.

These Directors were to have the naming, for royal sanction, of the members of the Company who should have command of the two vessels of war, and also of the country of New France and the fortified places therein; were to commission all other officers and functionaries of the Company; were to make its grants of land, and to commission whom they would to make such grants in the country,—the whole, on such conditions as they pleased; and, under certain restrictions, were to carry on all the Company's business,—appointing such factors and agents as they pleased, where and with whatever powers they pleased.

The only clauses at all bearing on the matters here in question, are the following,—in reference to certain of the powers and duties of these Directors:—

" 5.—* * nous leur donnons la faculté de nommer et présenter au roi ceux qu'ils jugeront
" capables, du nombre des dits associés, pour commander aux deux vaisseaux que le roi
" donnera, même en toute l'étendue de la dite N. F. * *, places et forts qui se bâtiront en
" icelle.

" 6.—Donner lettres et provisions aux officiers et gens de commandement qui doivent être
" établis par la compagnie, excepté ceux qui commanderont aux places et forts et en toute
" l'étendue du dit pays, qui seront pourvus comme il est dit ci-dessus.

(d) Ed. et Ord., 4°, Vol. 1, pp. 9 *et seq.;* and 8°, Vol. 1, pp. 12 *et seq.*

"7.—Distribuer les terres de la dite N. F., à telles clauses et conditions qu'ils verront être "les plus avantageuses pour la compagnie, ainsi qu'il est porté par les dits articles; même "commettre tels sur les lieux qu'ils trouveront à propos pour la distribution des dites terres, "et en régler les conditions.

"9.—Etablir tels facteurs et commis que bon leur semblera, tant en ce royaume qu'en la "N. F. et ailleurs, avec tels pouvoirs qu'ils jugeront nécessaires pour le bien de la dite "compagnie."

"11.—Ne seront les directeurs obligés, en leurs assemblées et délibérations particulières, "d'appeler plus grand nombre des dits associés pour les assister, qu'en cas qu'il soit question "de présenter au roi et nommer quelques officiers ou personnes de commandement, ou bien "de leur délivrer provisions à cet effet,—ou qu'ils voulussent distribuer et aliéner aux dits "associés et autres quelques terres de la dite N. F., excédant 200 arpents; pour ce qu'aux "dits cas ils seront tenus d'appeler en leur assemblée le plus grand nombre des associés que "faire se pourra; et ne vaudra ce qui aura été par eux résolu, que la dite délibération ne "soit au moins souscrite de 20 des dits associés, y compris les directeurs ou leurs procureurs, "en la présence du sieur intendant des affaires du dit pays de la N. F.: et pour les autres "affaires, les résolutions ne seront valables qu'elles ne soient au moins souscrites de 4 des "directeurs et du secrétaire de la compagnie."

"16.—Auront le soin, les dits directeurs et administrateurs, de rechercher et choisir à leur "possible les soldats, artisans, ouvriers et autres personnes, tant hommes que femmes, que "l'on est tenu passer en la N. F., avec telle diligence qu'ils soient prêts à s'embarquer au "temps du passage: préféreront néanmoins ceux qui leur seront nommés par les dits asso- "ciés; et pour éviter à la confusion qui pourroit survenir, seront tenus les dits associés don- "ner 4 mois auparavant le temps de l'embarquement les noms, surnoms et demeure de ceux "qu'ils voudront faire passer."

§ 178.—In the year following, on the 6th of May, 1628, both these instruments having been laid before the King received his sanction; and letters-patent(*e*) issued in due form, ordering—

—"qu'ils aient lieu et sortent leur plein et entier effet, et que du contenu en iceux les "sieurs * * et leurs associés jouissent pleinement et paisiblement, sans qu'il y soit contre- "venu en quelque sorte et manière que ce soit, sous les peines portées par iceux."

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§ 179.—It was contended, that in the King's undertaking (by the sixth section of this grant expressed) to revoke all former grants of land in Canada, there was to be found a sort of indication of the trust-character of such grants.

§ 180.—If so, the argument would affect only those grants; leaving the character of this grant of the whole country to the Company of New France, to be made out, according to the known rules of legal interpretation, from the words used in its redaction.

§ 181.—But in truth, the argument fails even of this. There is nothing to show that the Cardinal or the King held these older grants to have been less than what they described them as having been, "*dons faits des dites terres.*" On the contrary, from their so calling them, it is clear that they had no idea of

(*e*) Ed. et Ord., 4°, Vol 1, pp. 15 *et seq.*; and 8°, Vol. 1, pp, 18 *et seq.*

their having been anything less. The fact of the King's having promised that he would revoke all grants of land made in his name, so far from proving that he had made none, proves it to have been known and admitted that he had; that his grants were of a kind (unless cancelled) to interfere with the operation of the grant he was then making. Nor does it even prove that he, the King, had or pretended to have the *legal* right to revoke such grants, by the mere operation of his will and pleasure. Every one knew that the maxim "*donner et* "*retenir ne vaut*" was as good in law, against the Crown as against the subject; that what the Crown had given, it could not legally resume at will. If the recitals of this *Acte* are to be believed, these earlier grantees had absolutely failed to avail themselves of their grants. It is as certain as any matter of history can be, that with very few exceptions indeed, they had no sort of possession, and that generally they could not have so much as taken possession, even as matter of form. No doubt they were, all or nearly all, in gross default as regarded the conditions of their grants. When the King engaged to revoke their grants, he must be presumed to have had this fact in view. Indeed, he in effect recited it as in his view. His meaning (for all ends of legal interpretation) must be understood to have been, that he would do what he was engaging to do, in a legal way, and not in an illegal way; either enforcing an escheat by legal process, or else inducing the interested parties to abandon a claim liable to be legally defeated.

It is observable, moreover, by the way, in reference to the four grants above remarked upon, (§§ 160—163,) that the Company renewed that of Notre Dame des Anges(*f*) to the Jesuits, as we shall presently see; that Hebert was left to hold his grants of Sault-au-Matelot and St. Joseph,(*g*) unrevoked, and without re-grant or confirmation; and that the King compensated Guillaume de Caen,—not as for an express revocation of the grant of his Barony of Cap de Tourmente, but simply as having been "*dépossédé*,"—by granting him another Barony elsewhere.(*h*)

In these cases, perhaps the only cases where the parties might have made out a grievance, the matter was thus arranged, without any testing of the promise of revocation. In others, it is likely enough that there was no need of arrangement. The King had engaged with the new Company, that they should have no trouble from claimants under his grants; and,—the lands being worth nothing, and the claimants being acquiescent, whether from this cause, or from poverty, or from consciousness that their claims would not bear looking into,—one may presume that the Company had no trouble from this source to complain of, or, if they had, that the Crown in one way or other easily put an end to it.

(*f*) By No. †8 of Abstract.

(*g*) *Vide suprà*, § 164, Note(*y*).

(*h*) *Vide suprà*, §160.

§ 182.—The other supposed trace of the trust idea, which was suggested by the learned Counsel in the anti-seigniorial interest, is to be found in the fifth section of the grant, and in the seventh of the Company's Articles of Association.

It was contended, that the royal authorisation granted to the Company by the former, for the imprövement, regulation and distribution of the lands of New France, imported a trust for such distribution; and that the assignment of that charge by the Company to their Directors, imported a recognition on their part, of such trust.

§ 183.—Trying, for the moment, to suppose the case so to be, a first and very obvious remark suggests itself, as to the character and extent of this supposed trust.

The authority given to the Company is this:—

> "Pourront les dits associés améliorer et aménager les dites terres, *ainsi qu'ils verront être*
> "*à faire*, et icelles distribuer à ceux qui habiteront le dit pays et autres, *en telle quantité et*
> "*ainsi qu'ils jugeront à propos;* leur donner et attribuer *tels titres et honneurs, droits, pou-*
> "*voirs et facultés, qu'ils jugeront être bons, besoin ou nécessaires*, selon les qualités, conditions
> "et mérites des personnes, et généralement *à telles charges, réserves et conditions qu'ils ver-*
> "*ront bon être.* Et néanmoins, en cas d'érection de duchés, marquisats, comtés et baronnies,
> "seront prises lettres de confirmation de S. M.," etc.

And that which (with the King's express sanction) they delegate to their Directors, is this:—

> "Distribuer les terres * * *à telles clauses et conditions qu'ils verront être* LES PLUS AVAN-
> "TAGEUSES POUR LA COMPAGNIE, ainsi qu'il est porté par les dits articles; même commettre
> "tels sur les lieux qu'ils trouveront à propos pour la distribution des dites terres, *et en*
> "*régler les conditions.*"

In a word, the Company are authorised by the King, and the Directors (with the King's sanction) are authorised by the Company, to do everything *as they may please*, and for the advantage merely of the Company; under restriction only, that if their pleasure should be to call their grants dukedoms, marquisates, earldoms or baronies, the grantees must get the King's letters of confirmation in order to the real enjoyment of such territorial dignity.

If this must be called a trust, it is at least a very odd one; a trust to do as one will—for one's self—with what is called one's own; a trust, giving no one else a particle of right or claim, in, to or on, the thing said to be held in trust.

§ 184.—Supposing, even, that the words which here abandon everything to the discretion of the Company, to be exercised with a view solely to its own interest and the pleasure of its Directors and members, had been less strong, the inference sought would still be far from following.

The Company was bound to take out so many settlers. Until such number should have been taken out, had every French Catholic a right to be taken out, if he wished it? The question answers itself. But the sixteenth of the Articles of Association of the Company, approved by the King, and above quoted (§ 177), also answers it, by showing in terms, that the Directors were of course to choose freely for the Company, and that the partners (not being Directors) were to have

as much of patronage as could well be given them in the matter. No trace is to be found of the notion that any one else had anything to do with it.

The Company was also to maintain a number of ecclesiastics. Could any ecclesiastic prefer a claim to such maintenance?

The Articles of Association charge the Directors to select members of the Company (Art. 5), for certain commands. Could any such member therefore claim such command?

They direct the commissioning of other officers (Art. 6), and of clerks and factors (Art. 9), in the same style in which they direct (by Art. 7) the distribution of land. Had any man, therefore, a right to claim of them any of such employments?

The discretion of the Company, and of the Directors was left just as free in any one of these cases as in any other.

Indeed, the eleventh of the Articles of Association, of itself alone, is a full proof that no one thought of the Company as under obligation to attend to any one's requests for land, otherwise than as it should suit the views of its Directors and other members to do so. To what end, otherwise, the requirement of 20 signatures of Directors and other partners, set in presence of an Intendant, to all grants of more than 200 arpents, while 4 signatures of Directors, with that of the Secretary of the Company, were to be enough for any other act whatever?

§ 185.—If, indeed, these passages had been far less explicit than they are, and had stood unexplained by any context, there might seem to be some show of reason for an argument to this effect,—that although no one but the Company took an interest in the grant, so as to be able to require a sub-grant on any specified terms, or even any sub-grant at all, yet the Company itself might be viewed as the *dépositaire* of a high public trust, and as bound thereby to a public duty, limitative (though in a very indefinite degree, and at the instance of the Crown only) of its proprietary right, properly so called.

§ 186.—But, in the first place, they are of a date and of a country, repellant of such interpretation. The seventeenth Century was not the time, and the France of that age was not the country, for this kind of refinement in the mere interest of an idea of abstract public right.

And they occur, besides, in instruments which fully and clearly show what their meaning was; and that that meaning was precisely accordant with the temper and habits of that time and country.

§ 187.—It was always held in principle, (as has been shown,) that the grant of a *fief* was an essentially bilateral contract; the grant itself, however imperfectly phrased or recorded, binding the grantor—expressly or by implication of Custom—on every point involved therein, and that, irrevocably; and the acceptance, even though it were the mere act of taking possession of the realty granted, as largely and as irrevocably binding the grantee.

But here, extraordinary pains were taken to show that it was meant by both parties to put of record the fact that this grant was in the strictest possible sense a bargain—between contracting parties, after full discussion and appreciation on both sides, of all its terms.

§ 188.—The very preamble shows that the neglect of duty of the Vice-Roys, and the inadequacy for its purposes, of the machinery of trade-monopoly in the hands of de Caen and his associates, were strongly felt by the King's government; that the proper mode of remedying the evils so felt, had been discussed; that propositions from different quarters had been invited and considered; and that, thereupon, the Cardinal and the representatives of the Company had concluded upon the bargain about to be put in writing. It is out of the question to suppose, that the real bargain can have been something quite different from what was written.

§ 189.—The consideration to be given by the Company is the matter next recorded; and purports to be recorded with exactness.

And it is a consideration the precise opposite in its nature, of what it should have been for the carrying out of the anti-seigniorial theory. If the idea had been to make the Company a holder of wild land on public account, for quasi-gratuitous allotment to all comers, the fitting counterpart to such project would have been to make it also the cheap carrier of all comers, across the ocean, to such wild land. This latter project does seem to have been tried, with de Caen and his co-adventurers,—who had been bound (as the preamble of this instrument shows) to take out emigrants at so much a head. The former never had been tried; and could not be, in earnest, without the latter. Yet not only is there here no word of any obligation to part with wild land on any given terms, but there is also a marked abandonment of the de Caen project of cheap passage for offering emigrants. Instead of it, the Company (with no obligation to employ any more than two ships of some 300 tons each) is to find, take out and settle in New France, just so many persons—their number, what we should now call trifling, though probably then thought large—of certain quality, in so many years, at its own cost, maintaining them for so long after getting them out, and then establishing them *on cleared land*, or in any other adequate way providing them a means of living. Add to this, that besides these charges, the burthen of a heavy religious establishment for them and for the Indians, was to rest upon the Company; and one sees at once, that the whole plan went upon the other principle—of simply requiring the Company to effect a given result as to settlement in a given time, of course, by such means, and on such terms of bargain with its settlers, as it could. It is impossible to imagine that a Company, bound *coûte qu'il coûte* to buy so much emigration of a certain kind within so long, and not limited as to the terms it was to make with the emigrants whom it was to buy, or with any one else, can have been otherwise than free to make just such terms as it would.

§ 190.—To this add the further fact, that the extent and nature of the territorial grant made, by way of part recompense for this the Company's precise undertaking, is stated with no less exactness; that the King, besides declaring that he gave to the Company for ever, "in all property, justice and lordship," ("*en toute propriété, justice et seigneurie*,"—these latter words of the phrase cumulatively extensive of the former, and the whole importing that the grant

was of the very largest property that a King could grant,) the whole country of New France, "lands, mines and minerals, (such mines always subject to the "*ordonnance*,) ports and harbors, rivers large and less, (*fleuves, rivières*,) ponds, "islands, islets, and generally the whole extent of the said country in length and "breadth, and further, so far as it shall be possible for them to extend and "make known the name of His Majesty,"—under reserve of nothing but *foi et hommage*, a light crown of gold at each accession to the throne, and the function of simply commissioning the highest officers of justice, on the Company's nomination,—specially added, that the Company might do just as it would with all its lands, and might part with them just as it would, only not with any dignity as high as or higher than the prized rank of baron, unless with his sanction. And one may be thought to be reading a pretty explicit contract for a pretty extensive proprietary grant.

§ 101.—But even with this, one will not have shown the whole case. For this contract imported two grants to the Company; that of this territory, with its large adjuncts, in the first place, and that of a large commercial monopoly, with its adjuncts, in the second; both for the one consideration so precisely stated. And it provided specially for the case of a failure on the part of the Company as to what was no doubt regarded as the most onerous part of this consideration,—the getting out of the required number of emigrants in the required time; and this, in two ways. If caused by war, foreign or civil, that is to say, not by fault of the Company, further delay (by section 18) was to be granted. If not, (by section 10) the King's two ships were to be paid for, and the commercial monopoly to be forfeited. Nothing more.—The grant of the land, with all its incidents, was to hold; unless indeed, in the case (as is understood, necessarily, under every contract that is ever made) of such utter failure as should in law involve an utter forfeiture.

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§ 102.—Expressions fell from the learned Counsel retained against the Seigniors, of a nature to imply that there was a something in respect of liability to forfeiture for non-performance of contract, that distinguished the Canadian *fief* from the French, and tended to imprint on the former a trust-character.

In this respect, there was no particle of difference between the two. For failure of his contractual obligation, the French vassal always incurred forfeiture, just as certainly as the Canadian vassal could do. *Désaveu* and *félonie* imported forfeiture, under this rule; simply as being such failures, in respect of certain clauses of the feudal contract—essential or natural to it, as might be. Every Dominant and vassal, in regulating the terms of their contract, might make or unmake causes of forfeiture, under their contract, as they would. But their doing this affected no one else. The vassal liable to a hundred special contractual forfeitures, was as little of a trustee for third parties, as the vassal not liable to one.

It is no part of the Seigniors' pretension, that the King could not do this in Canada; nor even, that within certain limits he did not do it. All they say is,

that what he did in this way was not much, and had no practical tendency in the trustee-direction.—In this particular case, this their conclusion can present no sort of difficulty.

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§ 193.—Wherein, then, did this grant differ from the ordinary grant of a *fief* by the Crown of France, under the metropolitan Custom of Paris?

There certainly were several points of difference. But none of them were such as that the Seigniors can have occasion to wish them kept out of view.

§ 194.—As to this matter of liability to forfeiture, the one special cause that could have arisen under the contract, would have been the occurrence of a failure on the part of the Company, as to the performance of its special obligations,—so much more extensive than that provided against by the tenth Section of the contract, as to have entitled the Crown to demand the annulling of the contract. Under a grant merely regulated by the Custom of Paris, there would not have been this cause of forfeiture.

The nature of those obligations (as we have seen) makes this peculiarity, for all purposes of this argument, perfectly immaterial.

§ 195—It was a grant of a *fief*, and of large privileges besides, of the commercial kind, not ordinarily associated with the *fief*. But that, also, is a peculiarity of no importance to this argument.

§ 196.—Independently of these peculiar privileges, the grant was of a *fief* of extreme extent,—not only in the territorial point of view, but also in respect of its incidents of the kind which one may characterise as naturally more or less associated with the notion of the landed *fief*.

Besides that large right of property (signified by the two words *propriété* and *seigneurie*) in the whole soil, land and water alike,—which was inherent in the immediate vassal of the Crown having no feudal tenant under him, it vested in the Company almost everything more that could be vested in it without absolutely divesting the Crown of everything.

It cut off all question as to navigable rivers (*fleuves*), the St. Lawrence included, by expressly giving them.

It as expressly gave up all mines and minerals,—subject only to the general operation of the *Ordonnance* in that behalf.

It granted a proprietary *justice*, so large as to have involved abdication by the Crown of the right of establishing royal courts, even of appeal,—at least within the granted territory. The officers of the "*justice souveraine*" of New France were to be named by the Company, and only to take commissions of the King. His highest Royal Court in France might there exercise its measure of appellate control; but there was to be none nearer.

It went almost as far towards giving away his executive supremacy, as his judicial. For he was not to have the direct choice of a single functionary connected with the affairs of New France.

And it reserved to the Crown, as *suzerain*, a proprietary *directe* as small as was well possible; homage, with an honorary periodical *prestation*, of nominal value,—to the exclusion of all pretence to *quint*, *relief* or other feudal due of any kind.

§ 197.—It went even further.

In thus abandoning the *quint* and *relief*, it in effect, for practical purposes, involved the allowance of an unlimited *jeu de fief* on the part of the Company. (*i*) For, there being no dues on mutations, however made, there could be no distinction of privileged and unprivileged,—no working check on any. The Crown could neither demand dues of any one acquiring land from the Company, under pretence of making him a co-vassal with the Company, for his part of the *fief* of New France; nor yet ever subject him to loss, from having his title treated as *non-avenu*, in the interest of the Crown.

But, that there might be no possible question as to the effect of all such alienations, it declared expressly (by that fifth Section which has so strangely been read(*j*) as if it could have been meant to be limitative of the Company's powers) that the Company was to have this unlimited *jeu de fief*, as against the Crown. The Crown, as Dominant, bound itself to recognise and admit all manner of titles to land that the Company should see fit to issue; derogating, therein, from the feudal rule in all time known and settled, to the contrary.

§ 198.—There was never any doubt as to the capacity of Dominant and vassal to derogate, as between themselves, from this rule, or from any of the usages as to the *jeu de fief* that grew out of it. So that, of course, the Company (as Dominant) would have been free, even without this clause, to let their vassals do what they would as to this matter, so far as the Company's rights went. But this clause gave them the further freedom of so doing, as against the Crown also.

All feudal bar was removed from the introduction (if the Company should see fit) of that unrestricted *jeu de fief* which it was obviously desirable, in the public interest, to introduce. But at the same time, the age was too feudal for the idea to be entertained of absolutely introducing it. The Company were as free to maintain it, or even to enhance its rigor as between themselves and their grantees, as they were to do otherwise.

So far was it from being of the temper of the times, to tie the hands of a proprietor by public rule, for mere public interests.

(*i*) *Vide suprà*, §§ 102, 103 *et seq.*

(*j*) *Vide suprà*, §§ 182 *et seq.*

§ 199.—A larger consequence of this fifth section,—which was thus, in truth, far from insignificant—was its release of the Company from all restriction as to the *jeu de justice.*

The power to deal with and grant their lands as they would, and to attribute to such lands "such titles and honors, rights, powers and faculties, [less the barony, "&c.,] as they may judge to be fit, requisite or necessary, according to the "qualities, conditions and merits of individuals, and generally under such char-"ges, reservations and conditions as they may think fitting,"—imported the most unrestricted faculty of dealing with their *justice* in every way recognized by law, irrespectively of all control or interference by the Crown,(*k*) whether as Seignior Dominant or otherwise.

§ 200.—Of this grant, the Seigniors now hear it argued,—that, not meaning a word of what it says, but just everything that it does not say, it is to be viewed as a first document of a series, introductive (in their entirety) of the pretended Canadian feudal law of the "*fidéi-commis seigneurial.*"

They have no occasion to argue that it fails of [illegible]ting well with the series of documents that followed it.

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§ 201.—That this grant was perfectly well understood by every one in those times, as passing the very property of the soil (as well as the higher attributes of *seigneurie* and *justice*, incidental to the character of the grant as being that of a *fief* of the largest possible kind) to the Company, as proprietors in their own right,—is a proposition that could be made out from other sources; were the terms of the grant (as they are not) such as to admit of a doubt upon the point.

§ 202.—In 1645 (Jan. 14), after the Company had been in operation for 17 or 18 years, and when therefore (from the silence of the Crown in that behalf,) it must be presumed to have accomplished its 15 years' engagements to the satisfaction of the Crown, so as to have been out of danger of the penalties of the 10th section of its grant,—we find that a species of Treaty was entered into between it and the body of the French settlers of Canada; the latter having sent delegates to France for that purpose.

The matter specially in dispute was, as to the trading monopoly of the Company, and the very small measure of free action left by it, in terms of the royal grant, to the settlers. On this point, the Company—now beginning to find themselves in that state of confirmed pecuniary embarrassment which, 18 years later, made them too happy to throw up their grant—agreed to make, and made, for the consideration of a stipulated yearly payment of 1000 beaver skins, and of an undertaking by the settlers to buy all their stores at a valuation, and to

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(*k*) *Vide suprà*, §§ 139, *etc.*

relieve them of all charges for local administration, and so forth, a cession to the settlers, as a *communauté d'habitans*, of their trading rights within certain territorial limits, large enough to cover all the ground then at all resorted to for such purposes.

The *Articles* setting forth the terms of this cession, open thus:—

"1.—La Compagnie de la N. F. se retient et conserve les noms, titres, autorité, et droits "qui lui ont été donnés par le défunt roy de glorieuse mémoire, et ce faisant demeurera en "pleine propriété, possession, justice et seigneurie de tout le pays et toute l'étendue décla-"rée par l'édit du mois de Mai 1628, portant l'établissement de la dite compagnie; et partant "elle disposera comme elle a ci-devant fait, toutes les terres, bois, prés, fleuves, îles, rivières "mines et minières, et en fera expédier les concessions avec telles charges et conditions "qu'elle jugera à propos."(*l*)

It hardly need be said that the context records in terms the fact, that all parties held the trade sold to the settlers, to be worth far more than the land not sold to them. For, the fact of the price paid for the one, under reservation of the other by the vendor, is proof enough of this.

The interesting fact is, that the settlers, at the moment when (as a *communauté*) they were buying the trade at a high price, left it of record that they claimed no right in the land,—unless as individuals under title from the Company; and that the Company was to remain as it always had been, proprietor of such land in the largest sense, absolute master of its own terms as to all alienating thereof.

§ 203.—To enable the settlers to act as a *communauté* for the objects of this contract, the King's sanction was required; and it was accordingly given on the 6th of March of the same year.

The *Arrêt* for this purpose, after reciting this contract, as being one—

—"par lequel, entr'autres choses, la compagnie de la N. F., relevant [retenant?] et con-"servant les noms, titres, autorités, droits et pouvoirs qui lui ont été donnés par l'édit de son "établissement, pour demeurer en pleine propriété, possession, justice et seigneurie de tous "les pays et étendues des terres de la N. F. auroit accordé," etc.—

—declares the King's entire ratification and approval of it, in the usual terms.(*m*)

(*l*) See MSS. DOCUMENTS OF QUEBEC HISTORICAL SOCIETY; 2d Series, Vol. 1, pp. 152—162.

The document cited in the text is to be found, as above, in one of the MS. volumes of the Literary and Historical Society of Quebec, procured at public cost, and now in the keeping of Mr. Faribault of Quebec.

Three series of these volumes will be more or less quoted from in these pages —

The *first*, a set of volumes copied some years ago, at Albany, from Col. Brodhead's copies and extracts of documents by him taken in Paris.

The *second*, a set since copied in Paris, and received here a year or more ago.

The *third*, another set copied in Paris, and received here during last year.

(*m*) EDITS ET ORD., 4°, Vol. 1, pp. 18 and 19; 8°, Vol. 1, pp. 28 and 29.

§ 204.—In 1663, when the increasing embarrassments of the Company necessitated their surrender of their grant into the King's hands, the Company's vote of the 24th of February ordered the making of—

—"une démission entre les mains de S. M., de la propriété et seigneurie du dit pays appar-"tenant à la dite compagnie, pour en disposer par S. M. comme il lui plaira, se rapportant "à son équité et bonne justice, d'accorder un dédommagement," etc.(n)

The notarial instrument passed under this vote, on the same day, records the appearance of the parties—

—"lesquels, sur ce qu'ils ont appris que S. M. désiroit avoir la propriété et seigneurie de la "N. F., appartenante à la dite compagnie, ont en conséquence de la délibération de la dite "compagnie de cejourd'hui, * * supplié et supplient par ces présentes S. M. d'agréer la "démission qu'ils font à son profit * * de la propriété et seigneurie du dit pays de la N. F., "pour en disposer par S. M. ainsi que bon lui semblera, se remettant à son équité et justice "de leur ordonner tels dédommagements," etc.(n)

And the King's acceptance of this surrender, in March of the same year, after recital of it, reads thus:—

"Nous avons dit, déclaré et ordonné, disons, déclarons et ordonnons, voulons et nous plait, "que tous droits de propriété, justice, seigneurie, de pourvoir aux offices de gouvernement, "et lieutenants généraux des dits pays et places, même de nous nommer des officiers pour "rendre la justice souveraine, et autres généralement quelconques, accordés par notre très "honoré seigneur et père de glorieuse mémoire en conséquence du traité du 29 Avril 1628, "soient et demeurent réunis à notre couronne," etc.(n)

§ 205.—The *Edit* of the King, creating the *Conseil Supérieur de Québec*,(o) in the month of April of the same year 1663, refers to these transactions, in its preamble, thus:—

"La propriété du pays de la N. F., qui appartenoit à une compagnie de nos sujets, laquelle "s'étoit formée pour y établir des colonies, en vertu des concessions qui lui en auroient été "accordées par le feu roi notre très honoré seigneur et père de glorieuse mémoire, par le "traité passé le 29 avril 1628, nous ayant été cédée par un contrat volontaire, que les inté-"ressés en la dite compagnie en ont fait à notre profit le 24me février dernier," etc.

—and again, in its enacting clause:—

—"avons créé, érigé, ordonné et établi, et par ces présentes signées de notre main, créons, "érigeons, ordonnons et établissons un conseil souverain, en notre dit pays de la N. F., à "nous cédé comme dit est, par le contrat de cession de la compagnie à laquelle la propriété "en appartenoit,—pour être le dit conseil souverain séant en notre ville de Québec," etc.

§ 206.—Again, in the King's instructions under date of the 7th of May of the same year, to M. Gaudais,(p) who was sent out as a Commissioner to report upon the state of the colony, there occurs this incidental reference:—

(n) Documents Seigneuriaux, Vol. 2, pp. 8 *et seq.* Edits et Ord., 4°, Vol. 1, pp. 19 *et seq.*; 8°, Vol. 1, pp. 30 *et seq.*

(o) Edits et Ord., 4°, Vol. 1, pp. 21 *et seq.*; 8°, Vol. 1, pp. 37 *et seq.*

(p) Edits et Ord., 4°, Vol. 2, pp. 24 *et seq.* Commissions des Gouv. et Int., pp. 22 *et seq.*

"Sur ce qu'il a été remontré au roi, que jusqu'à présent la propriété du dit pays ayant "appartenu à la compagnie de ses sujets, laquelle depuis peu a remis ses droits entre les "mains de S. M., il n'y avoit point de justice réglée," etc.

§ 207.—A manuscript document in the French archives(q) shows, again, the language in which the members of the Company, some eight years afterwards, referred to this transaction, when preferring their prayer to the King for the "*dédommagement*," in hope of which they had made their surrender:—

"S. M. considérera, s'il lui plait, que par la dite remise elle est entrée aux droits dont la "compagnie jouissait, qui sont * *

"Plus la propriété de tout le pays, d'où il se peut tirer des bois considérables pour la "construction et mastage des vaisseaux, forts et autres bâtimens.

"Plus les forts et habitations, avec les canons, magasins et munitions."

§ 208.—Strange, if what the King gave the Company as a property,—what the settlers (with the King's approval) admitted for the Company's property, and did not buy,—what the Company gave back to the King as a property,—what the King again and again called a property that he had acquired by such retrocession,—what its ex-proprietors never hesitated to characterise as having been their property, when asking the King to pay them for it,—was all the while no property, but a public trust in which every French Catholic had a vested right!—To what extent?

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§ 209.—The Seigniors (be it repeated) have no occasion to maintain that rights of property, when given in those times, were always scrupulously respected. On the contrary, as part of their case, they will have occasion to show, presently, to what extent and how the temper and habits of those times caused those rights to be often more or less set aside. The fact of things having been done against law, even by those in authority, is wholly aside from the question of what the law was. Property was not the less property in law, because in fact power may at times have put in hazard some of its essential incidents.

§ 210.—In this case, however, and with reference to this grant to the Company of New France, there is no question of its having had effect given to it, very fully and exactly, at least in so far as regarded Canada,—from the time when the retrocession by England (in 1632-3, under the treaty of St. Germain en Laye) of Canada and of the portions of Acadie which the English had overrun, enabled the French Crown to place the country in the effective possession of the Company, down to the time when, in 1645, the settlers (as we have seen) were allowed to acquire a great part of its rights. And from this latter date, as regarded the rights not so acquired by the settlers, and especially as regarded the Company's absolute proprietary right in the soil, it was still very fully carried out until 1663, when the Crown re-acquired those rights by voluntary surrender of the Company.

(q) M. S. Doc. Que. Hist. Soc., 2d Series, Vol. 1, pp. 49-51.

§ 211.—With regard to that part of New France, then known as Acadie and now forming the Lower Provinces and part of Gaspé, the story cannot be told in so few words.

§ 212.—Acadie formed part of the territory granted to the Company; and though none of the Company's grants, as lately published from the Provincial records, extend into it, a number of the Company's grants were made from it. The recitals of the *Arrêt* of the *Conseil d'État* of 1703,(*r*) for the regulation of Acadian titles to land, mention 8 such grants, (*s*) viz:—

1.—In 1632 (May 19), to RAZILLY, who is described as "Claude de Razilly, "*Lieut. pour le Roy en la N. F.*,"—of "*la rivière et baie de* STE. CROIX, *îles y* "*contenues et terres adjacentes*":—

2.—In 1634 (Jan. 15), to the same,—of the "*fort et habitation appelé le Port* "*Royal, et de terres adjacentes, dans l'étendue de 5 lieues au-dessus et de 5 lieues* "*au-dessous, le long de la côte, sur 10 lieues de profondeur*":—

3.—On the same day to the same,—of the "ILE DE SABLE":—

4.—On the same day to the same,—of the "*fort et habitation de la Hève*":—

5.—In 1635 (Jan. 15), to LA TOUR, named as "Charles de St. Etienne de la "Tour,"—of the "*fort et habitation de* LA TOUR, *avec les terres adjacentes dans* "*l'étendue de 5 lieues au-dessus et de 5 lieues au-dessous, en rangeant la côte, sur* "10 *lieues de profondeur*":—

6.—On the same day to the same,—of the "*fort et habitation de* ST. LOUIS, AU "PORT DE LA TOUR, *avec les mêmes étendues du fort et habitation de la Tour*":—

7.—In 1636 (Jan. 25), to la Tour's father,(*t*) named as "Claude de St. "Etienne, père,"—of the "*habitation appelée 'le vieux logis' à* PENTACOUET, *de* "*l'étendue de 10 lieues de large sur 10 lieues de profondeur*":—

8.—In 1657 (Nov. 20), to EMMANUEL LE BORGNE, who then claimed to hold Razilly's rights,—a grant which is characterized as one "*par laquelle il lui est* "*accordé la propriété des terres situées dans l'Acadie, depuis l'entrée de la rivière* "*de l'Ile Verte jusqu'à la Nouvelle Angleterre, excepté ce qui avait été concédé* "*au dit Sr. de la Tour.*"

(*r*) MSS. Doc. QUE. HIST. SOC., 3rd Series, Vol. 2, pp. 538—569.

(*s*) These grants are not noted in my ABSTRACT; the MS. volume containing this *Arrêt* of 1703, having only come to hand just before, or during, the sitting of this Court in September. At the time of the argument, I was not aware of the fact of its being there obtainable.

The conditions of these grants do not appear; but this is of the less consequence, as there is no reason to suppose them unlike the grants of corresponding dates in Canada.

(*t*) The name of the grantee of this grant is not given in the *Arrêt* of 1703, but is to be found in a "*Mémoire sur les contestations qui sont à régler au sujet de l'Acadie,*" evidently by a lawyer or committee charged to report upon the case with a view to the redaction of the *Arrêt*, and which may be the report or part of the report of Messrs. Daguesseau, Amelot and Deshaguais, mentioned in the *Arrêt*. This *Mémoire* is to be found in the MSS. Doc. QUE. HIST. SOC., 3rd Series, Vol. 1, pp. 582—588.

Besides which, the King's Commission to Nicolas Denys, of the year 1654, to be noted presently (*infrà*, § 218), speaks of some other old grants, held by him in Acadie, as having emanated from the Company.

§ 212.—But, for a number of years before the date of the Company's grant to Le Borgne, of 1657, it is sufficiently certain that its attention almost, if not wholly, ceased to be directed that way.

Charnisay, who bought Razilly's rights from his heirs in 1642,(u) seems to have carried on his civil war with la Tour, which ended in the destruction of the latter's fort in 1645,—without reference to the Company, and under precaution only of getting the King's sanction. In fact, for some time before this last date, there is no doubt that the embarrassments of the Company had been gradually, but inevitably, forcing the real exercise of their chartered powers out of their hands,—in Canada, to a less extent,—in Acadie (where the trader-grantees fought out their quarrels without let or hindrance, even from the Crown) to a greater.(v)

(u) The deed is referred to, in the *Arrêt* of 1703, as of date of 1642, Jan. 16. Though it is more than possible that Charnisay's possession may have been of earlier date.

(v) The state of affairs in Acadie through this period was so remarkable, and (in order to the right understanding of the documents to be presently cited) so interesting, as to warrant the following condensed extract from Garneau.

I have not the means of verifying the statements there made as to the first division of Acadie into three provinces, and the commissioning of Razilly, la Tour and Denys, as their respective Governors. If such Commissions issued after 1628, it is presumable that they issued on the presentation of the Company. Denys' did so, certainly (*infrà*, § 218.)

Nor can I verify the statements as to the grant on the river St. Jean in 1627, to the elder la Tour, and its confirmation in favor of the son, by royal letters patent before 1634. From the *Arrêt* of 1703, it is plain that if such grant was so made and confirmed, the la Tours (father and son) took the further precaution of getting titles from the Company in 1635 and 1636,—being grants 5, 6 and 7, noted in the text.

The statement that la Tour the younger got the grants of Isle de Sable, La Hève and Port Royal, in 1634, is contradicted by the *Arrêt* of 1703; which assigns these grants (2, 3 and 4, noted in the text) to Razilly.

As to the after-narrative, I am not aware that there is any question.

Acadie,—says Garneau, starting from the time of the retrocession of the conquered part of it, in 1632-3, under the treaty of St. Germain-en-Laye,—

—"resta abandonnée aux traitans. Laissés à leur propre cupidité, sans frein pour réprimer "leur ambition dans ces déserts lointains où ils régnaient en chefs indépendans, ces mar- "chands s'armèrent bientôt les uns contre les autres, et renouvellèrent en quelque sorte les "luttes des châtelains du moyen âge. * *

"L'Acadie fut divisée en trois provinces, dont le gouvernement et la propriété furent "donnés au commandeur de Rasilli, à Charles Etienne de la Tour, et à M. Denis. Au pre- "mier échut Port-Royal, avec tout ce qui était au sud jusqu'à la Nouvelle Angleterre; le "second eut depuis Port-Royal jusqu'au Canceau; le troisième, la côte depuis Canceau jus- "qu'à Gaspé.—Rasilli fut nommé gouverneur en chef de toutes ces provinces.

"La Tour, désirant faire confirmer par le roi de France la concession de terre faite à son "père en 1627, sur la rivière St. Jean, obtint des lettres patentes qui lui en assuraient la

§ 214.—In 1647 (Feb.), the Company having in the meantime, as we have seen, abdicated no small part of its functions, even in Canada, in favor of the settlers there,—Charnisay, who had not only destroyed la Tour's establishments, but also his character at Court, obtained letters-patent(*w*) from the King, by which, after recital of his distinguished services for the last 14 years, as a local governor and otherwise, the suppression of la Tour's treasonable projects being dwelt upon as not the least of them,—he was confirmed or appointed—one

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"propriété; et plus tard en 1634, il se fit donner encore l'île de Sable,—10 lieues en carré "sur le bord de la mer, à la Hève,—et enfin, 10 autres lieues à Port Royal avec les îles "adjacentes. Mais le commandeur de Rasilli fut si enchanté, en arrivant à la Hève, de ses "beautés naturelles, * * qu'il se la fit céder par la Tour et qu'il y fixa sa résidence. * * "Peu de temps après, Rasilli mourut, et ses frères cédèrent ses possessions à M. d'Aulnay "de Charnisé, qui fut nommé gouverneur de toute l'Acadie.

"Le premier acte de Charnisé fut d'abandonner la Hève * *. Mais, soit rivalité dans la "traite des pelleteries, * *, soit mal entendu au sujet des limites de leurs terres, soit enfin "jalousie de voisinage, la mésintelligence se mit bientôt entre lui et La Tour, et elle alla si "loin qu'il ne resta bientôt plus d'autre alternative pour amener une solution qu'un appel "aux armes. En vain, Louis XIII écrivit-il une lettre au premier en 1638, pour fixer les "limites de son gouvernement, * *. Ils continuèrent à s'accuser mutuellement auprès du "roi, jusqu'à ce que Charnisé, ayant réussi à noircir son antagoniste dans l'esprit du monar-"que, reçut l'ordre de l'arrêter et de l'envoyer prisonnier en France. C'est pour exécute-"cet ordre qu'il alla mettre le siége devant le fort St. Jean.

"La Tour, attaqué, tourna les yeux vers les colonies anglaises, et rechercha l'alliance des "habitans de Boston. Comme les deux nations étaient en paix, le gouverneur de cette ville "n'ôsa point le soutenir ouvertement; mais * * jugea quelque temps après, qu'il pouvait "permettre à la Tour de prendre les volontaires qui voudraient bien le suivre * *. Cette "force le mit en état non seulement de faire lever le siége à Charnisé, mais le poursuivre "encore jusqu'au pied de ses propres murailles. * *

"Charnisé se plaignit de l'agression commise par des sujets anglais en pleine paix. Le "gouverneur de Boston répondit en lui proposant un traité de paix et de commerce entre "l'Acadie et la Nouvelle Angleterre, que Charnisé s'empressa d'accepter, * *.

"Débarrassé des Américains, le gouverneur de l'Acadie apprenant que la Tour était ab-"sent de son fort, y courut pour le surprendre; mais Madame la Tour * * fit une si vigou-"reuse défense que Charnisé * * eut la mortification d'être obligé de lever le siège, et de "fuir devant une femme. * *

"Alors Charnisé * * profita du moment pour retourner mettre le siège devant St. Jean, "dans lequel il avait appris que Madame la Tour se trouvait seule avec une poignée d'hom-"mes. * * Il commençait désespérér de succès, lorsqu'un traître l'introduisit secrètement "dans la place le jour de Pâques. Madame la Tour, réfugiée dans une partie du fort où elle "pouvait encore se défendre, le força à lui accorder les conditions qu'elle demandait. Quand "celui-ci vit le peu de monde à qui il avait eu affaire, honteux d'avoir accordé une capitu-"lation si honorable, il prétendit avoir été trompé, et fit pendre sur le champ la garnison, "en obligeant Madame la Tour à assister au supplice, une corde au cou.

"Tant d'efforts et de soucis * * épuisèrent et conduisirent lentement au tombeau une "femme dont les talens et le courage méritaient un meilleur sort.

"Depuis ce moment son mari erra en différentes parties de l'Amérique. Il vint à Québec "en 1646, et y fut salué à son arrivée par le canon de la ville, et logé au château St. "Louis." * * —Vol. 1, pp. 147-151.

(*w*) MSS. Doc. Que. Hist. Soc., 2d Series, Vol. 1, pp. 182—190.

cannot precisely say which—as Governor of the whole of Acadie, with most extensive powers, administrative, legislative, and even diplomatic; all of which, however, he was apparently to find his own means of enforcing, and that at his own cost.

The clause in this instrument, defining his powers as to land, is the following:

"Voulons et entendons que le dit Sieur d'Aulnay Charnisay puisse, et lui donnons pouvoir "de se réserver et approprier ce qu'il jugera estre plus commode et propre à son établisse- "ment et usage, des terres du dit pais à lui,—et d'en donner et départir telle part qu'il "advisera, tant à nos dits sujets qui s'y habitueront, qu'aux dits originaires,—et de leur attri- "buer tels titres, honneurs, droits, pouvoirs et facultés, qu'il jugera bon estre, selon les qua- "lités, mérites et services des personnes."

The whole of this grant—inclusive, as of course, among other things, of what was altogether its most valuable item, a strict monopoly of the trade in peltry —was made as of a property *en fief*, in these terms:—

—"avons au dit Sieur d'Aulnay Charnisay, privativement à tous autres, concédé, octroyé "et attribué, et par ces présentes concédons, octroyons et attribuons, en confirmant la posses- "sion en laquelle il est de ce faire, la traite des pelleteries avec les dits sauvages de la "Cadye depuis la rivière Saint Laurent jusques à la mer et tant que le dit paiis et costes "pourront s'estendre jusqu'aux Virgines,—

"pour en jouir, ensemble les terres, mines d'or, argent et cuivre, et autres métaux et mi- "néraux, et de toutes les choses ci-dessus déclarées, à lui, ses hoirs, successeurs, et ayants "droit,—

"à cause de nous, en faisant l'hommage, en personne ou par procureur, attendu la distance "des lieux," etc.

§ 215.—The death of Charnisay, however, not long after, made an opening for la Tour; of which he was not slow to take advantage.

In 1651 (Feb. 27), he obtained accordingly, in turn, the King's letters-patent,(*x*) setting forth his distinguished services, for the longer term of 42 years, and especially against Charnisay, (from all of whose charges he is, by the way, declared to have been acquitted on the 16th of that month,) and confirming or appointing him—the phrases are again ambiguous—as Governor of all Acadie, with powers nearly answering to those conferred on Charnisay in 1647; though rather more briefly stated, and not *en fief*, nor with any expressed hereditary right of property in his Government.

These letters-patent contained the following clause, in reference to his old grants of land; thought advisable, it is to be presumed, by reason of the very different disposition which the King had indirectly assumed to make of them by his grant of 1647 to Charnisay:—

"Voulons et entendons que le dit Sr. de St. Etienne [de la Tour] se réserve, approprie et "jouisse pleinement et paisiblement de toutes les terres à luy ci-devant accordées, et d'icelles "en donner et départir telle part qu'il avisera, tant à nos dits sujets qui s'y habitueront, "qu'aux dits originaires, ainsi qu'il jugera bon être, suivant les qualités, mérites et services "des personnes."

(*x*) MSS. Doc. Que. Hist. Soc., 2d Series, Vol. 1, pp. 206-210.

§ 216.—La Tour's fortune, however, was in this too good to last. In September of the same year, he executed a transaction with the widow Charnisay, for the restitution of his fort and property on the River St. Jean(*y*); and shortly afterwards, he married her, and assumed possession of all the property of the minor children of his old rival, as well as of his own property. But in the meantime, suspected at Court notwithstanding his acquittal, he had new hostilities to encounter.

Emmanuel le Borgne, one of the principal merchants of la Rochelle, who had advanced Charnisay large sums for his Acadian adventures, and with whom the widow Charnisay had passed a transaction(*z*) in 1650 (Nov. 9), settling the amount due by the estate, and (apparently) making over to him a 9 years usufruct of all Charnisay's Acadian rights,—found means to get himself authorised(*a*) to seize them, notwithstanding la Tour's letters-patent of 1651.

A new civil war resulted; in which Denys also found himself disagreeably implicated; and which was brought to an unlooked for end, by a new conquest of most of Acadie, in 1654, by the New Englanders. After which, in 1656, Cromwell made a grant of the whole country(*b*) to la Tour and two English associates, Temple and Crown; and it only re-passed into the uncontested possession of the French Crown, in 1667, under the treaty of Breda.(*c*)

§ 217.—Pending these transactions, there appeared as a rival claimant under the letters-patent to Charnisay, of 1647, no less a personage than a Prince of the blood-royal, the Duc de Vendome; who, in 1652 (Feb. 18), executed, with a party acting as attorney for the widow Charnisay, what purported to be a deed of partnership or association(*d*) between himself and the heirs Charnisay,—he to maintain their rights at Court and otherwise, and they in consideration to make over to him the half of their assumed *fief* of Acadie.

Indeed, under date of December of the same year (1652), the French archives furnish a document implying an acceptance by the King, of the Duke as Co-Seignior of Acadie, in virtue of this instrument. It does not appear to have been put forward in 1703, by the Duke's representatives, in support of their then claims; and it may, therefore, be a question whether or not the King regularly executed it. But its existence, in the archives, as a document ever so much as submitted in such an interest, for perusal, is a sufficient indication of how far removed

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(*y*) Recited in the *Arrêt* of 1703; *ubi suprâ*.

(*z*) Recited in *Arrêt* of 1703; also in *Mémoire* introductory to same; *ubi suprâ*.

(*a*) "Mais ses menées avec les Anglais l'ayant rendu suspect à Mazarin, un nommé le "Borgne * * se fit autoriser a se saisir des héritages laissés par son débiteur en Acadie, et "cela à main armée s'il était nécessaire."—Garneau, Vol. 1, p. 151.

(*b*) MSS. Doc. Que. Hist. Soc., 3d Series, Vol. 2, pp. 582-8; also recited in *Arrêt* of 1703, *ubi suprâ*.

(*c*) Garneau, Vol. 1, pp. 151, 2; also documents recited in *Arrêt* of 1703, *ubi suprâ*.

(*d*) Recited in *Arrêt* of 1703, and in *Mémoire; ubi suprâ*.

men's minds were in those days, from any too high idea of public right, or of public trust as involved in the high offices of the state.

The preamble of this instrument (or perhaps, draft of instrument) for recognizing the successor to Richelieu's office of "grand-maistre, chef et surintendant-"général de la navigation et commerce de ce royaume," and uncle of the King, as Co-Seignior with the heirs Charnisay,(e) reads thus:—

"Comme nous serons toujours bien aise de maintenir nos sujets dans la jouissance de ce qui "leur appartient, aussi avons nous très agréable que pour se conserver dans la propriété des "grâces et bienfaits que nous leur avons départis, ils se servent des moyens qu'ils trouveront "propres et commodes à cet effet,—or, estant arrivé depuis quelque temps que certains par-"ticuliers, (entre autres, les nommés Charles de Turgis de St. Estienne de la Tour, Simon et "Nicolas Denis, frères, et Maillet) ont usurpé sur notre chère et bien aimée De. Jeanne "Motin, veuve de Charles Menou vivant Seigneur d'Aulnay, (auquel et ses enfans, par nos "lettres patentes du mois de Février de l'année 1647, nous donnasmes le gouvernement per-"pétuel et la propriété de toute l'estendue des païs, costes d'Acadie, et isles adjacentes, de "la N. F. en l'Amérique Septentrionale,) divers forts et places considérables du dit pays, et "qu'elle a grand sujet d'appréhender, si elle n'est pas promptement et puissamment secourue "d'hommes, de vivres, d'argent et de vaisseaux, elle sera entièrement dépossédée de ce qui "reste en son pouvoir,—

"Elle a eu recours dans un si pressant besoing, à notre très cher et très aimé oncle le Duc "de Vandosme, pair de France, grand-maistre, chef surintendant-général de la navigation et "commerce de ce royaume, sur la confiance qu'elle a prise que la considération de sa nais-"sance aussy bien que le rang qu'il tient luy seroit une protection asseurée, et que d'ailleurs "par l'authorité que sa charge luy donne, il pourroit mieux que personne la rétablir dans "ce qui luy a esté usurpé, la retirer d'oppression, et la garantir avec ses enfans d'une ruyne "totalle qui seroit inévitable s'ils perdoient la propriété des d. pays, parce que tout ce qu'ils "avoient de bien a esté employé dans le bastiment des d. forts, à faire des peuplades, et à "l'establissement des séminaires de personnes ecclésiastiques pour vacquer à la conversion "des Sauvages et au salut des âmes de ceux qui se sont habitués en ces quartiers là,—

"Mais d'autant que notre d. oncle le Duc de Vandosme sera obligé de faire de grandes et "immenses dépenses pour donner secours à la dame d'Aulnay, et recouvrer sur les sus-"nommés les lieux dont ils se sont emparez,—et qu'il ne seroit pas raisonnable qu'il les fist "sans quelque espoir de remboursement,—elle a donné charge de convenir en son nom avec "notre oncle le Duc de Vandosme, que moyennant cela il demeurera, ensemble ses hoirs, "successeurs et ayant cause, conjoinctement avec elle, ses enfans et ayant cause, Co-Seigneurs "de ses terres et pays de Acadie et isles adjacentes de la N. F. en l'Amérique Septen-"trionale, gouvernement et pouvoirs y attribuez, et d'en signer et arrester ainsy qu'il a été "faict un traité d'association," etc.

§ 218.—The only remaining document citable in this connexion, which I have been able to find, is the commission(f) granted by the King to Nicolas Denys, in 1654 (Jan. 30), pending his struggles with le Borgne, and just before the surrender (by la Tour and le Borgne) of the parts of Acadie for which they were fighting, to the English.

This Commission recognizes Denys as formerly "*institué et établi par la com-*"*pagnie de la Nouvelle France*" as Governor of the territory from Cap Rosiers

(e) MSS. Doc. Que. Hist. Soc., 2nd Series, Vol. 1, pp. 221—3.

(f) Edits et Ord., 4o, Vol. 2, pp. 17 *et seq.*; Com. des Gouv. et Int., pp. 17 *et seq.*

to Canseau(*g*); eulogizes, in turn, *his* services for the last 10 years; condemns strongly the conduct of Charnisay, [!] in having destroyed his settlements "*à* "*main armée et sans aucun droit*"; and with the same happy ambiguity of phrase that marks the Commissions of 1647 to Charnisay, and of 1651 to la Tour, confirms—or names—him Governor of that tract and of Newfoundland, Cape Breton and other islands, "*pour y rétablir notre domination et la dite com-* "*pagnie de la N. F.*," etc.

Like the Commission to la Tour, this instrument purports to confirm the Company's old grants to him,—and in these words:—

> "Voulons et entendons que le dit Sieur Denys se réserve, approprie et jouisse pleinement "et paisiblement de toutes les terres à lui ci-devant concédées par la dite Compagnie de la "N. F., lui et les siens; et que d'icelles il puisse en donner et départir telle part qu'il avisera, "tant à nos dits sujets qui s'y habitueront, qu'aux dits originaires, ainsi qu'il jugera bon être "selon les qualités, mérites et services des personnes."

§ 219.—In all this, what is there to control, or modify ever so slightly, the obvious interpretation of the grant to the Company of New France, in respect of the proprietary right thereby conveyed?

It was their titles granted to Denys, that the King confirmed in 1654,—after Denys had been violently dispossessed, and (probably) under color of royal sanction; and it was not merely the King's rights, but those of the Company also, that he then professed to charge Denys to re-establish.

It had been their titles, that la Tour had got the King to confirm to him in 1651; after the King had assumed, in 1647, to sanction his being dispossessed for alleged treason, by Charnisay.

And le Borgne, in 1657, fortified his titles,—derived, mainly, from them through Razilly and Charnisay, and secondarily from the King himself through Charnisay,—by an express grant from them; and this, although it is probable that he had obtained direct royal authority for taking to himself all that had been Charnisay's.

§ 220.—The King's grant to Charnisay, in 1647, certainly assumed to ignore their rights.

But how was it regarded in 1703, when the confusion as to all Acadian land titles had become such as to force from the Crown a general regulation as to them?

The representatives of the Duc de Vendôme then claimed under it. But their claim was wholly disallowed. In the *Mémoire*(*h*) already referred to, among other criticisms showing the weak points of the claim, there occurs this passage:—

(*g*) So making it sufficiently apparent that any Commissions originally granted to Razilly, la Tour, or Charnisay, must also have been from the Company or at its instance.

(*h*) MSS. Doc. Qub. Hist. Soc., 3rd Series, Vol. 2, pp. 582—588.—*Vide suprà* § 212, Note (*t*).

"Ces lettres [de Fév. 1647, au Sr. Charnisay] n'étaient point enrégistrées, et si on avait
"voulu les faire enrégistrer, on n'eût pas manqué d'y faire opposition de la part de la com-
"pagnie de la N. F., à qui toute l'Acadie et le commerce des pelleteries exclusif avait été
"concédé par édit du mois de Mai 1628, régistré au parlement de Bordeaux, laquelle com-
"pagnie subsistait, et au préjudice de laquelle ces lettres patentes ne pourraient pas avoir
"été obtenues:"

—showing that the Crown lawyers of that day were far enough from fancying that the Crown had any dispensing power over its contracts, or that its contract with the Company of New France had passed to that body anything short of the *bonâ fide* proprietorship of the soil,—as the deed said.

§ 221.—Indeed, this *Mémoire* goes further; for it follows up the foregoing extract, thus:—

"Quand on prendrait droit par ces lettres, elles ne donnaient au Sieur d'Aulnay [Charni-
"say] que le pouvoir de s'approprier ce qu'il jugerait être plus commode et propre à son
"établissement et usage. Le droit de la veuve et de ses enfans était donc réduit à ce qu'il
"s'en était approprié seulement, et ne comprenait pas toute l'Acadie."

Distinguishing exactly this smaller grant to Charnisay, (upon the supposition, always, of its having had any force at all,) from the larger grant to the Company, the *rapporteur* yet makes it vastly larger than the anti-seigniorial theory would allow that to the Company to have been. Charnisay was free to take to himself what he would; and what he should have taken, would have become his own. The Company, without having to appropriate anything, had all for its own. By the anti-seigniorial theory, holding all in trust, it could not so much as appropriate anything in derogation of its trust. No such theory could have been hinted at to the *Conseil d'Etat*, or (for that matter) to any body in those times,—whether by a Daguesseau, or by any less distinguished Crown law officer, or by anybody else.

§ 222.—Charnisay's grant of 1647, such as it was, and these confirmations to la Tour and Denys, of 1651 and 1654, all provide for sub-granting,—equally with the grant to the Company. But how?

To Charnisay there purported to be given a power of granting lands not specially made his own; in other words, a power of granting what was treated by that instrument as if it were Crown land. And with such grants, still according to that instrument, he was authorised to confer any kind of title or other right, without restriction.—Could any one under that instrument *demand* a grant of him, as a right? If so, on what terms? Who were to be titled, or otherwise privileged? Who, but Charnisay, was to judge of the "*qualités, mérites et ser-*
"*vices des personnes*,"—according to which, always, his grant purported to make him free to make out his grants, by way of reward, as he should see fit?

To la Tour and Denys,—as to the Company,—the permission came, as having reference to what was admitted to be their own. And it came with those added words: "*ainsi qu'ils verront bon être, suivant les qualités, mérites et services des*
"*personnes.*" What other sense could it have borne in their case, than what it bore in the grant to the Company? Freeing them from control or interference

as to their *jeu de fief*, it was a privilege—sought by them; not a burthen sought to be put upon them. There was no thought of putting burthens on them, of any kind.

§ 223.—Again, this grant to Charnisay, such as it was,—smaller though it was than that to the Company of New France,—was a grant in which, for the price of a promised exercise of official and other influence, a Duc de Vendôme could be induced to buy a half share. Did he buy that share, as part of a property, or as part of a trust? Could he have had a thought, that after he and his Co-Seigniors should have appropriated such and such tracts of Acadian land as "*commodes et propres à leur établissement et usage*," he and they might run a serious risk of being told that their appropriation did not matter,—that they held *à titre de fidéi-commis seigneurial*, for the *établissement et usage* of every one but themselves?

In 1853, by way of anti-seigniorial eulogy upon the Kings of France, collectively, the Attorney General assured the House of Assembly, that—

"In the whole history of the world, more benevolence cannot be found, than in the *arrêts*, "edicts and ordinances of the Kings of France relative to the settlement of Canada."(*i*)

Were the Duc de Vendôme and the King, in this case equally benevolent?

Is the anti-seigniorial picture of these times, an Arcadian picture,—or a true one?

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§ 224.—As a next step, then, in our inquiry,—how, to whom, and upon what terms, (of quantity, tenure and so forth) did the Company dispose of the lands thus granted to itself?

Did it deal with them, as if they were its own; and as if it meant to make them the *bonâ fide* property of its grantees? Or, did it act as if it held under any trust for its grantees; or as if it meant its grantees, or any of them, so to hold?

§ 225.—As regards its Acadian territory,—having no copies of any of the Company's Acadian grants,—we can offer no more precise answer to these questions, than may result from the considerations above suggested, aided by the obvious presumption of there having probably been no great difference between them and those made within the limits of what is now Canada.

§ 226.—Enough of its Canadian grants remain—not merely as extant in recorded copies, but even as titles that are still of force to determine the legal rights of many of the Seigniors now appearing before this Court—to admit of the fullest and most precise answer to these questions, in regard to Canada.

§ 227.—A first class of these grants consists of those made to the three religious bodies, which received grants directly from the Company; the Jesuit

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(*i*) Speech of 22nd March, 1853, reported in Quebec Morning Chronicle of 13th April, and (French version) in pamphlet "*Débats*" from Canadien office, p. 18.

Fathers; the Ladies of the Hôtel Dieu of Quebec; and the Ladies Ursulines of Quebec.

§ 228.—The seven properties acquired by the Jesuits were the following:—

1.—Land at Three Rivers (600 arpents), under Title No. 4 of ABSTRACT.

2.—Notre Dame des Anges, originally granted by the Duc de Ventadour (Title No. †2, cited *suprà*, § 163); confirmed by Titles †8 and 32.

3.—Their College ground at Quebec (called at first 12 arpents), under Titles †9 and 32.

4.—The Isle des Ruaux, under Title 18.

5.—La Vacherie, acquired in exchange for part of their College ground; confirmed under Title 32.

6.—The Isle St. Christophe, by Title 38*c*.

7.—Land at Tadoussac (6 arpents), by Title 42.

§ 229.—No two of these titles read alike; but they are all of them as far from limitative of the grantees' property in the grants made, as they well could be.

§ 230.—The 600 arpents at Three Rivers are given "à toujours," "en toute "propriété, seigneurie, *tout ainsy qu'il a pleu au roy nous concéder le dit pays "de la N. F.*" It may surely be assumed that it was not meant to require sub-granting from so small a grant; the rest of the title hinting at nothing of the sort. So that these words become double indicative,—as showing, not merely that the Company meant to give by the same sort of tenure as that under which they had taken, but also that they held their ownership of New France for as private a property as that of a 600 arpent plot might be in the hands of a religious community.

Notre Dame des Anges is first confirmed by Title †8, and the College ground is first given by Title †9, as grants "à toujours," "en toute propriété." Later, by Title 32, the Jesuits having successfully claimed release from every kind of charge or condition as attached to these grants,—Notre Dame des Anges is re-granted "à perpétuité, et en pleine propriété, *en franc aleu*,(*k*) avec tous droits de "haute, moyenne et basse justice, seigneuriaux et féodaux, droit de pesche sur "les dites rivières, vis-à-vis de leurs concessions, privativement à tous autres, "même les préz que la mer couvre et découvre à chaque marée, sans aucune "charge ny redevance," under reserve only of appeals from their *justice* to the Grand Sénéchal of New France. And by the same Title, the College ground and La Vacherie were confirmed to them "en main-morte, sans aucune charge "ny redevance."(*k*)

(*k*) It was a question raised at the argument before this Court, whether or not the Company had the right to create an *aleu*.

But for the powers specially conferred by the 5th Section of their Charter, this might well be doubted. Although, even under the 4th Section (*had it stood alone*) the remedy of the Crown might possibly have proved to be more nominal than real. The grant, in the case

Isle des Ruaux, a small property, was given, by Title 13, "en toute sa con-"sistance et estendue, sans en rien retenir ni réserver, à toujours en toute pro-"priété et seigneurie;" and this, for the special purpose of supplying the grantees with "nourriture de bestiaux pour l'entretien de leurs maisons et résidences."

Isle St. Christophe, another small property, seems to have been given (Title 38c) *en franche aumône noble.*

And Tadoussac, (Title 42,) was given, either *en franc aleu roturier*, or *en franche aumône roturière*, "sans aucune charge, à perpétuité, en pleine pro-"priété."

§ 231.—Turning to the conditions attached to certain of them.

Title 4 (for the land at Three Rivers) imposes the following, and no others:—

1.—"sans qu'ils soient obligés à aucune chose, sinon que d'en donner l'adveu pour cette seule "fois seulement, les dispensant pour toujours après cela, et taut que besoin est ou seroit "avons amorty et amortyssons les dites terres cy-dessus concédées, dans lesquelles les dits "* * feront passer telles personnes qu'ils choisiront pour les cultiver et dresser les habita-"tions nécessaires,—

2.—"et néantmoins dans l'estendue des terres cy-dessus, non plus qu'ailleurs en la dite N. F., "les y habituéz ne pourront traitter des peaux, pelleteries, autrement qu'aux conditions de "l'édit du roy, faict pour l'établissement de notre Compagnie,—

3.—"et faisant, par les dits * *, passer des hommes pour la culture dee dites terres, ils en "remettront tous les ans les rolles au bureau de notre dite Compagnie, affin qu'elle en soit "certifiée et que cela tourne à sa décharge, estant réputéz du nombre de ceux qu'elle doit "faire passer suivant l'édit cy-dessus."

Title 13 (for Isle des Ruaux) says the same thing in other words,—except that it requires an *aveu* every 20 years, and omits the reference to the *amortissement* of the grant.

Titles †8 and †9 (the first grants, by the Company, of Notre Dame des Anges and the College land) differ from Title 13, only in form of expression, and from their having some clauses added (in the former) as to reservation of land, and as to religious services, and (in the latter) as to honors to the Company. Of these,

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supposed, would have been an attempt at a *démembrement de fief*, complicated with a constructive *désaveu*, (*vide suprà*, § 115.) Such *désaveu* might have been held inexcusable; and the *commise*, or forfeiture to the Crown as Dominant, of the property sought to be erected into an *aleu*, would in that case have resulted. But if excused, the whole right of the Crown would have been, to make the grantee hold under homage, as a Co-Seignior with the Company for so much of the territory of its great *fief* of New France. There could not be any *quint* or *relief* to make such holding burthensome to him, or profitable to the Crown.

Under the 5th Section, however, it seems to be clear enough that the Crown had precluded itself of all legal right to criticise the terms of the Company's grants, so long as they were grants of portions only of the lands of their *fief*. Leave given to distribute such lands "*ainsi qu'ils jugeront à propos*," and to attribute to the lands so distributed "*tels titres et* "*honneurs, droits, pouvoirs et facultés qu'ils jugeront être bon*,"—imported the license (anomalous, certainly) of making such distributed lands *aleux*, if the Company pleased.

In this instance, three properties were erected into *aleux*; one, an *aleu noble*,—the others *aleux roturiers*.—The validity of the grant is not known to have been ever called in question.

the reservation of land clauses are the only ones that have any interest here :—

1.—"à la charge toutes fois, que hors la dite palissade il sera laissé de la place autant qu'il "en faut pour un chemin royal propre pour venir d'en haut au fort de Québec, et en la ville "que l'on y fera bastir,"—

6.—"et si la ville de Québec s'estendait un jour jusques aux dites terres et que la Compagnie "eut besoin de partye des dites terres pour y faire bastir un fort ou autres bastimens, la "dite Compagnie pourra reprendre ce qu'elle aura besoin des dites terres, en rendant aux "dits * * d'autres terres suivant qu'il est porté par la délibération de l'assemblée générale "de ce jour,—

7.—"et dès à présent ils laisseront, pour la commodité publique, un chemin royal de 20 "toises de largeur le long des bords de la dite rivière St. Charles et du dit fleuve St. Lau-"rent, en l'estendue des terres à eux concédées."

Title 32, of course, did away with all condition as to these two properties, and as to La Vacherie. And the Isle St. Christophe and land at Tadoussac were also granted, without condition of any kind.

§ 232.—The Company, then, though bound towards the King, to cause a certain amount of emigration to New France, did not bind these grantees to effect any part of it. For the Jesuits, these contracts created—not an obligation to carry out any given number to the satisfaction of the Company—but a *right* to take out and settle in the country whom they pleased, without reference to the satisfaction or dissatisfaction of the Company as to their choice. All the obligation of the Jesuits was, to give in the rolls of any shipments that they should make, to the Company, in order that the Company might include them in its returns to the King, for its own discharge towards the King.—The Jesuits need not send out a settler, unless they chose.

Much less did the Company reserve for itself a particle of control, under their contracts, as to the way in which the Jesuits should deal with their lands,—whether as their own property, or in the way of alienation by sub-grant or otherwise. Large grant or small, all are alike in this. Indeed, as to the large grant, the most striking incidental proof is given of the absoluteness of the property meant to be transferred, by the terms of the special reservations of roads, and of the provision for the conditional resumption of land for forts or other public buildings. Without these, it was not thought that the grantees would have been sufficiently held to the render of their land, even for these public uses. With these petty reservations made,—was the sweeping reservation of a right to force concession on such and such terms, *meant, though not made?*—Even the petty reservations that were made, were given up.

So far were these grantees from the disposition to hold under restriction,—and the Company from the disposition to restrict them.

§ 233.—Three properties are to be noted, as acquired by the Hôtel Dieu of Quebec :—

1.—Lands at and near Quebec (12 arpents in town, 30 in the banlieue, and 200 near it), under Title 9*a* of Abstract.

2.—Grondines (W. part), under Title 10.

3.—St. Ignace, under Title 34*b*.

§ 234.—The first of these titles seems to have been lost; but it is sufficiently recited in the second of them.

By this latter (No. 10), the land in the town is declared to be given for the building of the Convent,—and Grondines (1 league by 10) by way of further endowment of it. The conditions, if any, of the three smaller tracts are not stated. Those of the fourth and large tract make it (strictly speaking) a grant to be held nobly, *par service divin;* under obligation—to render an *aveu* every 20 years,—to offer a yearly mass,—to hand in rolls of any emigrants that might be sent out,—and lastly, to enforce the Edict as to the trade in peltry.

§ 235.—The St. Ignace title (No. 34*b*) recites a donation to the Nuns, by Robert Giffard, of a part of a grant formerly made to him by the Company,—and on their prayer thus confirms and enlarges their ownership:—

—"avons confirmé et confirmons, et en tant que besoin est ou seroit, donné, concédé et ac-
"cordé, donnons, concédons et accordons, aux dites * * la dite ½ lieue de front sur la rivière
"St. Charles, et 10 lieues de profondeur, à prendre * * et pardevant à la rivière St. Charles,
"la dite rivière comprise, isles et islets estant en icelle, vis à vis la dite ½ lieue de concession,
"pour jouir par les dites * * de la dite étendue de terre en franche aumône et franc aleu
"sans justice à perpétuité,—
—"sans aucune chargé que d'en donner adveu et dénombrement de 20 ans en 20 ans aux
"officiers de la dite Compagnie."

The words "*en franche aumône et franc aleu*" are certainly here out of place; as the two tenures are incompatible with each other,—and indeed, the obligation to render an *aveu* every 20 years is (in strictness) incompatible with either. But we certainly have here a grant, of noble tenure,—and one that was free of all burthen save this of rendering *aveux.*

§ 236.—The Ursulines' properties may be called two in number:—

1.—Lands at and near Quebec (a number of small tracts), under Titles †8*a*, †8*b*, †17*a*, †26*b*, †28*b*, †28*c*, †28*d*, and 34*a*.

2.—Ste. Croix, under Titles †8*a* and 34*a*.

§ 237.—Of the titles above cited for the smaller tracts at and near Quebec, three (†8*a*, †8*b*, and 34*a*) are extant *au long.* The others are merely referred to in Title 34*a;* and related, probably enough, to parts of the land granted by Titles †8*a* and †8*b*.

By the former of these last mentioned titles, the Company granted with a view to the endowment of the grantees, 12 arpents for their buildings, &c., and also Ste. Croix (1 league by 10); and by the latter, they added 30 arpents in the banlieue of Quebec, and 200 arpents near it; all, on the same terms; that is to say, under obligation—to render an *aveu* every 20 years,—to offer a yearly mass,—to hand in rolls of their emigrants,—to enforce the edict as to trade in peltry,—and further—

—"à la charge de faire passer en la N. F. dans l'année prochaine, du moins 6 personnes
"pour commencer à défricher, cultiver et bâtir sur les dites terres concédées, et pareil
"nombre de 6 personnes l'année suivante, autrement la dite concession demeurera nulle,"—

—or in other words, *par service divin*, and *en seigneurie*, with this last special obligation over and above those of the Grondines grant (*suprà*, § 234) to the Hôtel Dieu.

As to this special obligation, by the way, it may be worthy of passing note, that the fact of its being here stipulated adds weight to that of its not being stipulated in any other of the grants we have yet come to. When the Company meant to bind a grantee to take out emigrants, they knew the words to use. When they merely required a deposit of rolls of such emigrants as might be sent out, they did so, as meaning not to bind the grantee to effect any larger emigration than he might choose.

But it would seem that these grantees liked restriction of any kind, as little as the Jesuits or as the Ladies of the Hôtel Dieu; and that the Company cared as little to restrict them. For, by Title 34*a*, *all* their grants, small and large alike, were confirmed to them—

—"en franc alleu et main morte, avec pouvoir de bailler les dits lieux en fiefs, cens et rentes, "portant lods et ventes, saisines et amendes, même le dit lieu de Ste. Croix en toute jus-"tice, haute, moyenne et basse, avec tout droit de pêche dans le fleuve St. Laurent le long "de leur concession, à perpétuité,—
1.—"sans autre redevance que les dévotions desquelles elles s'acquittent tous les ans de la "dite Compagnie,—
2.—"et à la charge de donner un aveu et dénombrement des dits héritages de 20 ans en 20 "ans aux officiers de la dite Compagnie résidant à Québec."

The words "*en franc aleu*" are of course as inaccurate, in a technical point of view, here, as in the St. Ignace grant to the Hôtel Dieu just remarked upon (*suprà*, § 235), and which bears date of the same year. But the grant is, not the less, a grant of almost the largest property that the Company could give; constituting all the properties in question (one of them being of 1 perch of land only) into grants *par service divin* and *en seigneurie*, clear of all obligation, save the required religious service and the *aveu*,—and adding to the one large property the distinctive attributes of the *justice* of all grades, and of the *pêche* in the St. Lawrence.

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§ 238.—A sort of intermediate link between these grants to religious bodies and the ordinary lay grants of the Company, is to be found in the grant of Sillery, by Titles †29 and †**30**.

These Titles are very peculiar, and very interesting.

§ 239.—The former sets forth the grant, as made by the Company.

After recital of the Company's desire to bring together the Indian population for religious teaching,—the attachment of certain converted Indians to Sillery,—and the building of a church there for them, by the Jesuits,—this grant runs thus in favour of these Indians:—

—"nous leur avons donné et donnons par ces présentes, de notre plein gré, l'estendue d'une "lieue de terre depuis ** sur 4 lieues de profondeur, le tout sous la conduite et direction "des pères Jesuites qui les ont convertis à la foy chrestienne, et de leurs successeurs,—

—"sans toutefois déroger aux concessions de quelques portions de terre que nous avons "faites par cy-devant à quelques particuliers françois, dedans cette étendue, lesquels relève-"ront du capitaine chrestien des sauvages comme ils relevaient de nous avant cette dona-"tion—

—"que nous faisons pleine et entière, avec tous les droits seigneuriaux que nous avons et "que nous pouvons prétendre, sauf et réservé la justice que nous nous réservons à faire "exercer par nos officiers à Québec, leur cédant tous les autres droits qu'un seigneur peut "jouir ;—

—"de plus, nous donnons à ces nouveaux chrestiens qui demeurent en ces contrées, tout "pouvoir de pescher et tout droit de pesches dans le grand fleuve St. Laurent, le long des "terres de la présente concession qui y aboutissent, sans qu'aucune autre personne y puisse "pêcher, sinon avec leur congé et permission, révoquant la concession par nous cy-devant "accordée au gouverneur de la N. F., attendue l'opposition formée sur les lieux de la prise "de possession en vertu d'icelle ;—

—"nous leur donnons de plus toutes les prairies et herbages et toutes autres choses qui se "trouveront sur les bords ou sur les rives ou descouvertures des marées qui répondent à "leurs terres et à leur concession, sans qu'aucun autre y puisse rien prétendre, prendre ou "recueillir sans leur permission,—

—"laissant néantmoins le chemin libre au public le long du fleuve et lieux nécessaires à "régler par nos officiers estant sur les lieux ;—

—"pour jouir des choses cy-dessus par les dits sauvages en franc aleu, sans aucune rede-"vance à la Compagnie de la N. F."

§ 240.—The extraordinary precaution was taken, for this grant, of obtaining a royal confirmation of it; perhaps, because of its peculiarities,—as vesting in the Jesuits a directorate over the Indian grantees,—as transferring grants before made by the Company and in their direct *mouvance*, to the anomalous *mouvance* of an Indian chief or tribe, said to hold *en franc aleu*, but fettered by this dependance on the Jesuits,—and as assuming to revoke the grant of *pêche* formerly made to the Governors of New France; or possibly, in some measure, from a wish, on the part of the Jesuits, to fortify by words under the King's hand, a claim (which, from a clause of the confirmation, as below quoted, they would seem to have had in view) to be allowed their grant elsewhere than at the spot first indicated.

This confirmation (No. †**30**), after recital of the Company's grant, and of the King's wish to forward its object, proceeds—

—"avons de notre grâce spéciale, pleine puissance et authorité royale, en agréant et con-"firmant la dite concession **, donné et octroyé, donnons et octroyons par ces présentes "signées de notre main, une lieue sur le grand fleuve, sur 4 lieues de profondeur dans les "terres,—

—"non seulement à l'endroit contenu en la dite concession, mais encore en tous les lieux et "endroits où il y aura un fort * *

—"avec tous les endroits [*droits*] de chasse et de pesche et de tous autres émoluments qu'ils "pourront retirer de cette estendue de terre ou rivières adjacentes, sans aucunes dépendances "ny redevances, avec laquelle nous leur quittons, délaissons et remettons,—

—"à la charge toutes fois que les dits sauvages seront et demeureront toujours sous la conduite, direction et protection des pères de la Compagnie de Jésus,—

—"sans l'avis et consentement des quels ils ne pourront remettre, concéder, vendre ny "aliéner les dites terres que nous leur accordons, ny permettre la chasse ny la pesche à "aucuns particuliers que par la permission des dits pères aux quels nous accordons la direction

"les affaires des dits sauvages, sans néantmoins qu'ils soient tenus d'en rendre compte qu'à
" leurs supérieurs.

—" Voulons en outre que si quelques Européens se trouvaient établys dans les limites, qu'ils
" soient et demeurent dépondants des Capitaines Chrestiens et direction des dits pères, tout
" ainsy qu'ils étoient de ceux qui leur avoient accordé la portion de terre qu'ils possédoient,—
—" et que doresnavant ne sera donné terre dans cette estendue, que par l'ordre des Capitaines
" Chrestiens et aveu et consentement des dits pères leurs protecteurs, le tout au profit de ces
" peuples."

§ 241.—There can, of course, be no pretence here of any other limitation of property, as against these Indian grantees, than is involved in their being subjected to the directorate of the Jesuits.

The Company had created an *aleu noble;* and the King signified his approval of the act.

In doing so, and by way of indicating clearly what were to be the powers of the Jesuits, he declared the Indians incapable of retro-ceding, conceding, selling, giving or otherwise alienating the lands of their grant, and even of allowing people to hunt or fish thereon,—unless with the leave of the Jesuits. With that leave, they were to be as free to do any one of these things as to do any other. The words—"remettre, *concéder, vendre* ny aliéner"—naturally ran together; no distinction made between them.

The notion was unknown, of a proprietor (under whatever noble tenure) not having just as much capacity to sell as to concede.

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§ 242.—The ordinary grants of the Company admit of division into several classes.

Some purport to pass to the grantee the same description of estate in the land, as the Company held in it under their grant from the King.

Others, without using words expressly assimilative of the estate granted, to the estate held by the Company, yet purport to grant *justice* in its entirety.

One, at least, purports to grant *justice, moyenne et basse* only.

Others are *en fief, sans justice.*

Some, that are known to have been made, are not extant; so that their tenor cannot be stated.

One, of those extant, hardly admits of being classed.

And, lastly, some are *en censive.*

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§ 243.—The grants purporting to pass the same measure of estate as the Company held, cover the following properties:—

1.—Beauport (1 league by 1½ leagues, with augmentation in depth of 2½ leagues more), under Titles 3 and 35 of ABSTRACT.

2.—La Citière (of unascertained extent, but presumably covering all the District

of Montreal, south of the St. Lawrence, *and more*), under a Title not noted in Abstract.(*l*)

3.—Lauzon (6 leagues by 6 leagues), under Title 5.

4.—Beaupré (from Beauport to the Rivière du Goufre, by a depth of 6 leagues), under Title 6.

5.—The Isle d'Orléans, under Title 7.

6.—The Isle de Montréal, under Titles †7*a*, 15, **16** and 46.

7.—St. Sulpice (2 leagues by 6), under Titles 15 and **16**.

8.—Gaudarville (in two parts, together—say, 45 arpents by 4 leagues), under Titles 33 and 37.

9.—Mille Vaches (3 leagues by 4), under Title 36.

10.—Neuville, Dombourg or Pointe aux Trembles, (from 2 to 3 leagues, by 4,) under Title 38.

11.—St. Roch des Aunais (3 leagues by 2), under Title 41.

§ 244.—The common granting phrase of these titles reads thus :—

—" en toute propriété, justice et seigneurie, à perpétuité, tout ainsi et à pareils droits qu'il " a plu à Sa Majesté donner le pays de la Nouvelle France à la dite Compagnie."

Where these are not the precise words, others equivalent to them take their place.

§ 245.—Of the intent of these words, as purporting to grant every description of stream, large and small, and indeed all land covered with water, as well as all mines, within the territory covered by each title, there can be no question. Independently of the effect of the words *seigneurie* and *justice* as super-added to the word *propriété*,—the Company took their grant, as expressly including "terres, *mines*, *minières*, (pour jouir toutefois des dites mines conformément à

(*l*) It may be a question whether this property ought to be classed here, or under the head of the grants of unascertained tenor.

I rank it here, because from Document No. 40 of the first series, laid by Government before this Court, it appears to have issued at the yearly meeting of the Company in 1635, one year after the grant of Beauport, and one year before the grants of Lauzon, Beaupré, etc., when the Company's grants were issuing in this form; as well as because from its extent, and the fact of its being a grant to a son of Jean de Lauzon, there can be no doubt of its having issued in the most favorable form then used for grants to laymen.

The extent of the grant appears, from the facts,—that Laprairie (Title 18), parts of Longueuil (Titles 44*b* and 50*a*), the Isle St. Paul near Montreal (Title *a* 49), and part of St. François du Lac (Title, wrongly numbered as 54*a*), were all originally sub-granted from it.

In Document 40 above referred to,—and which is the *procès-verbal* of the *prise de possession* of the grant by the grantee's agent, it is described as "*la consistance des troys* [a clerical error, evidently, for *pays*] *isles, rivières, mer et lac mentionnées par la dite concession.*" A river called Ste. Marie, falling into the St. Lawrence above the Sault St. Louis, and an island called the Isle St. Jean, are given as its upper boundary; and the Rivière St. François is made its lower boundary. What was meant by the words "*mer et lac*" must be matter of conjecture.

"l'ordonnance,) *ports et havres, fleuves, rivières, étangs*, isles, islots, et généralement toute l'étendue du dit pays;" and they here gave all that they had taken.

In some particular instances, indeed, as regarded rivers and lakes more particularly, this has happened to be made clear, independently of the effect of these words in the grant.—Thus, the Beauport grant (Title 3) is described as starting where the river called Notre Dame de Beauport falls into the St. Lawrence; and the words are added without qualification, "*icelle rivière comprise*," —words that could not have been so added, if they had not meant that the river formed part of the very property meant to be granted.—In that of Lauzon, again, (Title 5,) the case is stronger, if possible; for there the description of the object granted reads, "*la rivière Bruyante*, scituée **, AVEC 6 lieues de profondeur "dans les terres, et 3 lieues à chaque costé de la dite rivière,"—making the river the first object of the grant, and giving the land on either side *with it*.—The grant of Gaudarville (Title 33) contains the unnecessary words, "et de tout "le compris en iceux, tant en bois, prés, *rivières, ruisseaux, lacs*, isles, et généralement de tout le contenu entre les dites bornes;" and that of the Augmentation of Gaudarville (Title 37), like that of Beauport, bounding the grant by a river which was *all* meant to fall within it,—adds "*icelle Rivière du Cap Rouge* "*comprise*."—The *prise de possession* of La Citière describes that grant as "la "consistance des pays, isles, *rivières, mer et lac* mentionnées par la dite con-"cession." (*Suprà* § 243, Note (*l*)).—And the second grant of Montreal, with St. Sulpice, (Title 15,) grants the rights of "pesche et navigation dans le grand "fleuve St. Laurent, et autres lacs de la Nouvelle France, *fors et excepté en ceux* "*qui auroient été concédés en propriété aux particuliers*;" showing what a matter of course affair the concession of a navigable stream or lake as a property, was then taken for.(*m*)

§ 246.—In the matter of the conditions attached to these grants, there was a good deal of variety. But no one of these varieties approached the form required by the anti-seigniorial theory.

§ 247.—As to the dues payable to the Company as Dominant, four varieties are observable.

For Beauport, La Citière (presumably), Lauzon, Beaupré, the Isle d'Orléans, and the first grant (Title †7*a*) of Montreal, they were, at each mutation of possessor, with the rendering of *hommage lige*, "*une maille d'or du poids de demy*

(*m*) Indeed, the extreme readiness with which in those days water (even though navigable) was held for private property in the hands of the owner under noble title, cannot be questioned by any one familiar with the documents of the period. The *Ordonnance* of 1669, (not registered in New France, by the way,) in its assertion of the special property of the Crown afterwards insisted on, was notoriously and confessedly an innovation, and one that was but partially carried into practical effect.—As to the titles granted in New France, it will be seen that they were continually declaring waters that were navigable, to be the private property of one or another grantee Seignior.

"*once*" (for Beauport "*du poids d'une once*"), "*et le revenu d'une année, de ce* "*que le dit * * se sera réservé après avoir donné en fief ou à cens et rentes tout ou* "*partie des dits lieux.*"

For Montreal, as granted the second time, and for St. Sulpice, (Titles 15, 16 and 46,) there was to be—with the render of ordinary homage—payment of "*une pièce d'or du poids d'une once* en laquelle sera gravée la figure de la Nouvelle France telle qu'elle est empreinte au sceau dont la Compagnie se sert en "ses expéditions, *outre tels droits et redevances qui peuvent escheoir pour les fiefs* "*de cette qualité;*" these last words, taken in connexion with the next clause,—which ends with words recognitive of the Custom of Paris as a rule meant to be followed every where in New France,—establishing the *relief* and the *quint* of that Custom.

For Gaudarville, as first granted (Title 33), a very peculiar rule was laid down. With the render of *hommage lige*, at each mutation of possessor of the *fief*, there was combined "*le revenu d'une année, et de plus une maille d'or du poids d'une* "*once*, A CHAQUE MUTATION DE ROY."

While, for Mille Vaches, Neuville and St. Roch des Aunais, the rule was made to be, the rendering of an ordinary homage, with payment of—"pour rachapt, "*le revenu d'une année à chaque mutation de possesseur*, suivant la Coutume du "Vexin Français enclavé de celle de Paris." And for Gaudarville, upon the grant of its Augmentation (by Title 37), the rule was modified into the render of *hommage lige*, with payment of "*le revenu d'une année à chaque mutation.*"

§ 248.—The learned Counsel in the anti-seigniorial interest, of course tried to make much, at the argument before this Court, of the latter words of the clause above quoted from the grants of the Beauport form,—"*de ce que le dit* "* * *se sera réservé après avoir donné en fief ou à cens et rentes tout ou partie* "*des dits lieux.*"—They are about the only words in any grants of this period, out of which even such show of argument as they offer could be got up. There was no choice but to interpret them as an *implied* requirement upon the grantee to sub-grant *en fief* or *à cens*.

But in the first place, in order to so utter an abrogation of all antecedent rule, the requirement needed to have been precise. What is usual and consonant with rule, is readily implied. What is unprecedented and against all rule, never can be.

And suppose, instead of these words, that there had been a direct clause embodying those of them upon which alone this quibble rests; suppose these grants had purported expressly to be made, A LA CHARGE DE "*donner en fief ou à* "*cens tout* OU PARTIE *des dits lieux;*" to what would it have amounted?—After having so granted *part*, these grantees would have been under no legal obligation to grant more. That is to say, for all ends of legal interpretation, the words would have been a mockery.

And again, what are they but words in the titles of some five or six properties only,—nothing answering to them in any other titles of their period? No proposition can be more certain, than that each grant formed a contract of itself. What may be in one and not in another, affects that one, and not that other.

Whatever the titles of these five or six properties may have been, the rest (as to this) were not like them. If the question is as to usage, the majority—not the small minority—must settle it.

§ 249.—Not that the Seigniors have cause to shrink from the closest examination of these particular titles. It would be odd, if they had; for the titles are of grants made to men who certainly had special influence with the Company, and who were not likely to have taken grants on worse terms than other people. Indeed, comparing this clause in these titles with the analogous clause in the other titles of the same general class, and applying to their interpretation those rules of common sense which every body in any other case would at once apply unconsciously,—these titles will be found (as one would have expected) the most favorable to the grantees.—There were grants, liable to pay, besides a nominal coin, the *quint* and the *relief* of the Custom of Paris, the former the fifth part of the price on every sale, the latter a year's revenue *of the whole fief* on every mutation not being by sale nor yet *en ligne directe*,—a grant that, besides such nominal coin, was to pay a year's revenue *of the whole fief* at every accession of a King,—and grants that were to pay a year's revenue *of the whole fief* at every mutation of possessor;—while these favored grants, with the nominal coin, were to pay—not the revenue of the whole *fief*,—but *that of such part only as the holder might not have chosen to alienate by sub-granting en fief or en censive.*

Under all of these grants, except these last, the Company thus retained all its fiscal check (as Dominant) over its vassals, in the matter of the *jeu de fief*. They could not alienate, in whole or part, except under liability to immediate payment of dues wherever the *jeu* should trangress the limits of the Custom,—and to future *relief*, irrespective of it, though it should not.(*n*)

Under these favored grants, it was made clear that the Company waived these its fiscal rights, in favor (so to speak) of the two feudal forms of contract. No profit was ever to accrue to it upon any alienation that should have been put into the form of a sub-grant *en fief* or *en censive;* no matter how far the process might be carried. Even the remoter profit, which the Custom of Paris allowed by the operation of its *relief*, whenever accruing on the mutation of the *fief*, was given up. The contractual *relief* here stipulated (varying therein from that of the Vexin Français) fell only on the lands not parted with by sub-grants

(*n*) *Vide suprà*, § 102, etc.

It is assumed here, that the Custom of Paris, in the absence of contract to the contrary, governed New France even at this time. By the second grant of Montreal (in 1640) the Company recognised it, apparently for the first time. Some of their later grants, and also their treaty with the *habitants* in 1645, (*suprà*, §202,) confirmed by the King,—repeat the recognition. But as the Metropolitan Custom, it may probably be taken to have been the presumed rule from the first.

If Henrion de Pansey's idea (*suprà*, § 101) as to the possible exemption of *landes et terres incultes* from the restrictioos of the *jeu de fief* under the Custom of Paris, can be thought applicable to this period, it would go to lessen their pressure at the outset, and so long as the lands of the country should be generally wild,—but would not avail to do away with them as matter of Canadian law.

having one or other of the two feudal forms. If, indeed, the grantees of these *fiefs* should choose to alienate piecemeal, without adopting either of these forms, a year's revenue would have been the fine. But no difference could have been made between such alienations, on the score of their being for money or not for money. The distinction of sale and not-sale was ignored. And, *à multo fortiori*, there could have been no difference made between the grant *en fief* or *à cens*, with *deniers d'entrée*, and that without. Such distinction was unknown to the Custom of Paris, opposed to the common rule of the feudal system, not hinted at by the document constitutive of the contractual rule here in question.

In those days, independently of the mere smaller amount of this contractual *relief*, this privilege of creating *arrière-fiefs* and *censives* that the Dominant must recognise as withdrawn from his immediate *mouvance*, and *inféodés* in spite of him, was deemed of the highest value; so much so, that it was claimed by the great feudatories of the Crown, as one of their peculiar privileges. LOYSEAU speaks of this claim thus:—

"La quatrième prérogative des grandes seigneuries, qui est d'une notable importance, * * "est que ceux qui les ont, et non autres, peuvent créer des fiefs et des censives * * au pré-"judice du roy; attendu qu'il a esté dit tout au commencement du livre des fiefs, qu'il n'y a "que les vassaux du roy *qui feuda dare possint*,—ce qu'il faut entendre, qu'il n'y a qu'eux "qui les puissent donner de leur propre autorité et sans permission du souverain, et en telle "sorte qu'ils soient distraits de sa tenure immédiate, et soient faits arrière-fiefs ou cens "inféodez."(o)

This right, pushed to the extreme limit of the reduction of the grant to the *fief en l'air*, these titles gave to these favored parties.—The anti-seigniorial argument has to twist it into a heavy burthen; and to make such burthen press—not on these parties only—but on every body else.

§ 250.—If proof that the view here taken is the correct one, could be wanting, it would be found in the recitals of a later grant having reference to two of these properties.

In 1674, when Canada had passed into the hands of the Company of the West Indies, Bishop Laval, then proprietor of Beaupré and the Isle d'Orléans, (as well as of Sault-au-Matelot,) petitioned the Company to release those two *fiefs* from the burthens imposed by these grants; and his petition was granted. The deed granting it (Title 134*a*) recites this clause by the following paraphrase:—

—"mais d'autant qu'il est spécifié dans les contrats de concession qui ont été fait aux * * "*qu'ils payeront à chaque mutation* de *possesseur une année de revenu des terres et domaines* "*qui seront retenus* par eux ou leurs ayant cause, *après avoir concédé aux particuliers* "CE QU'ILS NE VOUDROIENT GARDER,—laquelle clause le dit Seigneur Evesque estime trop "onéreuse," etc.

And upon this representation by the Bishop, the burthen was remitted, and all the conditions of these grants reduced to the four below stated; and this, not

(o) *Des Seigneuries*, Chap. 6, No. 22; p. 31, Edn. of 1701.

simply by the Company, but by and with the advice also of the Commissioners who were then acting for the Crown in reference to the Company's affairs, then not in the most flourishing state. The words of the deed are these :—

—"avons, pour et au nom de la dite Compagnie, et de l'avis de * * commissaires nommés par "le Roy pour l' [illegible] employ des effets de la dite Compagnie, remis et remettons par ces "présentes au d. Seigneur Evesque tout ce qu'il pourroit devoir * * et avons déchargé et "déchargeons les dits domaines, terres et seigneuries de Beaupré et Isle d'Orléans du devoir "et obligation de payer à la dite Compagnie le revenu d'une année à chaque mutation de "possesseur, savoir * *; demeureront seulement le dit Seigneur Evesque, Séminaire, ou "autres qui les possèderont à l'avenir obligé—

1.—" de rendre la foy et hommage à la dite Compagnie de 20 ans en 20 ans, au Château de "Québec,—

2.—" avec une maille d'or du pois de demi once pour chacune des dites seigneuries,—

3.—" dont les appellations ressortiront au Conseil souverain de Québec,"—
(and further, for indulgence as to all three Seigniories,)

4.—" et sera en outre obligé le dit Seigneur Evesque, ou ses ayant cause, en reconnaissance " de la dite remise de faire célébrer tous les ans une messe,* *

—" moyennant lesquelles charges et le présent règlement, les d. terres et acquisitions, "tant le dit emplacement [Sault-au Matelot] que les dites seigneuries de Beaupré et Isle " d'Orléans demeureront quitte et deschargé pour toujours de tous autres droits quelconques."

So much for the pretence that this clause (reductive of the ordinary dues of the *fief*—though not enough so to meet the wishes of the Bishop) meant the opposite of what it said.

§ 251.—To proceed, then, to another.

Two of these grants, and two only, do contain a further reference to alienation. But in what sense? Not only do they not require it in any shape, as by sub-granting or otherwise. They simply *restrict* it,—and by two rules not in the least alike.(p)

That of Beauport (Title 3) reads—

6.—sans que le dit * * puissent disposer de tout ou de partie des lieux cy dessus à luy " concédés qu'avec le gré et consentement de la dite Compagnie, pendant le terme et espace " de 10 ans à compter du jour des présentes, après lequel temps il luy sera loisible d'en " disposer au proffit de personne qui soit de la qualité requise par l'édit de l'establissement " de la dite Compagnie."—

And the grant of Montreal and St. Sulpice (Title 15) reads—

8.—" ne pourront aussi les dits * * faire cession on transport de tout ou de parties des choses " cy dessus concédées, au profit de ceux qui seront desjà habituez sur les lieux, soit à Québec, "aux Trois-Rivières ou ailleurs en la N. F., mais seulement à ceux qui voudront passer " exprès, affin que la colonie en soit d'autant plus augmentée."—

The grantee of the former (in 1634, when the Company was just beginning to make their grants) was bound by contract not to alienate in any way—whether by sub-grant or otherwise—to any one whatever, any part of his grant,

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(p) The only other grant of the Company, directly referring to this matter, also *restricts* alienation,—but again, by a third rule.—See *infrâ*, § 262.

for ten years to come, unless with leave of the Company; but after that time he might do so, as he should choose, to any one being a French-born Catholic.

The grantees of the latter (in 1640, six years afterwards) were bound by contract not to alienate in any way—whether by sub-grant or otherwise—to any one resident in New France, any part of their grant, for all time to come; but might do so as they should please, at all times, to any one whom they might see fit to send out from France on purpose.(q)

One does not wonder at the fact that neither clause seems to have found its way into any other contract of concession.

But one well may wonder that it should have become necessary to contest the marvellous pretension—that would convert the parties owning under all these contracts, alike, into holders of just a trust-estate, for alienation on certain terms and on no others.

§ 252.—Closely connected with the subject matter of the clauses last noted, is a peculiarity marking one grant, only, of this class,—this same Title 15, of Montreal and St. Sulpice. It reads thus :—

11.—" pour commencer à faire valoir les terres cy dessus concédées, seront tenus les * *
" de faire passer nombre d'hommes en la N.F., par le prochain embarquement que fera la dite
" Compagnie, avec les provisions nécessaires pour leur nourriture, et de continuer d'année en
" année, afin que les dites terres ne demeurent incultes, mais que la colonie en puisse être
" augmentée,—

12.—" et afin que la Compagnie soit certifiée de la diligence qu'ils y feront, et que cela luy
" serve à la décharge de ceux qu'elle doit faire passer pour la colonie, les dits * * ou autres
" qui y conduiront les hommes aux embarquemens, en tel nombre toutefois que la Compagnie
" sera disposée de les recevoir, seront tenus d'en remettre les rôlles entre les mains du secré-
" taire de la dite Compagnie, le tout conformément aux règlements d'icelle Compagnie."—

Some of the other titles of this class bind the grantee to the simple furnishing of a roll of such emigrants as he may send out; as we have seen, some of the titles granted to religious bodies, also did. This is the only grant of the class, that, like one of those to the Ursulines above noted (Title †8a, see § 237), directly bound the grantee to anything in the way of procuring emigration. Unlike that, however, it is vague, as specifying no required number. It is observable too, that it is to be limited by the Company's readiness to furnish passages. Its special insertion in this grant suited well enough with the insertion

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(q) This title was specially ratified by the King (No. 16.); and the Seminary of Montreal hold their Seigniories of Montreal and St. Sulpice under it, to this day; bound, therefore, at all times (according to this clause) not to part with an acre—by sub-grant or otherwise—to any one not directly emigrant from France.

Wherever it seems to suit the anti-seigniorial theory to do so, these clauses are held to limit the estate of the grantee, *ipso facto*, to all intents whatever. Any hint at sub-granting by the grantee, however slight, is magnified into an obligation giving every one but himself a vested interest in the grant.—It is not known that any one was ever so absurd as to doubt the proprietary capacity of these Seigniors to contravene *this* clause.

Here (no exigency pressing) the rule of common sense, that these clauses are all mere facultative stipulations of the grantor, is admitted readily by every one. No other rule of interpretation could be suggested, but by a pressing exigency.

of the special clause as to not granting land to any but emigrants, also thrown into it, both requirements facultative—experimentative—and apparently, peculiar to this single grant.

§ 253.—This grant of Montreal and St. Sulpice is peculiar as regards two other connected clauses:—

9.—"entend la dite Compagnie que la présente concession ne puisse préjudicier à la liberté "de la navigation, qui sera commune aux habitants de la N. F., et par tous les lieux cy-"dessus concédés,—

10.—"et à cet effet qu'il soit laissé un grand chemin royal de 20 toises de large tout à l'en-"tour de la dite isle depuis la rivière jusques aux terres, et pareille distance sur le fleuve "St. Laurent depuis la rive d'iceluy jusques aux terres concédées, le tout pour servir à la "dite navigation et passage qui se fait par terre:"—

—indicative of an impression, (as to which we shall find further marked indications in other grants presently to be noted,) that the grant was of a property of so large and high a kind, as in the absence of reservation of this kind might warrant the grantees in the exercise of a power of interference, by absolute prevention, or by toll, with the very navigation of the St. Lawrence.

§ 254.—In the same spirit, the grantee of Beauport was bound to build no fortifications, unless with permission; and the grantees of Montreal and St. Sulpice,—except for defence against the Indians.

And the grants of Lauzon, Beaupré, the Isle d'Orléans, Montréal and St. Sulpice, all contained a clause of reference to an intended procurement for them, of some one or other of the special titles, of duchy, marquisate, earldom or barony, reserved for royal confirmation.

§ 255.—Several of these grants, again, on the other hand,—that is to say, those of Gaudarville (Titles 33 and 37), Mille Vaches (Title 36), Neuville (Title 38), and St. Roch des Aunais (Title 41), were made under no conditions whatever, except those for homage, dues to the Company, and regulation of the appeal (provided of course, in all the grants of this class) from the *justice* of the grantee.

§ 256.—One of these grants last referred to, that of Gaudarville,—is remarkable, from the terms of the title (No. 37) for the Augmentation that was made to it in 1653.

That title (granted by Jean de Lauzon, then Governor) ran thus:—

"Scavoir faisons que les irruptions continuelles des Iroquois paraissant journellement aux ha-"bitans du Cap Rouge, où ils ont fait plusieurs massacres et eulevé nombre d'habitans,—le peu "d'habitations qu'il y a demeurent [demeurant] abandonnées, soit par la mort de ceux qui les "faisoient valoir, soit parce que effectivement les habitans les ont quitté,—de manière que "ce lieu court fortune d'estre entièrement perdu pour estre esloigné de tous secours, et avoir "besoin de quelque personne puissante qui avec l'assistance de ses amis pust soustenir "l'effort de ces barbares, y faisant construire quelque réduit; et jugeant que Louis de Lauzon, "Escuyer, seigneur de la Citière et de Gaudarville, se pourroit résoudre à la deffence de ce "poste si on luy vouloit accorder ce petit espace de terre, et le joindre, ensemble la censive "qui est sur iceluy, à sa terre et seigneurie de Gaudarville,* *

—" à ces causes * * avons accordé, donné et concédé, accordons, donnons et concédons par
" ces présentes au dit * * l'espace de terre qui est euclos entre * * et à la Rivière du Cap
" Rouge, icelle Rivière du Cap Rouge comprise; laquelle étendue de terre, ensemble la
" censive y establie, uny, joint et incorporé, unissons, joignons et incorporons à sa dite
" seigneurie de Gaudarville, pour en jouir et user, et le tout posséder à perpétuité, * * aux
" mémes droits de fief, haute, moyenne et basse justice et seigneurie, qui luy ont esté ac-
" cordées par la dite concession du 8me febvrier, et généralement aux mémes droits que la
" Compagnie de la N. F. a droit de jouir des dits lieux par l'édit de son établissement,—
1.—" à la charge d'en porter la foy à la sénéchaussée de Quebec par un seul hommage
" lige,—
2.—" et revenu d'une année à chaque mutation,—
3.—" et que la justice sera exercée par son juge de Gaudarville, le tout ne composant qu'une
" seigneurie, les appellations duquel juge ressortiront par devant le sénéchal de la N. F.
" ou son lieutenant à Québec."

Part of the small tract (*petit espace de terre*) here added to Gaudarville, had thus been granted *en censive* by the Company; part had not. The whole was added to Gaudarville; this granted part being specially distinguished as a *censive*, that is to say, as consisting only in a certain *directe* over the land; and the other part, as a *utile* in its entirety, of the kind which the grantee might or might not afterwards subdivide into *directe* and *utile* as he should please.

We shall have to notice presently two grants (*r*) made *en censive*, some 6 or 7 weeks later, close to this spot, for this same purpose of inducing the grantee to serve zealously for the defence of Quebec and its neighbourhood against the Indians,—by this same Governor, to two persons perhaps of smaller means and no doubt of less influence (*s*) than the Seignior of Gaudarville.—The anti-seigniorial theory would require one to believe that this grant, to the more powerful man, was of a trust; and those, to the less powerful, a property.

§ 257.—The title (No. 15) already more then once adverted to, of Montreal and St. Sulpice, is rendered the more interesting from the fact of its having received the direct sanction of the King,—by Title No. **16.**

As in the case of Sillery already noticed (*suprà*, § 240), this confirmation was probably obtained in consequence of peculiar circumstances connected with the grant.

The Island of Montreal had been granted to "Messire Jacques Girard, Chevalier, Seigneur de la Chaussée," in 1636, by Title †7*a*; who, however, evidently never took possession of his grant. On the contrary, in 1638 (April 30), he declared by deed,(*t*) that he had only taken the grant as *prête-nom* for Jean de Lauzon; who again, in 1640 (Aug. 7), under the style of "Messire Jean de "Lauzon, Conseiller du Roy en ses Conseils d'Etat et privé, Intendant de la "justice, police et finance en Dauphiné," made it over by deed of gift(*u*) to

(*r*) *Vide infrà*, § 281.

(*s*) This grantee was the near relative—brother, son, nephew or cousin, I am not sure which—of the Governor.

(*t*) MSS. Doc. Que. Hist. Soc., 2nd Series, Vol. 1, pp. 84—86.

(*u*) MSS. Doc. Que. Hist. Soc., 2nd Series, Vol. 1, pp. 86—88.

"Pierre Cheverier, écuier, Sieur de Faucamps, et Jérôme LeRoyer, Sieur de la "Dauversière." In December of the same year, these donees obtained from the Company a new grant, Title 15 above mentioned, which, setting forth a revocation of the old grant, gave them most of the Island of Montreal, and also the tract since known as the Seigniory of St. Sulpice,—which would seem to have been thus thrown in as an equivalent for the part of the Island given up to the Company. These parties, however, were again acting for an association afterwards known as "*La Compagnie de Montréal*," consisting of themselves and several other persons of very considerable influence; though, for some reason, the parties seem not to have passed their notarial declarations(*v*) to that end till after the obtaining of the royal confirmation here in question.

By that confirmation (Title **16**) they seem to have sought and they certainly obtained, an indirect allowance of their own quasi-corporate existence, as well as certain very important rights to the future *communanté d'habitans* of their Island of Montreal.—It was granted them "*tant pour eux que pour les habitans* "de Montréal en la N. F., *et leurs associés pour la conversion des Sauvages* du "dict pays," "pour ce que les exposans doubtent devoir estre troubléz en l'ex- "écution de leur entreprise, s'ils n'ont sur ce nos lettres de ratification," etc. And besides ratifying the grant (*w*) in all particulars,—so showing that its terms were in no wise repugnant to the King's views,—it gave special power to the grantees to receive "*legs pieux*" for support of their religious foundations, to govern and fortify their island, to erect their people into a "*corps de ville ou commu-* "*nauté*," and further, "à faire descendre et monter en liberté par la rivière de St. "Laurent leurs barques ou canots de Québec à Montréal, pour y porter les "vivres et munitions nécessaires aux habitans *sans qu'ils soient tenus mouiller* "*l'ancre en aucun lieu* sinon pour leur commodité, *ni qu'ils puissent être trou-* "*blés et empêchés sous quelque prétexte que ce soit;*" another passing indication of the readiness with which in those days people entertained apprehension of the exercise of feudal rights of property (by the way of toll and otherwise) over navigable rivers; and an evidence of the official knowledge of the Crown—so to call it—of the fact that according to the principles of law as then held, the Company of New France had, and its other grantees might have, such rights in that behalf as the grantees of Montreal and their settlers had good reason

(*v*) Of 1644, March 25, and 1650, March 21.—See Edits et Ord., 8vo, Vol. 1, pp. 26—28.

(*w*) This ratification, somewhat strangely, refers not only to the grant of the 17th December (Title 15), but also to the previous deed of the 7th of August, as if it also had been from the Company, instead of being only from one of its leading members.

The grantees, notwithstanding their admission *to the Company*, that they gave up that title, thus got it comprehended in their ratification. Indeed, they even got their grant described in it, as being of *the whole island*, as well as of the tract on the mainland given in lieu of part of the island.

In 1659 (April 21) by Title 46, they got from the Company a grant of the rest of the Island of Montreal, on the terms of their former grant—saving only a small tract thereby granted to M. de Faucamps personally.—How far the encroaching recitals of this ratification of 1644, may have been meant to cover a pretention thereafter to this further grant,—or whether they were errors of carelessness, may be doubtful.

to guard against (so far as they might) by such letters-patent as these from the Crown.

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§ 258.—The grants of the next class, not so precisely assimilated to the original title of the Company of New France, but yet purporting to comprehend, the *justice* in its entirety, as well as the *propriété* and *seigneurie*, of the tract granted, are the following:—

1.—Deschambault (in two parts, each of ½ a league by 3), under Titles †14, †24 and 34.

2.—Rivière du Sud (1½ by 4 leagues), and the Isles aux Oies and aux Grues, under Title 17.

3.—Dautré (in two parts, each ½ a league by 2), under Titles 12 and 19.(*x*)

4.—The tract, afterwards divided into St. Gabriel and St. Ignace (2 leagues by 10), under Titles 20 and 25; the latter merely authorising a change of site, the tract first described being found to have been granted before.

5.—Portneuf (1½ by 3 leagues), under Title 21.

6.—The tract since known as forming Repentigny, Lachenaie and l'Assomption (4 leagues by 6), under Title 22.

7.—Bécancour in the District of Three Rivers (about 2 leagues square), under Titles 23, 26 and 47.

8.—St. Etienne (?) in the District of Three Rivers (½ a league by 3), under Title †39.

9.—Coulonge (less than 500 arpents, near Quebec), under Title 44*a*.

10.—An unnamed property on the St. Charles near Quebec (of unknown size, part of an abandoned grant that had been made, probably before the time of the Company, to the Recollets), under Title †48*a*.

§ 259.—Whether or not a grant of this class would have been held in those days to pass the property of a navigable stream within its limits, may be made a question; but there can be none, as to its passing the full property of every stream not absolutely navigable. And indeed, as has already been observed, (*suprà*, § 245, Note(*m*)) the distinctive claim of the Crown to all navigable streams is of a date later than this period.

One of these grants, however, is express as to (perhaps) the principal stream comprehended within their limits.—The title of Rivière du Sud (No. 17) is exactly like that of Lauzon,(*y*) in respect of its being a grant primarily of that river, and but secondarily of so much land on either side of it.

Another, that of Bécancour (No. 23) mentions incidentally a "lac St. Paul," as forming part of it.

(*x*) This grant is peculiar, from the fact that the first half of it was granted by Title 12 "*en propriété et fief*," with no mention of *justice*, and that by Title 19, for the second half, the two were thrown together "*en toute propriété, justice et seigneurie.*"

(*y*) *Vide suprà*, § 245.

§ 260.—Indeed, so prevalent were the impressions of those days, as to the inherent rights of a feudal lord, even over navigable rivers of the largest class, that six of these grants contain clauses to prevent their exercise over the St. Lawrence; and this, although none of the grants (any more than that of Montreal above(*z*) referred to) purport to grant that river itself.

In the grant of Deschambault (No. 14), they are coupled with a prohibition of the building of fortresses, thus :—

5.—" ne pourront aussy le dit * * bâtir aucun fort ou forteresse dans le dit lieu tenu en fief,—
6.—" ny empêcher en quelque manière que ce soit la navigation sur le dit fleuve St. Laurent " à l'endroit des terres concédées,—
7.—" ains seront tenus, pour servir à la dite navigation et passage sur le dit fleuve, de laisser " un grand chemin de 20 toises de large depuis la rive du dit fleuve en la saison qu'il est " le plus eslevé jusques aux prochaines terres ou habitations qui seront faites sur icelle."

In that of Rivière du Sud (No. 17), they read thus:—

6.—" et encore que les dits lieux soient concédés en pleine propriété, néanmoins entend la dite " Compagnie que la présente concession ne puisse préjudicier à la liberté de la navigation " sur le dit fleuve St. Laurent qui sera commune à tous les habitans et autres allants ou " venants,—
7.—" et à cet effet qu'il soit laissé un grand chemin royal de 20 toises de large au bord du dit "fleuve St. Laurent et depuis iceluy jusques aux terres fermes, les droits de seigneurie sur " le dit fleuve St. Laurent réservez à la dite Compagnie."

And in those of Dautré (No. 19), Portneuf (No. 21), Repentigny, &c., (No. 22), and Bécancour (No. 23), the difficulty apprehended is more expressly stated and guarded against, thus :—

5.—" et encore que les dits lieux soient accordés et concédés en pleine propriété, néantmoins " *ne pourra* le dit * * ou autres habitants d'icelle *empescher le cours de la rivière St. Laurent,* " ny d'autre qui pourroient se trouver dans les dites terres cy-dessus concédées en pleine pro- " priété, *ny prétendre aucun droit sur les barques ou vaisseaux qui passeront* en montant " ou descendant, *ou s'ingerer de les arrester* pour cause ou occasion que ce soit,—
6.—" et mesme seront tenus de laisser un chemin royal sur le dit fleuve de St. Laurent de " 20 toises de large à prendre sur le bord du dit fleuve St. Laurent en la saison qui est le " plus élevé jusqu'aux terres plus proches d'iceluy."

§ 261.—For the matter of the dues payable to the Company, these grants were not uniform; one of them—Title †39—imposing the *relief* of the Custom of Vexin François; and the rest, either expressly or by implication, the *quint* and *relief* of the Custom of Paris.

None of them, therefore, specially relieved the grantee from the ordinary limitations as to the *jeu de fief* and *jeu de justice.*

§ 262.—One of them, and one only, the title (No. 12) of the grant of the first half of Dautré,—contains a stipulation as to the alienating of the land granted.

And it is like those of Beauport and Montreal already remarked upon (*suprà*, § 251) in this; that it restricts alienation of all sorts, instead of requiring it to

(*z*) *Vide suprà*, §§ 253 and 257.

be made in any particular way. But on the other hand, it imposes an entirely different rule of restriction from either of the two rules there imposed. The words are—

8.—" et sans que le dit * * puisse faire cession ou transport de tout ou de partie des lieux " à luy cy-dessus concédées si ce n'est au proffit des François desjà resident en la dite N. " F., ou qui en ce cas s'obligeroit d'y passer pour les deffricher et faire valloir."

§ 263.—Again, one other of them, and but one, that of Deschambault (No. †14), resembled the title of Montreal and St. Sulpice in the particular respect of super-adding to the obligation—not uncommon, but at the same time far from universal—to furnish rolls of any emigrants sent out, in order to the discharge *pro tanto* of the Company, the further charge of furnishing some amount of emigration. The clause is this:—

8.—" fera le dit * * passer jusques à 4 hommes de travail au moins pour commencer le "défrichement, outre sa femme et sa servante, et ce par le prochain qui se fera à Dieppe " ou à la Rochelle, ensemble les biens et provisions pour la subsistance d'iceux durant 3 " années, qui lui seront passés et portés gratuitement jusques à Québec en la N. F., à la " charge de rendre le tout abord des vaisseaux de la dite Compagnie à Dieppe ou à la " Rochelle, le tout à peine de nullité de la présente."

Not identical, therefore, with the like clause in either of the other two titles that alone alluded to this matter.(a) The same sort of thing, it would seem, could not be done twice in quite the same way.

Add, that it was here made clear that the bargain as to this modicum of emigration was most perfectly bilateral. The grantee was to send out so many, and need send no more; and the Company was to give free passage. In the other cases, the like free passage was presumably understood.

§ 264.—Stress was laid in argument before this Court, by the learned Counsel acting against the Seigniors, upon the fact that one of these titles (No. 34), being the third of those relative to Deschambault, purported to deal with the land already granted by two other titles (Nos. †14 and †24); as though that fact in some way gave color to the idea of a something of trust-character as involved in them.

But how stands the case? The first of the three grants was to François de Chavigny, Ecuier, Sieur de Berchereau, and Delle. Eléonore de Grand-Maison, his wife; the second, of an augmentation on the same terms, purported to be to him alone. Both of these grants were made by the Company at home. The third, issued by Jean de Lauzon, then Governor in Canada, in the Company's name, set forth (truly or falsely, one cannot now say) that Chavigny had left the country and abandoned everything he had in it, leaving his affairs in confusion, and apparently deserting his wife—whom, it will be remembered, he had become bound to bring out with her servant-maid and his own 4 labouring men, to settle upon their grant. For some reason,—probably to give color to her claim to hold the property from his creditors, or from himself, or from both,—she

(a) *Vide suprà*, §§ 237 and 252.

seems to have sought a declaration from the Governor that the property should be held for her own; and the Governor granted it, thus:—

—" avons par ces présentes disposé des lieux par luy ainsy abandonnés et à luy accordés par " concession des 4 Déc. 1640 et 29 Mars 1649, en faveur de Delle. Eléonore de Grand Maison, " à laquelle nous les avons donnés et concédés, donnons et concédons par ces présentes, pour " en jouir par elle et les siens et ayans cause à perpétuité, aux mêmes charges, clauses et " conditions qu'elles avoient esté cy devant octroyées au dit sieur de Chavigny;"—

—whether equitably or not, one cannot now say; but most surely, not with any too exact adherence to anything that can be called a rule of law.

There is nothing, however, to show that any question of law was ever raised about it. Presumably, Chavigny took no more thought of the property, or of the wife, that he had run away from. And whether he did or not, the proceeding at all events left her no more a trustee for all the world as to this property, than he and she, or he alone, had been before—under the former grants, which most surely furnish no hint to that effect.

§ 265.—One of these titles—that of Coulonge (No. 44*a*), is interesting from the fact of its having imported no grant of property, in the narrower sense of the word,—but only a grant of *seigneurie* and *justice*.

Strictly speaking, it was no grant, but a mere erection of certain lands held *en censive*, into a *fief* bearing the title of a *Châtellenie*, and (of course) all the attributes of justice. From the copy furnished me by the gentlemen of the Seminary, its present proprietors, and a number of other titles *en censive* with which also they have supplied me, it appears that M. Daillebout, a high functionary of those days, "Directeur de la traite de la Nouvelle France," being proprietor of several contiguous grants made by the Company *en censive*, near Quebec, in all not far from 500 arpents in extent, obtained from the Company this new title-deed, setting forth, that—

—"Désirant reconnôitre les bons services qu'elle a cy-devant reçus, et ceux qu'elle espère " recevoir cy-après du Sr. * *, à ces causes elle a érigé la terre de Coulonge sise * * ses circon- " stances et dépendances en titre de Châtellenie, avec justice, haute, moyenne et basse, suivant " la Coutume de Paris, pour en jouir par luy et les siens ou ayans cause, au dit titre de Châ- " tellenie,—

1.—"mouvant par un seul hommage lige de Québec,—

2.—"et que les terres qui se trouveront enclauses dans ses bornes, relèveront de la dite Châ- " tellenie, et luy payeront les cens et rentes que la dite Compagnie s'était réservés."

From the terms of this latter condition one might infer that the Company were probably under the impression that the territory in question comprised some land held *en censive* by other parties than M. Daillebout; although that does not seem to have been the case. But certainly, no one can fancy that the change of his tenure from the lower to the higher grade, involved any obligation, or even any legal liability to obligation thereafter, to alienate his land or any part of it, on any particular terms to any one,—or did anything but extend the range of his previously existing property in it.

The conditions of the title are simply the two above given. And the existence of the title simply evidences the fact, that M. Daillebout in seeking, and the Company in granting, the quality of a *fief* of this high grade, to this petty plot

of ground, were faithfully transplanting to the new world the ideas and usages of the old,—were not bent on creating for the new world, a new system of feudal law and usage.

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§ 266.—Another illustration, almost more striking, to the same effect, is to be found in the case of the one title which purports to have granted a *justice moyenne et basse* only.

§ 267.—This Title (No. 45) is of the *fief* Bécancour, on the Cap Rouge road near Quebec, *a property of* 10 (*ten*) *arpents only;* and was granted—like Coulonge—by the Company's direct vote, to a high local functionary; the "Sieur Réné Babineau, Chevalier de l'ordre du Roy, Grand Voyer en la Nou- "velle France, fils de M. Babineau, l'un des anciens Directeurs de la Com- "pagnie," being the grantee; and the grant being in the following words—only:—

—"désirant reconnôitre les bons services qu'elle a reçus de **, elle luy a donné et concédé "en fief mouvant de Québec, avec moyenne et basse justice, suivant la coutume de la ville, "prévosté et vicomté de Paris, 10 arpens de terre de profondeur, sur un de large, lequel "s'appellera le fief de Bécancourt, size sur le chemin du grand Cap Rouge, qui étoit cy- "devant des terres de la ferme appartenante à la dite Compagnie, lesquels 10 arpents sont "chargés de bois revenus depuis qu'ils sont deffrichés."

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§ 268.—The grants *en fief, sans justice*, are the following:—

1.—Part of Gentilly (½ a league by 2), under Title 24*a*.
2.—Vieuxpont (?) (1 league by 5), under Title 27.
3.—Jacques Cartier (½ a league by 5), under Title 28.
4.—Isle St. Joseph (40 or 50 arpents), under Title 40.
5.—Part of Pointe du Lac (unstated width by ¾ of a league), under Titles 43 and 43*a*.
6.—Boucher (200 arpents), under Title 44.
7.—St. Michel (some 150 arpents), under Title 46*b*.(*b*)
8.—St. Jean (60 arpents), under Title 48.

§ 269.—Of which grants, five—Gentilly, Vieuxpont (?), Jacques Cartier, St. Michel and St. Jean—were charged with *quint* and *relief* in terms of the Custom of Paris; and the other three with the *relief* of the Custom of Vexin François.

(*b*) Since the printing of my Abstract, I have obtained a copy of this title from the gentlemen of the Seminary of Quebec; and find it to fall into this class, and to be in these words,—direct from the Company:—

—"avons donné en fief au Sr. de Tilly, une concession appelée de St. Michel, sise près de "Sillery **, pour en jouir par le dit ** en toute propriété,—
—"et de payer à chaque mutation ce qui est accoutumé de payer suivant la Coutume de "Paris, au receveur de la dite Compagnie à Québec."

§ 270.—One only of these grants (No. 43), that of part of Pointe du Lac, contains any condition beyond those of homage and payment of feudal dues; and its further conditions are but these two :—

3—" feront les dits * * habituer les dites terres en leur estendue, et y travailler dans 4 ans " de ce jour,—

4.—" souffriront, les dits * * ou autres jouissant des dites terres, que les chemins qui se " pourront establir par les officiers de la Compagnie de la N. F., passent par leurs dites " terres, si ainsi les dits officiers le trouvent expédient,—

—the former of these clauses presenting the only case, where the Company is known to have imposed an obligation to settle the lands granted "*en leur estendue*," and (of course) leaving the grantee free as to his mode of doing it,—the latter, an obligation far from universal, though not so uncommon.

§ 271.—The small extent of four of these grants, (Isle St. Joseph, Boucher, St. Michel and St. Jean,) to say nothing of the small extent of Coulonge and Bécancour (*suprà*, §§ 265—7), is of itself decisive evidence that grants *en fief* were not in those days imagined to be saddled with any condition of sub-granting.

In this respect, there was no contractual distinction made between the 10 arpents of Bécancour, and the leagues on leagues of Beaupré.

§ 272.—Indeed, the titles of St. Jean, and—as I learn from the gentlemen of the Seminary—St. Michel also, were in the position of Coulonge (*suprà*, § 265), in this further respect also; that they were not in fact first grants of the land, but merely erections of land granted and held by its grantee *en censive*, already.

The title of St. Jean is express as to this. Jean Bourdon, the proprietor favoured with it, was an official and man of mark in those times, who had obtained several other grants *en fief*, and whom we shall presently find(c) to have got more than one other property converted from the *censive* into the *fief*. This particular title (very short) ran thus, by direct vote of the Company :—

" Sur la demande faitte à notre Compagnie par le sieur Bourdon qui l'a [qu'elle a] gratifié " de la charge de procureur fiscal au dit pays, tendante à ce que sa maison appellée St. Jean " fust mise en fief, il a esté résolu la dite maison St. Jean être en fief avec la quantité de 60 " arpens de terre,—

1.—" mouvant et relevant du Fort St. Louis de Québec,—

2.—" et ce, suivant les us et coutumes de la ville, prévosté et vicomté de Paris."

Did he, any more than Daillebout with his Châtellenie, dream of a conversion of his property into anything ever so remotely analogous to a public trust?

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§ 273.—The further grants *en fief*, which are known to have been made by the Company in Canada, but of which the terms must be said to be unknown, are not many.

(c) *Vide infrà*, §§ 280, 281 and 301.

I have ascertained none but the following :—

1.—Godefroy ; see No. 11 of ABSTRACT.

2.—Pachevigny ; see Nos. 26*a* and 28*a*.

3.—Niverville ; see No. 46*a*.

4.—Mingan, terre ferme ; see No. 47*a*.

5.—Dutort.

6.—Des Maures, or St. Augustin.

7.—St. François, in *banlieue* of Quebec.

8.—The grant or grants, out of which Batiscan and Cap de la Magdeleine were constituted.(*d*)

§ 274.—This last and two others—Mingan and Des Maures—were grants of the larger class. Godefroy, Niverville and Dutort fell short of it. St. François was quite small. And Pachevigny, granted in two parts, is stated to have been a *fief* of a fraction of an arpent, only, in its total extent.

§ 275.—The *prise de possession* of Dutort has been laid before this Court by Government,—No. 44 of the 1st series.

It is only interesting from this negative clause in its description of the tract granted :—

—"sans qu'il puisse prétendre avoir aucune propriété dans la dite rivière Puante, isles "qui sont dedans, ny aussy en tout ou partye du lac St. Paul, encor bien que la dicte ligne "s'y rencontrast," etc.

—a clause indicative of the well known general understanding, that to a *fief* bounded by, or taking in, part of a river or lake, there went a property therein, accordingly,—unless the title ran to the contrary.

§ 276.—St. François, like Coulonge, St. Michel and St. Jean, was an erection of lands, originally granted *en censive*, into a *fief*.(*e*)

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§ 277.—The grant, characterised as non-descript, that of the Common at Three Rivers (Title 26 *Bis*), hardly calls for notice.

It is a sort of *Ordonnance* by the Governor, declaring certain land,—part of which at least had been ceded for the purpose by certain proprietors,—to be a Common for the *habitans* under certain conditions. Indirectly, it evidences the natural tendency of the time to assimilate the Canadian to the French Seignior, by its concluding words,—" le tout sans préjudice des droits des Seigneurs de " ce pays, qui auront droit d'y mettre pasturer les bestes selon la coutume."

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§ 278.—There remain, then, the Company's grants *en censive*.

Of these, there are but few extant ; though a much greater number must have been made.

(*d*) *Vide infrà*, § 291.

(*e*) *Vide infrà*, § 281.

§ 270.—Three of them were made by instruments which at the same time made also a grant *en fief*. A comparison of the words used for the two grants, ought to be not insignificant.

First in date, of the three, is the grant of the first part of Beauport (Title 3 and 3 *cens* 1 of Abstract), by which in 1634, the *fief* is first granted as a league and a half of land, with a river included,—

—" pour jouir des dits lieux par le dit * * en toutte justice, propriété, et seigneurie à perpé-" tuité, tout ainsy et à pareils droits qu'il a plu à S. M. donner le pays de la N. F. à la dite " Compagnie,—

1.—" à la réserve toutesfois de la foy et hommage que le dit * * seront tenus porter au * *
2.—" avec une maille d'or du poids d'une once, et le revenu d'une année de ce que le dit * * " se sera réservé après avoir donné en fief ou à cens et rentes tout ou partie des dits " lieux,—
3.—" et que les appellations du juge des dits lieux ressortiront nüement à * *—
4.—" que les hommes que le dit * * feront passer en la N. F. tourneront à la décharge de la " dite Compagnie en diminution du nombre qu'elle doit y faire passer, et à cet effet en " remettra tous les ans les rolles au bureau de la dite Compagnie, affin qu'elle en soit " certifiée,—
5.—sans toutesfois que le dit * * puissent traitter des peaux et pelleteries au dit lieu ny " ailleurs en la N. F. qu'aux conditions de l'édit de l'establissement de la dite Compa-" gnie,"—

—and then two arpents of land are added *en censive*, thus:—

—" *outre lesquels choses cy la Compagnie a encore accordé au dit * * une place proche le fort " de Québeck contenant 2 arpens, pour y construire une maison avec les commodités de cour et " jardin, lesquels lieux il tiendra à cens du dit lieu de Québeck,"*—

—and these two more conditions are stipulated as applicable, apparently, to both grants alike:—

6.—" sans que le dit * * puissent disposer de tout ou de partie des lieux cy dessus à luy " concédés qu'avec le gré et consentement de la dite Compagnie, pendant le terme et " espace de 10 ans * *, aprés lequel temps il luy sera loisible d'en disposer au proffit de " personne qui soit de la qualité requise par l'édit de l'establissement de la dite Com-" pagnie,—
7.—" et sans que le dit * * puisse fortiffier les lieux cy dessus concédés sans la permission de " la dite Compagnie."

Second in date, of 1640, is the grant of the first part of Deschambault (Title 14 and 14 *cens* 3), by which a *censive* is first granted, thus:—

—" *nous avons au dit * * donné, concédé et octroyé, et * * donnons, concédons et octroyons " par ces présentes les terres et lieux cy après déclarées, c'est à savoir: 2 arpens de terre à " prendre dans le lieu désigné pour la ville et banlieue de Québec, s'y trouvant des places non " encore concédées, ou de proche en proche, pour y faire un logement avec jardinage où il se " puisse retirer avec sa famille, plus, 30 arpents de terre à prendre hors la dite banlieue de la " ville de Québec et de proche en proche icelle en lieux non encore concédés,"*—

—then, the *fief*, thus:—

—" et outre encore avons au dit * * donné, concédé et octroyé, donnons, concédons et oc-" troyons par ces présentes, * * ½ lieue de terre en large à prendre * * sur 3 lieues" * *—

The *habendum* follows, common to the two grants:—

—"POUR JOUIR PAR LUY, SES SUCCESSEURS OU AYANS CAUSE, DES TERRES CY-DESSUS CONCÉDÉES "EN PLEINE PROPRIETE, ET LES POSSEDER, SCAVOIR":—

—then the particularisation of the *censive*, thus:—

—"*les dits 2 arpens de terre * * et les 30 arpens * * en roture,—*

1.—" *à la charge d'un denier de cens payable au fort de Québec par chacun an au jour qui " sera cy après désigné,—*

2.—" *le dit cens portant lots et ventes, saisine et amendes;"—*

—and then, that of the *fief*, thus:—

—"et la dite ½ lieue de terre * * sur 3 * *, en toutte propriété, justice et seigneurie, aussi "à toujours * *

1.—"à la réserve touttes fois de la foy et hommage, que le dit * * seront tenus de porter au * *

2.—"et de payer les droits et profits de fief * *

3.—"à la charge aussi que les appellations du juge qui pourroit être estably par le dit * * "ressortiront nüement au * *

4.—" en outre ne pourront les dits * * et autres qui passeront de France ou qui se trouveront " sur les lieux pour habiter et cultiver les dites terres concédées, traitter de peaux de " castors et pelteries avec les sauvages, si ce n'est * *—

5.—" ne pourront aussy le dit * * bâtir aucun fort ou forteresse dans le dit lieu tenu en fief,—

6.—" ny empêcher en quelque manière que ce soit la navigation sur le dit fleuve St. Laurent "à l'endroit des terres concédées,—

7.—" ains seront tenus * * de laisser un grand chemin de 20 toises * *

8.—" fera le dit * * passer jusques à 4 hommes de travail au moins pour commencer le dé- "frichement, outre sa femme et sa servante, et ce * *—

9.—" et afin que la Compagnie soit certifiée du travail qui se fera pour le défrichement des "dites terres, seront les dits * * obligés de remettre * * le rolle des hommes qu'ils feront " passer, qui doivent être réputés de ceux que la Compagnie doit envoyer," etc.

Third and last in date, of 1649, is the grant of Jacques Cartier (Title 28 and 28 *cens* 7), by which there is first conveyed the *fief*, thus:—

—"avons donné, concédé et octroyé, et * * donnons, concédons et octroyons par ces présentes " les terres et lieux cy après déclarés, c'est à sçavoir: ½ lieue de large sur le bord du fleuve "St. Laurent, avec 5 lieues de profondeur, à la charge que ce soit en lieu non concédé, et de "laisser un chemin de 100 pieds de large entre le dit fleuve et les terres concédées, pour en "jouir par la dite * * à toujours, à l'avenir, à titre de fief,—

1.—"mouvant et relevant de notre Compagnie à Québec par un seul hommage lige,—

2.—"et à la charge de payer à l'avenir les droits seigneuriaux et féodaux, ainsy et au cas "qu'il se pratique en France, selon la Coutume * * de Paris,—

—and then a *censive*, thus:—

—"*et de plus avons donné, concédé et octroyé, et * * donnons, concédons et octroyons à la dite " * * un arpent de terre dans l'enceinte désigné pour la ville de Québeck, ou aux Trois Riviè- " res, * * à la charge aussy que ce soit en lieu non concédé, pour en jouir pareillement par la " dite * * en toute propriété,—*

1.—" *à la charge du cens qui sera de 6 deniers pour le dit arpent par chacun an, payable à " celuy qui sera commis par notre Compagnie à Québec,—*

2.—" *le dit cens portant lods et ventes, saisines et amandes, suivant et au cas qu'il y eschet "portés par la Coutume de Paris."*

If, in any of these cases, it was meant to make the *fief* grant less of a property than the *censive* grant, the parties at least took an odd way of saying so.

§ 280.—The earliest separate grant *en censive*, by the Company, that I have found, is that made by Titles 7 *cens* 1a and 13 *cens* 2 of Abstract,—and which appears to have been the grant to Bourdon, afterwards erected into his *fief* of St. Jean. (*Suprà*, § 272).

It was first made here by the resident Governor, about 1637, thus:—

—"avons distribué et départy sous le bon plaisir de Messieurs de la dite Compagnie au "sieur * * la consistance de 50 arpens de bois ou environ mesure de Paris en roture, "scituées dans la banlieue de Québec et compris * *, pour en jouir luy ses héritiers et ayans "cause pleinemment et paisiblement en pure roture,—

1.—" aux charges et censives que Messieurs de la Compagnie de la N. F. ordonneront,—

2.—" et à la charge que le dit * * fera travailler au défrichement des dits bois,—

3.—" et souffrira que les chemins qui se pourront établir par les officiers de messieurs de la "dite Compagnie passent par ses terres, si ainsy les dits officiers le jugent expédient,—

4.—" et prendra concession de messieurs de la dite Compagnie des dits bois à luy par nous "distribués."

—and, in 1639, it was thus confirmed by the Company, after recital of the above grant:—

—"la Compagnie a confirmé et confirme la dite distribution des terres, et en tant que besoin "est, en a de nouveau fait don et concession au dit * * pour en jouir par luy, ses successeurs "ou ayans cause, aux dits charges et conditions cy dessus exprimées, et outre moyennant 1 "denier de cens pour chaque arpent par chaque an, dont pourtant ils payeront aucune chose "durant les 10 premières années à compter du jour de la dite distribution."

§ 281.—Next in date, still keeping to the titles printed among the Seigniorial Documents of 1852, are two out of four *censive* grants,—apparently afterwards erected into a *fief* St. François, for this same M. Bourdon.(*f*)

By Titles 16 *cens* 4 and 16 *cens* 5, the Governor, in 1646, granted two tracts in the *banlieue* of Quebec,—the one, of 75 arpents, to Bourdon,—the other, of 50 arpents, to "M. Jean le Sueur, Escuyer, Prestre, Curé de St. Sauveur;" on the terms of his previous grant above mentioned,—that is to say, leaving the rate of *cens* to be fixed by the Company. How the Company fixed it, does not appear; their confirmation not being extant.

By Titles 38 *cens* 9 and 38 *cens* 8, respectively, his successor, in 1653,—"*eu* "*égard à la dépense que les Sieurs Bourdon et St. Sauveur font sur les dits* "*lieux pour couvrir Québec de l'irruption des Iroquois,* (*g*) *et leur donner courage* "*de continuer*,"—granted each of them an augmentation of his former grant, to extend to the river St. Charles, in the following words:—

—"avons donné, concédé et octroyé, donnons, concédons et octroyons au Sr. * * l'estendue "de terre qui sera et se rencontrere entre sa concession de * * et la rivière St. Charles,—

—"pour en jouir par le dit * * à toujours,—

(*f*) They are printed in the Seigniorial Documents (Vol. 2, pp. 114 *et seq.*, French version), under the caption of "*Titre du fief de St. François*"; but the title by which the change of tenure was effected, is not printed. I have not been able to procure it; but it was presumably something not unlike the title either of St. Jean or else of St. Michel or of Coulonge.

(*g*) *Vide suprà*, § 256, for terms of neighbouring grant *en fief*, made in same year, and with same view of inducing grantee to special service against the Indians.

1.—"aux conditions portées par sa dite concession,—
2.—"et outre à la charge de 6 deniers de cens pour chacun arpent par chacun an, payable "au jour de St. Remy, chef d'octobre, à la récepte du domaine de la Compagnie de "Québec,—
3.—"le dit cens portant lods et ventes, saisine et amende, suivant la coutume de la prévosté "et vicomté de Paris."

§ 282.—Intermediate in date, between the first and second pair of these four grants, we have one other, printed *au long* in the SEIGNIORIAL DOCUMENTS,—No. 27 *cens* 6 of ABSTRACT.

This grant, of 1649, is of 10 arpents close to Three Rivers, with a neighbouring *Isle aux Cochons;* and is made by the Company directly, without reference to any previous allotment by the Governor. It is only noticeable, as fixing the rate of *cens* at 3 *deniers* per arpent, yearly.

§ 283.—A later printed title (No. 146) demonstrates by its recitals the existence of a more remarkable *censive* grant (24 *cens* 5*a*) by the Company, under date of 1647,—being for a tract of a quarter of a league of front by one league of depth, or 1681 arpents, now part of the Seigniory of Gentilly,—

—"*à la charge d'un denier de cens pour chaque arpent*, LORSQU'IL SERA EN VALEUR SEULEMENT."

§ 284.—Besides which, there have been placed in my hands by the gentlemen of the Seminary of Quebec, since my ABSTRACT was printed,—several other titles to grants *en censive*, for parts of what afterwards became the *Châtellenie* of Coulonge and the *fief* St. Michel.

One of these, for 160 arpents, first made here by the Governor in 1637, and then confirmed by the Company in 1639, answers closely to the grant to Bourdon of corresponding dates (*suprà*, § 280), except that it contains some special clauses as to the use of certain *ruisseaux* by the grantees and their neighbours.

The others,—two confirmed by the Company, two confirmed by de Lauzon as Governor, and two simply granted by him,—all between 1649 and 1652,—answer in substance, as regards their rate and other conditions, to the grants made to Bourdon and St. Sauveur in 1653. (*Suprà*, § 281.)

§ 285.—Beyond question, all these rates were low; and the other conditions of all these grants, easy. Land was plenty and settlers were few. One should almost rather wonder that any rate could be obtained, than that no higher should have been obtainable.

But, at all events, there was as yet no notion of a uniform rate. Even the Company had none for its own *censive.* Much less, as we shall presently see, had the Seigniors who held under the Company, for theirs.

§ 286.—There is a document which has gone far to create an opposite impression, and which was cited with that view in argument before this Court. But it is of far too late a date to be trustworthy on such a point; it does not say what, for the sake of the argument sought to be drawn from it, it had need say; and what it does say, is shown by the documents of the time not to have been the truth.

This document is an *Ordonnance* of Bigot, the last Intendant of Canada, under date of 1758; issued for the fixing of the rates of *cens et rentes* within the *censive* of Quebec. It recites, as fact, that the *directeur du domaine du roi* had represented to him the Intendant, that he had set himself to record the titles to properties in that *censive*:—

"Que par l'examen d'iceux, il auroit reconnu que les cens et rentes des trois quarts des "emplacements, mouvant en la dite censive, étoient inconnus et à régler; les titres primitifs "étant perdus;—

"Qu'il auroit vu par les titres primitifs de l'autre part, que toutes les concessions des ter-"rains dans la dite ville avoient été accordées par les gouverneurs et intendants, à la charge "de 5 sols, 6 deniers, de cens et rentes payables tous les ans à la recette du dit domaine in-"distinctement du plus ou moins de terrain;—

"Qu'il auroit également vu que les concessions de terres dans la banlieue du dit Québec, "avoient été faites à la charge d'un denier de cens et rentes par chaque arpent en super-"ficie,—et qu'il seroit à propos de pourvoir à la fixation de ces cens et rentes," etc.

Whereupon, as recommended, he the Intendant ordered that those rates should forthwith be exacted for the 29 years past, and at intervals of 10 years forever thereafter.

All this, however, is far enough from showing that even within the Quebec *censive* there had existed, before 1758, a known uniform rate; and further still from showing that such uniform rate was one of the early institutions of the country. On the contrary, it is apparent that the thing remained for enactment, was only enacted under color of the loss of most of the original titles, and had to be adapted to the different circumstances of town and *banlieue* by the adoption of two entirely different principles of rating.

The rates, thus pretended to have been ascertained by this *directeur du domaine*, and which were thus enacted by this Intendant in 1758, contrast with those really ascertainable as imposed by the Company of New France, thus:—

On the one hand, we have, as a result of what may have passed for research on the part of a government official, in 1758,—

Upon all lots, in the town of Quebec, 5 *sols*, 6 *deniers*, per lot, irrespective of extent,—

And upon all properties in the *banlieue* of Quebec, 1 *denier* per arpent.

On the other hand, we have, as facts, for this first period of the real history of Canada,—

In 1634, grant (with Beauport) of 2 arpents in town of Quebec,—no rate stated. (*Suprà*, § 279.)

In 1639, two grants (afterwards St. Jean? and part of Coulonge) of 50 and 160 arpents respectively, in *banlieue* of Quebec,—at 1 *denier* per arpent, but with release from that charge for the first 10 years. (*Suprà*, §§ 280 and 284.)

In 1640, grant (with Deschambault) of 2 arpents in town or *banlieue* of Quebec, and 30 arpents close to latter,—at 1 *denier* for the whole 32 arpents. (*Suprà*, § 279.)

In 1647, grant (afterwards part of Gentilly) of a quarter of a square league quite away from town or *banlieue*,—at 1 *denier* per arpent, as the same should be brought into value only. (*Suprà*, § 283.)

In 1649, grant (with Jacques Cartier) of 1 arpent at Quebec or Three Rivers,—at 6 *deniers* per arpent. (*Suprà*, § 279.)

Same year, grant (of Isle aux Cochons, etc.) of uncertain extent, at and near Three Rivers,—at 3 *deniers* per arpent. (*Suprà*, § 282.)

From 1649 to 1653, eight or perhaps ten grants (afterwards St. François and part of Coulonge, etc.) of various sizes,—at 6 *deniers* per arpent. (*Suprà*, §§ 281 and 284.)

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§ 287.—It is no sort of answer to all this accumulation of evidence, showing the conduct of the Company to have been thus uniformly that of a proprietor holding under the largest title, and alienating after the fashion of those times by every kind of variant title to parties evidently meant for proprietors, all of them in their own right and not at all in trust,—to say, that in the preambles of *some* of its deeds of grant (for the fact is not so in regard to a great many of them) there is reference made to a "*pouvoir à nous donné par Sa Majeste,*" in one or another form of words.

A preamble that is clear may control the interpretation of an instrument otherwise ambiguous. But an ambiguous preamble by no means always used, can have no effect upon the interpretation of a host of instruments not at all ambiguous in themselves.—Here the titles are all clear; the preamble is occasional, and (for any anti-seigniorial interpretation of it, at least) not clear.

References to a power derived from the King, were courtly and politic; and are to be ranged with the expressions of "*désir d'avancer la Colonie de la Nouvelle France suivant la volonté du roy,*" and so forth, which also in various forms are to be found in *some* of these titles. They had, moreover, more of truth and meaning in them, than these latter had. For unquestionably, the King, by granting to the Company the property he did grant, had given it a power that admitted of such mention; and (as we have seen) he had gone further, and by the fifth section of his grant, had expressly extended that power, so as to make such mention of it, a most natural and proper recital of any grant that the Company might thereafter make.

These occasional preambles are, thus, in no antagonism to the uniform tenor of the body of these grants. That uniform tenor is irreconcilable with any anti-seigniorial interpretation of these occasional preambles.—There can be no question as to the inference.

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§ 288.—Such, then, being the style of the Company's direct grants,—what was that of the grants of its grantees?

Did they deal—were they allowed to deal—did every one deal with them—as if their grants were their own? Or, as if what was called property in land—or any particular kind of property, so called, to the exclusion of any other—was meant to be no property, but only a trust for those who were not called its proprietors?

§ 289.—The answer to this question cannot be based on so large a collation (relatively speaking) of the deeds of grant of these grantees, as has been above made, of the Company's deeds of grant, by way of answer to the like question in reference to those grants. I have not nearly the same proportion of the one at command, as of the other. The public records have not been at all searched officially for titles of sub-grants *en fief*,—nor yet until the last moment before the meeting of this Court, and then very slightly, for titles of such grants *en censive.*—I have not had time to collect elsewhere any considerable number of titles, of either of these classes; nor even, so to arrange and study the comparatively few titles quite lately exhumed in manuscript for production before this Court by order of Government, as to be able to make half the use of them that with more time at command I could have made.(*h*)

§ 290.—Still, there is material enough to indicate the fact,—which, indeed, might be presumed in the absence of all indication,—that these grants of the Company were taken and dealt with, as they were given, and not otherwise; that King, Company and settlers all alike acted as under the then feudal rules of France, and not as under any prophetic sense of what in this nineteenth century was to be said to have been the peculiar feudal rule of Canada in that behalf.

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§ 291.—Mention has been made (*suprà*, § 273) of a grant or grants by the Company, out of which the Seigniories of Batiscan and Cap de la Magdeleine were constituted.

The grantee, Jacques de la Ferté, one of the members of the Company (as indeed were most of the holders of its grants of the highest class as to size and tenure), granted Batiscan, 2 leagues by an unstated depth afterwards fixed at 20 leagues, to the Jesuits, in 1639, as an *arrière-fief*, to be held of himself, with all rights of *justice*, subject apparently to payment of the ordinary dues of the Custom of Paris, and of a silver coin every 20 years. The title itself is not printed; but from the short paraphrase of it given by Bouchette (see No. 13*a* of ABSTRACT), it would seem to have provided that the lands comprehended in the grant were—

—"to be possessed by the Fathers Jesuits, or applied and transferred to savages or others "becoming Christians, and in such manner as the Fathers shall think proper, so that these "lands shall not be taken out of their hands while they shall think proper to hold and pos-"sess them;"—

(*h*) The Counsel for the Seigniors have the right, and indeed, are bound, to place before the Court the facts,—that none of the MSS. produced by Government were communicated to them until quite shortly before the meeting of the Court,—that a good many were not seen by them till after their production,—and that some (they do not know how many) have not been communicated to them at all. In particular the professed tables of rates and clauses of *censive* grants—of which they are aware that a number of copies were handed in to the Court, were never shown to them; nor yet any copies, or note, of the deeds from which it was prepared.

—a style of grant not altogether savoring of a trust for distribution to settlers, otherwise than as the grantee proprietors should choose.

Cap de la Magdeleine, made over in 1651, by the same person and to the same parties, seems (according to the same authority) not to have been granted as an *arrière fief*, but simply given as a *fief* holding of the Company. (See No. 31 of Abstract.) When given, it had in it two *arrière-fiefs*, Marsolet and Hertel; on what terms granted, does not appear. It is said to have been—

—"given to the reverend Fathers in Canada, for their colleges and houses, to be by them "held in the same manner as they were before that time possessed by the donor, to be en-"joyed, done with and disposed of by the Fathers Jesuits, and their successors in N. F., as "they shall think proper, for the benefit of the savages converted to the Christian faith, and "in order to help towards subsisting the Jesuits in the said country; the whole conformable "and according to the customs and constitutions of the Company of Jesus, without any civil "obligation."

The presumption is, that de la Ferté's title was of the highest class of titles granted by the Company to others than religious bodies,—and relieving him therefore from all restriction as to the *jeu de fief* (*suprà*, § 249); and that he availed himself of his privilege, by alienating the whole of one of his grants by infeudation, and simply gave away the other, after having granted two *arrière fiefs* from it. It is certain, that the Jesuits and he regarded both of them as properties in the strictest sense.

§ 292.—The great Seigniory of La Citière (*suprà*, § 243, Note (*l*)) furnishes five several illustrations.

In 1647, the grantee made the following sub-grant from it,—of the Seigniory of Laprairie, 2 leagues by 4, also to the Jesuits,—being No. 18 of the Abstract:—

—"ayant lu la requeste que nous a présenté, en leur nom, le procureur des dits religieux, "par laquelle ils nous demandent une partie des terres qui nous ont été concédées par Mes-"sieurs de la Compagnie de la N. F., quelles terres sont scittuées le long du grand fleuve "St. Laurent du costé du midy, * * nous leur avons bien volontiers donné et accordé ce "qu'ils nous demandent, par ces présentes leur donnons et accordons 2 lieues de terre le "long de la dite rivière St. Laurent du costé du sud, à commencer depuis * *, sur 4 lieues "de profondeur dans les terres tirant vers le sud, ensemble les bois, prairies, lacs, rivières, "estangs et carrières qui se trouveront dans l'estendue des dites terres, dans lesquels les "religieux de la compagnie feront passer telles personnes qu'il leur plaira pour les cultiver. "Cette donation ainsi faite, afin d'estre participant de leurs prières et saints sacrifices;"—

—a grant, unmistakeably *en franche aumône noble*, clear of definite condition altogether.

§ 293.—In 1657, the proprietor of this same seigniory made another sub-grant—of 50 arpents by 100, (see No. †435 of Abstract,) part of what was afterwards united into the Seigniory of Longueuil, on the following terms, as shown by the recitals of the later title, consolidating several grants into that *fief*:—

—"en fief et seigneurie, avec tous droits de haute, moyenne et basse justice,—
1.—" à la charge de la foy et hommage,—
2.—" et que les appellations du juge d'icelle ressortiront aux Trois Rivières,—
3.—" et du revenu d'une année * * suivant la Coutume du Vexin François."

§ 294.—In 1662, the *gardien noble* then holding La Citière, made another sub-grant,—part of what became the Seigniory of St. François du Lac, (misplaced in ABSTRACT, as No. †54*a* under date of 1672, instead of being No. †48*b* under date of 1662,) on terms considerably different, as shown by like recitals of a title consolidating several grants into the Seigniory of St. François du Lac. The description of this sub-grant and of its conditions, as printed, reads thus:—

—"une terre en titre de fief et seigneurie, appellée * *, qui est en remontant le long du "grand fleuve St. Laurent, jusques à my chemin de l'embouchure de la rivière des Iroquois "dans le dit fleuve, et une lieue de profondeur dans les terres en la seigneurie de la Citière, "*et un quart de lieue dans le dit fleuve St. Laurent*,(*i*) avec le droit de chasse et de pesche "dans la dite estendue, aussy jusqu'à un quart de lieue dans le dit fleuve St. Laurent, avec "le droit de chasse et de pesche entre les dites isles et la terre ferme de la dite estendue, * *
—" pour en jouir en pleine propriété et fief, avec moyenne et basse justice,—

1.—" à la réserve d'une rente noble et seigneurialle de 5 minots de bled froment bon et "loyal, non rachetable, qui se devoit payer par chacun an au jour de * *

2.—et à la charge de la foy et hommage * *

3.—" avec le revenu d'une année * * suivant la Coutume du Vexin François enclavé de la "Coutume de Paris."

(*i*) At the argument before this Court, it was suggested, in opposition to my citation of this title, that these words may have been meant to indicate only the frontage of the seigniory on the St. Lawrence, and not an extension of the grant for a depth of a quarter of a league into its bed along such frontage. If so, an odd form of sentence has been adopted to convey such meaning.

In the after-portion of the consolidating title (No. 155 of ABSTRACT, pp. 81-3 of 1st Vol. of Doc. SEIG.) there occur some errors of clerk or printer; and there may have been some words left out in this earlier recital also. But whether there have been or not, it at least appears to me to be clear, that the frontage of the grant was meant to be indicated before the stating of its depth inland, and that the quarter of a league *in the St. Lawrence* was an added grant in reverse depth along that frontage.

The error or errors alluded to, in the latter part of Title 155, make it impossible to say with perfect certainty how the authorities in 1678, when consolidating the *fief* in question, dealt with this quarter of a league; but they at least *seem* to have taken it as I here read it,—and certainly, there is nothing like a hint at any excess of grant in the case, or at any intention to cut it down.

In 1732 and 1733, the titles of the seigniory were drawn into contestation before the Intendant, in reference to the exclusive right of *pêche* of the Seignior within this quarter of a league; and it was then taken (as indeed, from recitals, it clearly had been before) for a quarter of a league in the bed of the St. Lawrence *along a frontage of 2 leagues*. No one thought of it as a measure of frontage.—See Doc. SEIGN., Vol. 2, pp. 150-155.

Supposing, even, for the sake of argument, that the Seignior of La Citière here granted only a *droit de pêche* over this quarter of a league of the bed of the St. Lawrence along the frontage indicated,—although the words of the grant import more, as plainly as words can, he would yet have been himself exercising a proprietary right over the St. Lawrence; and the authorities must be admitted to have at least failed to question or doubt his legal capacity so to do. Not that the fact matters much, in reference to the argument as to what were the notions of that age about property in rivers and navigable waters generally; for more striking facts abound. The grant in 1674 (Title 135) of the whole width of the Ottawa, as part of Petite Nation, to be noted hereafter, is only one of them.

§ 295.—In 1664 (*k*) the Isle St. Paul, 830 arpents, (Title †*a*49 of Abstract,) was granted by the same party, from the same seigniory, to *three* grantees, thus:—

—"avec les isles et bastures adjacentes, ** pour ** en jouir en pleine propriété, à titre de "fief noble, avec justice moyenne et basse seulement,—
1.—"à la réserve d'une rente noble et seigneuriale de 6 minots de bled froment, bon, loyal "et marchand, non racheptable et solidaire tant qu'ils en jouiroient en commun,—
2.—"et arrivant qu'elle soit divisée entr'eux par égales portions, il se feroit 3 fiefs et 3 hom- "mages des dits lieux, et la rente pareillement partagée en 3, qui seroit 2 minots de bled "chacun sans solidité,—
3.—"la dite rente payable tous les ans, au jour et fête de **
4.—"avec le revenu d'une année ** suivant la coutume du Vexin François enclavé de celle "de Paris."

§ 296.—And in 1665 (*k*) the Isle Ste. Hélène and Islet Rond, some 134 arpents, since consolidated with the Seigniory of Longueuil, were granted (see Title †50*a* of Abstract) by the same party, from the same seigniory—

—"en fief, avec justice moyenne et basse seulement,—
1.—"relevant ** en pleine foy et hommage,—
2.—"à la charge de 10 minots de bled froment de rente noble, féodale et foncière, payable "à chaque fête de **
3.—"avec le revenu d'une année ** suivant la dite coutume du Vexin François,"—

—the grantor, however, by his agent, shortly afterwards admitting that this rent was too high, and reducing it by a postscript, to 10 *livres* in money.

§ 297.—From titles relative to the Isle d'Orléans, which have been placed in my hands, it is clear that a great part of that seigniory was very early granted away *en fief;* and though I have not been able to ascertain the terms of most of these grants, it is at least clear that, like those of La Citière, they were made according to no sort of rule.

Argentenay, for instance, one of the largest, at the east end of the Island, was granted in 1652 (July 23), on these terms, as recited in an *aveu et dénombrement* of 1714:—

—"avec les rivages, prairies et battures y attachées, avec tous droits de justice et seigneu- "rie, et à mesme et pareil droit que la Compagnie ancienne de la N. F. a donné la "seigneurie de Beaupré (*l*) et la dite Isle St. Laurent cy-devant ditte d'Orléans **
1.—"à la charge de porter la foi et hommage à chaque mutation de possesseur,—
2.—"avec le revenu d'une année,—
3.—"et que les appellations du juge qui sera établi ** ressortiront pardevant les juges "prévots du dit Beaupré." (*l*)

(*k*) These two grants fall just beyond the period of the Company of New France, but their connexion, as regards subject, is here, and I therefore take them up here.

(*l*) The grantees of Beaupré and Isle d'Orléans had formed themselves, with six other persons, into a "*Compagnie de Beaupré*," in 1636, for the holding and management of those seigniories; and for a number of years, the two were jointly managed, as if they had been one seigniory,—and generally under the name of Beaupré.
Long afterwards, when the two seigniories had come to fall into different hands, there was

§ 298.—Another *fief* as to the name of which I am not sure (*m*) is mentioned as granted in 1659 (March 29), at the other or Quebec end of the Island, of an extent of no more than 40 arpents of front, "*aux mêmes droits que mon d. Sr.* "*de Lauzon venoit de concéder le fief d'Argenténay.*"

§ 299.—La Chevallerie, a *fief* of 16 arpents by half the breadth of the island —there probably much less than a league, was granted in 1661 (Sept. 7), thus:—

—"à la charge de laisser entre leurs tenans de chacun costé un chemin de 15 pieds de large, "et autant le long du fleuve pour servir à la navigation, * *
—"pour jouir de la dite concession par les dits * * à toujours, pleinement et paisiblement, en "faire et disposer ainsy que bon leur semblera, en fief noble, et mouvant et relevant de "notre dicte seigneurie de Charny, (*n*)—
1.—"par un seul hommage lige au lieu seigneurial d'icelle,—
2.—"à la charge des lots et ventes selon la Coutume de Paris."

§ 300.—Another title to be noticed in this connexion is one by which in 1665 (Nov. 25), an earlier grant of the neighbouring small *fief* Mesnu, under date of 1661 (March 12), was reformed, and its site changed from the north side of the island to the south, in consequence of a clashing of grants. The terms of this concession in such new site are thus stated:—

—"pour jouir et demeurer par luy * * propriétaire des terres comprises * *, et le tout "posséder en titre de haute, moyenne et basse justice et seigneurie et droits y appartenants,—
1.—"à la charge que les appellations de la justice qu'il y pourra ou ses ayans cause establir "sur les dits lieux, ressortiront en la prévosté de la dite seigneurie de Beaupré en l'Isle "d'Orléans du costé du sud,—
2.—"et qu'il sera tenu d'obliger ses tenanciers de porter moudre leurs grains au moulin "bannal qui sera construit par les dits seigneurs de Beaupré en l'Isle d'Orléans du costé "du sud,—
3.—"au moyen de quoy le dit * * demeurera deschargé de la redevance annuelle de 100 sols "mentionnée au tiltre cidessus datté,—
4.—"les mutations de possesseurs demeureront fixées à la somme de 100 livres, tos., porta- "bles chaque fois qu'ils auront lieu, à la recepte de la seigneurie du dit Beaupré."

§ 301.—I have received from the Ladies Ursulines of Quebec, the titles of an *arrière fief* held by them in Lauzon, which are interesting from the fact of its

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a good deal of dispute and litigation as to whether some of the *arrière fiefs* in the Island, which had been granted (as this of Argentenay had been) to hold of Beaupré, did so hold or not. And it was at last decided, in accordance with the principle of the feudal system as to *démembrement*, that they did not.

(*m*) If it was Beaulieu, it must have been a second or supplementary title; as we have a grant *en censive* in Beaulieu, under date of 1652.—It may have been La Grosardière, since united (as to ownership) with Beaulieu; and with it forming but a very small property.

(*n*) Whether Charny was an *arrière fief* of the Isle d'Orléans, or simply another name given to the *fief* of the Isle d'Orléans, may be doubtful; though I incline to think that it must have been the former. In which case, La Chevallerie was, in the first instance, an *arrière fief* of an *arrière fief*.

having been based upon an original grant *en censive;* as we have seen that several of the grants *en fief* made by the Company, also were.

In the first instance, the grant *en censive,*—made in 1655 (March 30) by the grantee of Lauzon to Jean Bourdon, the same person who converted other *censive* grants of his from the Company, into the *fiefs* of St. Jean and St. François,—ran thus,—see No. 38 *ce[illegible]s 9a* of Abstract:—

—" avons donné et concédé, donnons et concédons par ces présentes à titre de cens et rentes " seigneuriales, à * *, le nombre de 280 arpens de terre à bois en notre seigneurie de Lauzon, " et bornés * *, pour en jouir par le dit * * avec tout droit de chasse et de pêche audevant " de la concession,—

1.—" à la charge de s'y établir dans la présente année, et y avoir feu et lieu, ou autre pour " lui, et y continuer à l'avenir, autrement la présente concession nulle sans autre formalité " [illegible] sans que le dit * * puisse prétendre aucun dommage et intérêt ni restitution des dé- " penses qu'il y pourrait avoir faites pour bâtir ou défricher,—

2.—" et de plus 1 denier de cens portant lods et ventes, saisine et amende, pour chacun des " dits 280 arpens de terre, payable * *, pour chaque année, et la trentième partie de l'an- " guille ou saumon que le dit * * pêchera ou fera pêcher au droit de la concession, sallée " et bien conditionnée, portable à * * avec 2 chapons vifs,—

3.—" enverra moudre ses grains au moulin banal, quand il y en aura un construit sur la dite " seigneurie,—

4.—" et clora les terres de fossés, et de plus [*autrement?*] ne pourra prétendre aucun dom- " mage contre ses voisins pour les dégâts que les bestiaux y pourraient faire à l'avenir,"—

5.—" souffrira sur ses terres les chemins qui seront jugés nécessaires par nos officiers, en- " semble sur le bord de la rivière St. Laurent pour faciliter la navigation et la montée à " l'abord des terres,—

6.—" ne pourra le dit * * vendre ni aliéner la présente concession, qu'il y ait au moins mis 10 " ou 12 arpens de terre en labour,—

7.—" et en cas de vente, nous ou ceux qui auront droit de nous, pourront retirer la dite con- " cession en remboursant le son principal de la vente, frais et loyaux comptes, suivant la " Coutume de Normandie, que nous voulons être suivie en ce chef, le surplus étant régi " par celle de Paris."

After which, in 1658 (May 29), upon Bourdon's petition to that effect, the Seignior granted him a new title (No. 45*a* of Abstract), in these terms:—

—" à quoi obtempérant, nous, voulant favorablement traiter le dit * *, avons augmenté la " dite concession d'un arpent de front sur le dit fleuve, et 160 arpens de terre en bois de pro- " fondeur sur chacun des dits 9 arpens de front, et icelle créée et érigée en fief noble, en- " semble la dite augmentation, avec tout droit de haute, moyenne et basse justice, pour en " jouir * * à perpétuité,—

1.—" à la charge de la foi et hommage,—

2.—" et du revenu d'une année * * suivant la Coutume du Vexin François enclavé de la " Coutume de Paris,—

3.—" et que les appellations du juge qui sera établi sur les lieux ressortiront pardevant le " juge prévost de notre dite seigneurie,—

4.—" ce faisant, déchargée la dite concession des cens et redevances et charges dont elle était " ci-devant chargée."

§ 302.—Another *censive* grant by the same Seignior in the same *fief* (and which also, as late as 1698 or 1699, was erected into an *arrière fief,*—see No. 311*a* of Abstract,—but "*sans banalité et sans justice*") was made in 1648

(Oct. 15), of 5 arpents by 40, with rights of *chasse* and *pêche*, on quite different terms from those of the above grant in 1655,—thus :—

1.—" à la charge de 12 deniers de censive par chacun arpent qui sera défriché et mis en " terre labourable ou en nature de pré,—
2.—" et sans autre charge annuelle que de mettre par chacun an ès mains du procureur fis- " cal * * par chacune année, un quatron [quart ?] d'anguille salée et bien conditionnée,—
3.—" à la charge de retrait en cas de vente."(o)

§ 303.—A third grant of the *roture* class, still of the same seigniory, furnished me by the Ladies Ursulines, is of the date of 1654 (May 4), *en franche aumône roturière*, under reservation (among other things) by the Seignior, of the entire property of a *ruisseau* falling within it, and of 18 feet of ground on either bank, —and of the right to fix the pecuniary dues as he might see fit, in case of the property passing out of the Ursulines' hands. This grant (No. 38*a* of ABSTRACT) runs thus :—

—" avons donné et accordé, donnons et accordons par ces présentes * * le nombre de 320 " arpens de terre * * à savoir : 8 arpens de front sur le grand fleuve St. Laurent à commencer " à 3 arpens près de l'embouchure du ruisseau du moulin à scie * * et 40 arpens de profondeur " * * à la réserve du cours du dit ruisseau du moulin à scie que nous nous réservons en tout " son contenu avec 18 pieds de chaque côté, et en sorte que les dites Mères ne puissent user " du dit ruisseau, ni autres ayant droit d'elles, que par notre permission particulière,—pour " en jouir par les dites * * avec tout droit de pêche et de chasse audevant et audedans de la " dite concession en main morte, franche aumône, tant et si longuement que cette concession " sera entre leurs mains,—

1.—" pour ce qu'en cas d'aliénation nous la pourrons charger ainsi que nous jugerons raison- " nable,"—

2, 3, 4 & 5.—Answering *in substance*, to Conditions 3, 4, 5 & 7, respectively, of the *censive* grant to Bourdon, *suprà*, § 301.

§ 304.—A fourth title (No. 38*b*) indicates a rate of 1 *denier* per arpent and a thirtieth of the eels and salmon caught, as having been charged in 1654, in this seigniory,—without the 2 live capons, which formed part of the Bourdon grant (*Suprà*, § 301.)

And a fifth, (being for a grant of 3 arpents by 40,) which has been laid before this Court in MS.,—No. 27 of 1st Series,—shows, under date of 1655 (Nov.

(o) See No. †26 *cens* 5*b* of ABSTRACT.

The terms of this title, and of the erection into *arrière fief*, in 1698 or 9, are taken from an *Arrêt* of the *Conseil Supérieur*, of 1706 (Dec. 20), where the whole affair is recited as a matter of course transaction.

The erection into *arrière fief* (311*a* of ABSTRACT) is there thus recited :—

—" il a créé et érigé en arrière-fief les 5 arpens de terre de front sur 40 de profondeur, sis " * *, et à icelui arrière-fief laissé le droit de moulin, et icelui droit concédé, en tant que " besoin seroit, à toujours et sans banalité et sans justice, au contraire relevant de celle de la " dite seigneurie, et moyennant que les habitans d'icelle moudroient préférablement leurs " grains au dit moulin à tous autres des côtes voisines, en attendant qu'il y en ait un banal " de construit,—

1.—" à la charge de la foy et hommage par le dit * * à perpétuité,—
2.—" et d'une tasse d'argent du poids d'un marc, ou la valeur en argent monnoyé, à chaque " mutation de possesseur ou seigneur dominant."

18), with conditions answering substantially to those of this Bourdon grant, another rate still; being 1 *denier* per arpent, *one eleventh* of the eels and salmon caught, duly salted, and 2 live capons.

§ 305.—The Seigniory of Beauport furnishes the earliest *censive* grant, in point of date, of which I have been able to obtain a copy; No. 26 of the 1st series of documents laid before this Court by Government. It was made by the grantee of the seigniory in 1637 (Jan. 29), to an old servant, apparently; and its terms are so peculiar, and so significant of the entire freedom of the contracts of *accensement* in those days, as to warrant its insertion here:—

—" le dit Sr. de Beauport a donné et donne par ces présentes, à titre héréditaire, au dit
"Langlois, 300 arpents de terre en roture, selon la Coutume de Paris, plantés en bois de
"haute futaie, icelle terre située * *,—

—" pour par le dit Langlois être cultivée, défrichée et ensemencée,—

—" laquelle terre le dit Sr. séra tenu lui faire mesurer et borner, commençant * *

1.—" à la charge que le dit Langlois baillera par chacun an, * * 5 sols de rente avec 2
" chapons et 2 journées d'homme, une à la moisson et l'autre à la finaison des foins,—

2.—" avec les autres droits seigneuriaux * * selon la Coutume de Paris.

3.—" Le dit Sr. * * se retient le droit de pâturage, sans que le dit Sr. soit tenu à aucun guide
" de bestiaux à lui appartenant;—

4.—" Plus, le dit Sr. donne au dit Langlois 1 arpent de terre ensemencée en bled avec un
"poinson de farine, * *, et le dit Langlois a promis et s'est obligé au dit Sr. * * lui vendre
"l'arpent de terre, moyennant que le dit Sr. * * luy fasse défricher un autre dans ses
" terres au mesme estat qu'estait à luy,—

5.—" que le dit Langlois sera tenu de se faire bastir une maison dans Beauport,—

6.—" y donner et faire ses bleds, farines au moulin du dit Sr. * *

7.—" et par ces présentes le dit Langlois et sa femme tiennent quitte le dit Sr. de tous les
"services qu'ils luy ont rendus,—

8.—" et le dit Sr. * * donne quittance et tient pour rentes les rentes et soumissions que le dit
" Langlois est tenu de faire sur icelle,—

9.—" devant même lui donner permission de chasse et de pêche sur le front de son étendue,
" *et sortie sur la grande rivière.*"

§ 306.—Two other *censive* grants of this period, belonging to this Seigniory of Beauport, have been laid before this Court by Government; neither of them in the least like this, as to their terms,—or, indeed, like any other yet noticed.

One (No. 2 of 2nd Series) is of 1644,—6 arpents by a league and a-half, with no mention of *chasse* or *pêche;* at a rate of 20 *sols tournois* per arpent of front, with 1 *sol* of *cens* per arpent of front, and 2 capons (or 30 *sols*, at the Seignior's choice) for the whole; the grantee to survey his lot, and to make all roads, and otherwise to be bound as under the Custom of Paris,—"*droits de moulin*" being oddly enough referred to as if established under that Custom.

The other (No. 6 of 2nd Series) is of 1650, of two lots together comprising 30 arpents, also without mention of *chasse* or *pêche;* at a rate of 1 *sol* per arpent,—and with no special conditions whatever.

§ 307.—A *censive* grant in Deschambault under date of 1645, (No. 3 of 2nd Series,) laid before this Court by Government, out-does even the above grant of 1637 in Beauport, for the anomalous speciality of its conditions. It is of 8 arpents by 20, at a rate of *cens et rentes* of 2 capons for the whole and of 6

deniers for every "*arpent de terre deffrichée;*" and the added conditions read thus:—

—"et pour donner courage au dit Pierre Massé, et luy donner le moyen de vivre, le dit Sr. " * * promet et s'oblige luy donner et avancer 1 arpent de terre prest à labourer, et 2 autres " arpens sur lesquels le bois est abattu et débité, estant les dits 3 arpens sur la présente " concession,—

—"et a esté accordé qu'il sera permis au dit Sr. * * de rentrer sy bon luy semble sur les " terres de la présente concession, et s'en rendre possesseur dedans 6 ans, ensemble les " bâtiments qui seront fait sur ycelle,—en donnant toutefois une autre concession de pareille " terre au dit Pierre Massé, et luy faisant déserter et bastir autant de terre et maison qu'il " s'en pourra trouver sur la présente concession, à pareille condition cy dessus spécifiéz, des" quels 1 est prest à labours et les 2 autres il n'y a que le bois d'abattu et débité,—et sy le " dit Sr. * * ne pret point possession dedans les dits 6 ans de la présente concession, il n'y " pourra plus revenir, et elle appartiendra entièrement au dit Pierre Massé,—
—"lequel en ce cas sera tenu * * de déserter sur les terres du dit Sr. * * 1½ arpent de terre,
—"et le dit Pierre Massé rendra le dit 1½ arpent prest à mettre en labours ainsy qu'il est " accoustumé de faire en ce pays,—au lieu ou le dit Sr. * * destinera * *
—"promettant le dit Sr. * * de donner au dit Pierre Massé 6 journées de son charpentier " pour aider à se loger et sa famille,—sans que le dit Pierre Massé soit tenu nourrir le dit " charpentier, ny rendre aucune journée au dit Sr. * *
—"et le dit Sr. * * n'entrera point en possession de la dite concession, terres désertées et " logement, qu'il n'en ayt autant fait déserter et bastir, affin que * * le dit Pierre Massé aille " demeurer en la concession que le dit Sr. * * luy pourra faire."

§ 308.—Among the documents laid by Government before this Court, there are also three *censive* grants in Notre Dame des Anges (Nos. 4, 5 and 8 of 2nd Series); not like any of the foregoing, as to dimensions, rate or conditions; one of them not like the other two in any of these respects; and the two that are alike, being for 4 and 3 arpents respectively by a depth of 4 leagues.

§ 309.—There is one grant, furnished (No. 7 of 2nd Series) from Sillery; also made by the Jesuit Fathers, the proprietors of Notre Dame des Anges,—but on terms again, as peculiar as was well possible.

It was a grant of 2 arpents by 40, for a rent of 12 *deniers* per arpent as fast as it should be cleared, of 20 *sols* per arpent of frontage, of 2 *deniers* as *cens*, and of 2 live capons or "*poullets venus*," yearly,—in all, 3 *sols* or more per arpent so soon as the clearance should have been made; and under the following special conditions:—

—"luy * * sera obligé avec ceux qui auront droit de pesche vis à vis de leur concession, de " faire un chemin commode * * affin que * * puisse commodément descendre la coste * *
—"et encore à la charge de commencer à faire défricher dans un mois commençant * *
—"et bâtir et habiter * * sur la dite concession dans un an d'huy, pour tout délay;—
—"et les années suivantes de cultiver les dites terres en sorte que les dits cens et rentes " puissent estre perçus par chacun an,—
—"sinon et à faute de les percevoir, le dit * * Supérieur de la résidence de Sillery * * ou " quelqu'autre personne qui en soit commis * * de * * rentrer en la possession des d. héritages " par luy délaissés, prendront sans forme ni figure de procèz, et sans le rembourser des " fraiz qu'ils auront pu y faire,—
—"sera tenu le dit * * de permettre aux sauvages de Sillery de couper et prendre du bois " de chauffage, et pour autres usages sur la dite concession, sans qu'il les puisse empescher " ou molester, quant et lorsqu'ils en auront besoin,—

—" sera aussi tenu le dit * * de moudre ses grains au moulin qui sera basty sur les terres " seigneuriales des sauvages de Sillery, en cas qu'on en fasse bastir un."

§ 310.—Three titles are produced within the Seigniory of Beaupré (Nos. 9, 10 and 53 of 2nd Series), all of a league and a half in depth; otherwise, no two of them alike, and none of them following any of the above forms. Strictly speaking, they are not grants; not being made by the Seignior; but they seem to recite the rates, and more or less of the conditions, stipulated by the Seignior.

§ 311.—Lastly, in the Isle d'Orléans, there are furnished by Government three more *censive* grants of this period, and two others have been placed in my hands by clients.

Of the former, one (No. 24 of 1st Series) is of 6 arpents by 10 in an *arrière fief* then called Beschereau; and the other two (Nos. 23 and 25 of 1st Series) are in the small *arrière fief* of Beaulieu.

Of the latter, one is in this same *arrière fief;* and the other (No. 28 *cens 7a* of ABSTRACT) is a direct *censive* grant by the Seigniors of the Island to the Ursulines of Quebec, which was shortly afterwards converted into a *franche aumône roturière.* (No. 35*a* of ABSTRACT.)

No two of these are alike in terms; and no one of them follows, in terms, any one of those above remarked upon.

§ 312.—The three grants the little *arrière fief* of Beaulieu, at the extremity of the Island just opposite Quebec, are particularly remarkable.

The earliest in date (No. 23 of 1st Series) was of 1652, for 4 arpents by a depth presumably ranging from 15 to 30 arpents, and a lot of 20 perches, near, with a right of *pêche* subsidiary to that of the Seignior, and also a right of pasturage for his own cattle only, on the margin of the river on either side of the grant; at the yearly rate of 20 *sols* per arpent of front, "*un double de cens*" for the whole, and 3 live capons; the special conditions being, settlement within a year, and residence forever, on pain of summary escheat without compensation for any improvements,—suit to the banal mill, whenever there should be one,—the render of land for roads,—the stipulation not to sell till at least 10 or 12 arpents should be in cultivation,—and that the meadow (meaning, apparently, the river beach open to the pasturage above spoken of) might be mowed by the grantee, but not to the extent of over 100 "*bottes de foin.*"

The second in date (No. 25 of 1st Series) was of 1659,—the grant to Jacques Bernier dit Jean de Paris,—adjoining the above, and of 2 arpents by a like depth; and its conditions are these:—

1.—" le dit * * s'oblige payer par chacun an, * * 10 *sols pour chaque arpent de terre à quoi se* " *pourra monter la dite concession, tant en terre désertée que complantée en haut bois,* et 3 " chapons vifs, aussi par chacun an, * * avec 3 deniers de cens pour toute la dite conces- " sion,(*p*)—

2.—" les dits cens et rentes payables en effets du crû du pays, au prix courant,—

(*p*) In all, therefore, including the capons, 11 or 12 *sols*, or more, per arpent.

3.—" portant lods et ventes, saisine et amende, selon la Coutume * * de Paris * *.

4.—" Sera permis au dit preneur d'envoyer ses bestiaux à lui appartenant en propre, paître " à la prairie et bois, et non à d'autres;—

5.—" aura le dit preneur droit de chasse et de pêche devant la dite concession et dans toute " l'étendue de la dite terre.

6.—" Sera loisible au dit seigneur bailleur, si bon lui semble, de tendre quelques filets au " devant de la dite concession.

7.—" Sera obligé le dit preneur de faire mesurer la dite terre dans le jour et an, à ses dé- " pens;—

8.—" comme aussi d'envoyer moudre ses grains au moulin banal du dit seigneur bailleur, en " cas qu'il y en ait un bâti;—

9.—" sera tenu faire garder ses bestiaux, pour éviter tous dégats qu'ils pourraient faire à " l'avenir;—

10.—" ensemble de se faire bâtir dans le village qui sera proposé pour cet effet;—

11.—" tiendra le dit preneur feu et lieu sur la dite terre, ou autre pour lui, faute de quoi la " présente sera nulle."

The latest in date, which has been furnished to me in MS., was of 1661 (Sep. 25), a grant to one Jean Foucher, of 2 arpents by a like unstated depth, and also of a village lot, with right of *chasse* and *pêche*, and pasturage on the meadow; at the rate of 6 *deniers* of *cens*, with 6 *livres* and 2 capons, for the farm, and 1 *poulle* for the village lot; the other conditions being simply, that the grantee should build a house and barn in the year and day, on pain of nullity of his grant,—and that he should do suit to the banal mill, whenever one should have been built.

§ 313.—That the second of these grants, that to Jean de Paris, should have forced itself on the notice of the learned Counsel retained against the Seigniors, was unavoidable. So also was, perhaps, the line of argument taken by them in reference to it.

If a rate of 10 *sols* per arpent in money, with an addition in kind raising it according to the value of those days to 12 *sols* or thereabouts, could be and was stipulated in 1659,—the sequence is not thence easy, to the doctrine that all rates over 2 *sols* of money value of this day, are absolutely illegal, and must now be cut down. To warrant it, there must be shown some text of law enacted by competent authority, and in clear and precise terms. Every one knows that no such text exists.

The learned Counsel, accordingly, sought to put in question *the fact;* and argued that this rate was really of 10 *sols* per arpent *of frontage.* Its words are express, to the contrary. In the long record of an obstinate law-suit in 1745, (*q*) between the then Seignior of Beaulieu and the then holder of this land, this grant is cited and argued upon by both parties, always in its obvious sense as fixing a rate per superficial arpent, and neither the parties, nor the Intendant before whom the suit was pending, ever thought of questioning the perfect legality of such rate. Yet the deed, found by search at Government instance among the notarial records, is now impeached! It is said, that it *must* have been a mistake. It was even argued that its style proved this,—inasmuch as in

(*q*) Printed in the 2nd Vol. of the DOCUMENTS SEIGNEURIAUX, pp. 187 *et seq.*

those days it was *de style* to fix rates by the arpent of frontage, and not by the superficial arpent; the fact being, that every known *censive* grant by the Company, and by far the major part of all the known *censive* grants of this period made by the Company's grantees, take the rule of the superficial arpent or of the total extent, to the exclusion of the arpent of frontage.

That the rate was high, there is no doubt; higher than the values of that time warranted. The grant was afterwards abandoned, in consequence; the high rent voluntarily redeemed, by subsequent dealings of the parties; and a re-grant made at a lower rate. But no one—till now that the exigency of a desperate argument drives to all lengths—doubted that it was so made, and was perfectly legal as so made.

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§ 314.—Arrived at the end of the discussion of this period of Canadian history, I may surely again say, that as yet we have come to nothing that should tend ever so remotely to indicate the notion, on the part either of the King, or of the Company, or of their grantees or sub-grantees,—that the feudal system of Canada either was, or was meant to be, a something different from the feudal system of France.

If holders of land *en fief* in Canada were to be land-distributors, and not veritably land-owners, it was absolutely necessary that their grants should not merely hint at such a thing, but should plainly say so.—Not one grant is there, that either says this, or hints it.

To make it possible to imagine that such a system was then thought of, the grants *en fief* should (at the very least) have been uniformly large, so as to admit of and require distribution; and those *en censive* uniformly small, so as not to require it.—Instead of which, we have *fiefs* of all sizes, ranging from the hundred leagues and more, to the ten arpents, if not (as in the case of the *fief* Pachevigny) to the fraction of a single arpent; and we have *censive* grants of all sizes, from the arpent or less, to the thousand arpents and upwards.

Every one dealt with all manner of contracts for disposal of land, precisely as in France; exercising all that fredom—not to say, license—of private contract, which characterised the feudal system. The *franc aleu* and the *franche aumône*, both *noble* and *roturier*,—the tenure *par service divin*,—the *fief*, of every grade from the baronial(r) downwards of every possible size, and granted under all manner of variant conditions as to privilege and otherwise,—and the *censive*, of most variant degrees of size and burthen,—were all there; no one contracting otherwise than as under a system that interposed no check of the political kind upon any sort of contract made for the alienating of real estate. *Fiefs* of higher grade than the baronial were expressly contemplated; though none seem to have been created. *Justice* was parcelled out with the *fief*, more or less extensively, or was held back from it, with all the aristocratic caprice and punctilio of the France of that

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(r) *Vide supra*, § 160.

day. The dues to be paid by the Seignior to his dominant, were fixed at will; clauses *in factum* were introduced into their grants, at will,—but never any clause hinting at that obligation to sub-grant, which the anti-seigniorial theory now makes out to have been of the essence of all grants *en fief* in Canada. Holders *en fief* of the Company, sub-infeuded with as large license as the Company had infeuded to them,—still with this pregnant omission of the special clause that they should all have put in, according to the anti-seigniorial hypothesis.

The Company and its Seignior grantees made their grants *en censive* with as large license; at rates ranging from the *denier* or twelfth of a *sol* for 32 arpents—or for each arpent cleared—or for each arpent granted, with release from payment for a first 10 years—up to the 10 or 12 *sols* per arpent; without special burthen of any kind, or with any kind of bargain that they saw fit to make and could make as to any. And men sought for the great favor of having their *censive* grants converted into grants *en fief*.

Unless every one then looked upon the *fief* as a mere property, every one's contracts were all carefully worded, to mislead as to their meaning.

§ 315.—And this is not all.

The Seigniors' case is not merely, that thus far we have come upon no trace of the *fidéi-commis seigneurial*. Although that is much.

Allowing for lapsed and renewed grants, something like three tenths of all the land now held seigniorially in Lower Canada, is still held under the seigniorial titles—from the Crown or from the Company—of this period. The Attorney General's Propositions dis-property (so to speak—one has to coin a new word for a new idea) every *fief*, without exception for titles of any class.

But nothing is more certain, than that by feudal law—herein coincident with the very first principle of all law—no mere will or word of the Crown, which had bound itself contractually to these grants, could ever change them from what they were when made, into what these Propositions assert that they are now.

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§ 316.—We arrive, then, at the Second Period of our history of Canadian land-granting; that which ended with the surrender of the Charter of the Company of the West Indies, in 1674.

§ 317.—It was an assertion repeatedly insisted on in argument, before this Court, by the learned Counsel retained against the Seigniors,—and not without reason, in view of the necessities of their argument,—that all the grants of the Company of New France were revoked by the King.

This assertion has been more than once indirectly contradicted, in the foregoing pages, by anticipation. It is now time to deal with it directly.

§ 318.—In the first place, and without reference to the tenor of any document or documents emanating from the King or from any one else, that may be cited as in support of it,—*it cannot be true;* because an examination of the titles to seigniorial properties furnishes ample proof to the contrary.

Some of the titles granted by the Company, there is no doubt, lapsed; their holders either never taking possession, or else before long giving it up; and the land, after a time, being granted *de novo* to other parties, without reference to any former grant as having been made of it, and without remonstrance on the part of the prior grantees. La Citière, above mentioned, was so dealt with; though not to the extent of ignoring the titles which its proprietors had granted while they still assumed to hold it. (*s*) And it is not to be doubted that there must have been other grants in the like case. Though their names have not come down to us.

Some other grants were modified,—generally, in the way of enlargement of privilege or extent, or both,—by later grants, at the instance of the grantee. As for instance, in the case of the Sault-au-Matelot, Beaupré and the Isle d'Orléans, by Title 134*a*, already noted; (*t*) where onerous conditions were relaxed. Or, as in the cases of Portneuf and the Isle d'Orléans, hereafter to be noted; where those grants were raised, the one into a *baronnie*, and the other into a *comté*. But in all these cases, whatever the change made, the entire validity of the old title was always most expressly recognized.

And everywhere else, it always was so, tacitly; the proprietors holding and claiming to hold under these old titles, and not otherwise.

There was never anything like a real revocation of the Company's grants. So far from it, that of La Citière is the only instance *of a known grant* of the Company that failed to remain of force. It was no doubt abandoned; but even as to it, there is no presumption that it ever was, properly speaking, revoked.

§ 319.—In the next place, looking to the instruments which are said to have wrought this revocation, it will be easy to show that they could have done no such thing.

§ 320.—The first of these is an *Arrêt* of the King in his *Conseil d'Etat*, under date of 1663 (March 21), printed with the heading of "*Révocation des concessions non défrichées*"; (*u*) not the last document of its class, by the way, that has taken character for purposes of reference, from the heading given to it by the printer rather than from its real contents.

Those contents are as follows:—

"Le roi s'étant fait representer en son conseil son édit du présent mois, (*v*) par lequel S. M. " en conséquence de la cession et démission des intéressés en la Compagnie de la N. F. au" roit repris tous les droits qui leur avoient été accordés par le roi défunt, en conséquence " du traité du 29 avril 1627,—

(*s*) *Vide suprà*, §§ 292-296.

(*t*) *Vide suprà*, § 164, note (*x*), and § 250.

(*u*) Doc. Seign., Vol. 3, pp. 135, 6; Edits et Ord., 4°, Vol. 1, pp. 24, 5; 8°, Vol. 1, p. 38.

(*v*) *Vide suprà*, § 204.

—" et ayant été remontré à S. M. que l'une des principales causes que le dit pays ne s'est
" pas peuplé comme il auroit été à désirer, et même que plusieurs habitations ont été détruites
" par les Iroquois, provient des concessions de grande quantité de terres qui ont été accor-
" dées à tous les particuliers habitants du dit pays, qui, n'ayant jamais été et n'étant pas en
" pouvoir de défricher, et ayant établi leur demeure dans le milieu des dites terres, ils se
" sont par ce moyen trouvés fort éloignés les uns des autres, et hors d'état de se secourir et
" s'assister, et même d'être secourus par les officiers et soldats des garnisons de Québec et
" autres places du dit pays,—et même il se trouve par ce moyen que dans une fort grande
" étendue de pays, le peu de terres qui se trouvent aux environs des demeures des donataires
" se trouvant défrichées, le reste est hors d'état de le pouvoir jamais être ;—

" A quoi étant nécessaire de pourvoir, S. M. étant en conseil a ordonné et ordonne,—

—" que dans 6 mois du jour de la publication du présent arrêt dans le dit pays, tous les
" particuliers habitans d'icelui feront défricher les terres contenues en leurs concessions,—

—" sinon, et à faute de ce faire, le dit temps passé, ordonne S. M. que toutes les terres
" encore en friche seront distribuées par nouvelles concessions au nom de S. M., soit aux
" anciens habitants d'icelui, soit aux nouveaux. Révoquant et annullant S. dite M. toutes
" concessions des dites terres non encore défrichées, par ceux de la dite compagnie.

" Mande et ordonne S. dite M. aux Srs. de Mézy, gouverneur, évêque de Petrée, et Robert,
" intendant au dit pays, de tenir la main à l'exécution ponctuelle du présent arrêt; même
" de faire la distribution des dites terres non défrichées, et d'en accorder des concessions au
" nom de S. M."

§ 321.—The recital here given as to the evil to be remedied, is significant, as well from what it says, as from what it does not say.

What it complains of, is the too great size of the grants, and the consequent dispersion of the grantee settlers.

Of distinction between grants *en fief* and grants *en censive*, there is not a word.

But, upon the anti-seigniorial theory, that the grants *en fief* were made for sub-grant *en censive*, and under implied obligation thereto, this complaint and this silence were equally misplaced. The grants *en fief*, so viewed, except perhaps the very largest, could hardly have been called too large. Those *en censive*, in most instances,—excepting always as regarded their excessive depth, an evil not by that time felt or suspected,—hardly were so. Taken all together, as undoubtedly they all were, for grants of a mere property to the grantees,—the *fief* a more nearly absolute property than the *censive*,—the undistinguishing complaint of their generally excessive size was most natural and well founded. Upon the anti-seigniorial hypothesis, quite another style of document was called for.

§ 322.—So also, with the main enactment. Within 6 months from the publication of the *Arrêt*, every grant was to have been cleared! Still, no distinction of the *fief* from the *censive*.

But, if the former had had in it a particle of that element now called the "*fidéi-commis seigneurial*," such distinction must have been made. The holder of land under any sort of trust for the letting of it out to others to clear, could not have been required under pain of forfeiture, instantly to clear it all himself.

§ 323.—Nor was the threatened penalty less significant; the simple distribution of the uncleared lands to others. On what tenure?—How account for there

being nothing said of this; if, indeed, the distinction of the tenures partook ever so slightly of the character now sought to be set up?

§ 324.—In truth, it is impossible not to see, that however sensibly the preamble may be said to have stated the evil that pressed for remedy, the enactments as to the remedy itself were too preposterous to pass for earnest.

Even the ignorance of a home Council of State of those days, as to the posture of affairs in a new Colony, could not have been so utter, as to have admitted of the idea that any considerable amount of clearing could really be done in the 6 months set for it,—or that (upon the inevitable failure to clear) any considerable demand for grants of the uncleared land, from parties able and more disposed to clear, could really be got up as a means of punishing the inevitable delinquency of every grantee in the Colony. It was at least known that the population of New France was a handful; and that these vast concessions of land in it spread over many hundreds of leagues of forest, hard to clear, from its timber and its climate, to say nothing of its Indians.

What was meant, was to check the tendency of the settlers towards dispersion,—the one evil complained of. To that end, every one was ordered to clear his lands at once; a command impossible to be obeyed to the letter anywhere, and to which no show of obedience could be made, except in the immediate vicinity of the *few* posts that were held in force. All granted land, not cleared, it was added, should be held liable to grant to other applicants. Revocation was not pronounced, of all existing grants; much less, of all existing grants *en fief*. What was said as to revocation of grants—though separated in our present printed version from the clause immediately preceding it, by a full stop and the use of a capital letter—was obviously nothing but a formal ending added to that clause, for the completion of what in sense was all one and the same sentence. The King's order ran, that the uncleared lands should be re-distributed in his name to new applicants, he the King to that end and in that case revoking and annulling whatever older grants might have been made thereof.

§ 325.—It is quite unnecessary to go into any discussion as to the King's legal right, under the circumstances, to promulgate a rule of *haute police* of this description. Had it been enforced against any one having the courage and the pecuniary means to maintain his legal rights under a grant so assumed to be revoked, that question would have been tried. It never was tried; and that, not merely for want of a party courageous and rich enough to raise it; but because the *Arrêt* was not enforced, and was not meant to be enforced,—was, in a word, a mere *arrêt comminatoire*, such as the French Court was in the every day practice of issuing, for all sorts of purposes.

§ 326.—A first link in the chain of extraneous proof, adducible as to the nature and intent of this *Arrêt*, is to be found in the Royal Instructions to the Sr. Gaudais, who was sent out in May of this same year, 1663, as a Commissioner to report upon the state of matters in New France. (*w*)

(*w*) Edits et Ord., 4°, Vol. 2, pp. 24 *et seq.*; Commissions des Gouv., et Int., pp. 22 *et seq.*

These instructions thus treat of the subject-matter of this *Arrêt* :—

"Le dit Sr. Gaudais étant informé que la principale chose qu'il faut examiner pour la "manutention des colonies du dit pays, et pour leur augmentation, étant de défricher la plus "grande quantité de terres qu'il se pourra, et de faire en sorte que tous les habitans soient "unis dans leurs demeures, et qu'ils ne soient pas éloignés les uns des autres d'une grande "distance, (sans quoi ils ne peuvent s'assister pour toutes les choses qui regardent la culture "de leurs champs, mais même sont exposés aux insultes des sauvages et particulièrement "des Iroquois, lesquels, par le moyen de cette séparation, peuvent venir presqu'à couvert "dans les bois jusqu'aux habitations des dits Français, les surprennent facilement, et par- "cequ'ils ne peuvent pas être secourus, les massacrent et font déserter ainsi ces habitations "qui sont éparses qui ça qui là,) il n'y a rien de si grande conséquence que de travailler à "réunir les dits habitans en des corps de paroisses ou bourgades, et à les obliger à défricher "leurs terres de proche en proche, afin de s'entre-secourir au besoin,—et quoique ce moyen "fut le plus certain, il trouvera assurément, étant sur les lieux, que le peu de soin et de "connaissance que la compagnie qui a ci-devant possédé le pays en a eu, et l'avidité de ceux "qui ont voulu s'y habituer, (lesquels ont toujours demandé des concessions de terres de "grande étendue, dans lesquelles ils se sont établis,) ont donné lieu à cette séparation "d'habitations, qui, se trouvant fort éloignées les unes des autres, non seulement les parti- "culiers qui ont obtenu des concessions n'ont pas été en état d'en faire les défrichemens, "mais même a donné grande facilité aux Iroquois à couper la gorge, massacrer et rendre "désertes presque toutes les dites habitations,—et c'est ce qui a obligé le roi de rendre "l'arrêt (*x*) dont la copie est mise entre les mains du dit sieur Gaudais, ensemble de faire "écrire au sieur évêque de Petrée, de remettre entre ses mains l'original du dit arrêt, pour "le faire publier et afficher partout aussitôt après son arrivée.

"Et *comme il voit clairement* par les raisons ci-dessus expliquées, *qu'il est impossible de se "pouvoir jamais assurer de ce pays* et d'y faire des habitations considérables, *que l'on n'oblige "tous ceux qui ont eu ces concessions de les abandonner, et de s'unir en des bourgades et "paroisses* les plus nombreuses qu'il se pourra, pour défricher toutes les terres qui se trou- "veront aux environs de proche en proche, lesquelles *en ce cas* il faudroit de nouveau "partager et en donner à chacune bourgade ou paroisse, selon le nombre de familles dont "elle seroit composée,—*il tâchera de persuader cette vérité par toutes sortes de moyens au dit "sieur évêque, au gouverneur* ET AUX PRINCIPAUX DU PAYS, *afin qu'ils concourrent unanime- "ment à faire réussir ce dessein*, lequel il leur fera connoître être non seulement d'une "nécessité absolue pour leur conservation, *mais même que S. M.* LE FERA EXECUTER *par une "révocation générale de toutes les concessions.*

"Au cas que quelques-uns de ceux auxquels les dites concessions ont été faites, se mettent "en devoir de les défricher entièrement, et qu'avant l'expiration des 6 mois portés par le "dit arrêt, ils aient commencé d'en défricher une bonne partie, l'intention de S. M. est que "sur leur requête le conseil souverain les puisse pourvoir d'un nouveau droit de 6 mois "seulement, lequel étant fini, elle veut que toutes les susdites concessions soient déclarées "nulles."

§ 327.—Here, then,—besides that all grants, *fief* and *censive*, are still treated alike, we have the King plainly telling his Commissioner, that this *Arrêt* had for object, simply to oblige the holders of land-grants to give up the idea of going off to bury themselves on their respective properties,—in a word "*to abandon*" their grants, and come together into "*bourgades et paroisses*," where they could unite their clearances, upon smaller grants to be made them with that special

(*x*) Evidently the *Arrêt* of the 21st of March.

view; that he, the Commissioner, was to explain this to the Bishop, the Governor, and the leading settlers, and by all sorts of means was to try to persuade them into co-operation, for the carrying out of this policy, under threat, as a last resort, of a general revocation of all grants, by the King, if nothing less would serve.

Surely, nothing can be clearer, than that the King did not suppose that he had already effected that revocation by that *Arrêt.*

The last paragraph of the extract is amusing; as indicative of anything but a clear idea of the practical value of an extra 6 months of indulgence in the matter of the clearing of a boundless extent of forest. But it at least confirms this comminatory view of the *Arrêt;* and itself, indeed, can but be read as either unmeaning, or else comminatory.

§ 328.—Another interesting extract from these instructions, has reference to a somewhat different though closely connected subject.

We have seen (*suprà,* §§ 202, 3) that in 1645 the Company sold their monopoly of the fur trade to the settlers as a *communauté d'habitants,* with the King's express sanction; and also (*suprà,* §§ 227 to 284) how capriciously, by their contracts of concession to their grantees, they often gave away, in whole or part, or fixed at lighter rates than they need have done, their profitable rights upon their grants of land,—the profitable rights so fixed being all that, by law, the King could at this time (1663) assume to claim upon the lands so granted.

As to these two matters, the King thus instructed his Commissioner:—

"Et d'autant que le principal revenu dont la compagnie jouissoit, consistoit en l'achat et "traite des pelleteries, qu'elle avoit seule et qu'elle a cédés par un traité particulier, à la "réserve d'un millier de castors par chacun an,—et que cette cession s'est trouvée fort dom-"mageable au dit pays, en ce que les habitans ont appliqué la meilleure partie de leurs "soins à ce trafic, au lieu de les appliquer entièrement, comme ils faisoient autrefois, au "défrichement et culture des terres, et même que l'achat des dites pelleteries étant libre à "tous les habitans et ne se faisant que des mains de sauvages, ils les ont enchéries à l'envi "les uns des autres, en sorte que tout l'avantage est passé aux sauvages et toute la perte "aux François,—le roi veut que le dit Sr. G. s'informe particulièrement des moyens de re-"tirer au profit de S. M. la dite traite,—en faisant connoître aux habitans que c'est leur "bien, et qu'elle n'entend tirer aucune utilité du pays, et au contraire qu'elle veut y em-"ployer une somme considérable, tous les ans, pour le maintenir et l'entretenir, et pour le "peupler.

"Le dit Sr. G. observera tout ce qui se peut et doit faire pour l'établissement des droits "de souveraineté et de seigneurie directe et foncière, dans toute l'étendue du dit pays, sans "toutefois fouler les dits habitans, que S. M. veut soulager en toutes choses."

Gaudais was thus to try to persuade the settlers into another little act of complaisance. They were to be brought, if possible, for their own good, not merely to abandon their individual grant of land, but also their corporate purchase of the right to trade in furs.

And he was further to ascertain and report, as to all that could possibly be done, to establish for the King everywhere throughout the country, those fiscal rights of sovereignty and direct feudal lordship, which the Company had so largely made away with, as regarded a great part of its extent.

Instructions, both of them, savoring of fiscality and Court craft,—rather more than of that pure benevolence, which on high anti-seigniorial authority is said to have so marked the whole policy of the Kings of France in reference to Canada.(*y*)

Not to say, that the latter is, yet again, a super-abundant proof of the non-revocation of—nay, even of the non-intention to revoke—the Company's seigniorial grants. Those grants alone could have stood in the way of the recognition of all manner of fiscal right of the Crown, whether as arising out of its *souveraineté*, or out of the *directe foncière* in and over all land in Canada. Had they been revoked, the revocation would have established these fiscal rights in their entirety, *ipso facto*. Had it been even intended to revoke them, no enquiry or report could have been wanted, for the finding out of some way or other to establish them.

§ 329.—An incidental procedure which happens to have come down to us, shows that in October of this year (1663) the Governor and Bishop had occasion to recognise, and did recognise most unhesitatingly, the Company's grant of the Island of Montreal, as a grant, in full force, of the full property of such Island.

The Governor commissioned(*z*) the Sr. de Maisonneuve as local Governor of Montreal. The latter at once laid his Commission before the *Conseil Supérieur*, the Governor and Bishop present; and with leave of the Council gave notice to the "*Srs. intéressés en la seigneurie et propriété de la dite Isle de Montréal*," of his application that it should be enregistered. The Curé of the Island appeared, and stated that he was only their agent for the taking possession of the Island, "*en vertu des cessions et transports à eux faits de la propriété d'icelle;*" but that he knew they held letters patent of the King (being Title **16**, *suprà*, § 257), which conferred on them the further right to name the Governor of the Island. Whereupon, the Council allowed a delay of 8 months for the production of their titles, and of these letters-patent with the rest; and in the meantime registered the Commission, to be acted on till the further pleasure of the King should be known.(*a*)

What the final decision was, does not appear. But certainly neither the validity of the Company's grant, nor yet its proprietary character, were for a moment put in question.

§ 330.—In fact, it was not until the 6th of August of the year following (1664), that the Governor and Bishop laid the *Arrêt* of 1663 before the *Conseil Supérieur*. When the proceedings had (*b*) were as follows :—

(*y*) *Vide suprà*, § 223.

(*z*) Edits et Ord., 4°, Vol. 2, p. 340.

(*a*) Edits et Ord., 4°, Vol. 2, p. xxiii; 8°, Vol. 2, p. 12.

(*b*) Doc. Seign., Vol. 3, p. 143; Edits et Ord., 4°, Vol. 2, pp. xxiii and 125, 8°, Vol. 2, pp.18 and 19.

"Mons. le gouverneur et Mons. l'évêque ayant présenté au conseil, l'arrêt du conseil d'état
" du Roi, du 21e. mars, 1663, portant ordonnance que dans 6 mois du jour de la publication
" d'icelui, tous les particuliers habitans feront défricher toutes les terres contenues en leurs
" concessions, sinon et à faute de ce, que toutes celles qui se trouveront en friche seront
" distribuées par nouvelles concessions au nom de S. M., révoquant et annulant S. dite M.
" toutes concessions des dites terres non encore défrichées, faites par les ci-devant intéressés
" en la compagnie de la N. F., par lequel il leur est ordonné tenir la main à l'exécution
" ponctuelle du dit arrêt, même de faire la distribution des dites terres non encore défrichées
" et d'en accorder des concessions au nom de S. M.,—
—" ils demandent que le dit arrêt soit exécuté de point en point selon sa forme et teneur,—
—" et en ce faisant, que toutes les terres qui ne sont aujourd'hui désertées et mises en
" valeur, soient déclarées réunies au domaine du roi, pour en être disposé au nom de S. M.
" par nouvelles concessions en faveur de ceux qui en demanderont comme dit est.—
—" déclarant les dits Srs. gouverneur et évêque, qu'ils ne prétendent en aucune façon inté-
" resser les peuples habitans de ce pays, ni les obliger de quitter leurs maisons et habitations,
" consentant qu'elles demeurent en l'état qu'elles sont, mais que pour celles desquelles il
" faudra accorder des concessions, ils tiendront la main à ce que l'intention du roi y soit
" suivie et qu'elles soient réduites en bourgs et bourgades, autant que faire se pourra,—
" comme aussi qu'il soit défendu à tous prétendus seigneurs de disposer par concessions
" d'aucunes terres en non-valeur, à peine de nullité,—
—" ouï sur ce le procureur-général du roi,—qui a requis que toutes les terres occupées de
" bois debout soient réunies au domaine du roi.

" Le conseil, avant faire droit, a ordonné que le dit arrêt sera communiqué au syndic des
" habitans, à la diligence du procureur-général du roi, pour, sa réponse vue, être ordonné ce
" que de raison."

§ 331.—All which further shows the same state of things, and puts still the same interpretation upon this *Arrêt*. The Governor and Bishop formally call for an order to put the *Arrêt* into precise execution; but at the same time declare as formally, that it shall not be executed. Gaudais, it is clear, had either not tried, or else had wholly failed to persuade all parties of the expediency of an exact compliance with the King's wishes. The holders of grants were not ready to abandon them; and they were promised accordingly that the *Arrêt*, when registered, should not have effect as against them, to make them leave their houses and settlements however uncleared, but should merely regulate as to future grants,—and be accompanied with a prohibition to all claimant Seigniors to sub-grant wild land on pain of nullity. Notwithstanding which, on the demand (most inconsistent, one must admit, with this promise, unless indeed the demand was meant for a mere threat, to admit of facultative application by future judgments if occasion should require,) that all wild land be declared re-united to the Crown domain, the order that passed went no further than to the communication of the *Arrêt* to the *syndic des habitans*, for such remonstrance as he might have to offer.

What remonstrance he offered, again does not appear; or whether he offered any. The matter rested there. The *Arrêt* was not registered; perhaps had not been meant to be.

§ 332.—However this may have been, one inference from one clause of this entry on the Council Journals is unavoidable.

The Governor and Bishop offered so to modify the *Arrêt*, in practice, as to make out of it, or rather add to it, *a prohibition*—

—"à tous prétendus seigneurs *de disposer par concessions d'aucunes terres* EN NON VALEUR, *à* "*peine de nullité*."

On the understanding that the object in view was what the King called it in the preamble of the *Arrêt* and in his instructions to Gaudais, the prevention of stray settlement on remote grants,—this is intelligible enough. The holders of extant grants were to be let alone, by way of compromise, as to any stray settlements that they might have made, but were to be restrained from sub-granting as Seigniors (and the holders of the grants at any distance were generally holders by Seigniorial title) any land not first cleared.

On the anti-seigniorial theory, which makes the Seigniors to have been agents for the granting of wild land, and treats this *Arrêt*, not as a police threat for a temporary end, and having no more reference (to say the least) to grants *en fief* than to grants *en censive*, but as a real and special revocation of all extant grants *en fief*,—this clause is unintelligible.

§ 333.—The records of the *Conseil Supérieur* furnish note of another procedure, having reference to this *Arrêt*; and still in the same sense. The entry(c) is this, under date of three months later, 1664, Nov. 8 :—

"Sur les assignations qui ont été faites à P. et N. et L., à la requête de P. C., pour leurs parts "et portions de leurs fermes de pêches sur la côte de Lauzon,—qui ont remontré que les "dites pêches sont sur des lieux non défrichés ni habitués,—

—"ce qui fait que nous, sieur de Mézy, gouverneur, * * en la N. F., avons ordonné "au procureur-général du roi, de s'opposer à la distribution de leurs deniers, comme étant "les dites fermes (pourquoi on leur demande) entre les mains de S. dite M. suivant son "arrêt du conseil, du 3e. mars, 1663, enrégistré, publié et affiché ou besoin a été le———; "et de plus, par la déclaration qui en a été faite par nous et Monsieur l'évêque en date du "8e. aout dernier, suivant l'ordre que le roi nous en a donné,—et qu'il soit ordonné que les "deniers provenant des dites fermes soient mis entre les mains du greffier pour en disposer "au nom de S. dite M.;—

"Pourquoi le dit sieur procureur-général du roi a requis—que défenses soient faites à tous "seigneurs d'affermer aucunes terres ni pêches sur les lieux non défrichés ni habitués, et de "se prévaloir des titres à eux concédés par les seigneurs généraux,—requérant que les deniers "qui sont dûs et demandés soient mis au greffe au profit de S. M.,—et que le présent soit "lu, publié et affiché.

"Sur quoi le conseil, faisant droit, a ordonné que les dits arrêts de S. dite M. seront exé"cutés selon leur forme et teneur jusques à nouvel ordre du roi,—ce faisant, que les dits P. "N. et L., et autres redevables de pareille nature, fermiers, paieront le prix de leurs fermes "entre les mains du greffier de ce conseil, qui leur en donnera bonne et valable décharge,— "et que le présent sera lu, publié et affiché afin que nul n'en ignore."

§ 334.—In this case, upon suit by the grantee of the Seigniory of Lauzon, or in his right, against parties renting of him certain rights of fishery on the St. Lawrence, opposite uncleared land, for rents due,—the Governor orders the Crown law officer to intervene and claim such rents as belonging to the Crown. The dates given to the King's *Arrêt*, and to the declaration of the Bishop and

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(c) DOC. SEIGN., Vol. 6, pp. 9 and 10; EDITS ET ORD., 4°, Vol. 2, p. xxiii; 8°, Vol. 2, p. 21.

himself, upon which taken together he professes to base this claim, are wrongly stated; but there can be no doubt that the reference is to the *Arrêt* of the 21st of March, and to the explanatory declaration of the 6th of August, above cited (*suprà*, § 330); however hard it may be to show that they precisely made out the claim. The blank left, as to the pretended enregistration and publication of the *Arrêt*, tallies well with the failure of the Council in August (as we have seen) to order the taking of those steps in the case.

The law officer of the Crown intervenes, and demands three things:—

1.—A general prohibition to all Seigniors,—of the leasing out of wild land or of fishing rights opposite to wild land, and of all other proprietary acts under their titles from the defunct Company:—

2.—Payment of the monies in suit, to the King's use.

3.—Publication of the order to be rendered.

The Council evaded the first of these conclusions, by just prefacing their order as to the second and third, with the Court formula, that the King's *Arrêts* be executed; a formula, by the way, which they seem to have drawn as if they had thought that more than one such *Arrêt* was in question,—but to which they took care to add as a saving clause, "until further order of the King."

§ 335.—Of course, no one can ascribe weight, in a legal point of view, to any procedure at the mere instance of de Mézy, before the *Conseil Supérieur* of his troubled administration. Even if one could, the fact that this *Arrêt* had not been proposed for enregistration till August (*suprà*, § 330) would be decisive that its six months of delay could not have expired in November of the same year, and therefore, that the *Arrêt* could have had no operation as to the case in hand,—independently of all considerations arising out of its tenor and of the fact that it was not even then enregistered. For some reason or other, it is manifest that the Governor was bent on a mere stretch of power; in which the Council seconded him,—but not to the full extent.

But the use here of the words "*fermes*," "*fermiers*" and *affermer*," is still not wholly without significance. They are not the proper words for the case of any form of feudal sub-grant. The defendants here sued must be presumed to have held under a lease, far short of a *bail à cens;* and such leases are here referred to as in common use.—It is one of the tacit assumptions necessary to the anti-seigniorial theory, to ignore the fact of the resort to such leases.

The demand of a prohibition to be addressed to the Seigniors, is again of itself a new evidence of the known fact that their titles were not held to have been revoked; and the failure of the Council—or in other words, its refusal,—to order such prohibition, shows anything but a disposition to have them revoked at all.

§ 336.—Add, that the King's further order could not have confirmed even the temporary sequestration here ordered. The Seigniory of Lauzon has been

held ever since, as it had been till then, under its old title (No. 5, *suprà*, § 243, &c.), as granted by the Company.(*d*)

§ 337.—I pass then, to another most important document.

The year following—the scandals of the de Mézy government having reached their height—an entire change of administration was effected; the Marquis de Tracy being commissioned to the chief command over all the French possessions in America, the West India Islands included; and Messieurs de Courcelles and Talon, respectively, as Governor and Intendant of New France.

The King's instructions to Talon in this capacity, under date of 1665, March 27, drawn presumably by Colbert, thus treat of this matter:(*e*)—

" L'une des choses qui a apporté plus d'obstacles à la peuplade du Canada a été que les " habitans qui y sont allé s'établir, ont fondé leurs habitations où il leur a plû, et sans se " précautionner de les joindre les uns aux autres, et faire leurs défrichemens de proche en pro- " che pour mieux s'entre-secourir les uns aux autres au besoin. Ils ont pris des concessions " pour une espace de terres qu'ils n'ont jamais été en état de cultiver, par leur trop grande " étendue, et étant ainsi épars, se sont trouvés exposés aux embuches des Iroquois, qui " par leur vitesse ont toujours fait leurs massacres avant que ceux qu'ils ont surpris ayent " pû être secourus de leurs voisins.

" *C'est aussi par cette raison que le roi fit rendre il y a deux ans un arrêt du conseil*, dont " il sera délivré une expédition, au d. Sr. Talon, par lequel pour remédier à ces accidens, " S. M. ordonnoit qu'il ne seroit plus fait à l'avenir aucun défrichement que de proche en " proche, et que l'on réduiroit les habitations en la forme de nos paroisses et de nos bourgs " autant qu'il sera dans la possibilité; *lequel néanmoins est demeuré sans effet*, sur ce que " pour réduire les habitans dans des corps de villages, il faudroit les assujettir à faire de " nouveaux défrichemens, et à abandonner les leurs.

" Toutesfois, comme c'est un mal auquel il faut trouver quelque remède pour garantir les " sujets du roi des incursions des sauvages qui ne sont pas dans leur alliance, S. dite M. " laisse à la prudence du dit Sr. Talon, d'aviser avec le dit Sr. de Courcelles et les officiers " du conseil souverain de Québec, à tout ce qui sera praticable pour parvenir à un bien si " nécessaire.

" La difficulté qui s'est rencontrée, ainsi qu'il est dit ci-dessus, à l'exécution de cet arrêt " pour réunir les habitations en corps de paroisses, ayant empesché l'effet d'une chose qui est " tout à fait salutaire au pays, et laquelle peut le plus contribuer à rendre cette colonie " florissante, *il sera important que, sans s'arrêter à vouloir exécuter cet arrêt à la rigueur, le dit* " *Sr. Talon travaille* DE CONCERT AVEC LES HABITANS *à l'exécuter en partie, s'il ne peut être* " *exécuté entièrement;* et le tempérament que l'on y pourroit apporter seroit, par exemple, " qu'un habitant qui auroit une concession pour 500 arpens de terre, dont il n'auroit défriché " que 50 arpens, en abandonneroit 100 arpens aux nouveaux François qui viendront s'habi- " tuer au pays; *à quoi s'il s'opposoit*, ON POURROIT MEME MENACER *de lui ôter toutes celles qu'il* " *n'auroit pas encore mises en culture;* et effectivement, *en cas de besoin, il sera expédié une* " *déclaration* pour être enrégistrée au dit Conseil Souverain de Québec, *portant que les dits*

(*d*) A title, it may be remembered, that assimilated the estate of the grantee to that of the Company, but gave no special right of *pêche* or otherwise *in the St. Lawrence*,—where it is obvious enough these fisheries must have been.

It occurred to no one in those days, to suggest a distinction on that score, as to the Seignior's being owner of the *pêche* as well as of the land adjoining.

(*e*) MSS. Doc. QUE. HIST. SOC., 1st. Series, Vol. 1, pp. 40–42.

"*habitans seront obligés de défricher toutes les terres qui leur ont été concédées, sinon et à*
"*faute de ce faire, il leur en sera retranché chaque année le dixième ou quinzième pour les*
"*donner à de nouveaux colons,* et par ce moyen il y auroit lieu d'espérer que dans un petit
" nombre d'années toutes les terres concédées seroient généralement mises en culture,

" Il reste encore une chose à faire sur la même matière, qui servira beaucoup à l'augmen-
" tation de la colonie, qui est que le roi désire que dans le cours de chacune année le dit Sr.
" Talon fasse préparer 30 ou 40 habitations, pour y recevoir autant de nouveaux familles, en
" faisant abattre les bois, et ensemencer les terres que l'on aura défrichées aux dépenses de
" S. M."

§ 338.—If, even, one could suppose that the *Arrêt* here referred to was not the one above given, but another issued at about the same time, it would not be the less certain from this extract that the *Arrêt* of 1663 above cited was never carried into effect,—and this, with the King's full knowledge and acquiescence. If the uncleared grants of the Company (hardly any of their grants being other than uncleared) had already been revoked, or even if the King had supposed them so to have been, he could not have suggested, as a line of policy to be perhaps pursued, the obtaining from the grantees a very partial abandonment of them, under threat of worse, in case of non-compliance. We shall see, presently, that from the surrender of the Company's Charter to this time, hardly any grants had been made. So that the body of grantees with whom Talon (instructed as to this, in the same sense in which Gaudais had been instructed) was to act in concert, could only have been the Company's grantees.

§ 339.—But in truth, there is no trace of any other *Arrêt* of 1663 on this subject, than the one above cited. The King certainly referred to that, in his instructions to Gaudais; and characterised it as he did to Talon. De Mézy and Laval characterised it in the same sense, to the Council at Quebec. In fact, it was dealt with and spoken of, not as a piece of legislation, taking character from its enacting clauses, but loosely, as part—and part only—of an intimation given of the King's will. The author or authors of the instructions to Gaudais and Talon, respectively, must have written of it, from the despatch that covered it, and not from direct perusal of the document itself. De Mézy and Laval, in proposing it for enregistration (*suprà*, § 330), and de Mézy and his Crown law officer afterwards in the affair of the Lauzon fishery lessees (*suprà*, § 333), had no hesitation in adding to or taking from it, just as circumstances required; referring always, as to a perfectly sufficient authority, to the royal instructions conveyed to them, or said to have been conveyed to them, in other form. It was nothing more than a fragment of the body of instructions, as to the contemplated reduction of the settlements in Canada into *bourgade* form,—the fragment given to the local executive in form for promulgation; to be authoritatively promulgated, after enregistration in the archives of the *Conseil Supérieur*, if occasion should serve; but which seems not to have enregistered, and most surely was not promulgated and acted on.

§ 340.—These instructions to Talon even indicate what one may call an inveterate tendency of the French Court of that age, to proceed in this way,—*by menace not meant in earnest.*

This *Arrêt* is said to have been issued in a certain sense, and for an end of the last importance. It is said to have lain for two years unacted upon. Talon is told that he need not try to execute it exactly; but that it is very desirable that he should try to persuade the settlers to act with him, so as to give it some degree of effect,—say, by abandoning a fifth of their grants, when of a certain size.(*f*)

Then, he is told that with this view he may threaten them with a confiscation, if they should be refractory, of all their uncleared lands. Not that the King so much as pretended to Talon or to himself, that in that case he really contemplated so bold a step. On the contrary, the step thought of is declared to be a mere further threat, for publication, of an escheat, year by year, of a tenth or fifteenth part of the uncleared land; a threat not much more in earnest, probably, than the other.

§ 341.—Talon, by a despatch written home that year (1665, Oct. 4), answered (*g*) the above instructions thus:—

"Vous avez trop bien reconnu que tandis que les habitations ne se feront pas de proche "en proche le pays ne sera pas en état de se soutenir par lui-même contre les Iroquois, ses "ennemis irréconcillables. On apportera autant qu'on le pourra le remède au mal passé, "et on ne tombera pas dans cet inconvénient à l'avenir. Je projète une forme de défri-"chement pour bâtir une première bourgade; quand elle sera tout-à-fait résolue, je vous "enverrai le plan.(*h*)

"J'espère que vous jugerez la déclaration que je vous demande dans la réponse que je donne "à l'instruction du roi, si non nécessaire, au moins utile à l'établissement du pays; puis-"quelle ne peut qu'exciter les habitants au travail. Ainsi, je crois que vous ordonnerez "qu'elle me soit renvoyée.

"On peut toujours à bonne heure disposer des familles à passer dans l'année prochaine en "ce pays, sur l'assurance que je donne qu'il y aura des habitations préparées; et quand, au "lieu de 40 que vous m'ordonnez dans la courante, le roi voudra pour les suivantes qu'on en "dispose un plus grand nombre, j'en ferai faire autant qu'il plaira à S. M., si de sa part elle "me donne les secours nécessaires."

Of the draft of declaration here referred to, or of its tenor, I find no further trace. So that it could not have been sent out in form and acted on. Unless, indeed, as is not impossible, the *Arrêt* of 1672, presently to be noticed (*infrà*, §§ 389 *et seq.*), be taken for a tardy promulgation of it.

(*f*) The size illustratively given, is at least illustrative of the looseness of notion prevalent at Court, as to these Canadian grants. The writer of these instructions evidently thought 500 arpents a large grant,—and such as ought to be reduced. Was he aware that there were numbers of *censive* grants that ranged far beyond the 1000 arpents; and that, for a *fief* grant any thing below 10,000 arpents might be counted as far below the average?

It is supposable enough, no doubt, that neither he nor yet the author of the *Arrêt* had these great *fief* grants in view at all; that all they were exactly thinking of, was the settlement of the more immediate environs of Quebec and Three-Rivers,—where the practical question arose, rather as to *censive* and small *fief* holdings than otherwise.

But if so, what—on that supposition—becomes of the trustee-theory, or of its sister fiction of a revocation of these trust-grants?

(*g*) MSS. Doc. Que. Hist. Soc., 1st Series, Vol. 1, pp. 58, 9.

(*h*) *Vide infrà*, § 367.

§ 342.—It must be admitted, however, that Talon can have had no thought of putting into execution the *Arrêt* of 1663. He was not instructed, and he did not propose, so to do.

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§ 343.—In the meantime, that is to say, shortly before the sending out of Talon as Intendant, the King had chartered the Company of the West Indies. His *Edit*(*i*) to that end bore date of the month of May, 1664; but was not enregistered at Quebec, and so did not take effect for Canada, until the 6th of July, 1665,—after the arrival of Messrs. de Tracy, de Courcelles and Talon.(*k*)

§ 344.—The preamble recited the recent organisation(*l*) of a "*Compagnie* "*de la terre ferme de l'Amérique*" "*autrement appelée France Equinoctiale*"; the necessity of strengthening that Company for commercial purposes; the abandonment of Canada by the Company of New France; the mere sale, by the *Compagnie des Isles de l'Amérique*, of the West Indian Islands granted them in 1642, to individuals who had wholly failed to establish French trade there;(*m*) the King's acceptance of the retrocession of New France; and his intention to redeem the sold West India Islands, and grant them, and every other possession that he could grant, to the new Company, augmented always by the addition of all who would enter into it.

(*i*) Doc. Seign., Vol. 2, pp. 11 *et seq.*; also Edits et Ord., 4o, Vol. 1, pp. 29 *et seq.*; and 8o, Vol. 1, pp. 40 *et seq.*

(*k*) See Document No. 56 of 1st Series, laid before this Court by Government.

(*l*)" On venoit, par un édit d'octobre 1663, de former une compagnie, sous le nom de com-
" pagnie de la France Equinoxiale, pour l'établissement de Cayenne, et de la partie Fran-
" çoise de la Guyanne, entre la rivière des Amazones et celle d'Orenac; cette compagnie
" parut propre à être utilement chargée en même tems des autres colonies, sauf à augmenter
" le nombre des associés. Un édit de mai 1664 consomma ce projet," etc.—Petit, *Gouvernement des Colonies Françoises*, 1771, Vol. 1, pp. 19, 20.

(*m*) The words of the *Edit* as to this, are these:—
—" ayant reconnu que * *,—et que dans les isles de l'Amérique, ou la fertilité des terres
" y a attiré un grand nombre de François, ceux de la compagnie à laquelle nous les avions
" concédées en l'année 1642, au lieu de s'appliquer à l'agrandissement de cette colonie et
" d'établir dans cette grande étendue du pays un commerce qui leur devoit être très-avanta-
" geux, *se sont contenté de vendre les dits Isles à divers particuliers*, lesquels s'étant seulement
" appliqués à cultiver les terres, n'ont subsisté depuis ce temps-là que par le secours des
" étrangers, en sorte que jusques à présent ils ont seuls profité du courage des François qui
" ont les premiers découvert et habité les dites Isles et du travail de plusieurs milliers de
" personnes qui ont cultivé les dites terres,"—etc.

In the course of the argument before this Court, the question was suggested, as to whether or not the Company of New France under their Charter had the right to sell,—and was answered unhesitatingly for the Seigniors in the affirmative.

If authority or precedent can be of use to prove what is beyond question on the score of principle (*suprà*, §§ 197 and 198), the King's reference here to the acts of the *Compagnie des Isles de l'Amérique* may be of such use.

His Charter to that Company was almost exactly in the terms of that to the Company of

§ 345.—After which, the *Edit* proceeds:—

" A ces causes et autres bonnes considérations à ce nous mouvans, savoir faisons, qu'a-
" près**—avons par le présent édit,établi et établissons une Compagnie des Indes Occidentales
" qui sera composée des intéressés en la terre ferme de l'Amérique et de tous nos sujets qui

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New France. The clauses in it, corresponding to the 4th and 5th of the latter (*suprà*, §168) are given in the following words, in PETIT, Vol. 1, pp. 13-15, and in MOREAU DE ST. MÉRY, Vol. 1, about p. 50.

" 3.—Nous avons accordé et accordons, à perpétuité, aux associés de la dite compagnie, " leurs hoirs, successeurs et ayants cause, la propriété des dites isles situées **, en toute " justice et seigneurie, les terres, forts, rivières, ports, hâvres, fleuves, étangs, et mêmement " les mines et minières, pour jouir des dites mines conformément aux ordonnances; et de " toutes lesquelles choses susdites, nous nous réservons seulement le ressort, la foi et hom-" mage, qui nous sera fait et à nos successeurs rois de France par l'un des dits associés au " nom de tous, à chaque mutation de roi, et la provision des officiers de justice souveraine " qui nous seront nommés et présentés par les dits associés, lorsqu'il sera besoin d'y en " établir."

" 7.—Les dits associés disposeront des dites choses à eux accordées, de telle façon qu'ils " aviseront pour le mieux; distribueront les terres entre eux, et à ceux qui s'habitueront sur " les lieux, avec réserve de tels droits et devoirs, et à telles charges et conditions qu'ils juge-" ront plus à propos, et même en fief, avec haute, moyenne et basse justice; et en cas qu'ils " désirent avoir titre de baronnies, comtés et marquisats, se retireront par-devers nous pour " leur être pourvu de lettres nécessaires."

PETIT (Vol. 1, pp. 17, 18) gives the following account of sales made by the Company:—

" La Guadeloupe et ses dépendances, la Désirade, Marie Galande et les Saintes, furent " vendues au beau frère du gouverneur le 4 sept. 1649, pour somme de 60,000 livres, et une " rente de 600 livres de sucre fin, qui fut le même jour rachetée pour une somme de 1500 " livres en argent, à raison de 12 livres 10 sols le cent pesant de sucre.

" Le gouverneur de la Martinique acheta cette isle et les dépendances de son gouverne-" ment, la Grenade, les Grenadins et Ste. Lucie, pour la somme de 60,000 livres, par acte " du 27 sept. 1650.

" Le gouverneur de St. Christophe, chevalier de Malte, acheta sous le nom de son ordre, " pour une somme de 120,000 livres, cette isle, et des prétensions à celles de St. Martin et " de St. Barthélemy, par acte du 24 mai 1651."

Dissatisfied in 1664 with the result of these sales, and the failure of the vendees to get up a French trade with their Islands, the King yet made no pretence of questioning their legality; but simply undertook, as we shall see, to provide for the buying out of the parties holding under them.—Had a doubt been possible, of the legality of the transactions, it is not to be supposed that they would have been mentioned without censure, and in the matter of course way in which they here are mentioned, or that this costly mode would have been taken to get rid of the inconveniences which they were felt to have entailed.

Between the case of this Company and that of the Company of New France, there was but the one difference hinted at in this preamble of the *Edit* of 1664,—that the fertility, resulting from soil and climate, of the West India Islands enabled the former to get a price paid for those Islands, while the less productive forests, colder climate and more warlike Indians, of New France, left the latter at disadvantage in this respect. If the Company of New France took no money for its grants,—and one is not entitled to say with any degree of confidence that it did not,—the cause is not to be soughtin any want of legal right or in any doubt or cavil as to such right, but simply in the fact that the grants may not have been tempting enough to induce men to give money for them.

"voudront y entrer,—pour faire tout le commerce qui se peut faire en l'étendue des dits pays "de la terre ferme de l'Amérique, depuis la rivière des Amazones jusqu'à celle d'Orenoc, et "Isles appelées Antilles, possédées par les François, et dans le Canada, l'Acadie, Isles de "Terreneuve, et autres Isles et terre ferme depuis le nord du dit pays de Canada jusqu'à la "Virginie et Floride, ensemble la côte de l'Afrique depuis le Cap Vert jusqu'au Cap de "Bonne-Espérance, tant et si avant qu'elle pourra s'étendre dans les terres, soit que les dits "pays nous appartiennent pour être ou avoir été ci-devant habités par les François, soit que "la dite Compagnie s'y établisse en chassant ou soumettant les sauvages ou naturels habitants "des dits pays, ou les autres nations de l'Europe, qui ne sont dans notre alliance,— —"lesquels pays nous avons concédés et concédons à la dite compagnie, en toute seigneurie, "propriété et justice,—

—"et après avoir examiné les articles et conditions qui nous ont été présentés par les inté- "ressés en la dite compagnie, nous les avons agréés et accordés, agréons et accordons, "ainsi qu'elles sont insérées ci-après :"—etc.

§ 346.—Those of the subjoined "*articles et conditions,*" which more directly relate to and qualify the grant conveyed by the above extract, are the following:—

"19.—Appartiendront à la dite compagnie, en toute seigneurie, propriété et justice, "toutes les terres qu'elle pourra conquérir et habiter pendant les dites 40 années,(*n*) en "l'étendue des dits pays ci-devant exprimés et concédés, comme aussi les Isles de l'Amérique "appellées Antilles habitées par les François, qui ont été vendues à plusieurs particuliers par "la compagnie des dites isles formée en 1642, en remboursant les seigneurs propriétaires d'i- "celles des sommes qu'ils ont payées pour l'achat, conformément à leurs contrats d'acquisition "et des améliorations et augmentations qu'ils y ont faites suivant la liquidation que feront "les commissaires par nous à ce député, et les laissant jouir des habitations qu'ils y ont établies "depuis l'acquisition des dites isles.

"20.—Tous lesquels pays, isles et terres, places et forts, qui peuvent y avoir été construits "et établis par nos sujets, nous avons donné, octroyé et concédé, donnons, octroyons et con- "cédons à la dite compagnie,—pour en jouir à perpétuité en toute propriété, seigneurie et "justice; ne nous réservant autre droit ni devoir que la seule foi et hommage-lige, que la "dite compagnie sera tenue de nous rendre et à nos successeurs rois, à chaque mutation de "roi, avec une couronne d'or du poids de 30 marcs.

"21.—Ne sera tenue la dite compagnie d'aucun remboursement ni dédommagement envers "les compagnies auxquelles nous ou nos prédécesseurs rois ont concédé les dites terres et "isles, nous chargeant d'y satisfaire si aucun leur est du, auquel effet nous avons révoqué et "révoquons à leur égard toutes les concessions que nous leur en avons accordées, auxquelles "en tems [tant?] que besoin, nous avons subrogé la dite compagnie, pour jouir de tout le "contenu en icelles, ainsi et comme si elles étoient particulièrement exprimées.

"22.—Jouira la dite compagnie en qualité de seigneur des dites terres et isles, des droits "seigneuriaux qui y sont présentement établis sur les habitants des dites terres et isles, ainsi "qu'ils se lèvent à présent par les seigneurs propriétaires,—si ce n'est que la compagnie "trouve à propos de les commuer en autres droits pour le soulagement des dits habitants.

"23.—La dite compagnie pourra vendre ou inféoder les terres, soit dans les dites isles et "terres fermes de l'Amérique, ou ailleurs dans les dits pays concédés,—à tels cens, rentes et "droits seigneuriaux, qu'elle jugera bon,—et à telles personnes qu'elle trouvera à propos.

"24.—Jouira la dite compagnie de toute les mines et minières, caps, golfes, ports, hâvres, "fleuves, rivières, isles, et islots, étant dans l'étendue des dits pays concédés,—sans être tenue "de nous payer pour raison des dites mines et minières aucuns droits de souveraineté, des- "quels nous lui avons fait don."

(*n*) The 40 years limited by the 15th article, for the commercial monopoly of the Company, *infrà*, § 347.

"40.—Après les dites 40 années expirées, s'il n'est jugé à propos de continuer le privilége
"du commerce, toutes les terres et isles que la compagnie aura conquises, habitées ou fait
"habiter, avec les droits et devoirs seigneuriaux et redevances qui seront dus par les dits
"habitants, lui demeureront à toute perpétuité en toute propriété, seigneurie et justice, pour
"en faire disposer ainsi que bon lui semblera, comme de son propre héritage,—comme aussi
"des forts, armes, et munitions, meubles, ustencils, vaisseaux et marchandises qu'elle aura
"dans les dits pays,—sans pouvoir être troublée, ni que nous puissions retirer les dites terres
"et isles pour quelque cause, occasion et prétexte que ce soit; à quoi nous avons renoncé
"dès à présent, à condition que la dite compagnie ne pourra vendre les dites terres à aucuns
"étrangers sans notre permission expresse."

§ 347.—By the fifteenth and three following articles it was provided, that the Company was to have a 40 years monopoly of all the trade of the vast territories thus made over to them, their fisheries alone excepted; that they were to be paid a bounty of 30 *livres* a ton on all goods to be imported by them into such territories,—and of 40 *livres* a ton on all goods to be thence brought back to France; that any of such goods which the Company might wish to re-ship to foreign parts, should be free of export duty, if freighted in French vessels; and that the Company shonld pay no duties of export or import on any stores of war, or provisions or other necessaries for their ships.

§ 348.—By the twenty-fifth and six following articles, the Company was invested with the right to built forts, manufacture all munitions of war, and raise forces; to appoint Governors, at pleasure, who were to be commissioned by the King; to remove such Governors, also at pleasure,—their own commission for the superseding of a Governor to have force for 6 months or a year, so as to obviate difficulty from any delay in the issue of a royal commission; to maintain, officer and man, a navy; to capture prizes therewith for themselves, subject to the *ordonnances de marine*; to make treaties of peace and alliance with all kings and princes of their territories, subject to the King's approval; to make war upon them, "*en cas d'insulte;*" to demand the King's aid, at his own cost, against all enemies of the state, who should molest them; and to appoint and remove all local officers of justice, of every kind and degree,—under reservation only, that the members of such *Conseils Souverains* as they should create, were to take commissions from the Crown, upon the Company's nomination.

§ 349.—The thirty-third and thirty-fourth articles provided for the observance of the Custom of Paris (*o*) throughout the territories in question; maintained all French settlers in their rights, as though resident in France; declared all their descendants, and all descendants of converted savages, to be natural born Frenchmen; and gave all artisans who should have exercised their art there through 10 consecutive years, to be "*maîtres de chefs-d'œuvres*" in all towns of France.

(*o*) The words of this article are:—

"33.—Seront les juges établis en tous les dits lieux tenus de juger suivant les loix et
"ordonnances du royaume, et les officiers de suivre et se conformer à la Coûtume de la prévôté et vicomté de Paris, suivant laquelle les habitants pourront contracter, sans que l'on
"y puisse introduire aucune autre coûtume, pour éviter la diversité."

It cannot be said that this provision was necessary for the introduction of the Custom of

§ 350.—By the second and following thirteen articles, the thirty-second, the thirty-fifth and following four articles, and the forty-first and forty-second articles, provision was made for the organisation of the Company, and the conduct of its affairs.

Every one was to be free to join it, (without derogation to their nobility, or even exclusion of foreigners,) within a term of 4 months, and to subscribe any sum, not less than 3000 *livres*, to its capital stock; which stock was made transferable at will by the holders. Extensive privileges were granted to all large holders. A board of 9 directors, 3 at least to be merchants, was created, with large powers,—subject to the yearly general meeting of the Company. The Company's effects, and the shares therein of its members (even though aliens) were declared not subject to seizure for the King, and almost free of seizure at other instance.

Special provisions in favor of the Company and of its members were made, as to the course of all civil litigation having reference to its affairs.

And the King engaged to make to it certain pretty heavy advances, on most favorable terms.

§ 351.—The only direct obligation imposed upon the Company is to be found in the first article,—which reads thus:—

" 1.—Comme nous regardons dans l'établissement des dites colonies principalement la

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Paris,—at any rate into Canada. As the Metropolitan Custom, it may safely be held to have been a presumed rule, in the absence of contrary stipulation, from the first. As early as 1640 and repeatedly afterwards—as we have seen, *suprà*, § 249, Note (*n*)—the Company of New France recognised it as a universal rule, and the King on two occasions confirmed their recognition of it. And by the *Edit* of April 1663, enregistered in September of that year for the first creation of the *Conseil Supérieur de Québec*, (see EDITS ET ORD., 4°, Vol. 1, p. 23, and 8°, Vol. 1, p. 38,) that body had been enjoined to proceed—

—" autant qu'il se pourra en la forme et manière qui se pratique et se garde dans le ressort " de notre cour de parlement de Paris."

All that can be called peculiar or novel here, as regarded Canada, was the formal prohibition of the introduction of any other Custom; and even that can hardly be said to have been requisite. The Custom of Paris once introduced universally, *as it had been for Canada*, no authority short of legislative was competent to introduce any other.

A strange *équivoque* as to this prohibition, has been ventured upon in the anti-seigniorial interest. It is said to have made it illegal to stipulate in a contract of *accensement*, otherwise than as provided by the Custom of Paris. As though such phrase did not import either infinitely too much, or infinitely too little.

If it be held to mean, that such contracts must have nothing in them but what the Custom of Paris would import as appertaining to them; all that need be said is,—that of course the same rule must be applied to all other contracts; and being so applied, the King might as well have said that his subjects should not contract at all as to any detail of any matter, but must leave all details of their contracts of every kind to such interpretation as the Custom (in the silence of the parties) would supply. No one ever could start such a notion, unless it were for the uses of an anti-seigniorial argument.

If on other hand, [illegible] be held to mean merely, that men could neither make such contract *as under another C[illegible]m*, and so as to introduce bodily the incidents of such other Custom,—nor yet transgress any express requirement or prohibition of the universal Custom; the rule may most safely be applied to all contracts, but will serve no anti-seigniorial end.

The introduction of the Custom of Paris, and the prohibition of the introduction of any other, restrained men no more as to their contracts of *accensement*, than as to their contracts of marriage, and other contracts generally.

"gloire de Dieu en procurant le salut des indiens et sauvages, auxquels nous désirons faire
"connoître la vraie religion, la dite Compagnie * * sera obligée de faire passer aux pays ci-
"dessus concédés le nombre d'ecclésiastiques nécessaire pour y prêcher le saint évangile et
"instruire ces peuples de la créance et religion catholique, apostolique et romaine, comme
"aussi de bâtir des églises et y établir des cures et presbitères, dont elle aura la nomination,
"pour faire le service divin aux jours et heures ordinaires et administrer les sacrements aux
"habitants, lesquelles églises, curés et presbitères, la dite Compagnie sera tenue d'entretenir
"décemment et avec honneur, en attendant qu'elle les puisse fonder raisonnablement,—sans
"toute fois que la dite Compagnie puisse changer aucun des dits ecclésiastiques qui sont à
"présent établis dans le dit pays,—sur lesquels elle aura néanmoins le même pouvoir et
"autorité que les mêmes gouverneurs et propriétaires des dites isles."

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§ 352.—It is obvious to remark, that the terms of the real estate grant conveyed by this instrument, are not altogether the same as those of the like grant made to the Company of New France.

The general words of the opening clause (*suprà*, § 345), which of themselves might read as an absolutely unqualified grant of property, are qualified by the subjoined articles (*suprà*, § 346); although neither to the extent, nor in the way, required by the anti-seigniorial theory.

§ 353.—Instead of at once taking an estate for ever in the whole of the conceded territory, as the Company of New France did,—the Company of the West Indies had the whole of their larger territories made over to them (in property, and with the superadded attributes of lordship and *justice*) under this very peculiar limitation,—that so much thereof as they should get possession of and settle during the 40 years of their commercial monopoly, and also (if redeemed from the vendees) the sold West India Islands, together with all seigniorial and other dues thereto appartaining, should remain theirs for ever on the easy and comprehensive tenure agreed upon,—everything else, presumably, in the event of the term of their commercial monopoly not being extended, then reverting to the Crown.

But all that thus was granted to them, was granted to them as a property of their own; and with a license as to their disposal of it, that was very nearly if not quite as large as that allowed to the Company of New France.

§ 354.—Indeed, in one particular that license was larger; for they were to pay no "*droits de souveraincté*" on their mines,—while the Company of New France was only entitled to hold them "*conformément à l'ordonnance*," that is to say, subject to payment of such dues.

§ 355.—And in another particular, it has been spoken of, as if larger; for the twenty-third article, in place of the more general terms used in the fifth section of the older grant (*p*) which have been spoken of as though they did not com-

(*p*) *Suprà*, § 168 and § 183. Answering to section 7 of the grant of the West India Islands, in 1642, to the *Compagnie des Isles de l'Amérique.*—*Suprà*, § 344, Note (*m*).

prehend the contract of sale,—expressly declared that the Company of the West Indies might sell, as well as sub-grant, on what terms and to whom it would.

In this respect, however, the truth is, that a comparison of the two clauses shows the older grant to have involved a larger delegation of power, instead of a less, to the grantee Company.

Under the older grant, the right to sell, not needing to be mentioned, passed to the Company by operation of law, and was even amply protected in its hands from liability to mutation fines.(q) And with it, under the general words used, went the right on the part of the Company, to create *fiefs* with title, if short of the baronial,(r) and *aleux*,(s)—as also the right of disposing of its *justice* at will without restriction.(t)

Under this later grant, the rights to create *châtellenies* and *aleux*, and to dispose of *justice* quite at pleasure, are not so clear.

§ 356.—Practically, however, for all purposes of the present argument, these minor shades of distinction are utterly unimportant.

What is at once certain and important, may be summed up in few words.

Both grants alike dealt with all the three cumulative elements (so to speak) of the real estate of those days,—the *propriété*, the *seigneurie* and the *justice* of the territories granted.

Both alike granted in express terms all manner of waters, navigable or not, and all mines.

Both alike left the grantee Company free to sell or to sub-grant feudally, whether *en fief* or *en censive*, precisely as it would,—and under no obligation, or liability to be brought under obligation, to sell or sub-grant to any one, unless it would, or on any terms other than such as it should determine upon in its own interest.

And the later grant, by expressly vesting in the new Company all the seigniorial dues that had been established by the old, (see Article 22, cited *suprà*, § 346,) with the mere right(u) in its discretion, of commuting them "*pour le soulagement des habitans*," of course at the instance of the latter,—admitted

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(q) *Vide suprà*, §§ 197, 8, and § 344, Note (m).

(r) *Vide suprà*, § 265.

(s) *Vide suprà*, § 230, Note (k).

(t) *Vide suprà*, § 199.

(u) That this was a mere right, is plain from the terms used. If the idea had been, to require of the Company to grant such *soulagement*, otherwise than in its own discretion, quite other terms should have been resorted to.

Had the grant to this Company been an absolutely indefeasible grant forever, it would of course have been a waste of words to say that it had this right. But as, at the end of 40 years, an indefinite part of it was apparently intended to revert to the Crown, the words were not wholly wasted which expressly gave the power during those 40 years to reduce dues, the property of the Crown at the time of the grant,—and as to which, therefore, the Crown might be held entitled to require, that they should not be reduced to the prejudice of its fiscal interests.

unmistakeably, that all such dues, however variant, had been legally and rightly established, and were not to be altered otherwise than by consent of the parties interested.

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§ 356.—There is no doubt, however, that this grant to the Company of the West Indies was much more imperfectly carried into execution in Canada, than that to the Company of New France had been.

§ 357.—The Royal instructions to Talon, of 1665, March 27, already referred to (*suprà*, § 337), contain the following significant passage:—

—"S. M. a joint le d. pays à la concession qu'elle a faite à la Compagnie des Indes Occidentales, dont il est nécessaire que le d. Sr. Talon voye les lettres de concession, par lesquelles "la compagnie est en droit de nommer le gouverneur et tous les autres officiers; et [mais?] "comme la compagnie connaît assez qu'elle ne pourroit pas trouver des personnes qui eussent "assez de mérite, et qui fussent assez autorisées pour occuper ces postes et les remplir dignement, elle a été bien aise que le roi fit cette nomination, jusques à ce que par la continuation "des bontés et de la protection de S. M., cette colonie s'augmentant considérablement, la d. "compagnie puisse alors par elle-même trouver des sujets propres pour y envoyer.

"Il a été bon que le d. Sr. Talon sceust toutes ces choses pour lui faire connoître que "l'intention et la volonté du roi sont qu'il protège, appuye, et travaille autant qu'il sera en "son pouvoir à bien établir l'autorité de la compagnie dans le dit pays;" etc.(*v*)

§ 358.—It was not till after Talon's arrival, as has already been observed (*suprà*, § 343), that the first step was taken towards giving effect to the grant in Canada,—by its enregistration here.

§ 359.—Having taken this first step and apparently not done much more, Talon—in the same despatch of 1665, Oct. 4, which has been cited (*suprà*, §341),—wrote home, remonstratively, thus:—

"Quoique par la réponse(*w*) que je donne au 4e. article de mon instruction, vous puissiez "bien connaitre s'il est avantageux au roi de céder à la compagnie la propriété de ce grand "pays avec le droit de pourvoir au gouvernement, ou de conserver l'un et l'autre à S. M.,— "je m'explique sur le motif qui a pu la porter à faire cette cession à la dite compagnie; et "je dis, que s'il a été d'augmenter les profits pour lui donner d'autant plus de moyens de "soutenir ses premières dépenses, augmenter le nombre de ses vaisseaux, et faire un grand "commerce utile à son état, sans avoir pour objet l'étendue des habitations de ce pays et la "multiplication de ses colons, il est à mon sens plus utile au roi de laisser à la dite compagnie cette propriété sans aucune réserve; mais, si elle [c'est-à-dire *S. M.*] a regardé ce "pays comme un beau plan, dans lequel on peut former un grand royaume, et fonder une "monarchie, ou du moins un état fort considérable, je ne puis me persuader qu'elle réussisse "dans son dessein, laissant en d'autres mains que les siennes, la seigneurie, la propriété des "terres, la nomination aux cures et adjoints, même le commerce qui fait l'âme de l'établissement qu'elle prétend.

"Ce que j'ai vu jusqu'ici depuis mon arrivée, m'a bien persuadé ce que j'avance; puisque depuis que les agens de la compagnie ont fait entendre qu'elle ne souffrirait aucune liberté

(*v*) MSS. Doc. Que. Hist. Soc., 1st Series, Vol. 1, p. 35.

(*w*) The other despatch here referred to is not given; nor any further indication of its tenor, than the extract in the text affords.

" de commerce, non seulement aux François qui avoient coutume de passer en ce pays pour
" le transport des marchandises de France, mais même aux propres habitans du Canada
" jusqu'à leur disputer le droit de faire venir pour leur compte des denrées du royaume,
" desquelles ils se servent tant pour leur subsistance que pour faire la traite avec les sau-
" vages, qui seule arrêterait ce qu'il y a de lus considérable entre les habitans, qui pour y
" demeurer avec leurs familles ne trouvent pas assez de charmes en la seule culture des
" terres.

" Enfin je reconnais très bien que la compagnie continuant de pousser son établissement
" jusqu'où elle le prétend porter, profitera sans doute beaucoup en dégraissant le pays ; et
" non seulement elle lui ôtera les moyens de se soutenir, mais encore elle fera un obstacle
" essentiel à son établissement,—et dans 10 ans il sera moins peuplé qu'il ne l'est aujour-
" d'hui.

" On a mis la compagnie en possession, non seulement des droits honorifiques et de sei-
" gneurie, mais encore de tous ceux qui rendent quelqu'utilité.

" Quant au commerce, j'apprêhende qu'elle ne le fasse dans une trop grande étendue.
" Elle se [fonde?] pour cela des termes de sa concession qui le lui donne privativement à tous
" autres ; et je crains que par là elle fasse perdre cœur à la plus nombreuse et considérable
" partie des habitans du Canada.

" Comme sa prétention et les ordres que le roi m'a donné par mon instruction, par
" lesquels S. M. me commande d'exciter les dits habitans au commerce, ne s'accordent pas trop,
" je tiendrai tant que je pourrai les choses en balance, pour nourrir quelqu'espérance de
" lucre et de profit dans les esprits que je trouve abattus,—jusqu'à ce que dans l'année pro-
" chaine S. M. me soit mieux expliquée de ses intentions sur ce sujet, sur lequel je m'étendrai
" davantage dans mes premières dépêches." (*x*)

§ 360.—These views, however, were in great part combated, the year following, by a despatch of the great Colbert (*y*) under date of 1666, April 5; in which, replying either to the above passage, or to the corresponding passage of Talon's other despatch there mentioned, or to both,—that minister thus wrote :—

" L'autre raisonnement que vous faites sur l'abandonnement que le roi a fait du pays à la
" Compagnie des Indes Occidentales, et les inconvénients que vous en appréhendez, peut
" être aussi combattu par une raison qui est capable, elle seule, de détruire toutes les
" autres que vous apportez au contraire; c'est que nous avons vu par expérience que cette
" colonie n'est tombée dans l'état languissant où elle a été jusques ici, que parce que l'an-
" cienne compagnie était trop faible, et parce que cette même compagnie l'a ensuite aban-
" donnée entre les mains des habitans (*z*) ; et si vous étudiez bien ce qui s'est passé sur ce
" fait là, vous demeurerez d'accord que ces deux causes ont produit la désertion des anciens
" colons, et empêché que d'autres ne s'y soient allés établir, comme ils auroient fait assuré-
" ment, si une compagnie puissante comme celle-ci les avoit soutenus.

" Il est constant que vous aurez trouvé de grandes difficultés dans les commencemens, et
" par l'inexpérience et peut-être par l'avidité des agens et commis de la compagnie ; mais
" vous en serez bientôt sorti par les remèdes que la compagnie même y aura apportés, et
" par les soins qu'elle prendra de révoquer ceux de ses agens et commis qui auront quelque
" emportement, pour en substituer d'autres plus modérés en leur place.

" Ce n'est pas dans ces seules précautions que le roi veut borner les moyens de faire sub-
" sister les habitans du Canada ; S. M. a fait condescendre la compagnie à se relâcher en
" leur faveur de la traite avec les sauvages, quoiqu'elle pût la prétendre aux termes de sa
" concession, et qu'il auroit été même plus avantageux de la lui laisser, parcequ'il est à

(*x*) MSS. Doc. Que. Hist. Soc., 1st Series, Vol. 1, pp. 52—54.

(*y*) MSS. Doc. Que. Hist. Soc., 1st Series, Vol 1, pp. 81—85.

(*z*) By the contract of 1645.—*Suprà*, §202.

"craindre que par le moyen de la traite, les habitans ne demeurent une bonne partie de "l'année dans l'oisiveté, au lieu que s'ils n'avoient pas la liberté de la faire, ils seroient "nécessités de s'appliquer à bien cultiver leurs terres.

"Tout ce que vous alléguez pour faire connoître qu'il seroit plus avantageux de laisser le "commerce en la disposition de tous les habitans, que de le renfermer ès mains de la seule "compagnie, étant particulièrement fondé sur la mauvaise administration des agens et com- "mis, il sembleroit que les précautions que l'on prendra à l'avenir d'en faire de tous choix, "suffiroient pour vous persuader du contraire. Mais, pour vous donner lieu d'en juger encore "avec plus de certitude, la compagnie, sur les instances que je lui en ai faites, en a accordé "la liberté pour cette année indistinctement à toutes sortes de personnes ; quoiqu'il soit fort "à craindre que ces particuliers n'enverront de France que les marchandises et denrées sur "lesquelles ils trouveront du bénéfice, et laisseront manquer le pays de celles qui lui seront "peut-être les plus nécessaires,—outre que par ce moyen les castors étant en différentes "mains, il est certain que le débit s'en fera à vil prix."

Proceeding then to another subject, the Minister answers a question which Talon had raised, as to the right of the Company to certain dues—"*le quart sur* "*les castors et le dixième sur les orignaux*,"—originally imposed (it would seem) by the *communauté d'habitans* upon themselves, to meet their liability to defray the charges of the local government of the country, under their contract with the Company of New France for the purchase of the fur-trade (*suprà*, § 202) in 1645. These dues, he says, have been rightly made over to the new Company; the King having no claim(a) to them,—nor yet any claim whatever upon any mines that should be worked in the country.

After which follow these two paragraphs; the one, an evidence of the same disposition to seek revenue from Canada which showed itself in the instructions to Gaudais (*suprà*, § 328) three years before; the other, the only further reference that I find in this correspondence, to the matter of land ownership in Canada.

"Sur quoi il écheoit néanmoins à considérer que comme par les nouveaux établissements "qui sont faits et par l'augmentation du nombre des colons, la traite augmentera aussi de "valeur, il est juste que non seulement elle acquitte avec régularité les charges ordinaires, "mais qu'elle supplée de quelque chose aux extraordinaires,—convenant déjà de faire un "fonds annuel de 2000 livres pour subvenir aux parties inopinées, et même que si le roi forme "quelque entreprise dans laquelle son propre avantage et celui du pays se rencontrent égale- "ment, de fournir aux frais qu'il sera nécessaire de faire.

"La même raison qui fait conserver à la compagnie le droit du quart sur les castors, qui "est * *, vous obligera à vous déterminer sur l'incertitude où vous étiez de faire toutes les "inféodations au nom de la compagnie, et de procéder à la confection du papier terrier, sur "la requête de son agent général."

To carry out *pro tanto* the views of this despatch, there was sent with it an *Arrêt* of the *Conseil d'Etat*, dated three days later; by which the King, in consideration of the voluntary waiver by the Company, of its trading monopoly to the extent above indicated, and on condition of its assuming the charges of local government which the contract of 1645 had cast upon the *habitans*,—formally made over to it these dues upon peltry, with the monopoly of the "*traite de* "*Tadoussac reservée*."(b)

(a) —"Le roi lui ayant concédé le Canada, ainsi que tous les autres pays de sa concession, "en toute seigneurie et propriété, ne s'en étant réservé que la souveraineté," etc.

(b) Edits et Ord., 4°, Vol. 1, pp. 48 *et seq.*; 8°, Vol. 1, pp. 60 *et seq.*

This *Arrêt* also again speaks of New France as "concédée en toute propriété, seigneurie "et justice" to the Company.

§ 361.—Under date of the same year 1666, (registered Sept. 16,) there has been preserved in the archives of the *Conseil Supérieur*, another document(c) which throws some further light on this subject of the imperfect action had, to give effect to the grant made to the Company of the West Indies.

This document is a *Requête* submitted by le Barroys, the agent general of the Company, to Messrs. de Tracy, de Courcelles and Talon, with their notes of reply in the margin. It presents 31 heads of demand on a variety of subjects, of very different degrees of practical importance,—which are answered in a variety of ways, and by no means always in a sense such as the spirit of the Company's *Edit de création* would have required. The King had begun (with the full consent of the Company, and rather to oblige it than himself, as he told Talon in his instructions,—*suprà*, § 357) by naming those three officers himself, instead of taking them upon the Company's nomination, as the *Edit* provided. And however much, notwithstanding the irregular mode of their selection, they may yet have been in a certain theoretical sense the Company's servants, they by no means acted as so being.

The first demand, which was simply for the abstract recognition of the Company's right as "*Seigneurs des pays dénommés en l'édit de S. M., pour en jouir*
"*en toute propriété et justice, ainsi que de tous autres droits à eux concédés par*
"*le dit édit*,—was of necessity answered by the word "*Bon.*"

The second, which followed up that demand, by the requirement that the officers of the *Conseil Supérieur* should be commissioned upon nomination by the Company, and that other judges and officers should be "*établi*" by the Company, received no answer.—Special demands made (Nos. 19 to 22) as to the inferior judicial establishment at Quebec, were met with evasive answers.—That made for the like establishment at Three Rivers (No. 23), and that for the commissioning of all notaries, *huissiers* and *sergents* by the Company (No. 24), were granted.

The eighteenth, which followed up the general words of the first by the practical demand—

"18.—Que la dite compagnie soit mise en possession et jouissance des droits seigneuriaux
"et de tous les autres qui lui sont concédés par le dit édit"—

—was thus evaded; de Courcelles throwing over the matter—mainly to Talon, secondarily to de Tracy:—

"Mons. l'intendant prendra, s'il lui plait, d'examiner cet article. En se conformant aux
"intentions de S. M., il paroit fort juste de faire ce qui est demandé par cet article. Et quand
"Mons. de Tracy aura agréable, je travaillerai à faire tourner les droits seigneuriaux au profit
"de la compagnie, quand monsieur l'intendant le pourra ou qu'il lui plaira d'y commettre."

The twenty-fifth had reference to the *papier terrier*, alluded to in the concluding words of the extract just made of Colbert's despatch; and was in these words:—

"25.—Que le papier terrier commencé par Mons. l'intendant soit fait au nom de la dite com-
"pagnie; et que les aveux et dénombrements, même les fois et hommages soient rendus au
"dit nom entre les mains de mon dit sieur l'intendant, et en présence de l'agent ou commis
"général de la dite compagnie; et que pour cet effet les titres concernant les concessions

(c)Edits et Ord., 4°, Vol. 1, pp. 45 *et seq.*; 8°, Vol. I, pp. 51 *et seq.*

"tant en fief qu'en roture, soient remis entre les mains du dit agent ou commis général, pour "en être les dépositaires et en rendre compte à la dite compagnie toutefois et quantes."

—Eliciting, again, this evasive reference to Talon, apparently written by de Courcelles:—

"*Idem* [c.-à-d. *renvoyé à Mons. l'intendant.*]—Ce qui est demandé par cet article me semble "si juste qu'il n'y a pas lieu de le refuser; seulement il est bon d'examiner si ces titres, "aveux et dénombrements ne seront pas mieux ès mains du greffier ou du procureur fiscal, "dans les archives de la compagnie, qu'ès mains de son agent général; cela étant de l'inté-"rét de la compagnie seule, c'est à elle de le déterminer."

And lastly the twenty-sixth, the only other demand having any reference to land-granting, ran thus:—

"26.—Que les concessions qui se feront à l'avenir seront données par mon dit sieur l'in-"tendant, à tels cens et rentes qu'il sera par lui jugé à propos, en présence du dit agent ou "commis général de la dite compagnie, au nom de laquelle tous les titres de concessions "seront passés."

Upon which the following is the note made,—again indicative, apparently, of a wish on de Courcelles' part to assent, and of an opposition on Talon's part that was none the less obstinate for the fact that he did not venture on a plain refusal: (*d*)—

"*Idem* [c.-à-d. *renvoyé à Mons. l'intendant.*]—Rien ne paroît plus conforme aux intentions "de S. M.; ainsi il semble très juste d'accorder ce qui est demandé par cet article."

§ 362.—The only other documents that I have been able to find, throwing any material light upon this subject of the practical relations between the Crown and the Company in Canada, are:—

1*stly.*—Two, which—as they only bear upon this point incidentally—will be better cited hereafter (*infrà*, §§ 367 *et seq.*) than here; more especially, as they do little more than confirm the inferences to be drawn from the foregoing.

(*d*) It admits of suggestion, perhaps, that Talon's signature of these answers is to be taken to import his acquiescence, on reflection, in de Courcelles' written view. Such, however, does not seem to me to be its meaning. De Courcelles *referred the matters to Talon*, adding a note of his own idea. Talon signed an assent to the reference of the matters, for himself to look into and act upon thereafter. If he had meant more, he should have added a memorandum by way of statement of his own view.

From his despatches and Colbert's answer, above quoted, we know that he was arguing adversely to the Company, with the minister,—on these points, among others; and the argument seems to have been in a state to offer him considerable encouragment for holding them still open

Besides all which, there is the strongest presumption that he neither went on at once with the *papier terrier* in the Company's name, nor yet ever granted land in the Company's name, as these demands required that he should have done. Every reference to the *papier terrier* shows it to have remained an unfinished work down to 1673, (see citation from despatch of Frontenac, *infrà*, § 362,) when Talon had left the country; and indeed, it seems never to have been completed till some years after the Company had ceased to exist. And no grant, either by Talon or by Bouteroue, in the Company's name, is extant.

Indeed, even supposing the interpretation here set upon these answers to be wrong, and the answers to have meant assent, the case is not altered.—The facts would remain, that till then these compliances with the *Edit* of 1663 had been refused or evaded,—and that, though then promised, they were not carried into effect.

2ndly.—The grants of land made through this period,—which also will require fuller examination hereafter (*infrà*, §§ 397 *et seq.*); it being enough here to say, that they were of two classes,—the greater part made in the King's name and containing very slight mention of the Company, and indeed occasionally none at all,—and a smaller number made by the Company itself, in its own right, and afterwards recognised for valid by the King.

And *3rdly.*—The following extract from a despatch by Frontenac to the Minister, under date of 1673, November 19,(*e*) having immediate reference to certain grants of the former of these two classes,—the mass of which had been issued by Talon about a year previous:—

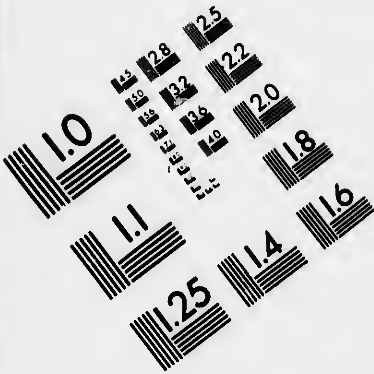
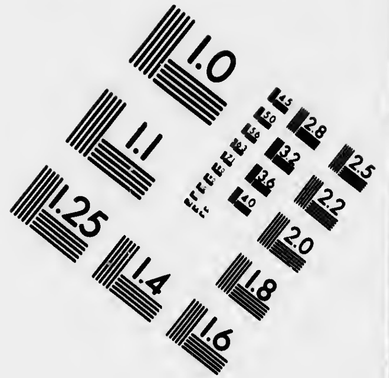
> "Il s'est aussi rencoutré une autre difficulté pour la confection du terrier d[illegible], de la
> " compagnie, touchant les foi et hommages que doivent rendre les officiers des troupes et
> " autres personnes des plus considérables de ce pays, à qui M. Talon a donné des conces-
> " sions; parceque les ayant toutes accordées au nom du roi, avec injonction d'en prendre la
> " confirmation de S. M. dans un an, sans parler de Messrs. de la compagnie, dans les titres
> " qu'il en a donné, ils ont soutenu ne point devoir porter la foi et hommage aux officiers de
> " Messrs. de la compagnie, mais seulement au roi ou à ceux qui le représentent. C'est ce
> " qui m'a obligé de faire surseoir le terrier à cet égard, jusqu'à ce que vous l'eussiez réglé,—
> " pour ne point donner d'attente aux titres accordés par M. Talon suivant l'arrêt du conseil
> " qui lui donnait permission de le faire, et les ordres qu'il en avait reçus, conformes à ceux
> " qui sont aussi portés par mes instructions.
>
> "Mais pour finir toutes ces sortes de contestations, j'estime qu'il serait nécessaire qu'il
> " vous plût faire expliquer S. M. sur l'exécution de l'arrêt par lequel elle avait autrefois
> " donné la propriété de ce pays à Messrs. de la compagnie,—et que je remarque n'avoir été
> " presque suivi en aucun article par Messrs. de Tracy et les ministres du roi qui l'ont suivi,
> " hormis dans la perception des droits seigneuriaux qu'on leur a toujours laissé; parceque si
> " le roi entend, comme il y a bien de l'apparence, qu'on ne les regarde plus que comme des
> " engagistes ou des seigneurs utiles, il est aisé de terminer toutes les difficultés de cette
> " nature sur le pied de ce qui se pratique en France."

§ 363.—Through the later years of the Company's existence, its pecuniary embarrassments were not likely to add to its capacity for the struggle by which alone it could have secured the full enjoyment and use of the immense properties and franchises originally granted to it by its Charter.

§ 364.—But admitting all that has thus been shown, the obvious answer is—as in the case of the Company of New France (*suprà*, § 209)—that it has nothing whatever to do with the question of the legal interpretation of the grant itself.

§ 365.—If indeed, the facts had been, that this Charter was exactly acted up to, according to the ordinary sense of the words used in it, in every particular, except as regarded its grant (so called) of territorial property,—and that that grant had been treated (notwithstanding the absoluteness of its wording) as if it were a mere trust-grant,—a plausible show of argument might have been got up, on the basis of such facts, for the application of the anti-seigniorial hypothesis *to that grant.*

(*e*) MSS. Doc. Quе. Hist. Soc., 2nd Series, Vol. 2, pp. 301, 2.

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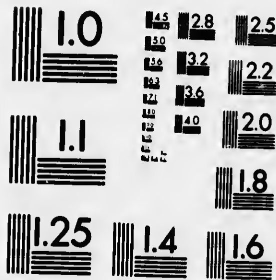
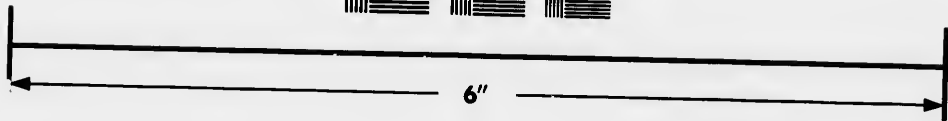

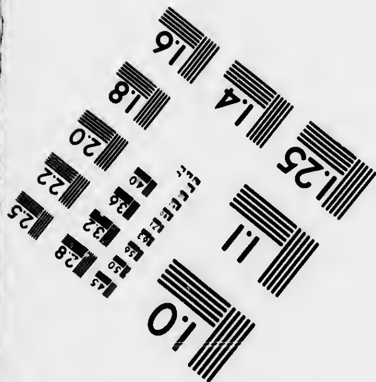
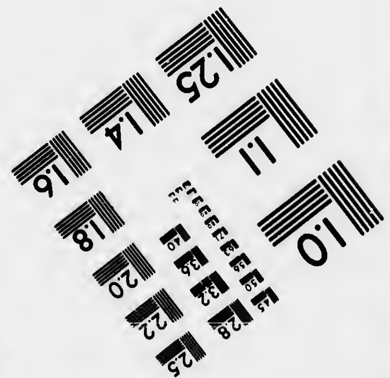

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Although, even in that case, and though pushed no further, the argument would have been a strained and unsound one; because the clear and precise words of an instrument are not changed as to their sense, for any end of legal interpretation, by the mere fact of the parties not having acted up to that sense. And most surely the argument could have had no show of application to any other grants, than simply the one grant so supposed not to have been acted out.

§ 366.—But the facts are not so. The imperfect execution of this Charter affected several others of its provisions,—the sense of which, equally with that of its land-granting clauses, was beyond controversy,—more by far than it did those clauses.

Beyond controversy, the Company was to have named and removed all its governors at will. The King understood his grant to have meant—as no doubt it did, though the words were rather vague—that it was to name all its other officers also; for he so instructed Talon. But the Company found it well to acquiesce, and the King told Talon that it acquiesced gladly, in an arrangement purporting to be temporary, but which proved otherwise; under which the King named its three highest officers for Canada. (*Suprà*, § 357.)

In the clearest terms, by its Charter, it had the unrestricted nomination of all its judicial officers; the members of the *Conseil Supérieur* alone having to take commissions from the Crown after such nomination. But the King's chief officers in the country, having once been named by the King and not by the Company, had a natural leaning the other way,—as also had the body of incumbents in the country; and in 1666, its demands to that end were still only in part granted, and in part answered evasily, or not at all. (*Suprà*, § 361.)

Its commercial monopoly, except as to the fisheries, was for 40 years to have been unlimited. So Talon admitted, and Colbert. But here, there was the whole body of the colonists for it to contend against; and Talon warmly took the colonist side. The Minister, even while supporting its pretension on politico-economical grounds, as well as on the ground of the written letter of the Charter, found it necessary to induce the Company to give up no small part of such pretension. (*Suprà*, §§ 359, 360.)

Frontenac's *résumé* of the whole case, as late as 1673, has it, that except for the receipt of its seigniorial dues, its Charter had hardly been carried out in a single particular. (*Suprà*, § 362.)

For the matter of its land-ownership, if (as well as in regard to so many other matters) the Charter was not acted up to,—there was yet, at any rate, nothing like an assimilation of its quality to the trustee-quality of the anti-seigniorial code of non-feudal law. The King used no phrase of qualification in speaking of the the country as granted to the Company (*supra*, § 357); Talon remonstrated, still with no phrase of qualification, against the policy of ceding to a Company "*la propriété de ce grand pays,*" and of wholly placing "*la propriété des terres*" in other hands than the King's (*suprà*, § 359); Colbert in his reply, and the King in his accompanying *arrêt*, still with the same absence of qualification, allude to the grant of Canada as "*en toute seigneurie et propriété,*" and "*en toute propriété, seigneurie et justice,*" (*suprà*, § 360, notes *a & b*); Frontenac follows in the same style, calling it the *arrêt* by which the King "*avait autrefois donné la propriété de*

"*ce pays à Messrs. de la compagnie*," and which had simply not had effect given to it (*suprà*, § 362); language all, indicative of no possibility of misapprehension as to what the grant was perfectly well known by every one to have meant. Colbert even told Talon (*suprà*, § 360) that he saw no doubt as to the justice of the Company's demand that all grants should be made, and the redaction of the *papier terrier* proceeded with, in its name. If Talon did not yield the point, it was merely that he took the risk of disregarding, at once the *Edit*, and the Minister's hint as to what ought to have been done in obedience to it. The result proved him to have been safe in his calculations. He knew his weight, and the influences (of jealousy, courtierly timidity, and otherwise) that were at work at Court, and with the Company, to place matters, with the aid of delay, substantially at his own disposal. Probably enough, among other pretexts, he availed himself more or less of the peculiarity of the terms of the grant, already more than once referred to (*suprà*, § 352, etc.), according to which an indefinite remainder of the territory granted was presumably to revert to the Crown in 40 years. It may have been, that there was a disposition to view the Company somewhat in the light, as suggested by Frontenac's despatch, of an "*engagiste*," or "*seigneur utile*,"(*f*) though the terms of its grant made it vastly more; and in practice it was treated as if it had not been by any means so much. But at least thus much is certain. Every one knew and admitted that in law, according to its grant, the Company owned all the lands thereby covered, and could sell or grant them to whom it would, and as it would; and that by law the *papier terrier* was required to be made in its interest, and might therefore with perfect propriety be made in its name,—under reserve, *perhaps*, of the contingency of a lapsing of all unsettled territory to the Crown at or after the end of the 40 years.

The Company, I repeat, only failed to secure the full practical performance of the Royal contract. But at the same time, this also may be repeated, that among its last acts done in pursuance of the rights vested in it by that contract, were a number of grants of land, of most sweeping style,—grants of landed property in the largest sense, if words can be phrased to bear such sense,—which grants, so far from being at all questioned, were all expressly declared good by the instrument under which the King resumed its Charter.

(*f*) "*Holder in pledge*," or "*owner holding nothing but a* DOMAINE UTILE *in the property held.*" On the former supposition, the property still in the Crown; and the Company holding it as being so, though in the meantime for their own advantage, and as having a secondary right upon it.

On the latter supposition, the property, all but a *domaine* merely *utile*, in the Crown; and the Company holding only such *domaine utile*, with no quality of *seigneurie honorifique* attaching to it,—or in other words, not being a Seignior in the proper sense of the term.—See RAGUEAU, *Glossaire*, Vo. "Seigneur utile;" Vol. 2, p. 353.

Of course, Frontenac could not have meant to use this latter phrase in its strict sense, of holder of a merely *roturier* property. His meaning probably was, that the Crown might be looked upon as having the right of seigniorial disposition of the property, as a non-profitable prerogative; the Company taking the "*utile*," or profits to arise from such disposition when made. Although the one idea, strictly speaking, was as untenable as the other.

Frontenac lived in an age too feudal, for anything like the Attorney General's doctrine of 1853 (*suprà*, § 3), as to the Canadian Seignior's holding a *domaine directe* only, and not a *domaine utile*, in his land, by any chance to have occurred to him.

§ 367.—The next extant piece of evidence, to be noted, as to the land-granting projects of those times, is to be found in certain "*Projets de Réglements*," drafted evidently by Talon, signed (without date) by de Tracy and himself, and ordered for enregistration at a meeting of the *Conseil Supérieur* held in 1667 (January 24), at which de Courcelles, the Bishop and five other Councillors, the agent general of the Company not being one of them, were also present,—"*pour* "*être observés selon leur forme et teneur autant que la nécessité le requerra.*"(*g*)

After a number of provisions as to judicial procedure and some other subjects, this subject is taken up, and dealt with, in two parts; first, with reference to the *bourgades* which it was suggested should be formed at the King's expense near Quebec; and secondly, with reference to any others that should be formed elsewhere, at other cost than the King's.

The first part of this project(*h*) reads thus:—

" Après qu'il aura été estimé à propos de former des villages en corps de communauté, il " est bon d'observer qu'il importe très fort au service du roi, et au salut du pays du Canada, " de les planter autant qu'il se pourra dans le voisinage de Québec, pour les raisons sui- " vantes: * *

" Et pour parler dans son ordre des villages à former pour les habitations des nouvelles " familles qui seront envoyées par S. M., après avoir reconnu qu'il importe de les planter " près de Québec, il faut convenir que leur forme devant se prendre de la nature et situation " du terrain, il n'est pas aisé de la déterminer,—que cependant la ronde ou la quarré semble " la plus commode, si le lieu la souffre,—et que l'étendue de chaque habitation doit être " d'autant de terre qu'il en faut pour, étant distribuée en 20, 30, 40 ou 50 parts, donner 40 " arpents à chacune d'icelles,—et ce nombre d'habitations différent et inégal fera les bourgs, " villages et les hameaux selon l'exigence du terrain.

" Il faut pareillement arrêter qu'après avoir réservé dans ces hameaux, villages ou bour- " gades, les habitations nécessaires aux familles qui seront envoyées dans la présente " année, il semble que la distribution de ce qui en restera devra se faire à de vieux hiver- " nans, capables d'informer les chefs de familles nouvellement venues et établies, de la " manière de cultiver plus utilement la terre en la travaillant dans ses saisons, soit de vive " voix, soit par l'exemple de leur application au travail: et j'ajoute que s'il se trouve des " gens de différents métiers, servant ordinairement à fournir quelque chose de leur profession " qui soit utile à l'usage commun des habitans de ces bourgades, comme charpentier, maçon, " savetier et autres, il sera très à propos de les introduire en icelles, afin que sans sortir du " bourg, toutes les choses nécessaires, tant à la nourriture qu'au logement et vêtement de " l'homme, se trouve pour la commodité de celui qui l'habite.

" Quant aux clauses et charges qui seront stipulées dans les contrats qui seront faits en " faveur des concessionnaires, il semble qu'elles doivent être différentes, selon la différence " des sujets qui en seront gratifiés.

" Les soldats du régiment de Carignan-Salières, ou des garnisons des forts de Québec, des " Trois-Rivières et Montréal, étant de droit et de fait engagés au roi par la solde qu'ils " ont reçue, ne pouvant se dispenser de continuer de rendre dans le temps et dans les occa- " sions futures leurs services à S. M., soit * *, ainsi il n'y a aucun inconvénient de leur donner " les terres qu'ils défricheront, à cette condition; qui ne leur sera pas onéreuse, puisqu'elle " ne les sortira pas de celle dans laquelle ils se trouvent à présent: et parcequ'ils ne se peu- " vent établir par leur seul travail, il faut de nécessité les assister dans les premières " années. Il semble autant utile à S. M. que juste, de leur donner quelque secours de vivres

(*g*) Edits et Ord., 4°, Vol. 2, pp. 128 *et seq.*; 8°, Vol. 2, pp. 28 *et seq.*

(*h*) *Vide suprà*, § 341; for Talon's first premise in 1665, to the minister, as to the preparation of a plan of this sort.

"et d'outils propre à leur travail, et de leur payer la culture des 2 premiers arpents de terre
"qu'ils abattront et brûleront, quoique pour leur compte et à leur profit, les obligeant d'en
"cultiver en échange 2 autres dans les 3 ou 4 années suivantes, au profit des familles qui
"passeront de France ici, sans que pour ce il leur en soit rien payé. Par cet expédient on
"leur fournit les moyens de se faire un fonds de subsistance pour l'hiver, et on prépare des
"terres pour les familles que le roi semble vouloir établir à ses dépens. * *

"Les vieux hivernans qui demanderont des habitations pourroient trouver cette condition du
"service à rendre à S. M., moins agréable que les soldats, si d'un côté les droits naturels qui
"les obligent à se mettre en campagne, lorsqu'ils sont commandés, de l'autre, l'honneur dont
"on les peut toucher, et la remise qu'on leur peut faire des autres droits onéreux qui suivent
"ordinairement les concessions, ne les engageoient suffisamment à la recevoir; ainsi on la peut
"stipuler dans les contrats qui leur seront passés.

"Et comme S. M. semble prétendre faire la dépense entière pour former le commencement
"des habitations par l'abattis du bois, la culture et semence de 2 arpents de terre, l'avance de
"quelques farines aux familles venantes, on peut à leur égard demander en premier lieu ce
"qui est demandé des vieux hivernans, qu'ayant reçu 2 arpens en état de rendre les fruits de
"la culture et de la semence qui aura été confiée à la terre, ils en cultivent 2 autres dans les
"3 ou 4 années suivantes celle de leur arrivée, pour ne leur pas demander ce remplacement
"dans la première ou la seconde, ce qui les divertiroit trop de l'amélioration de leur habita-
"tion dans un temps auquel elles ont besoin de toute leur application pour leur donner l'éta-
"blissement duquel dépend celui de toute la famille; et pour le bénéfice qu'elles reçoivent par
"la concession de la terre,—au lieu de cens, surcens, censives ou autres redevances, qu'em-
"portent avec soi les concessions de ce pays, ils engageront au service du roi leur premier-né
"lorsqu'il aura atteint l'âge de 16 ans,—qui commencera son noviciat dans une garnison des
"forts, sans qu'il puisse prétendre autre solde que celle de sa subsistance, ou celle qui lui pourra
"être ordonnée par les états de S. M. durant le service qu'il rendra. Cette obligation n'ajoute
"presque rien à celle qu'un véritable sujet apporte au monde avec sa naissance, mais il semble
"que lorsque cette condition est stipulée, elle est moins rude quand elle est exigée, que lors-
"qu'il n'en est rien dit dans les contrats des terres données comme se donnent toutes celles du
"Canada.

"Comme dans toute cette distribution, il n'est rien réservé au profit de la Compagnie des
"Indes Occidentales, que S. M. veut bien gratifier de l'avantage que donne en cas pareil le
"droit de seigneurie,—ou les habitations relèveront immédiatement d'elle, et en ce cas, la
"haute, moyenne et basse justice pourra lui être attribuée, avec le droit de lods et ventes,
"saisines et amendes, et même un cens léger, s'il est jugé à propos,—ou si S. M., estimant
"qu'il soit plus avantageux pour elle d'avoir pour vassaux des officiers de ses troupes qui
"aient sur les roturiers la seigneurie utile et domaniale, elle peut créer en leur faveur quel-
"ques droits de cens ou de censives peu considérables, qui soient plutôt des marques d'honneur
"que des revenus utiles, et leur accorder la moyenne et basse justice, se réservant la haute,
"qu'elle attachera à une cour souveraine des fiefs ou à quelques officiers créés pour la conser-
"vation des droits de seigneur suzerain ou dominantissime."

The second part of the project immediately follows, in these words,—fewer, and (to say the least) less intelligible :—

"Les articles précédens ne traitant que de droits à établir dans les hameaux, villages et
"bourgades que S. M. fait ou fera former à ses dépens, pour être distribués aux pauvres
"familles qu'elle enverra de France et dont elle prétend peupler le Canada, ou qu'elle voudra
"distribuer aux soldats qui voudront s'y habituer, il est très-à-propos d'examiner à quels titres
"et sous quelles conditions on distribuera des terres, et on fera des concessions, aux particuliers
"qui voudront faire dépense et employer leurs soins à la culture du Canada, formant eux-
"mêmes des hameaux, des villages ou bourgades.

"Posant toujours le même principe que l'obéissance et la fidélité dûes au prince souffrent
"plutôt altération dans les pays de l'état éloignés que dans les voisins de l'autorité souveraine,
"résident principalement en la personne du prince et y ayant plus de force et de vertu qu'en
"tout autre, il est de la prudence de prévenir, dans l'établissement de l'état naissant du Canada,

"toutes les fâcheuses révolutions qui pourroient le rendre de monarchique, aristocratique ou
"démocratique, ou bien, par une puissance et autorité balancées entre les sujets, le partager en
"ses parties et donner lieu à un démembrement tel que la France a vu par l'erection des sou-
"verainetés dans les royaumes de Soissons, d'Orléans, comtés de Champagne et autres."

§ 368.—In connexion with this document, should be re..l another which bears date of the same day, and has been printed by Government as found in the archives at Paris, in the winter of 1852–3.

It is printed(*i*) under the heading of "*Extrait du Projet de Réglement fait par* "*MM. de Tracy et Talon pour la Justice et la distribution des Terres du Canada;*" and is in the following words:—

"Sur la distribution des terres du Canada et des concessions faites et à faire, avec leurs
"clauses, ils demandent—

"Qu'il soit fait une Ordonnance qui enjoigne à tous habitants et à tous étrangers possé-
"dant des terres, de déclarer ce qu'ils possèdent, soit en fief d'hommage lige, soit d'hom-
"mage simple, arrière-fief, ou roture, par dénombrement et aveu en faveur de la Compagnie
"des Indes Occidentales, donnant les conditions et clauses portées par leurs titres; pour qu'il
"puisse être connu, si les seigneurs dominants n'ont rien fait insérer dans les contrats qui
"leur ont été donnés par les seigneurs suzerains ou dominantissimes, au préjudice des droits
"de souveraineté,—si eux-mêmes distribuant les terres de leur fief dominant à leurs vassaux,
"ils n'ont rien exigé qui puissent blesser les droits de la couronne, et ceux de la subjection
"dûs seulement au roi;—

"Et pour que cette déclaration, ou dénombrement, se fasse avec plus d'exactitude,—que les
"copies des contrats des concessions soient fournies aux personnes dénommées dans les
"Ordonnances qui seront à cet effet affichées partout où besoin est.

"Par là il sera connu ce qu'on prétend avoir été distribué de terres en Canada, ce qui en a
"été travaillé et mis en valeur, ce qui en reste à distribuer de celles qui sont commodément
"situées; si les concessionnaires ont satisfait aux clauses mises dans leurs contrats, et sur-
"tout s'ils n'ont pas empêché ou retardé par leur négligence l'établissement du Canada.

"Il sera pareillement connu, ce qui importe à M. de Tracy et à M. de Courcelles, quel
"nombre de concessions a été distribué et mis en valeur depuis leur arrivée; par où le roi
"veut être informé du changement qu'ils auront causé en l'avancement du pays,—

—"que pour éviter toute confusion et donner au roi une parfaite connaissance des change-
"ments qui se feront tous les ans en Canada, il soit ordonné qu'à l'avenir il ne se fera aucune
"concession particulière ou générale, au nom de la Compagnie des Indes Occidentales, soit
"de la part des seigneurs de fiefs qui distribueront leur domaine utile à des habitants,—qui
"pour être valable ne soit vérifiée, ratifiée par celui qui aura le pouvoir de S. M., et insinuée
"au greffe du domaine de la dite Compagnie,—

—"au profit de laquelle il sera incessamment travaillé à la confection d'un papier terrier."

§ 369.—It is sufficiently apparent, from the style of this latter document, that it is not, properly speaking, an extract from any *Projet de Réglement*, as drawn up by de Tracy and Talon,—but an extract from a *précis* drawn up in France, in the office of the Minister, for the purpose of exhibiting to the Minister or to the King, or to both, the tenor of the recommendations of the Canadian authorities as to some such matter.

Nor yet, so far as internal evidence goes, can one very well suppose it a *précis* of any recommendations of de Tracy *and Talon*, as the heading of it would

(*i*) Doc. Seign., Vol. 4, p. 5.

indicate. In the body of the document, the names mentioned are those of de Tracy *and de Courcelles;* and the tone of it, as regards the Company of the West Indies, while it answers exactly to de Courcelles' views, expressed (as we have seen) a few months before, as exactly conflicts with Talon's. (*Supra*, § 361, etc.)

§ 370.—Reading the two documents together, as their identity of date and subject requires, one or two inferences would seem to be tolerably plain.

The one here first printed, we know to have been drawn by Talon, and registered as part of a *Projet de Réglement*, with the assent of de Tracy and de Courcelles, by the *Conseil Supérieur.* The first part of it, as to the settlements to be made close to Quebec at the King's cost, is intelligible enough; even the closing paragraph, where the Company had to be mentioned, though somewhat mystified, not being merely mystified. But the second part,—as to the plans of settlement elsewhere and at other cost than the King's,—trenched too closely on conflicting pretensions, for the King's three chief officers and the members of his *Conseil Supérieur* to be at all able to hit upon an intelligible set of words, by which to signify any opinion as to which they were agreed. The position and rights of the Company could not there be stated unintelligibly, without making the whole matter unintelligible; and they could not be stated intelligibly, without involving it all in controversy. Talon certainly could express a meaning when he chose. But the last sentence of this *projet* of his had none; unless, indeed, it be taken for a mutilated first sentence of a discussion (probably long) of the large question as to the best way of attempting to regulate colonisation in Canada, if undertaken by private enterprise, and of perhaps inducing private enterprise to undertake it as so regulated.

The presumption is, that he drew up a paper of this kind; but that his colleagues and he failed to agree. Certainly, for some reason or other they at least did not enregister or record it here. Probably enough, it was sent home. According to usage in such cases, he and they would each have sent his or their counter-statement, to the Minister,(*k*) invoking his interference to settle their dispute; and these counter-statements, thrown into the *précis* form in the Minister's office, were then submitted in official course, for consideration or otherwise, as might be.

In this case, the paper found in Paris bears no trace of having been prepared from Talon's statement of his views on this subject. But it very well may have been a *resumé* of what was thought the material part of that sent by de Tracy and de Courcelles.

(*k*) The MS. volumes, here so often quoted, of the Quebec Historical Society, are full of these counter-statements, and *précis* of counter-statements; showing an organized system of official correspondence on all sorts of subjects, not merely with the Governor, Intendant and Bishop, but often with officials and others, of most equivocal position. The mass of defamatory communications addressed to the Minister, in confidence, from all quarters, about almost everybody, lay and clerical, however amusing in some of its details, and however unavoidable perhaps under a system of professed absolutism, must have given immense trouble, and often must have mystified the Minister far more than it could have enlightened him.

§ 371.—Talon's project—that is to say the first part of it, for the second must be held for lost—merits some consideration.

§ 372.—His *bourgades*, as proposed for settlement at the King's expense, were to be as near Quebec as possible, to consist of from 20 to 50 lots of 40 arpents each,—that is to say, were to be of an extent of from 800 to 2000 arpents; and were to be as nearly round or square as might be.

In these, he proposed to brigade the settlers expected to be sent out that year by the King, with as much reference as possible to their callings, so as to have men of the more necessary trades in each. And in each, there were to be established some settlers who had wintered in the country, *vieux hivernans*, as examples to and teachers of the new comers.

The terms to be offered to the different classes of settlers in these *bourgades* were to be different.

One class of the *vieux hivernans* would naturally be soldiers, detailed for that service, whether they would or not. These were to get some allowances of food and tools, to be paid wages for the clearance of their first 2 arpents, and to be required in return, in the course of the next 3 or 4 years, to clear 2 other arpents for new-comers, without further pay. It is evident, that it was not intended that these men should cease to be subject to control as soldiers; and it is not clear that it was meant to give them a written title to the lands on which they should be placed.

The other or volunteer class of *vieux hivernans* could not be forced into these terms. But it was argued that they could be induced to agree to them, in consideration of release from the other onerous dues commonly attaching to concessions (" *des autres droits onéreux qui suivent ordinairement les concessions* "); and it was proposed accordingly to bind them to the same service by the deeds of concession—which they, certainly, were to receive.

To the new comers, it was proposed in the first place to give at first 2 arpents ready for cultivation and sown, together with some supply of food. For which, they were to be bound to a like cultivation of 2 arpents in the next 3 or 4 years, without pay,—and further, instead of the various dues otherwise attaching to concessions in the country, ("*au lieu de cens, surcens, censives ou autres redevances, qu'emportent avec soi les concessions de ce pays*,") they were to bind each his eldest son, from the age of 16, to military service, for a maintenance only, or for such pay as government should please to give.

§ 373.—So far, however, the rights proposed to be reserved, were all in favor of the King; while the lands on which they were to be secured had been granted to the Company,(*l*) by its Charter. The question recurred, therefore,—as to what should be the Company's rights upon them. And this question was answered by the suggestion of one or other of two alternatives. (*m*).

(*l*) It is manifest that Talon contemplated the founding of these *bourgades* upon land that had not passed into private hands.

(*m*) Both of them, very much in the spirit of what was probably meant by Frontenac's later suggestion (*suprà*, note *f* to §366) of assimilating the Company to the " *Seigneur utile*." The Crown, that is to say, disposing of the property for the Company; but letting the Company take to itself so much of the reserved "*directe*" as was more especially valuable.

On the one hand, the grants might depend directly of the Company,—in which case it would have for its profits, the *justice* of every grade, with a light *cens*, ("*un cens léger*,") and the *lods et ventes*, *saisines* and *amendes* thereto naturally attaching.

On the other hand, they might be made to depend directly of parties who should be vassals of the Company,(n) and in that case should have over the settlers a like light *cens*, ("*quelques droits de cens ou censives, peu considérables*,") with the *justice moyenne* and *basse* only,—leaving the *haute justice* to the Company. It should be added, however, though the draft is silent on that point, that the light *cens* would have carried with it, of course, *lods et ventes*, *saisines* and *amendes* also, as a source of profit to such vassals.

§ 374.—Talon, then, and his colleagues, while proposing in one breath, (as matter of alleged special favor, and in order to cover the exaction for the Crown of obligations to clear land for the Crown without pay, and give up one's eldest son to military service for less than pay,) to relieve certain classes of these settlers from the onerous dues ordinarily attaching to concessions,—in the next breath suggested that they should all have to pay a light *cens*, with the full casual dues incident thereto, and all usual burthens of the *justice seigneuriale*,—either to the Company, or else partly to it and partly to vassals holding under it. The two suggestions, it is plain, were not thought inconsistent. Nor were they; if one remembers the fact, that the *cens* (taken in its large and true sense as covering the *sur-cens*, *rentes* and dues of various kinds, that formed the fixed consideration of a grant) was naturally and ordinarily heavy,—and that besides the regular casual dues and the profits of the *justice*, a variety of other contingent burthens anything but light, was also ordinary. It may be true that, considering the proper values of things, Talon was promising little by his proposed exemptions; because, in truth, a system of concession at high rates and under burthensome conditions, could not, for any long time and to any great extent, have been kept up. But he was not promising, what the terms that he used showed to amount to nothing.

§ 375.—Again, he and his associates no less plainly here viewed the *justice*, which they proposed either to give to the Company or to divide between it and its vassals,—as a source of pecuniary revenue; and such was the light in which it is well known to have been universally regarded.

§ 376.—In a word, their plan was just a contradiction of what the anti-seigniorial theory holds to have been the plan of Canadian colonization.

For the special case where the King was supposed to be spending his money for a public end, land partly cleared was to be granted to men whom his servants should have selected and located at discretion,—on terms uncommonly favorable as regarded rate of *cens* and exemption from certain burthens ordinarily stipulated though not imposed (so to speak) by Custom,—but still subject to all the

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(n) *Possibly*, of the Crown; the latter part of the sentence admitting of being thus read,—though the whole hardly seems to have been so intended.

burthens of the Custom, those of the *justice seigneuriale* among the number, and to some others of a special kind that were by no means light.

So far as is known, their plan was never more than a plan. How far the *bourgades* formed near Quebec under Talon's supervision, were founded upon this model, or upon other terms, is not known. The tenor of the plan is not, however, for this, any the less of an indication as to what the notions of the age were as to the way in which such matters should be dealt with.

If Talon or his colleagues had ever heard or thought of a plan of colonisation by trust-holding Seigniors, whose inevitable obligation it should be to grant away their land, uncleared,—on fixed terms, far easier than by this real plan were held for specially favorable,—to every applicant who should demand it,—this, their real plan, at least has no likeness to it.

§ 377.—The despatch home, about the holders of existing land-grants, the *papier-terrier*, etc., remains for examination.

§ 378.—Its authors proposed the immediate completion of a *papier-terrier*, in the interest of the Company; every land-holder to be required by *Ordonnance* to declare all the terms of his title, to furnish a copy of it, and (apparently,—for the despatch does not seem to have been quite clear as to this) to indicate the extent of his clearings.

If they had thought of the *Arrêt* of 1663, as having gone into operation, and so escheated all uncleared grants, they had need to have been particularly precise on this point. For nothing could have been more important than a knowledge of what grants were still in force, and what not. Certainly, their tone as to it imports no such issue.

§ 379.—Over and above the satisfaction of what may be called statistical curiosity, they professed a desire to ascertain:—

1*stly.*—Whether the Seigniors holding immediately of the Company (for all the inuendoes of this despatch are favorable to the Company's pretensions as grantee of the country) had not got rights conferred upon them by their title-deeds, of such a kind as trenched upon the sovereign rights of the Crown.

2*dly.*—Whether, in granting *arrière fiefs*, they had not assumed to convey rights of such kind.

3*dly.*—Whether the grantees, generally, had or had not satisfied the conditions of the contracts under which they held.

And 4*thly.*—Whether they had not by their negligence prevented or retarded the settlement of the country.

§ 380.—The first and second of these questions had special and exclusive reference to grantees *en fief.* The third and fourth referred to them, apparently, in common with other grantees.

§ 381.—It will be seen presently (*infrà*, §§ 398 *et seq.*), that from the time of the surrender of the Charter of the Company of New France to this date, hardly any grants *en fief* had been made by or for either the Crown or the Company of the West Indies, in Canada. So that these questions, so far as they related to

such grants, must have referred almost exclusively to those of the Company of New France.

§ 382.—These (unrevoked, of course) were referred to, not as grants of a something less than property, but as grants of so large a property—of so much more than a mere property,—as to warrant the representatives of the Crown in an apprehension lest the prerogatives of the Crown should be found to be prejudiced by them. Even the grants made under them *en arrière fief*, it was apprehended, might be liable to the same suspicion.

In those days, and for long afterwards, grants were not placed of record, as they were made, in the public archives, or elsewhere where their tenor could be ascertained by the authorities. So that the authors of this despatch had not at hand the means of getting all the information that they wanted. But, as we have seen from the grants of that time still extant, they were not wrong as to their general notion of the tenor of these grants.

§ 383.—As to all the grants made, without exception, they wanted also to ascertain whether or not the grantees had complied with the conditions of their grants,—and whether or not, by negligence in the premises, they had retarded the settlement of the country.

Why so,—upon the theory now broached, of all the uncleared grants having been revoked in 1663?

No one thought of such theory then. On the contrary, it was felt that in order to a revocation, there must be shown to have been a failure to comply with the essential conditions of the grant,—or such other misconduct as on public grounds might be held equivalent thereto. The writers of this despatch may have had some ulterior plan of escheat in view; but they first had to come at their facts, to warrant it,—indeed, to enable them to put into words what it was to be.

§ 384.—Besides this *papier-terrier* work, and this *Ordonnance* required in order to it, they proposed another step,—also significant as to the style of thought of that day.

To avoid confusion, and keep the King well informed of all that was passing, they proposed to ordain—what? That the Company and the holders under it *en fief*, or any of them, should be compelled to make sub-grants on such and such terms, and to keep the King's officers advised thereof? On the anti-seigniorial theory of a trust for land-distribution, this should have been their plan.

Instead of which, it was precisely the reverse. Neither the Company, nor yet any Seignior under it, was to be suffered to make a grant, unless with leave of the King's officers! All such grants, to be valid, were to be verified, *ratified by the King's representative*, and registered in the Company's archives.

§ 385.—Is it suggested, that these Seigniors were therefore not veritable proprietors, but mere holders subject to an arbitrary veto of a King's officer?

The answer is obvious,—that a proposal by one or more servants of the Crown in Canada made to a higher servant of the Crown at home, for an act of manifest interference with proprietary right, shows no real legal limitation of such

right.—Even if it had been acted upon, by the issue of the proposed *Ordonnance*, it may be a question whether such legal limitation would have resulted. The aggrieved proprietors would have had their recourse by opposition to its enregistration, and (failing that) by remonstrance and litigation to get rid of it. And sooner or later, it must have been got rid of.—If acted on by mere Royal order, not registered in form, it is certain that such legal limitation would not have resulted. The Company's rights would have been, in practice, a little more encroached upon than they were before; and other Seigniors' rights, much more. But the rights themselves, at law, would have remained precisely what they were.

But in fact, we know that neither of these courses was taken. No such *Ordonnance* was registered, or (for anything that appears) so much as drafted. No such order of the King was ever set up, as pretended to be put in force.

The proposal, followed by failure to act upon it, shows that the idea found no favor; that this policy of curtailment of proprietary right was not adopted,—and this, not simply from over-sight, but because being suggested it was held not to be the policy that should be adopted.

§ 386.—Still further,—the fact remains, that so far as is known, the rest of these suggestions shared what certainly was the fate of this.

The *papier-terrier* does not seem to have been gone on with. No *Ordonnance* to that effect, in terms of this despatch, is extant. No procedure followed, for retrenchment of Seigniorial rights dangerous to the King's prerogative, nor for the enforcement of clauses of titles, nor for punishment of remissness of grantees. The Crown was not so anxious to give its officers enormous powers in Canada, as those officers were to get them. A Canadian Seignior's powers might be some restraint on a Governor or Intendant; and the Crown might sometimes rather like such restraint to exist, than otherwise. Absolute governments do not always want agents that are too absolute. The whole system was one of distrust of everybody; Governor, Intendant, Bishop, checking each other, checking other people, and meant to be suitably held in check by other people.(*o*) In this very instance, Talon and his colleagues were at cross purposes. The Canadian Seigniors, a good many of them,—and among others, the religious orders—were by no means without Court influence. Court notions were only too Seigniorial.

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§ 387.—That such was the fate of these projects, is further shown by the next documents in order of date, bearing upon this subject, that remain to us. To arrive at them, we pass over a few years.

§ 388.—The first of these to be noted, is the following extract, under date of 1672, April 7, from Colbert's instructions addressed in the King's name to the Count Frontenac, with his commission as Governor:—

"Le dit Sr. de Frontenac doit exciter par tous moyens possibles les dits habitans à la "culture et au défrichement des terres; et comme l'éloignement des habitations les unes

(*o*) *Vide suprà*, § 370, Note (*k*).

"des autres a considérablement retardé l'augmentation des colonies et a facilité autres fois
"les moyens aux Iroquois de réussir dans leurs funestes entreprises, le dit Sr. de Frontenac
"examinera ce qui est praticable pour assujetir les dits habitans à défricher de proche en
"proche, soit en obligeant les anciens colons à y travailler dans un certain temps, soit en
"faisant des concessions nouvelles aux François qui viendront s'establir au dit pays."(p)

This passage—all that I find here relative to this matter—is consistent enough with its antecedents, as simply showing their comminatory and inoperative character. Frontenac was to try to do what Gaudais and Talon had been successively told to try to do.

§ 389.—Another document, of so nearly the same date as to require to be read with the foregoing, is an *Arrêt* of the *Conseil d'Etat*, under date of 1672, June 4,(q) which is always cited in the anti-seigniorial interest, and was argued upon before this Court in connexion with the *Arrêt* of 1663,—and with the same ignoring of its real purport.

As with the *Arrêt* of 1663, the anti-seigniorial argument from it is based, not upon what it is, but upon what, by the printed heading given to it, it is said to be. That heading styles it "*Arrêt du Conseil d'Etat du Roi pour retrancher la* "*moitié des concessions.*" But the document itself reads thus:—

"Le roi étant informé que tous ses sujets qui ont passé de l'ancienne en la Nouvelle-France
"ont obtenu des concessions d'une très grande quantité de terres le long des rivières du dit
"pays, lesquelles ils n'ont pu défricher à cause de la trop grande étendue,—ce qui incom-
"mode les autres habitans du dit pays, et même empêche que d'autres François n'y passent
"pour s'y habituer, ce qui étant entièrement contraire aux intentions de S. M. pour le dit
"pays, et à l'application qu'elle a bien voulu donner depuis 8 ou 10 années pour augmenter
"les colonies qui y sont établies, attendu qu'il ne se trouve qu'une partie des terres le long
"des rivières cultivées, le reste ne l'étant point, et ne le pouvant être à cause de la trop
"grande étendue des dites concessions et de la foiblesse des propriétaires d'icelles:—

"A quoi étant nécessaire de pourvoir, S. M. étant en son conseil, a ordonné et ordonne—
—"que par le sieur Talon, conseiller en ses conseils, intendant de la justice, police et
"finances au dit pays, il sera fait une déclaration précise et exacte de la qualité des terres
"concédées aux principaux habitants du dit pays, du nombre d'arpents ou autre mesure
"usitée du dit pays qu'elles contiennent sur le bord des rivières et au dedans des terres, du
"nombre de personnes et de bestiaux propres et employés à la culture et au défrichement
"d'icelles,—en conséquence de laquelle déclaration la moitié des terres qui avoient été
"concédées auparavant les 10 dernières années sera retranchée des concessions, et donnée
"aux particuliers qui se présenteront pour les cultiver et défricher.

"Ordonne S. M. que les ordonnances qui seront faites par le dit sieur Talon seront exécu-
"tées selon leur forme et teneur, souverainement et en dernier ressort, comme jugements de
"cour supérieure, S. M. lui attribuant pour cet effet toute cour, juridiction et connaissance;
—"ordonne en outre S. M. que le dit sieur Talon donnera les concessions des terres qui auront
"été ainsi retranchées à de nouveaux habitants, à condition toutefois qu'ils les défricheront
"entièrement dans les 4 premières années suivantes et consécutives, autrement et à faute de
"ce faire, et le dit temps passé, les dites concessions demeureront nulles.

"Enjoint S. M. au sieur comte de Frontenac, gouverneur et lieutenant général pour S. M.
"au dit pays, et aux officiers du conseil souverain d'icelui, de tenir la main à l'exécution du
"présent arrêt, lequel sera exécuté nonobstant opposition et empêchement quelconques."

(p) MSS. Doc. Que. Hist. Soc., 1st Series, Vol. 1, p. 218.

(q) Edits et Ord., 4°, Vol. 1, pp. 60 *et seq.*; 8°, Vol. 1, pp. 70 *et seq.*

§ 390.—Unlike that of 1663, this *Arrêt* was enregistered in Canada,—in the September next following its date.

But it would be a great mistake to infer from this, that it was therefore otherwise carried into effect.

§ 391.—Had it been so, however, what would have been its effect?

Not an escheat *de plano* of the half of every concession of older date than 1662; but the preparation by Talon of a statement in exact detail, as to the quality and extent of the holding of every grantee in the country, and the number of persons and of cattle upon each,—consequently upon which statement there should follow a certain measure of escheat.

Was even this consequent measure of escheat to follow, *certainly?*

The words of the *Arrêt*, as above given, seem to say so. They read, that the half of every grant made before 1662 shall be escheated. But here, the words of an *Arrêt* of 1675, which will presently have to be noticed, and which otherwise is an exact copy of this, may help us some way towards what was meant. The clause there reads:—

—" en conséquence de laquelle déclaration la moitié des terres qui avoient été concédés " auparavant les 10 dernières années, *et qui ne se trouveront défrichées et cultivées en terres " labourables ou en prés*, sera retranchée des concessions, et donnée aux particuliers qui se " présenteront pour les cultiver et les défricher."

It is evident, that the words here printed in Italics have been left out of the *Arrêt* of 1672, by a mere error of a copyist. The escheat could not have been meant to fall on any cleared or meadow land.

But was it even meant to attach to the half of *all* other land, *de plano*, and absolutely?

If so, why was it that the *Arrêt* went on to provide for *Ordonnances* of a quasi-judicial character, by Talon, in order to the giving of effect to each such escheat,—and for execution to be granted upon such *Ordonnances* notwithstanding opposition or appeal?

The *Arrêt* was neither more nor less than a public instruction and authorisation, addressed and granted to Talon, to ascertain the state of all those holdings, and thereupon to enforce escheat within a certain limit, summarily, but yet by a procedure that was to be held for judicial; and as to which, notwithstanding the order for instant execution, there must have lain an appeal, or right of petition in the nature of appeal, to the King's Courts at home, or to himself through his ministers at home.

Not an arpent was or could be escheated under this *Arrêt*, unless after due preparation of this detailed statement by Talon, and under judgment by him duly predicated thereon.

391.—There remains no trace of such statement as having ever been made by Talon. On the contrary, as we shall see hereafter, the order to make precisely this same statement had to be repeated in 1675 to Duchesneau, his successor,—and by him it had not been obeyed until 1679.

Of course, there remains also no trace of one such judgment. Indeed, till after the statement should have been drawn, no such judgment as the King here ordered could have been put into the form of words requisite to give it a show of conformity to the *Arrêt*. But even apart from this, and further, without reference to the fact of there being no judgment of any sort, producible, for escheat of half the wild land of any grant,—after careful collation of every title *en fief* that I have been able anywhere to trace out,—I can state that I nowhere so much as find a trace of there having ever been effected as to any one of them, any such reduction of extent as was here threatened, whether with or without such judgment.

§ 392.—Again, as to any lands that should be escheated under this *Arrêt*, the order therein contained was express, that they should be granted to new settlers on condition of entire clearance within the next 4 years, under pain of nullity of the grant on failure so to clear.

Within the two months next following the enregistration of this *Arrêt*, Talon, as we shall see presently,(r) made 64 grants,—being all the grants extant under his name,—all of them *en fief*,—4 in Acadie and 60 in Canada,—none of them reciting any such escheat as preparatory thereto,— and none of them containing this impossible condition, under which alone this *Arrêt* had authorised his regrant of any escheated land.

They could not, therefore, have been grants of such escheated land.—Talon could not have got up his statement, and rendered his judgments in the time. And if he could,—if the grants had fallen within the purview of the *Arrêt*, he could not so have ignored all its provisions in the making of them.

§ 393.—For, the supposition is inadmissible, of Talon's having in this matter grossly disobeyed the King's real orders,—certain though it is, that he did not execute this *Arrêt*.

The day before this *Arrêt* was enregistered, he had enregistered here the King's letters-patent, making him, for his distinguished services in Canada, a Baron, and erecting a property of his near Quebec into a barony. Within the year, he returned to France, still in high favor; and within three years, he was made a Count, and his barony near Quebec a county,—still by way of further reward for these services.

He knew what his real orders were, and must have obeyed them to his master's satisfaction. The despatch or despatches that conveyed them are not extant, but probably enough, they were moulded upon those of 1665. (*Suprà*, § 337.) Indeed, the very *Arrêt* may have been, in substance, his own old draft of declaration of the same year. (*Suprà*, § 341.)

§ 394.—At any rate, and whether it was so or not, the inference is unavoidable,—not merely, that it was not acted on, but that it was not meant to be acted on; that it was like its predecessor of the year 1663, an *Arrêt comminatoire;* that its true object and intention was simply to add to the ostensible

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(r) *Vide infrà*, §§ 405 *et seq.*

authority and influence of the King's servants, over the people of the country, in the matter of the settlement of their lands,—an authority and influence which were to be exercised with a large discretion, subject to instruction by despatch, and according to circumstances as they should arise.

§ 395.—In another important respect also, this *Arrêt* resembled its predecessor.

It makes no distinction of the grants *en fief* from those *en censive.* One sweeping objection, and but one, is made—to their excessive size. The holders of them all are characterised, alike, as "*propriétaires;*" and were threatened alike, on a ground of alleged public policy.

Still, as in 1663, no germ of a notion of a "*fidéi-commis seigneurial*" is to be found.

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§ 397.—The non-revocation of the grants of our First Period thus established, I pass to the terms of the grants of this Second Period.

These grants,—speaking first of the grants *en fief* made in the name either of the King or of the Company—may be most conveniently classed thus:—

Those issued prior to the creation of the Company of the West Indies.

Those issued in Canada from that time to 1672, when Talon issued the bulk of his grants.

The Talon grants, of 1672.

Frontenac's grants, of 1673 and 1674.

The Company's grants, of the same two years.

And lastly, one by the King himself, in 1671, registered here the year following.

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§ 398.—Two only are extant, of the period between the surrender of the Charter of the Company of New France, and the issue of that of the Company of the West Indies.

They are grants by DeMézy and Laval, the Governor and Bishop respectively, in the King's name,—and under the same date, 1664, Aug. 8.

§ 399.—One (Title 49 of ABSTRACT) is in favor of the Jesuits, for an apparently small remainder of wild land near Three Rivers, in consideration of an exchange of 14 arpents made by them with the *habitans* for the Common. The grant was—

"en toute propriété—

—"aux mêmes droits et privilèges que leurs susdits 14 arpents eschangés leur ont esté
" donnés par messieurs de la Compagnie générale."

Presumably, the 14 arpents formed part of the grant of 600 arpents made by the Company of New France to the Jesuits, by Title 4 (*suprà*, §§ 230 and 231); so making this latter clause equivalent to a grant with the full rights of the Company of New France.

§ 400.—The other was of the Seigniory of Champlain, to an Officer of the army, captain of the garrison of Three Rivers, and in express consideration of his services,—in these words :—

—"avons donné et concédé, donnons et concédons par ces présentes, à * * en considération " des services qu'il a rendus à S. M. en ce dit pays, et qu'il continue de rendre journellement, " la quantité d'une lieu et ½ de terre de front à prendre * * sur 1 lieue de profondeur dans " les terres, la dite Rivière Champlain mitoyenne avec * *

—" pour jouir de la dite estendue de terre et de tout le compris en icelle, tant en bois, préz, " rivières, ruisseaux, lacs, isles, islets, et généralement de tout le contenu entre les dites " bornes, par le dit * *, en toute propriété, avec droit de toute seigneurie et justice, haute, " moyenne et basse, et aux droits honorifiques ordinaires aux seigneurs de paroisses dans " les églises, lorsqu'ils y seront bâtis,—

1.—" à la charge que les appellations de la justice que le dit * * pourra y establir, ressorti- " ront à la justice royalle des Trois-Rivières,—

2.—" et pour la foy, qu'il y séra tenu porter par un seul hommage lige à chaque mutation de " possesseur, * * la portera au Conseil Souverain à Québec,—

3.—" avec le revenu d'une année, selon la Coutume de la prévosté et vicomté de Paris."

—Equivalent, therefore, to the shorter lay grants by the Company of New France, of its most favored class (*supra*, § 255); the assimilation to the original grant of the Company of New France, resulting—not from the use of the words "*tout ainsi*," &c., as there occurring, but from the detail resorted to, in the setting out of the nature of the grant.

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§ 401.—Between these and the Talon grants, I can ascertain as issued in Canada no more than some five(*s*) grants (Titles, †50*b*, 51, †51*a*, 52 and †53); none of them large.

§ 402.—Three only of these (Titles 51, 52 and †53) are extant; and they may perhaps rather be called location tickets, or promises of grants, than actual grants; more especially as three of the subsequent formal Talon grants evidently embody them. They were thus worded :—

No. 51.—By de Courcelle.—" J'ay accordé au * * la terre qui est entre * * avec l'isle des " Pins qui se trouve vis-à-vis de la dite concession, pour y travailler incessamment, le tout en " cas que cela ne soit concédé à personne, et le contract luy sera fourny comme aux autres."

No. 52.—By same.—" Nous avons accordé une concession au * * de 20 arpens sur le " fleuve St. Laurent, à commencer * *, en cas qu'elle ne soit concédée à personne, et à la " charge d'y faire travailler incessamment et la mettre en valeur, suivant et conformément " aux intentions du roy, et aux mesmes clauses et conditions."

No. †53.—By same.—" Sur ce que nous a représenté le Sieur * * qu'estant chargé de " famille il n'avoit point d'habitation, nous lui avons accordé une concession au dessus de * * " en montant l'espace d'une demie lieue sur le bord du dit lac ; à la charge d'y faire travail- " ler incessamment suivant l'intention du roy."

§ 403.—The other two are merely referred to in subsequent grants, as written promises,—the one by Talon,—the other by Bouteroue, during the interval

(*s*) No. 50*c* of ABSTRACT, I find not to have been really a grant; but only an *ordonnance* by Talon, in reference to a dispute between the proprietors of Coulonge (No. 44*a*) and St. Michel (No. 46*b*).

between Talon's two terms of service as Intendant. Probably, they were not unlike the above.

§ 404.—Indeed, it is probable that a considerable number of other grants were first made in something like this form,—or, one might say, with something like this want of form.

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§ 405.—Of the Talon titles, of the months of October and November, 1672, —one (No. 116) was a mere location ticket, covered—apparently with an augmentation—by an after grant; and thus worded :—

"Certiffions à tous qu'il appartiendra, que nous avons permis au * * de faire travailler sur " 1 lieue de terre de front et 1½ lieue de profondeur, scavoir, * *; le tout soubz le bon plai- " sir de S. M., de laquelle il sera tenu prendre la confirmation des presentes."

§ 406.—Another (No. 58) was of the little Isle au Héron, near the Island of Montreal. The grantee, it is recited, had obtained from the Seminary of St. Sulpice, by that time proprietors of the Seigniory of Montreal, a grant opposite this island, together with a *droit de pêche* in the St. Lawrence opposite his grant; but doubting the right of the Seminary to grant such *pêche*, he had prayed for it from Talon, together with this island, and the *pêche* thereto appertaining. Talon, in consideration of his services, granted him the island as a *fief sans justice*, with its *pêche*, and (evading the question of his right under the Seminary grant) so far as need might be, ("*en tant que besoin seroit,*") the *pêche* opposite that grant, also,—the whole, under no other condition than the render of *foi et hommage*, and the payment of the *relief* of the Vexin François.

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§ 407.—Four (Nos. 56, 57, 59 and 60) were of grants in Acadie.

§ 408.—The preamble of one of these (No. 56) was made the text of some show of anti-seigniorial argument, before this Court.

It reads thus :

" Savoir faisons que sur ce qui nous a esté remontré par Martin d'Arpentigny, Sr. de Mar- " tignon, ancien habitant du dit pays de l'Acadie,—

—" que depuis les années 1652, 1653 et 1654, il est créancier de la succession du deffunct " Sr. de la Tour, son beau-père, gouverneur et propriétaire (*t*) de la Rivière St. Jean depuis " * * jusqu'aux * *, de la somme de 40,817 livres et des intérêts d'icelle, dont il n'a pu jus- " qu'à présent estre payé, à cause particulièrement que les Anglois ayant pris (*u*) la plus " grande partie de l'Acadie et une partie de ce qui appartenoit au dit deffunct, et mesme " pillez entièrement tous ses biens et ceux de luy Martignon,—

—" lequel, comme bon et fidel sujet et serviteur de S. M., avoit mieux aimé abandonner " le tout et se retirer en France que de servir sous les Anglois,—

—" mais, comme depuis quelques années les dits Anglois ont rendu ce qu'ils avoient usurpé " du dit pays, qui par ce moyen estoit demeuré vague et inhabité, iceluy Martignon auroit " esté conseillé de se mettre en possession de toute la concession qui appartenoit au dit def-

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(*t*) *Vide suprâ* § 212 *et seq.*

(*u*) In 1654.— *suprâ*, §216.

"funct, qui contenoit plus de 50 lieues de front * *, de laquelle luy exposant se pourroit dire
"propriétaire, soit qu'on le regardast comme créancier ou comme héritier à cause de sa
"femme, fille du dit deffunct,—mais ayant appris que le roy estoit en droict de rentrer en
"toutes les terres concedées auparavant les 10 dernières années faute de les avoir habituées
"et mises en valeur, il se seroit retiré pardevers nous, à ce qu'il nous plust luy concéder le
"tout ou partie des dites terres,—

—"offrant de les mettre incessamment en valeur en les cultivant,—et particullèrement
"d'y faire porter quantité de bestiaux de toute espèce dont il pourroit avec le temps secourir,
"non seulement ce pays, mais encore les Isles Antilles et autres lieux de l'obéissance de S.
"M.,—mesme d'y establir les pesches sédentaires de morues et autres poissons que la coste
"produit,—

—"en quoi il espéroit d'autant plus réussir, qu'il désiroit associer avec luy quelques
"François accommodés, desquels il avoit parolle,—

—"à quoi ayant égard * * avons donné," etc.

From all this preamble there was extracted the fragment of a sentence which represents the grantee in his petitioner-quality, as "*ayant appris que le roy* " *estoit en droict de rentrer en toutes les terres concédées auparavant les* 10 *der-* " *nières années faute de les avoir habituées et mises en valeur;*" and these words, —with the fact of the grant having been made to this party out of the larger grant formerly made to la Tour, and by him not improved,—were pressed into service, as somehow confirming the doctrine that the seigniorial grants on this continent passed something less than a property in the land granted.

§ 409.—But what was this preamble, and what were the facts as to this grant, that such inference should be drawn from them?

De Martignon, a son-in-law and creditor (on his own showing) of la Tour, who in his life time had held large grants in Acadie from the old Company, had his projects for the raising of cattle for export, and the establishing of fisheries, in Acadie, within his late father-in-law's old limits. La Tour, it will be remembered, had been violently dispossessed by Charnisay, under royal warrant; then, after Charnisay's death, had been confirmed in his rights by like warrant, and by marriage had put himself into possession of Charnisay's estate as well as of his own. Then again, under Court authority, le Borgne had sought to dispossess him; and while the struggle was going on between them,—no one of all these successive rivals having ever seriously set himself to make any settlement in the country except only for the carrying on of the fur trade,—the English had driven them out, and from 1654 to 1666 had pretty much held the territory in their own hands.

Under such circumstances, de Martignon could not safely have trusted to the la Tour titles,—if his claim through them had been ever so good; and he even failed by his petition to show that it was good. He called himself a son-in-law and a creditor of a ruined man, whose rights while living had all been matter of dispute; not the only creditor, one may be sure; and presumably, not the husband of a sole heiress.

He petitioned, accordingly, for a new grant; and we have in this preamble a recital of his petition,—his own way of putting his case. He had to name la Tour and his grants, by way of basing upon them his own claim; and he had to represent la Tour's grants as escheated or open to escheat,—for, to have called

them grants in full force, and indefeasible, would have been to bar his own claim by throwing himself back upon a defective pretension under them. Of course, he told his tale to suit his purpose; no one else was there, to tell any other; and the new grant passed as he asked for it.--Whether or not any other claimant under la Tour ever challenged it, does not appear. Upon such challenge, its value might have been tested. In the meantime, the trying to twist such a matter into a proof that the grant itself, and the other grants of the time, meant one thing though they said another,—is, again, no proof of a strong cause.

§ 410.—In direct contradiction, however, by the way, to the assumption that the old Company's uncleared grants were revoked by the *Arrêt* of 1663, this recital, even if taken to the letter, would make them only revocable. De Martignon's petition admitting this, (and it would not have suited his plea to admit more,) Talon, for the King, did not put in the larger claim.—We have seen, from other evidence, that he could not possibly have done so.

§ 411.—The preamble of the second Acadian grant (No. 57), issued the day following, was shorter; showing only that the grantee had set forth the excellence of certain land on the St. John, whether for cultivation or for establishment of a fishery,—and his own readiness to bring out next year a sufficient supply of men from France, if he could get a sufficient grant.

§ 412.—That of the third (No. 59), dated two days later, was shorter still; setting forth only, as the consideration for it, the services rendered and to be rendered by the grantee, de Soulanges, then just commissioned by Frontenac to command under him the territories upon the St. John,—and as its object, the giving him more means to continue such services, ("*pour luy donner d'autant plus de moyen de les continuer.*)

§ 413.—While the fourth (No. 60), to his brother and of the same date, was without a preamble.

§ 414.—The grants to de Martignon and de Soulanges,—of 6 leagues by 6, and 4 leagues by 1, respectively,—were granted with a *justice* of every grade. The other two,—of 2 leagues by an unstated depth, and 1 league square, respectively,--were granted with a *justice, moyenne et basse*, only.

§ 415.—The conditions upon which these grants were made, were sufficiently like those of the class next to be noticed, for a separate discussion of them to be unnecessary. (*Infrà*, §§ 423 *et seq.*)

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§ 416.—The remaining Talon titles, of this class, are 58 in number; and of these, 56 are printed,—leaving only 2 (Nos. 112*a* and †116*a*), of unknown tenor. Of these 56 titles, 34 conveyed *justice*, without limitation of grade,—that is to say, of every degree; the remaining 22 conveyed no *justice*.

§ 417.—Of the 34 justiciary grants, again, 22 (being Nos. 55, 61 to 77, 79, 80, †82 and 115), all, or nearly all of them, to officers, and principally to officers of the Carignan-Salières regiment, have the following preamble,—with here and there some slight verbal variance :(v)—

"S. M. ayant de tout temps recherché avec soin et le zèle convenable au juste titre de fils "aisné de l'église, les moyens de pousser dans les pays les plus inconnus, par la propagation "de la foy et la publication de l'évangile, la gloire de Dieu, avec le nom chrestien, fin pre-"mière et principalle de l'establissement de la colonie françoise en Canada,—et par accessoire "de faire connoistre aux parties de la terre les plus esloignées du commerce des hommes "sociables, la grandeur de son nom et la force de ses armes,—

—"et n'ayant pas estimé qu'il y en eut de plus seures que de composer cette colonie de "gens capables de la bien remplir par leurs travaux et leur application à la culture des "terres, de la soutenir par une vigoureuse deffense contre les insultes et les attaques aux-"quelles elle pourroit estre exposée dans la suite des temps,—

—"a fait passer en ce pays bon nombre de ses fidels sujets, officiers de ses troupes dans "le régiment de Carignan et autres,—

—"dont la pluspart, conformément aux grands et pieux desseins de S. M., voulant bien se "lier au pays en y formant des terres et seigneuries d'une estendue proportionnée à leurs "forces,—

—"et le Sr. * * nous ayant requis de luy en départir,—

—"Nous, en considération des bons, utiles et louables services qu'il a rendus à S. M. en "différents endroits, tant en l'ancienne France que dans la Nouvelle depuis qu'il y est passé "par ordre de S. M., et encore de ceux qu'il témoigne encore vouloir rendre cy-après, en "vertu du pouvoir par elle à nous donné, avons," etc.

§ 418.—Of the same class, 6 (Nos. 78, 81, 83 to 85, and 91), not being to officers, have the following shorter preamble,—varied in one instance (No. 81) to suit the case of a grantee who is not said to have begun a settlement :—

"S. M. désirant qu'on gratifie les personnes qui, se conformans à ses grands et pieux desseins, "veulent bien se lier au pays en y formant des terres d'une estendue proportionnée à leur "force,—

—"et le sieur * * ayant desjà commencé de fair valloir les intentions de S. M., nous auroit "requis de luy en départir ;—

—"Nous, en vertu du pouvoir à nous donné par S. M., avons," etc.

§ 419.—While the remaining 6 (Nos. 86 to 90, and 112), also not to officers, are without preamble, thus :—

"Sçavoir faisons qu'en vertu du pouvoir à nous donné par S. M., nous avons," etc.

One of these (No. 86), being to a son of one of the grantee-officers of the Carignan-Salières regiment, adds as a reason for the grant, the following :—

—"et ce, en considération du nom à luy imposé en celluy du roy sur les fonds-baptismaux, "—et pour remplacer le Sr. de St. Ours son père de ce qui peut manquer de 2 lieues qui "devroient lui estre fournies sur le fleuve St. Laurent pour sa concession particulière," [c. à d. No. 65] etc.

(v) One grant, for instance, (No. 77), is to the widow of an officer, and recites of course his services. Two (Nos. †82 and 115) do not purport to be to officers ; though, probably, they were so.—Two (Nos. 75 and 76) were to officers of other regiments than that of Carignan-Salières. The rest, although one or two do not expressly say so, appear all to have been to officers of that regiment.

§ 420.—Of the 22 non-justiciary grants, none are made to officers; 5 (being Nos. 93 to 97) have the shorter of the two preambles just given (*suprà*, § 418); 1 (No. 92) briefly gives the services of the deceased husband of the grantee, as the reason of the grant to her; and the remaining 16 (being Nos. 98 to †111, 113 and 114) begin without preamble, in the form last above given.

§ 421.—In 7 of the justiciary grants (Nos. 61, 67, 71, 75, 78, †82 and 91), and in 1 of the non-justiciary (No. †111), there is expressly declared to be a considerable river(*w*) or channel (*chenail*) of a river, comprised within the grant. In 2 cases (Nos. 64 and 69), the precaution was taken of excepting from the grant a boundary river or *chenail.* And in another (No. 66), the half of a boundary river was said to be granted.

§ 422.—The size of these grants varied greatly, though not nearly so much as we have seen was the case with the earlier grants; and the justiciary grants were generally much larger than the non-justiciary; most of the former ranging from 1 square league to 6; and most of the latter being of less extent than 1 square league,—say, from an eighth of a league or less than 900 arpents, upwards.

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§ 423.—It has been observed (*suprà*, § 415), that the conditions of these Talon grants in Canada, and those of the 4 Talon grants in Acadie, were sufficiently like to admit of their being all discussed together.

§ 424.—They related to the following points only :—

1.—Homage.
2.—Dues to accrue to the Dominant.
3.—Appeals from the grantee's *justice,*—where the grant was a justiciary one.
4.—Residence.
5.—The preservation of timber.
6.—Mines and minerals.
7.—Roads, and
8.—Ratification by the King.

§ 425.—For the Acadian grants, homage was to be rendered, provisionally and until other order of the King, ("*par provision seulement, et en attendant que* "*par S. M. il en soit autrement ordonné,*") at Fort Pentagouet.

The Canadian titles bound the grantee, to render homage at the "Château de St. Louis de Québec,"—adding, as a permanent arrangement, "*duquel il relevera.*"

But with the exception of one title, in Canada, (No. 114,). none of them explained whether the grant was intended to be held of the Crown or of the Company. That one title declared the grant in question to be made "*en fief* "*mouvant de la Compagnie Royale des Indes Occidentales.*"(*x*)

(*w*) Among others, the Nicolet, Rivière-Ouelle, Masquinongé and Rivière-du-Loup *en haut.*

(*x*) The silence of the other grants on this point, as we have seen (*suprà*, Note (*e*) to § 362,) led the grantees, or some of them, to claim the right of rendering homage to the Crown

§ 426.—The Acadian titles settled the dues payable to the Dominant (whether Crown or Company,) by reference to the Custom of Vexin Français,—that is to say, at the *relief* or year's revenue of the entire *fief* at every change of ownership of the *fief*.

The Canadian titles, on the other hand, read thus:—

2.—" aux droicts et redevances accoustumez, et au désir de la Coutume de la prévosté et " vicomté de Paris, qui sera suivie à cet esgard par provision et en attendant qu'il en soit " ordonné par S. M.,"—

—Talon, therefore, either hesitating as to whether that rule or the rule of the Vexin Français had better be adopted,—or wishing to keep the grantees liable, in case of need, to be placed under some other and more available scheme of taxation,—or, perhaps, like a good minister of finance, who entered heartily into the spirit of his master's fiscal instructions, first given to Gaudais and then to himself, acting under both influences.

Not that this quasi-suspensive ending of this clause was of any practical importance, however. No further or other order in the premises was ever made. So that the grants in question remained subject to the dues of the Custom of Paris and to no others; as, indeed, they would have been, had these titles been silent on the subject.

§ 427.—The condition as to appeals, in the justiciary grants, was left open to future regulation; the Acadian titles expressly saying so; and the Canadian leaving a blank where the words descriptive of the appellate tribunal should have been.

§ 428.—As to residence, the clauses generally (*y*) read thus:—

4.—" à la charge qu'il continuera de tenir ou faire tenir feu et lieu sur sa dite seigneurie,—

5.—" et qu'il stipulera dans les contrats qu'il fera à ses tenanciers, qu'ils seront tenus de " résider dans l'an sur les concessions qu'il leur accordera ou leur aura accordées,—et qu'à " faute de ce faire, il rentrera de plein droit en possession des dites terres."

In some instances, these clauses are so drawn as to imply that the grantee had not begun his settlement,—thus:—

4.—" à la charge qu'il tiendra feu et lieu sur sa dite seigneurie dans l'an,—

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and not to the Company; a claim that by no means followed from the mere fact of the Crown's having assumed to make the grant. Since both Fort Pentagouet and the Château St. Louis had been granted to the Company; so that, according to feudal idea, the dependance of a *fief* from them was a dependance from the Company.

The question does not seem to have been settled, till the determination of the Company's Charter in 1674 settled it.

(*y*) That is to say, in the words here given, or in words equivalent. There occur a number of minor changes in particular cases; apparently owing to inaccuracies in copying from a common form. The words here and elsewhere given in the text, seem to have been such common form.—Only the more important variances are here noted in the text. In my Abstract, I have tried to indicate them all; but some of them may be mere misprints in the Seigniorial Documents as laid before Parliament.

The numbering here given to all these clauses is that usual in the justiciary grants. For the non-justiciary, where the appeal clause does not appear,—and for some few others that are otherwise exceptional,—such numbering is not exact.

5.—" et qu'il stipulera dans les contrats qu'il fera à ses tenanciers, qu'ils seront tenus de " résider dans l'an, et tenir feu et lieu sur les concessions qu'il leur aura accordées,—et " qu'à faute de ce faire, il rentrera de plein droit en possession des dites terres."

One of the Acadian grants, No. 56, being the largest of them—that to de Martignon (*suprà*, §§ 408 *et seq.*), omits these clauses altogether. And the other three vary them from the latter of the above forms, by stipulating, that on default, the King (instead of the grantee Seignior) was to re-enter into possession,—thus :—

4.—" Cette concession ainsy faite à la charge que le dit * * y tiendra feu et lieu dans l'an,—
5.—" qu'il stipulera la mesme clause dans les contrats qu'il fera à ses tenanciers,—et qu'à " faute de ce faire le roy rentrera de plein droit en possession des dites terres."

§ 429.—The preservation of timber was provided for by clauses, generally in the following words :—

6.—" que le dit * * conservera les bois de chesnes qui se trouveront sur la terre qu'il se sera " réservée pour faire son principal manoir,—
7.—" mesme qu'il fera la réserve des dits chesnes dans l'estendue des concessions particu-" lières faites à ses tenanciers, qui seront propres à la construction des vaisseaux."

§ 430.—And lastly, the three matters of mines, roads, and ratification of grant, were thus (*z*) disposed of :—

8.—" pareillement, qu'il donnera incessamment advis au roy ou à la Compagnie royale des " Indes Occidentalles, des mines, minières ou minéraux, sy aucuns se trouvent dans l'es-" tendue du dit fief,—
9.—" et à la charge d'y laisser les chemins ou passages nécessaires,—
10.—" le tout sous le bon plaisir de S. M., de laquelle il sera tenu prendre la confirmation " des présentes dans un an du jour d'icelles."

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§ 431.—Frontenac's grants, made between the time of Talon's leaving the country in 1672, and the revocation of the Company's Charter in 1674, so far as ascertained, were 15 in number,—all of them in Canada.

One of these (No. 133*a*) is not extant.

§ 432.—Seven (Nos. 119, 120, 122, 128, 129, 131 and 134) are grants of trifling augmentations to certain of the Talon grants; and were made, with no new specification of conditions, upon the terms of such former grants.

§ 433.—Four (Nos. 121, 127, 130 and 133) were justiciary grants, in the main analogous to Talon's of the same class; but still, variant from them in several particulars that require notice.

The preambles are all special. That of No. 121—the grant of Chateauguay to Lemoine de Longueuil—recites his very distinguished services; and also a promise of grant made him by de Courcelles. Those of Nos. 127 and 130 also recite services and promise. While that of No. 133 recites only a petition by the grantee.

(*z*) One or both of the last two conditions being, however, omitted in a few grants; *e. g.*, both of them, in Nos. 56 and 57; the last but one in Nos. 59 and 60; and the last, in No. 115.

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